



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

BRIONES UTILITY CO.,

Respondent.

OSHRC Docket No. 10-1372

BRIEFING NOTICE

The parties are requested to brief all issues presented in the Complainant's Petition for Discretionary Review. In particular, the parties are asked to address whether the judge erred in vacating Citation 1, Item 1, which alleged a violation of 29 C.F.R. § 1926.652(a)(1) (protection of employees in excavations).

The parties are advised that when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty is also subject to review. Accordingly, the parties may address the amount of the penalty if they so choose.

All briefs are to be filed in accordance with Commission Rule 93.¹ The first brief is to be filed within 40 days of this notice. A party who does not intend to file a brief must notify the Commission in writing setting forth the reason therefor within the applicable time for filing

¹ The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, case law, law journal articles and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.

briefs, and shall serve a copy on all other parties. The time for filing briefs (or similar notices of intent) of opposing parties shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: September 4, 2012

_____/s/
Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

Secretary of Labor,)
)
)
 Complainant,)
) OSHRC Docket No. 10-1372
 v.)
)
 Briones Utility Company,)
)
 Respondent.)

PETITION FOR DISCRETIONARY REVIEW

Pursuant to Occupational Safety and Health Review Commission Rule of Procedure 91, 29 C.F.R. § 2200.91, the Secretary of Labor petitions the Commission for discretionary review of the administrative law judge's (ALJ) decision vacating the Secretary's citation in this matter.

STATEMENT OF ERROR

This case arises from a May 12, 2010 inspection by the Occupational Safety and Health Administration (OSHA) of Briones Utility Company (BUC). During the inspection, OSHA

Compliance Safety and Health Officer (CSHO) Raul Carrillo observed one worker inside a trench with inadequate cave-in protection. OSHA issued BUC a citation alleging a serious violation of 29 C.F.R. § 1926.652(a)(1) for failing to provide adequate protection from cave-ins in the excavation.² After an evidentiary hearing, the ALJ vacated the citation, finding that the Secretary failed to establish that BUC's employee was exposed to the hazard of a cave-in. Dec. 10.

The ALJ's decision to vacate the citation based on lack of employee exposure is not supported by the record or the applicable law. The ALJ only considered whether the facts established that the employee was actually in the zone of danger, and failed to consider whether it was reasonably predictable that he would be exposed to a hazard while in an improperly shored trench. And, the record evidence establishes both that the BUC employee was actually exposed to a hazardous condition and that it was reasonably predictable that he would be in the zone of danger.

The ALJ also erred in holding that the BUC employee's presence in the noncompliant trench was necessary and, thus, excusable. This alternative holding was erroneous for three reasons: (1) the evidence does not support the ALJ's finding that the employee's presence in the trench was required to install additional shoring; (2) BUC waived this argument by failing to raise it as an affirmative defense during the pre-trial conference; and (3) the Secretary did not have an opportunity to brief the issue.

STATEMENT OF FACTS

² The citation initially alleged a second serious violation of 29 C.F.R. § 1926.652(c)(2). OSHA withdrew this citation prior to the trial. *See* Tr. 68-69; 88.

A. *OSHA's Inspection and Citation of an Inadequately Protected Trench at a BUC Worksite.*

BUC is an underground utility excavation and trenching company owned by Alfredo Briones. Dec. 2. On May 12, 2010, BUC was excavating a trench in San Antonio, Texas, to expose a sewer and gas line conflict for San Antonio Sewer and Water and City Public Service. Dec. 2. CSHO Raul Carrillo drove past the BUC jobsite and observed the open trench. Tr. 19. Due to the potentially deadly hazards posed by trenches, OSHA compliance officers conduct inspections whenever they observe trenching operations taking place. Tr. 19-20. In accordance with this practice, CSHO Carrillo parked his car and proceeded onto the BUC jobsite. Tr. 20.

Upon entering the jobsite, CSHO Carrillo observed and photographed BUC employee, Armando Briones, in the trench without appropriate cave-in protection. Tr. 23; *see also* Compl. Exs. 4 & 7. After instructing Armando Briones to exit the trench, the CSHO introduced himself to Armando Briones' supervisor (and BUC owner), Alfredo Briones, who was on-site observing the trenching operations, and held an opening conference. Tr. 21-22. Following the conference, the CSHO collected a soil sample from the spoil pile, and measured the length and depth of the

trench. Tr. 22. Per the CSHO's measurements, the trench was in Type C³ soil and was approximately seven feet deep and ten⁴ feet long. Tr. 26-27.

