



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

Phone: (202) 606-5400  
Fax: (202) 606-5050

SECRETARY OF LABOR  
Complainant,  
v.  
P. A. LANDERS  
Respondent.

OSHRC DOCKET  
NO. 93-2992

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 6, 1995. The decision of the Judge will become a final order of the Commission on August 7, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before July 26, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

*Ray H. Darling, Jr. R/SHA*  
Ray H. Darling, Jr.  
Executive Secretary

Date: July 6, 1995

DOCKET NO. 93-2992

NOTICE IS GIVEN TO THE FOLLOWING:

Albert H. Ross, Esq.  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
One Congress Street, 11th Floor  
P.O. Box 8396  
Boston, MA 02114

Richard F. Schiffmann, Esq.  
3180 Main Street  
Barnstable, MA 02630

Richard DeBenedetto  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
McCormack Post Office and  
Courthouse, Room 420  
Boston, MA 02109 4501

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When the two OSHA inspectors appeared on the site that day, September 15, there were three persons working in the excavation, including the foreman. The north and east sides of the excavation were “moderately” sloped, the south and west sides were vertical, no side of the excavation was sloped in the horizontal to vertical ratio of 1½ feet to one (or 34°) which the Secretary claims was required for the type of soil at the excavation where no other alternative method of protecting employees from a cave-in existed (Tr. 13, 44, 119-20, 138-39).<sup>1</sup> These facts are not seriously disputed. Nor is there any dispute regarding the violative conditions which compose the three-item serious citation: the three employees

<sup>1</sup>Table B-1 of appendix B of the excavation standards specifies the maximum allowable slopes for each of the four soil classifications:

SOIL OR ROCK TYPE	MAXIMUM ALLOWABLE SLOPES (H:V) FOR EXCAVATIONS LESS THAN 20 FEET DEEP [3] <sup>[1]</sup>
STABLE ROCK TYPE A [2] TYPE B TYPE C	VERTICAL (90°) 3/4:1 (53°) 1:1 (45°) 1½:1 (34°)

**NOTES:**

1. Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.
2. A short-term maximum allowable slope of 1/2H:1V (63°) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be 3/4H:1V (53°).
3. Sloping or benching for excavations greater than 20 feet deep shall be designed by a registered professional engineer.

working in the excavation, where there was a possible danger of head injury, were not wearing head protection; materials including bricks and cement blocks were kept less than 2 feet from the edge of the excavation thereby exposing the employees to the danger posed by those materials falling into the excavation; the portable ladder used by the employees to gain access to the upper surface of the excavation extended only one foot instead of three feet above that surface (Tr. 18-22); Exhs. C-1 through C-7).

The only real controversy in this case focused on the classification of citation number 2 as willful (Tr. 147-49). Landers' post hearing brief. The gist of the Secretary's argument is that the foreman on the job, Eric Palmstrom, who knowingly identified himself as the "competent person,"<sup>2</sup> was well aware of the OSHA safety standards for excavations, and the obligation to protect employees from cave-ins when working in Type C soil that are 5 feet or more in depth.<sup>3</sup> The Secretary maintains that the foreman's actual knowledge of the soil type and the consequent requirement for some form of protective system demonstrates intentional disregard of or clear indifference to the excavation safety standard.

In *General Motors Corp., Electro-Motive Division*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶129,240 (No. 82-630 *et al.*, 1991), the Commission summarized essential elements of a willful violation:

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind - - conscious disregard or plain indifference. However, a violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an

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<sup>2</sup>Competent person is defined by 29 C.F.R. § 1926.650(b):

*Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

<sup>3</sup>Landers' foreman testified that during his discussions with the OSHA investigators on September 15, he admitted telling one of the OSHA officers that the excavation involved Type C soil because it had previously been excavated or disturbed (Tr. 17, 115).

objective one -- whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances.

It is not enough to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation. Nor is it enough for the Secretary simply to show carelessness or lack of diligence in discovery or eliminating a violation. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶127,893 (No. 85-355, 1987).

No mechanical test of the soil was performed by either party to determine the stability of the soil. The Secretary apparently relies on the foreman's statement to the OSHA compliance officer during the inspection that he considered the soil to be Type C because the soil had been dug some time in the past in order to install underground utility lines (Tr. 17, 115). On the basis of this statement, the Secretary charges that Landers should be held accountable for failing to slope at an angle not steeper than 1½ horizontal to 1 vertical — the allowable slope for Type C soil.

The record indicates that the only soil analysis was done by Landers' project manager, Joseph Kerrissey, a civil engineer, who testified that he performed visual and manual tests which led him to conclude that the soil was composed of strong, cohesive material classifiable as Type A (Tr. 78-79). When questioned on direct examination concerning the apparent inconsistency in the fact that the regulations specifically preclude previously disturbed soil from qualifying as Type A, he explained that the previously disturbed soil existed only 3 feet below the surface where the utility lines were located, the remainder of the soil was Type A (Tr. 80-81).<sup>4</sup>

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<sup>4</sup>Appendix A(b) of the excavation standards provides that no soil is Type A if:

- (i) The soil is fissured; or
- (ii) The soil is subjected to vibration from heavy traffic, pile driving, or similar effects; or
- (iii) The soil has been previously disturbed; or
- (iv) The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H:1V) or greater; or
- (v) The material is subject to other factors that would require it to be classified as a less stable material.

On cross-examination, Secretary's counsel called the witness's attention to two other discrepant provisions in the regulations: that Appendix A(b)(ii) disqualifies the soil from being classed as Type A because of the undisputed presence of heavy traffic (Tr. 93); that Appendix A(c)(4) requires a layered system "be classified in accordance with its weakest layer." Although there was no attempt by Landers to clarify these inconsistencies, the latter provision contains the following language that may be placed on the credit side of Landers' account: "each layer may be classified individually where a more stable layer lies under a less stable layer."

In determining the slope of the excavation, the project manager testified that he was also motivated by the provisions in the regulations which permit a short-term slope of ½ horizontal to 1 vertical in Type A soil 12 feet or less in depth. Table B-1, *supra*, n.1. Both the project manager and the foreman presented uncontradicted testimony that the excavation was open less than one day.<sup>5</sup> It is of compelling significance that the foreman relied on the project manager's professional engineering expertise for devising the method of protecting the employees from cave-in (Tr. 128). The project manager testified that his instructions were to open the excavation wide enough to avoid any danger from possible cave-in of the sides of the excavation (Tr. 79). The Secretary's photographic evidence shows that two sides were in fact inclined away from the excavation to a substantial degree (Exhs. C-1 thru C-5).

It merits observation that although it is clear that the conditions at the site precluded a Type A soil classification, there is nothing in the record which explains why both parties failed to address or refer to Type B soil, which expressly includes previously disturbed soils, Appendix A(b)(iii), and, by implication, soils subject to vibrations. While the B classification would not improve Landers' position in light of the excavation's two vertical sides, it would tend to lessen the overall gravity of the violation.

Viewing the evidence in light of the judge's observations of the witnesses, it is concluded that while it is clear that Landers violated the excavation protective system

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<sup>5</sup>Appendix B(b) defines short-term exposure as a period of time less than or equal to 24 hours that an excavation is open.

standard at § 1926.652(a)(1), and that the violation was serious within the meaning of 29 U.S. C. § 666(k),<sup>6</sup> it did not go beyond the bounds of carelessness and rise to the level of a willful violation.

As previously noted, Landers did not mount any significant challenge to the three-item serious citation. The photographic evidence provides clearly perceptible images of the substandard conditions which support the Secretary's claim that serious violations occurred when: (a) the three employees were working in the excavation without head protection, (b) materials were kept close to the edge of the excavation, and where (c) the portable ladder extended only one foot instead of three feet above the excavation surface.

Applying the penalty criteria of 29 U.S.C. § 666(j), a penalty of \$2,000 is assessed for the head protection violation, \$3,000 for the failure to keep materials away from the edge of the excavation, \$300 for the ladder violation, and \$5,000 for the failure to provide an adequate excavation protective system.

Based upon the foregoing findings and conclusions, it is **ORDERED** that serious citation number 1 is affirmed and a total penalty of \$5,300 is assessed. It is further **ORDERED** that citation number 2 is affirmed as a serious violation and a penalty of \$5,000 is assessed.

  
RICHARD DeBENEDETTO  
Judge, OSHRC

Dated: June 27, 1995  
Boston, Massachusetts

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<sup>6</sup>A serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists should an accident occur. 29 C.F.R. § 666(k).



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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**NOTICE OF DECISION**

IN REFERENCE TO:

Secretary of Labor v. P.A. Landers, Incorporated  
OSHRC DOCKET NO. 93-2992

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on June 27, 1995.

The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary  
Occupational Safety and Health Review Commission  
One Lafayette Centre  
1120 20th Street, N.W. — 9th Floor  
Washington, D.C. 20036-3419

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91. (Part of Rule 91 is attached hereto).

  
RICHARD DeBENEDETTO  
Judge, OSHRC

Dated: June 5, 1995  
Boston, Massachusetts

§ 2200.91

**Discretionary Review; Petitions for Discretionary Review; Statements in opposition to petitions.**

(a) **Review Discretionary.** Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his own motion or on the petition of a party.

(b) **Petitions for Discretionary Review.** A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the twenty-day period provided by 2200.90(b). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within 20 days after the date of docketing of the Judge's report. The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

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(d) **Contents of the Petition.** No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) **When Filing Effective.** A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) **Failure to File.** The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See *Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976).

(g) **Statements in Opposition to Petition.** Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. (See other side)

**Employer**

**Richard F. Schiffmann, Esq.**  
**3180 Main Street**  
Barnstable, MA 02630

**FOR THE EMPLOYEES**

I hereby certify that a copy of the decision in this case has been served by First Class Priority Mail upon the parties whose names and addresses appear on this notice.

Boston, Linda M. Quinn  
June 5, 1995 (date)

Albert H. Ross, Esq.  
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U.S. Department of Labor  
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