Cam Construction

SAFETY AND HEALTH

Penalties

Although the Department may assess a penalty up to ten times the base penalty, it should not do so in every instance. Under the circumstances of this matter, it was appropriate to calculate the penalty for a repeat serious violation by multiplying the base penalty by the number of times the violation had been repeated and to double that amount in an instance of a willful violation. *...In re Cam Construction*, **BIIA Dec.**, **90 W060 (1992)**

"Willful" violation

Because an employer had been cited for trenching violations while working in certain soil conditions, and the employer was fully aware of the safety requirements in those soil conditions, its decision not to comply with trenching requirements constituted a "willful" violation since the employer substituted its judgment for the requirement of the safety code and demonstrated either the intentional disregard of or plain indifference to the requirements of the statute.In re Cam Construction, BIIA Dec., 90 W060 (1992)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: CAM CONSTRUCTION)
)
Citation & Notice No. 439461)

DOCKET NO. 90 W060

DECISION AND ORDER

APPEARANCES:

Employer, CAM Construction, by Frederick P. Smith, Attorney, and by Eldo Camandona, President

Employees of CAM Construction, by Jerry Lester and Tom Jones

Department of Labor and Industries, by The Office of the Attorney General, per Aaron K. Owada, Assistant

This is an appeal filed by the employer, CAM Construction, on March 5, 1990 from Citation and Notice No. 439461 issued by the Department of Labor and Industries on January 30, 1990, which contained an order of immediate restraint and found a serious willful violation of WAC 296-155-655(5), a general violation of WAC 296-155-655(36), a general violation of WAC 296-155-655(13)(A), and a general violation of WAC 296-155-260(3)(E), and assessed a penalty of \$ 35,000.00 for the serious willful violation. Citation and Notice No. 439461 is affirmed and the penalty assessment is affirmed as modified.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and

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Order issued on May 14, 1991 in which the Citation and Notice was modified to change the serious willful violation of WAC 296-155-655(5) to a serious violation, and to reduce the penalty assessed for this violation and the total penalty from \$ 35,000.00 to \$ 3,500.00.

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5 The Board has reviewed the evidentiary rulings in the record of 6 proceedings and finds that no prejudicial error was committed and said 7 rulings are hereby affirmed.

8 The general nature and background of this appeal are as set forth 9 in the Proposed Decision and Order and shall not be reiterated in 10 detail herein.

The Department's Petition for Review is directed entirely to 11 contentions that Item No. 1 of the Citation and Notice, a serious 12 willful trenching violation, was appropriately cited. 13 Our Industrial 14 Appeals Judge's Proposed Decision and Order determined that the 15 employer had committed a serious trenching violation but this violation 16 was not willful. In making this determination the Industrial Appeals Judge appropriately cited our recent decision, In re The Erection 17 Company, Dckt. No. 88 W142 (November 11, 1990). In that decision, and 18 19 earlier decisions, we have relied upon the definition set forth by the Court of Appeals for the ninth circuit in National Steel & Shipbuilding 20 Company v. OSHARC, 607 Fed. 2d 311 (9th circuit, 1979) and adopted the 21

following definition of a "willful violation" under WISHA: A willful violation is one involving voluntary action, done either with an intentional disregard of or plain indifference to the requirements of the statute.

In re R. L. Alia, Dckt. No. 86 W024 (October 16, 1987).

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2 We disagree with our Industrial Appeals Judge's view that this 3 trenching violation was not willful under the above-quoted definition.

4 The record establishes that this is the third trenching violation 5 committed by CAM Construction, all of which resulted in orders of 6 immediate restraint. These violations occurred on September 27, 1989, December 11, 1989, and December 29, 1989. The last two violations were 7 8 committed at trenches which were dug in almost identical locations 9 involving the same type of soil. There is no question about the 10 employer's knowledge of the safety requirements governing trenches dug in the area of the second and third violations, and there is no 11 12 question about the employer's strident disagreement with these 13 standards. The employer, through its supervisor, Jerry Lester, 14 expressed the view that the type of soil in which the trenches were dug was sufficiently hard so that it did not require shoring. The soil in 15 16 the area of the two trenching violations was described variously as hard shale, hard pan, and "real hard clay". 17 Mark Dodds, a soils engineer, identified the material in the area of the excavation as "... 18 19 dense to very dense glacial till." 1/28/91 Tr. at 193, 11. 11 & 12. 20 The trench that we are concerned with was not dug in either solid rock 21 or compact shale.

In the employer's opinion this soil, which was extremely hard to dig, presented no cave-in hazard. The employer in this instance has substituted its judgement for the requirement of the safety code that

1 the sides of a trench four feet or more in depth be shored or 2 appropriately sloped in any soil condition other than solid rock or 3 compact shale. WAC 296-155-655(5).

The employer, Cam Construction, was obviously fully aware of the 4 5 specific requirements of WAC 296-155-655(5), and knew that allowing an 6 employee to enter the trench in question was a violation of these In our opinion, allowing Tom Jones to enter the trench 7 requirements. constituted the type of voluntary action done in disregard of 8 or 9 indifference to the requirements of the statute that was described by 10 the court of appeals in National Steel & Shipbuilding Co. v. OSHARC. The employer substituted its individual judgement for the safety 11 12 requirements. We find that this constituted a "willful" violation of WAC 296-155-655(5). 13

14 The proposed penalty for the serious violation cited under Item No. 1 was calculated in accordance with the standards set forth in RCW 15 16 49.17.180(7) and as set forth in the penalty work sheet, Exhibit 17. We are in complete agreement with the Department's determinations used 17 in reaching a base penalty of \$ 3,500.00 for Item No. 1. 18 In 19 calculating the base amount of the penalty, the Department 20 appropriately concluded that the probability of an injury resulting from the alleged violation was extremely high and that if an injury 21 occurred it would result in death or serious harm. 22 As this was the 23 third serious violation of the same safety standard committed within 24 three months' time, the Department acted appropriately in giving no

credit for good faith or history. The Department did allow credit for the small size and limited number of employees exposed to the hazard, which resulted in reduction of the base amount of the penalty from \$ 5,000.00 to \$ 3,500.00.

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Our only disagreement with the Department's penalty calculation 5 lies in its determination that this base penalty amount should be 6 7 multiplied by a factor of ten based upon determination that the 8 violation was willful. The violation cited under Item No. 1 represents 9 the third time this identical violation has been committed by the 10 employer and this should be reflected by an increase in the penalty subtotal. An appropriate way to take the fact of repeated violations 11 12 into account is to multiply the base penalty by the number of times 13 that the violation has been repeated. Thus, rather than multiplying 14 the base penalty by ten (10), we have determined that it should be multiplied by three (3), the total number of times the cited safety 15 16 standard has been violated by this employer, resulting in a subtotal of \$ 10,500.00. 17

Other than the penalty work sheet, Exhibit 17, which we have 18 19 previously referred to, the only guidance for the assessment of 20 penalties is contained in RCW 49.17.180. While the penalty work sheet provides an appropriate basis for assessing the factors described in 21 22 RCW 49.17.180(7), it does not provide guidance regarding assessment of penalties for the types of violations described in RCW 49.17.180(1). 23 24 The only limitation imposed by that provision is that the civil penalty

assessed for a willful or repeated violation shall not exceed \$ 1 50,000.00 for each violation.¹ Although there are 2 apparently no guidelines or regulations promulgated by the Department indicating why 3 they multiply the base penalty by ten for a willful violation, it 4 appears this factor comes from a comparison of the penalties which can 5 be assessed under Sections 1 and 2 of RCW 49.17.180. The maximum 6 penalty for a willful or repeated violation is equal to ten (10) times 7 the maximum amount that can be assessed for a serious violation. In 8 9 light of the willful nature of the serious violation committed by Cam Construction, believe penalty assessed should 10 we that the be significantly increased over the amount that would be assessed for the 11 12 third serious repeated violation of the trenching standard. In order to recognize the willful nature of the violation committed in this 13 14 instance, we feel that it is appropriate to double the amount which would be assessed if this were simply the third repeat of a serious 15 16 violation. Accordingly we will assess a total penalty of \$ 21,000.00 for the employer's willful repeated violation of WAC 296-155-655(5) 17 18 alleged as Item No. 1 in the Citation and Notice.

After consideration of the Proposed Decision and Order, the Department's Petition for Review filed thereto, and the letter of the employer's attorney, and a careful review of the entire record before

¹ Effective July 28, 1991, RCW 49.17.180(1) was amended to increase the maximum penalty to \$ 70,000.00 and a provision was added requiring a minimum penalty of \$ 5,000.00 for any willful violation.

us, we are persuaded by a preponderance of the evidence that the Citation and Notice should be affirmed, but the penalty for Item No. 1, a serious willful violation of WAC 296-155-655(5), should be reduced from \$ 35,000.00 to \$ 21,000.00.

FINDINGS OF FACT

1. On December 29, 1989 a safety inspector of the Department of Labor and Industries inspected a worksite of CAM Construction near 144th Avenue and Kent-Kangley Road in Kent, Washington. On January 30, 1990 Department the issued 439461 Citation and Notice No. ordering immediate restraint and alleging one serious willful violation of WAC 296 - 155 - 655(5)penalty of \$ 35,000.00, assessing а one general violation of WAC 296-155-655(36), one general violation of WAC 296-155-655(13)(A), and one general violation of WAC 296-155-260(3)(E). No penalties were assessed for the general violations. The Citation and Notice was received by the employer on January 31, 1990.

> On February 19, 1990 the employer filed a Notice of Appeal by mailing it to the Department, who referred it to the Board on March 5, 1990. On March 5, 1990 the Board issued its notice of filing of appeal.

- 2. On December 29, 1989 Tom Jones, while acting in the course of his employment with CAM Construction Company, entered an excavation made in glacial till, which was approximately nine feet in depth.
- 3. The excavation entered by Tom Jones on December 29, 1989, was not made in either solid rock or compact shale, and was not shored, sloped, braced or sheeted prior to Mr. Jones' entry.
- 4. On December 29, 1989 the employer did not provide an adequate means of exit from the excavation entered by Tom Jones.

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- 5. On December 29, 1989 the employer placed the spoils pile too close to the excavation especially in light of the gas main in the excavation.
- 6. On December 29, 1989 the employer did not have a fire extinguisher within 50 feet of stored gasoline and diesel fuel.
- 7. The employer, CAM Construction, had previously been cited on two occasions, September 27, 1989 and December 11, 1989, for allowing workers to enter excavations in violation of the provisions of WAC 296-155-655(5).
- 8. On December 29, 1989 the employer was fully cognizant of the safety requirements imposed provisions of the Washington bv the Administrative Code regarding the entry of employees into excavations more than four feet deep, and made a conscious decision to not slope or shore the sides of the excavation involved because of the nature of the soil, which the employer had determined in its judgement to be sufficiently stable to remove any risk of cave-in or sloughing.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
- 2. On December 29, 1989 CAM Construction Company violated the provisions of WAC 296-155-260(3)(E),WAC 296-155-655(5), WAC 296-155-655(13)(A), and WAC 296-155-655(36).
- 3 Item Nos. 2, 3, and 4 of Citation and Notice No. 439461 alleging general violations of WAC 296-155-655(36), WAC 296-155-655(13)(A), and WAC 296-155-260(3)(E), are affirmed.
- 4. CAM Construction's violation of the provisions of WAC 296-155-655(5) alleged under Item No. 1 of Citation and Notice No. 439461 constituted a serious willful violation. A base penalty of \$ 5,000.00 is appropriate, but no credit

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allowances should be granted for good faith or history because of the employer's two prior violations of the trenching safety standards within the past three years. Credit allowances of \$ 500.00 for size and \$ 1,000.00 for employees exposed should be granted, leaving a total base penalty of \$ 3,500.00. This amount should be multiplied by three because this was the third repeated violation, making a subtotal of \$ 10,500.00 which should be doubled in light of the willful nature of the instant violation, for a total penalty of \$ 21,000.00 for Item No. 1.

5. Citation and Notice No. 439461, issued by the Department of Labor and Industries on January 30, 1990, is affirmed as modified above, with the penalty assessed for Item No. 1 and the total penalty reduced from \$ 35,000.00 to \$ 21,000.00.

It is so ORDERED.

Dated this 8th day of January, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ S. FREDERICK FELLER Chairperson

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/s/ FRANK E. FENNERTY, JR. Member

/s/ PHILLIP T. BORK Member