On June 10, 2010, OSHA issued BUC a citation alleging a serious violation of OSHA's trenching standard. Specifically, OSHA alleged that BUC violated 29 C.F.R. § 1926.652(a)(1) by failing to provide adequate cave-in protection to an employee working in a trench which measured seven feet deep, three feet wide, and ten feet long.⁵

B. *The Excavation Standard and BUC's Use of Aluminum Hydraulic Shoring in the Trench.*

³ BUC owner Alfredo Briones claims that the soil inside the trench was Type B soil. Tr. 153. Although the CSHO's field test at the worksite identified the soil as Type B as well, a laboratory analysis performed at the OSHA Technical Center on a soil sample taken from the trench's spoil pile determined that the soil was in fact Type C. Tr. 30, 31, 32, 49. This result is consistent with the CSHO's observation that previously disturbed soil, like the soil in which the trench was dug, is usually Class C. Tr. 49. In any event, and as the CSHO noted, the laboratory analysis of a soil sample is more accurate than a field test. Tr. 48.

⁴ The citation originally indicated that the trench was twenty feet long. Dec. 2 n.4 (citing Resp. Ex. 1). However, the CSHO clarified that the trench was actually ten feet long. Tr. 27; *see also* Tr. 155.

⁵ Section 1926.652(a)(1) provides:

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

OSHA's standard on excavations requires employers to protect employees from cave-ins when they are working in any excavation greater than five feet deep located in potentially unstable soil. Tr. 49; *see* 29 C.F.R. § 1926.652(a)(1). The standard allows employers to choose from a variety of protective systems. Tr. 49; *see* 29 C.F.R. § 1926.652(a)(1). For example, an employer can use sloping, benching, trench boxes, or aluminum shoring. Tr. 49; *see* 29 C.F.R. § 1926.652(a)-(c).

BUC elected to use a form of aluminum shoring in its trench called vertical aluminum hydraulic shoring. Tr. 50; Dec. 6. Vertical aluminum hydraulic shores protect employees by pushing back on a trench's walls to prevent them from collapsing. Tr. 54. As depicted in BUC's Exhibit 4 (a photograph), two pressurized cylinder pistons reach across the width of the trench and exert pressure upon two vertical aluminum pieces, called walers. Tr. 53-54; Compl. Ex. 4. The walers push against sheets, also called panels or fin forms, which rest directly on the walls of the trench. Tr. 54; Compl. Ex. 4. The sheets prevent the raveling or sloughing of the dirt. Tr. 55; Compl. Ex. 4. Even though the sheets are between the walers and the walls, they are not part of the shoring's structural support. Tr. 55.

Employers using aluminum hydraulic shoring must select, construct, and implement the shoring system in accordance with one of the design options listed in 29 C.F.R. § 1926.652 (c). *See* Dec. 5. Subsection (c) requires employers to ensure that that the support system they choose is in accordance with either: (1) designs contained in appendices A, C, or D; (2) the shoring manufacturer's tabulated data; (3) tabulated data approved by a professional engineer; or (4) tabulated data created by a professional engineer. § 1926.652(c)(1)-(4).

BUC chose to use tabulated data generated by the shoring manufacturer (the option provided at § 1926.652(c)(2)). *See* Resp. Ex. 7 at “Section XVI. Trench Safety” (stating that aluminum hydraulic shoring shall be installed according to the manufacturer’s recommendation, i.e. the manufacturer’s tabulated data). Although the tabulated data generated by the manufacturer of the vertical aluminum shoring used by BUC was not introduced into evidence, CSHO Carrillo explained that he had seen manufacturer’s data for that type of shoring. Tr. 67. The data required a “horizontal distance [between hydraulic cylinders] of approximately four to six feet” for Type C soil. Dec. 7 (citing Tr. 67). Put another way, manufacturers of this type of shoring require that hydraulic cylinders be placed no more than six feet apart.⁶ Tr. 67; *see* § 1926.652, App. D, Figure No. 1. In a ten-foot long, seven foot deep trench, like the trench at issue in this case, this data would have required a minimum of two vertical aluminum hydraulic shores.⁷ Tr. 70-72.

