SECRETARY OF LABOR, Complainant, v. R.W. DUNTEMAN CO., Respondent.	OSHRC Docket No. 96-1101

APPEARANCES:

For the Complainant:
Helen J. Schuitmaker, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois.

For the Respondent:
Stanley E. Niew, Esq., Niew & Associates, P.C., Hinsdale, Illinois.

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

In this action the Secretary of Labor seeks to affirm two citations issued by the Occupational Safety and Health Administration to R. W. Dunteman Co. The matter arose after a compliance officer for the Administration inspected a worksite of the company in Des Plaines, Illinois, and concluded that it was in violation of various safety regulations adopted under the Occupational Safety and Health Act of 1970 and recommended that the citations be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Chicago, Illinois.

The principal citation alleged that:

Each employee in an excavation was not protected from cave ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper that one and one half horizontal to one vertical (34 degrees measured from the horizontal):

(a) Laurel and Webford, Des Plaines, Illinois - Two workers were observed spreading gravel for the bedding for the combine sewer pipe that was to be installed in a trench

> that was measured approximately 6 to 7 feet in depth, 16 feet in length, 12 feet wide at the top and 8 feet wide at the bottom were not protected from cave in hazards. This condition last existed on Tuesday, April 9, 1996.

in violation of the regulation found at 29 C.F.R. §1926.652(b)(1)(i) which reads as follows:

> (b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:
> (1) *Option (1)--Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

The primary facts are not complicated and may be briefly summarized. The Respondent is engaged in road construction and contracted with the City of Des Plaines, Illinois, for some road and underground work. Under the agreement the Respondent was required to comply with Occupational Safety and Health Administration regulations. The company subcontracted work below grade to C. G. Enterprises. The City appointed resident civil engineers to confirm compliance with the contract, including its safety provisions.

C. G. Enterprises dug a trench in connection with sewer installations. The trench in issue was over six feet deep without sloping or shoring and dug in previously excavated soil. From time to time city engineers were worried that C. G. Enterprises' employees were unprotected while working underground and brought their concerns to Respondent's attention a number of times. Indeed, on one occasion the entire project was halted for safety reasons. Safety matters brought to the Respondent's attention were relayed to C. G. Enterprises, but the unsafe conditions persisted. When the city was unsuccessful in safety cooperation with the subcontractor, it filed a complaint with OSHA regarding safety in trenching operations.

An OSHA compliance officer investigated the city's complaint regarding cave in hazards. He observed workers in a trench between six and one-half and seven feet deep with vertical walls with a small slope on one side with soil content between A and B strengths. Water in the trench was pumped out continuously. There was no trench box. The officer determined that employees in the trench were exposed to various hazards and recommended that a "Willful" citation be issued. His conclusion was based upon the fact that the City made attempts to correct the unsafe trench condition by reporting

its anxiety, both verbal and written, to the Respondent and its subcontractor without success, and that trench boxes were available but not in use. He also relied upon field notes of City engineers.

The evidence is clear that the Respondent's employees neither created the hazard nor were exposed to the trenching problem.

The issue is whether Respondent as general contractor who did not create the hazard or control the trenching operation was responsible for ensuring that workers in the excavation were protected. A general contractor who, as in this case, did not create the violative condition is responsible nevertheless for violations of other employers where the general contractor could reasonably be expected to prevent or detect and abate the violation. There is a presumption that the general contractor has sufficient control over the subcontractors to require them to comply with the safety standards and to abate violations. It is reasonable to expect the general contractor to ensure a subcontractor's compliance with safety standards if the general contractor could reasonably be expected to prevent or detect or abate the unsafe condition by reason of its supervisory capacity. Since the Respondent had notice of the infraction and failed to require abatement by the subcontractor, this portion of the citation is AFFIRMED.

The Complainant urges that its characterization of the violation as "Willful" is correct. An OSHA violation is "Willful" if it is committed with intentional disregard of, or plain indifference to, the requirements of the statute. In this case the Respondent knew that its subcontractor was in violation of the standard regarding trenching because City engineers had called its attention to the subcontractor's violations. Although these infractions were called to its attention of the subcontractor and the Respondent, the latter failed to pursue these admonitions. Ignoring the violations amounts to plain indifference to the requirements of the standard, and thus the violation was properly classified as "Willful."

Citation No. 1 contained five items relating to employees working in a manhole greater than four feet in depth (approximately eight feet) in the vicinity of Laurel and Webford, Des Plaines, Illinois, on April 11, 1996. Item 1a charged that employees entering the manhole did not test the atmosphere of the confined space prior to entry and on a regular basis for the presence of sufficient oxygen and absence of hazardous levels of toxic or combustible gases or vapors; Item 1b stated that employees entering a confined space were not provided with adequate precautions such as ventilation or respirators prior to entry; Item 1c alleged that employees entering a confined space were not provided with adequate precautions such as ventilation to prevent employee exposure to atmosphere containing

a concentration of a flammable gas in excess of 20% of lower limits; Item 1d asserted that employees entering a confined space such as sewer manholes did not have emergency equipment readily available; and Item 1e specified that employees entering a confined space such as a sewer manhole were not instructed in the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. these violations were in contravention of the standards found at 29 C.F.R. §1926.651(g)(1)(i), 651(g)(1)(ii), 651(g)(1)(iii), 651(g)(2)(i) and 21(b)(6)(i), respectively.

On these issues the compliance officer testified that at the manhole where the subcontractor's employees worked there was a possibility of methane gas. Yet there was no gas meter to test for gas or ventilation; there was no emergency equipment available; and the subcontractor's employees were not trained in safety matters relating to methane gas.

The compliance officer's information was confirmed by Respondent's superintendent who stated that the company had no gas meters because it did no underground work. He also made no inquiry of the subcontractor to ascertain if its employees were trained in methane gas safety measures. The superintendent also had no experience in ventilation, rescue equipment, breathing apparatus or hazards in connection with confined spaces.

Again, Respondent did not create the hazard, and its employees were not exposed to hazards related to confined spaces.

For the reasons mentioned in connection with the "Willful" citation, the Company was responsible for the safety of the subcontractor's employees. Therefore, these items of citation No. 1 are AFFIRMED.

There remains the questions of penalties. The Administration recommended a penalty of $32,000.00 for the "Willful" citation. Taking into consideration Respondent's efforts to inform the subcontractor of the City's safety concerns, I believe the suggested amounts excessive. For the "Willful" citation a penalty of $10,000.00 is in order. For the same reasons, the penalty for the serious violations is reduced to $800.00.

In sum, I find that the Respondent was in violation of the five items of citation No. 1, and a penalty of $800.00 is assessed. I also find that the Respondent was in "Willful" violation of the regulation shown in citation No. 2 and a penalty of $10,000.00 is assessed.

Sidney J. Goldstein
Judge, OSHRC

Dated: