



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
MANter CO., INC.
Respondent.

OSHRc DOCKET
NO. 92-0260

**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 28, 1993. The decision of the Judge will become a final order of the Commission on August 27, 1993 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 August 17, 1993 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.
Ray H. Darling, Jr.
Executive Secretary

Date: July 28, 1993

DOCKET NO. 92-0260

NOTICE IS GIVEN TO THE FOLLOWING:

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West Hartford, CT 06110

Richard W. Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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 ROOM 420
 BOSTON, MASSACHUSETTS 02109-4501
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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 92-0260
	:	
MANTER COMPANY, INC.	:	
	:	
Respondent.	:	
	:	

Appearance:

Ralph Minichiello, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Barrett Metzler, CSP
 Northeast Safety Management, Inc.
 West Hartford, CT
 For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et seq.*, (“Act”), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

BACKGROUND

On November 25, 1991, the Occupational Safety and Health Administration (“OSHA”), issued to Respondent, Manter Co., Inc. (“Manter”), two citations - a seven item serious violation and a one item willful violation. At the hearing, the parties advised the undersigned that all but two items had been settled. Subsequent to the hearing, the parties submitted a settlement agreement which I approved in its entirety in accordance with its terms. The remaining items, Serious Citation No. 1, item no. 6 for which a penalty of \$450

was proposed, and Willful Citation No. 2, item no. 1 for which a penalty of \$10,500 was proposed¹, are the subject of this decision.

By filing a timely notice of contest, Manter brought this proceeding before the Occupational Safety and Health Review Commission (“Commission”). A hearing was held in Boston, Massachusetts on March 15, 1993. The parties have submitted their briefs and this matter is now ready for decision.

DISCUSSION

On November 1, 1991, Manter, a construction company that performs excavations, was the contractor on the property of Weylu’s Restaurant in Woburn, Massachusetts. Manter was installing a post indicator valve onto an already existing water main. In order to reach the water main, Manter excavated a trench that measured 9 feet deep, 10 feet wide and 14 feet long. Manter asserts that prior to excavation, it determined through telephone calls to the local water company and to “Dig Safe”, a pipe locating organization, that two water pipes and two gas pipes should be in the immediate excavation location.

Excavation began on October 31, 1991, at 8:00 am and continued until November 1, 1991. The credible evidence supports a finding that during this two-day project Manter had four individuals working on the job site: two laborers, Andrew Bouchard and Terry Brown; Manter foreman and backhoe operator John “Hoyt” West; and the son of the owner of Manter, Barry Manter, who was identified by all employees on site, including Foreman West and Barry Manter, himself, as the supervisor on the job.

On November 1, 1991, while on his way to conduct an unrelated inspection, OSHA Compliance Officer (“CO”) John Yanovitch observed Manter’s excavation operation. As required by an OSHA national emphasis program, Mr. Yanovitch stopped to investigate whether the trenching was being conducted in accordance with OSHA regulations. Mr. Yanovitch made observations, took measurements and obtained a soil sample from the spoils pile on the side of the trench. As a result of his inspection, CO Yanovitch issued two citations. What follows is a discussion of the two items that were not settled.

¹ At the hearing, the parties moved to amend the complaint to allege in the alternative a serious violation of 29 C.F.R § 1926.652(a)(1). The motion to amend is granted.

A. Serious Citation No. 1, item no. 2

This item alleges a violation of 29 C.F.R. § 1926.652(c)(2) for failing to provide a stairway, ladder or other safe means of egress in a trench excavation that was more than 4 feet in depth. The excavation in question was 9 feet deep, 10 feet wide and 14 feet long. CO Yanovitch did not see a stairway or ladder in use inside the excavation or on the work site. The record reveals that the natural slope on the north side of the trench was the only means of egress. In fact, CO Yanovitch saw two Manter employees exiting the excavation by climbing, with great difficulty, up its north bank. Additionally, Warren Manter testified that the north slope was the means of exit and was used by him the day before the OSHA inspection.

The credible evidence demonstrates that the soil on the north bank, like the rest of the trench, was Type C. This finding is supported by the laboratory analysis of the soil sample and the expert testimony of geologist and civil engineer Wilbar Hoxie. However, instead of a 34 degree slope which is the angle of repose for Type C soil, the slope was at a 60 degree angle. Moreover, the soil forming the trench bank was wet and slippery. from more than 1.5 inches of rain. Additionally, the backhoe used to dig the trench was parked at the lip of the north bank, partially blocking the top of the bank.

The credible evidence supports a finding that the configuration, condition and composition of the soil, as well as the presence of equipment, made the north bank of the trench an unsafe means of exit. Manter's challenge to CO Yanovitch's training and experience is without merit. Accordingly, this item is affirmed and a penalty of \$450 is assessed.

B. Willful Citation No. 2, item no. 1

This item alleges a violation of 29 C.F.R. § 1926.652(a)(1) for not providing each employee working in an excavation over 5 feet in depth and consisting of Type C soil, with either the appropriate slope - at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured horizontally) - as defined in 29 C.F.R. § 1926.652(b)(1)(i) or an adequate protective system as defined in 29 C.F.R. § 1926.652(c).

CO Yanovitch measured the depth of the excavation to be 9 feet. While unable to actually measure the angle of the walls because of the instability of the trench, CO

Yanovitch estimated the angle of both the east and west walls of the trench to be approximately 85 degrees, instead of the 34 degrees required by the standard. He further testified that for the two hours he was at the job site, he did not observe a trench box, shoring, sheeting or bracing of any kind while employees of Manter were working in the excavation.

By allowing its employees to enter an excavation over 5 feet deep in Type C soil with improper sloping and no provision for a protection system of any kind, Manter exposed its employees to a serious hazard, the potential cave-in of the excavation. M a n t e r attempted to raise for the first time at the hearing the affirmative defense of greater hazard. Manter explained as a reason for the lack of proper sloping or other adequate protection that an unlocated gas pipe² existed at the time of the OSHA inspection and Manter was afraid of rupturing it. Thus, employees were placed in the ditch to guide the backhoe in its digging. However, Manter is barred from raising this defense because of its failure to affirmatively plead it, particularly given the fact that the Secretary objected to its being raised at trial. *See Dole v. Williams Enterprises*, 876 F.2d 186, 189-190 (CA DC 1989).

To establish that Manter's violation of this standard is willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard of the requirements of the Act or plain indifference to employee safety. To meet this burden, it is not enough for the Secretary to show that an employer was aware of the conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference when the employer committed the violation. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). *See also General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991).

² Manter did not raise this affirmative defense of greater hazard in its pleading. The first time Manter mentioned both the presence of the alleged undiscovered gas pipe and the defense of greater hazard was at the hearing.

Although this is a close case, I am not persuaded that the Secretary has met his burden in establishing a willful violation. There is a conflict in the evidence on this point. While the Secretary believes that he has established willfulness beyond a reasonable doubt, I am not convinced of this. Mr. Warren Manter, president of Manter, testified that he believed the walls of the trench were stable based on his observation and testing of the walls and on his forty-two years of excavating experience. While I do not agree with Mr. Manter's opinion regarding the safety of the subject trench, I did find him to be a knowledgeable and credible witness. Further, Mr. Manter entered the trench in question himself. I do not believe that he would have done that if he believed the trench to be unsafe. Accordingly, I find that the Secretary has established a serious violation, but not a willful violation. This item is affirmed as a serious violation and the penalty is reduced to \$1,500.³

Section 17(j) of the Act requires the Commission to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I have determined that a total penalty of \$1,950 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

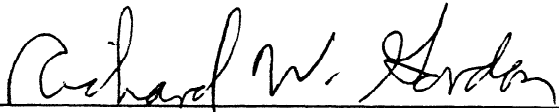
Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious Citation No. 1, item no. 6 is **AFFIRMED** and a penalty of \$450 is **ASSESSED**.

³ The proposed penalty for this item was \$10,500. OSHA arrived at this figure by starting with an original proposed penalty of \$5,000, and applying a 60% reduction for size and a 10% reduction for history resulting in a proposed penalty of \$1,500. OSHA then applied a multiplier of 7 for willfulness resulting in the \$10,500 proposed penalty.

2. Willful Citation No.2, item no. 1 is REDUCED to Serious and AFFIRMED and a penalty of \$1,500 is ASSESSED.


RICHARD W. GORDON
Judge, OSHRC

Dated: July 22, 1993
Boston, Massachusetts