Even though the tabulated data required a *minimum* of two vertical aluminum hydraulic shores, BUC owner Alfredo Briones allowed his employee Armando Briones to enter the trench with only one shore installed. Tr. 50, *see* Compl. Exs. 4, 7 (depicting Armando Briones working inside the trench with only one shore installed). Although Alfredo Briones thought that his employee was safe within the single shore, Armando Briones did not remain within the shore. *See, e.g.* Tr. 142-43 (Alfredo Briones testifying that the four-foot area where the shore is in place “is the right protection for one people to be inside.”); *see also* Tr. 57-58 (“He was outside. He was outside that protected area of that shore.”); Tr. 125 (Q. “Your head, your body is out – You are outside the shore?” A: “(Perusing [Complainant’s Exhibit 7]) Half.”); Compl. Exs. 4, 7. The

⁶ A complete protective system usually consists of three shores, though sometimes, fewer may be used if it is not feasible to install all three shores in a trench. *See* Tr. 59, 70-71.

⁷ Even if the soil had been type B, the data would have required a second shore. *See* Tr.70.

CSHO observed Armando Briones outside the shore for at least twenty to thirty seconds, but noted that he could have been outside of the shored area for longer than that time. Tr. 74-75. Further, it appears that Armando Briones only returned to the shored area when he saw the CSHO. *Id.*

The single shore was installed at one end of the trench. Tr. 65, 138-40. It extended approximately four feet along the trench's ten-foot long walls, leaving six feet, or three-fifths, of the trench unshored. Tr. 65-66. The composite sheets in this case measured four feet in width by approximately eight feet in height. Tr. 139-40. One sheet rested against each of the trench's ten-foot long walls. Tr. 141. However, because the sheets were only four feet wide, they only covered four feet of the walls' ten-foot length. Tr. 142-43. Due to their height, the sheets extended from the floor of the trench to its mouth, clearing the lip of the trench by approximately one foot. Tr. 140.

One vertical aluminum waler was located in the center of each sheet, bisecting the sheets' four-foot width. Tr. 50, 55, Compl. Exs. 2, 7. Consequently, each sheet extended approximately two feet from either side of each waler. Tr. 65-66. The walers pushed against the sheets, which rested directly on the trench's walls. Tr. 55, 65-66. The two pressurized cylinder reached across the trench and pressed into the walers. Tr. 53-54; *see* Compl. Ex. 4. The distance from the cylinders to the nearest trench end was two feet; the distance from the cylinders to the furthest trench end was eight feet. Tr. 65-66.

Although only one shore was installed in the trench at the time CSHO Carrillo arrived, BUC had at least one more shore on-site. Tr. 107, 142. In fact, BUC owner Alfredo Briones claimed that they were in the process of installing a second shore when CSHO Carrillo arrived at

the jobsite. Tr. 141-42. Although the exact timeline is somewhat unclear, Alfredo Briones attempted to install the second shore at least once before CSHO arrived. Tr. 138-42. However, due to the trench's slope, the second shore's sheets overlapped the first shore's sheets. Tr. 138, 140-41. Nevertheless, when the CSHO asked BUC to abate the violation, they were able to do so by installing the second shore.⁸ Tr. 72-73.

The second shore, like the first, was installed from outside the trench. Tr. 73. The CSHO explained that employees cannot be in the trench as they are installing the system. *Id.* The shores, which are lightweight, must be installed from the top of the trench going in. *Id.* BUC employee Armando Briones explained how in this case the shoring was assembled on the ground and then lowered into the trench. *See* Tr. 104-05.

C. *The ALJ's Decision*

The ALJ vacated the citation, holding that the Secretary failed to establish that BUC employee Armando Briones was exposed to a hazard. Dec. 12. Although the ALJ agreed that the trench's shoring was "incomplete," he nevertheless determined that an employee's "mere presence" inside a trench with incomplete shoring did not constitute exposure to a hazard. Dec. 10. The ALJ also found that leaning outside of the walls of the shored area did not expose Armando Briones to a hazard. Tr. 10. This finding was based in large part upon the CSHO's testimony about how vertical aluminum hydraulic shores function. *See id.* at 9-10. Specifically, the ALJ referred to the CSHO's testimony regarding the limited area that one shore can protect.

⁸ Respondent's Exhibit 1, a photograph taken after BUC abated the violation by installing the second shore, illustrates the company's installation difficulties. Tr. 147-48, *see also* Tr. 148 ("In the picture, it shows the hydraulic shores....And it shows the one fin form is [overlapping] with the other")

Id. (citing Tr. 67, 76). After stating that Armando Briones was not protected outside of the single shore, the CSHO noted that the “shoring gives you a good two to three feet of protection on either side of that one shore, for that area.” Tr. 76. The ALJ concluded that this testimony showed that the pressure from the single shore was effective at least to the ends of the sheets, which extended two feet on either side of the cylinder. Dec. 8 (citing Tr. 57-58).

The ALJ’s conclusions regarding the extent of the shore’s protection did not end there. After considering the CSHO’s testimony regarding the manufacturer’s tabulated data for its vertical aluminum hydraulic shores (four to six feet), the ALJ found that each individual shore would support half of that distance, or two to three feet. *Id.* at 9-10. The ALJ extrapolated that if the individual shore protected Armando Briones for one foot beyond the edge of the sheets, he was in no danger while standing at and leaning beyond the sheets.⁹ *Id.* at 10.

Finally, the ALJ found that even if he were to find employee exposure, any such exposure was excusable because it was necessary. Dec. 12. Specifically, the ALJ determined that “Armando [Briones] was uncovering the sewer and gas pipes because further excavation was needed to install additional shoring.” Dec. 12. The ALJ concluded: “Thus, the actions of Armando were calculated to facilitate the installation of shoring that was readily available and would provide additional protection.” *Id.*

REASONS THE PETITION SHOULD BE GRANTED

- A. *The ALJ Erred in Vacating the Citation Based on Lack of Employee Exposure to the Hazard.*

⁹ Neither the Secretary nor BUC argued that the shore provided this extra foot of protection.

The ALJ decision to vacate the citation based on lack of employee exposure is not supported by the record or the applicable law. To establish employee exposure to a hazard, the Secretary must show that “it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Products*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations omitted); *see also Kilby & Gannon Constr. Servs., LLC*, 2012 WL 1899709, *12 (No. 10-0755, 2012) (applying *Fabricated Metal Products* test to a trench citation). In other words, the Secretary can satisfy her burden by showing that an employee was actually in the zone of danger *or* that it was reasonably predictable that he would be in that zone. The ALJ’s decision ignores the second part of this test, focusing only on whether employee Armando Briones was actually in the zone of danger. The ALJ failed to assess whether it was reasonably predictable that he would be exposed to a hazard while in an improperly shored trench.

The record evidence establishes both that employee Armando Briones was actually in the zone of danger (the unprotected portion of the trench) and that it was reasonably predictable that he would be in the zone of danger while in the trench. The photographs introduced into evidence depict Armando Briones leaning outside of the shore and working in the unprotected portion of the trench. Dec. 8 (“The pictures taken by the CSHO clearly show that . . . [Armando’s] upper torso [was] leaning slightly outside of the fin form.”); *see also* Tr. 124 (Armando Briones admitting that he was cleaning a pipe in the photo). In a trench, where death or serious injury can occur in seconds, simply leaning outside a shored area could be deadly. *See* Tr. 74 (“Again, cave-ins happen in seconds.”); Tr. 80 (Trenching accidents can lead to “fractures, broken bones, and death.”)

Moreover, even if employee Armando Briones were not actually in the zone of danger at the time of CSHO Carrillo's inspection, it was reasonably predictable that he would enter the zone of danger. The ALJ, however, failed to even evaluate whether it was reasonably predictable that Armando Briones might stray outside of any allegedly protected area, focusing only on whether the employee's presence outside the single shore (in an area that both OSHA and the employer agreed was unsafe) constituted a hazard.¹⁰ It was reasonably predictable that Armando Briones might stray (even inadvertently) outside of the small, shored area, especially where his work had him stationed at the very edge of the shored area. *See* Dec. 8 (finding that the pictures show that the employee was standing at the threshold of the single shore).

B. *The ALJ Erred in Holding in the Alternative that Employee Armando Briones' Presence in the Trench Was Necessary and Therefore Excused the Violation.*

The ALJ's alternative holding that "even if the Court were to find the slightest hint of exposure, it cannot say that such exposure was unnecessary . . . [and] the actions of Armando were calculated to facilitate the installation of shoring that was readily available and would provide additional protection," was erroneous.

Contrary to the ALJ's finding, there is no evidence that employee Armando Briones' presence in the trench was necessary to install the second shore. The ALJ found that Armando Briones was in the trench uncovering the sewer and gas pipes because further excavation was needed to install the second shore. Dec. 12. However, the portions of the record upon which the ALJ relied do not support this finding. The record shows only that: (1) BUC attempted to install

¹⁰ Even if the single shore's alleged protection extended for one foot beyond the sheets (a fact that both the Secretary and the BUC appear to agree is untrue), the ALJ still erred by failing to consider whether it was reasonably predictable that employee Armando Briones would stray into the other half of the trench (outside of the tiny one foot area past the edge of the sheet).

the second shore prior to the CSHO's arrival (Tr. 138-42); (2) the second shore did not fit properly (*id.*); (3) BUC needed to excavate further to install the second shore (*id.*); (4) to excavate in the trench, the company used an excavator (Tr. 166); (5) the excavator's special tool, called a plate, protected the pipe (*id.*); and (6) after the inspection, the company was able to abate the violation by installing the second shore. Tr. 147-48.

In addition, CSHO Carrillo explained that employees cannot be in the trench as they are installing the system. Tr. 73. The shores, which are lightweight, must be installed from the top of the trench going in. *Id.* Employee Armando Briones similarly described how in this case the shoring was assembled on the ground and then lowered into the trench. *See* Tr. 104-05. And, following the inspection, the second shore, like the first, was installed from outside the trench. Tr. 73. Consequently, "there was a method of installing shoring which did not require workers to stand in the unshored portion of the trench." *Pike Electrical Contractor v. OSHA*, 576 F.2d 72, 74 (5th Cir. 1978) (finding that Secretary's interpretation of shoring standard as applying to installation of shoring was reasonable).

What the record does not show is how employee Armando Briones' presence in the trench was necessary to install the second shore. There is no evidence to suggest that BUC needed to uncover the pipe to install the shore.¹¹ Likewise, there is no evidence to show that the

¹¹ BUC's arguments on this point are convoluted. In its post-trial brief, BUC repeatedly contends that employee Armando Briones leaned outside of the single shore because the CSHO asked him to pick up a shovel. BUC Post-Hearing Brief 10. BUC argues that Armando Briones was never working outside the shore. *Id.* at 8. Thus, although the ALJ determined that the employee was working outside of the shore, his alternative ruling is based on allegedly essential work that BUC claims not to have been doing. Moreover, the ALJ did not consider the only evidence in the record that might show why BUC needed to uncover the pipe: that was the job the company was hired to do. *See* Tr. 97, 133-36. San Antonio Water System hired BUC to expose the water and sewer lines. Tr. 97-98; 133-134. Given this, it is far more likely that

employee had completed this allegedly essential task before BUC was actually able to install the second shore. Nor is there any evidence to suggest that BUC actually did further excavation before they installed the second shore. If the company truly needed to do further excavation before installing the shore, it had the necessary tool at hand and could install the second shore, from a safe position outside of the trench.

Moreover, BUC waived this affirmative defense. In a proceeding before the Commission, “the parties are required to file pleadings and a respondent must include in its answer ‘all affirmative defenses being asserted.’” *C.P. Buckner Steel Erection, Inc.*, 23 BNA OSHC 1929, 1930 (No. 10-1021, 2012) (quoting Commission Rule 34(a),(b), 29 C.F.R. § 2200.34(a),(b)). However, where a case is assigned to Simplified Proceedings, as this one was, “the parties generally are not required to file pleadings; instead, ‘[e]arly discussions among the parties and the Administrative Law Judge are required to narrow and define the disputes between the parties.’” *C.P. Buckner Steel*, 23 BNA OSHC at 1930 (quoting 29 C.F.R. § 2200.207(b)).

The consequence of a party’s failure to raise an affirmative defense during these “early discussions” is quite clear: “Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later.” 29 C.F.R. § 2200.207(b). As BUC did not raise this defense at the pre-trial conference, and neither BUC nor the ALJ noted any extraordinary circumstances, it was inappropriate for the ALJ to consider the defense.

employee Armando Briones was uncovering the pipe to finish the job than that he was uncovering the pipe to somehow permit the installation of a second shore.

The ALJ also erred in basing his alternative holding on an issue that the Secretary did not have an opportunity to brief. ALJs certainly have “the duty to determine issues that are presented by the evidence properly before [them].” *Kaiser Aluminum & Chemical Corp.*, 4 BNA OSHC 1162, 1165 (No. 3685, 1976) (citations omitted). In carrying out this duty, ALJs are not limited to the theories of counsel. *Id.* However, if an ALJ chooses to base an alternative holding on a theory that the parties have not advanced, the parties should be given notice and an opportunity to respond. *See, e.g. id.* (amending the pleadings, but staying the effective date of the order “to allow the parties a reasonable time in which to show good cause why the pleadings should not be so amended.”).

CONCLUSION

For the foregoing reasons, the ALJ erred in vacating the citation, and the Commission should direct review of the ALJ’s decision.

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