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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 11-02-2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ROCKFORD CORPORATION, ) No. 1 CA-IC 09-0091  
)  
Petitioner, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
THE INDUSTRIAL COMMISSION OF ) Rule 28, Arizona Rules of  
ARIZONA, ) Civil Appellate Procedure)  
Respondent, )  
)  
DIVISION OF OCCUPATIONAL SAFETY )  
AND HEALTH OF THE INDUSTRIAL )  
COMMISSION OF ARIZONA, )  
)  
Respondent Party in Interest. )  
\_\_\_\_\_ )

Special Action - Industrial Commission

ICA Claim No. Insp. N5645-311179857

Administrative Law Judge Thomas A. Ireson

**AFFIRMED**

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Cummins, Goodman, Fish, Denley & Vickers, P.C. Newberg, Oregon  
By George W. Goodman - Admitted in Arizona *Pro Hac Vice*

And  
Jardine, Baker, Hickman & Houston, P.L.L.C. Phoenix  
By Scott H. Houston  
Co-counsel for Petitioner

Andrew F. Wade, Chief Counsel Phoenix  
Industrial Commission of Arizona  
And Catherine Marie Bohland  
Attorneys for Respondent Party in Interest

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**S W A N N**, Judge

¶1 This is a statutory special action review of an Arizona Occupational Safety and Health Review Board order affirming an administrative law judge's determination that Rockford Corporation ("Rockford") violated Arizona Occupational Safety and Health regulations. Because the record contains sufficient evidence to support the Board's decision, we affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 On June 6, 2007, Arizona Division of Occupational Safety and Health (ADOSH) safety consultant William Garton observed a work site that included a 10-foot trench with vertical walls but no protective system inside.<sup>1</sup> Although he saw no workers inside the trench, Garton stopped and spoke to Donnie Freeman, the site foreman. Garton identified himself as an ADOSH consultant and told Freeman he was concerned about workers who might enter the trench without protective systems in place. Garton wore a shirt with the ADOSH logo and gave Freeman an ADOSH business card. Freeman explained no employee had been inside the trench without a protective system and pointed to the

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<sup>1</sup> A "protective system" is one designed to prevent trench walls from collapsing on workers.

speed shoring system nearby.<sup>2</sup> Garton offered ADOSH's free safety inspection services, but Freeman declined and Garton left.

¶13 On June 9, 2007, Garton drove past the site<sup>3</sup> and observed another trench on the west side of the road, with two employees working inside without a protective system. Garton took two pictures of the site, put on his "blue ADOT jacket[]" and looked for Freeman. Garton told Freeman that he had seen employees "standing next to vertical walls" inside the trench without a protective system and that the workers should not be there because it was unsafe. Freeman, however, said the employees were working in a sloped area of the trench<sup>4</sup> and took no further action. Garton called his supervisor, Mark Norton, explained the situation, and left the site. Within minutes, Norton called Freeman and offered an on-site inspection without any citation or monitoring penalties to identify weaknesses or troubled areas. Freeman explained "it wasn't necessary" because nobody would be in the excavation area without protective systems, and they were "wrapping up" within the next hour.<sup>5</sup>

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<sup>2</sup> Speed shoring is a hydraulic system that is put against both sides of the trench walls to keep them from collapsing.

<sup>3</sup> Garton's residence is located nearby.

<sup>4</sup> Sloping of trench walls protects workers from a cave-in.

<sup>5</sup> Norton believed that the job was finished, but Freeman meant that work for the day would soon stop.

Norton explained that further complaints or phone calls could prompt him to send out a compliance officer.

¶14 On June 11, 2008, Garton again drove by the work site and saw two employees working in the trench without a protective system. He did not stop, but talked to Norton at the office and showed him the pictures he took June 9. Norton directed a compliance officer to visit the site. A Notice of Alleged Safety or Health Hazards form was generated that identified the hazard as "[e]mployees working in 12 foot trench with no shores." The complainant was designated "anonymous."

¶15 ADOSH employee Raymond Snover investigated the site. Snover showed Freeman his credentials, told Freeman he was there "based on a complaint at the job site," showed him a copy of the complaint, and explained the investigation process. Freeman identified himself and the safety manager as the work site competent persons.<sup>6</sup> While Freeman filled out paperwork, Snover noticed two employees go into the trench. When Snover brought this to Freeman's attention, Freeman "yell[ed] at them to get out of the trench." Freeman and Snover inspected the trench and

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<sup>6</sup> A competent person is "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." 29 C.F.R. § 1926.650(b). Arizona has adopted federal OSHA standards. *Div. of Occupational Safety and Health of the Indus. Comm'n of Ariz. v. Chuck Westenburg Concrete Contractors, Inc.*, 193 Ariz. 260, 269, ¶ 41, 972 P.2d 244, 253 (App. 1998).

Snover noted it had vertical walls. Snover measured the trench, noted the soil type, and observed drying and cracking slopes and vibrations from a nearby train track. No protective systems were inside the trench, and the trench was not properly sloped.

¶16 A citation and notice of penalty was issued, alleging two willful serious violations, one serious violation, and two non-serious violations. The citation assessed a \$43,500 penalty. The Industrial Commission of Arizona unanimously approved the citations but increased the penalty to \$145,000 due to the "egregious" nature of the violations.

¶17 Rockford contested the citations and attended a three-day hearing. The two non-serious violations were dismissed, but the administrative law judge ("ALJ") found the other violations proven and imposed the original \$43,500 penalty. The Occupational Safety and Health Review Board ("Board") affirmed the ALJ's decision.

¶18 Rockford timely appealed. We have jurisdiction pursuant to A.R.S. § 23-423(I).

#### *DISCUSSION*

¶19 Rockford asserts (1) that ADOSH's conduct during the investigation and prosecution of the violations required that the entire citation be dismissed; (2) that ADOSH failed to provide substantial evidence to support the citation; and (3)

that ADOSH failed to prove that Rockford's conduct was "willful."

¶10 We may affirm, modify or set aside the decision of the Board in whole or in part. A.R.S. § 23-423(I). We will affirm the Board's findings of fact if they are supported by substantial evidence. *Id.*; *McAfee-Guthrie, Inc. v. Div. of Occupational Safety and Health of the Indus. Comm'n of Ariz.*, 128 Ariz. 508, 510, 627 P.2d 239, 241 (App. 1981).

#### I. ADOSH CONDUCT

¶11 Rockford contends the complaint should have been dismissed because ADOSH did not follow agency policies that required it to classify the investigation as a "referral" and inform Rockford employees that they could refuse the inspection.

¶12 An administrative agency is required to follow its own rules and regulations, and conduct in violation of such rules is unlawful. *Clay v. Ariz. Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989).

##### A. Complaint/Referral

¶13 An allegation of a safety or health hazard or violation in the workplace creates either an ADOSH "complaint" or "referral." ADOSH Policy and Procedure 2006-1 § IV(A) (August 1, 2006).<sup>7</sup> A complaint is based on information received

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<sup>7</sup> Available at [http://www.ica.state.az.us/ADOSH/ADOSH\\_Complaints\\_Referrals.aspx](http://www.ica.state.az.us/ADOSH/ADOSH_Complaints_Referrals.aspx), last visited 10/25/2010.

from a worksite employee; a referral is generated from information received from state or federal agencies, including ADOSH consultants. *Id.* § III(A),(B),(I). "Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if . . . [t]he information alleges that an imminent danger situation exists" and/or the "information concerns . . . an alleged hazard covered by a local, or national emphasis program,"<sup>8</sup> and there are "reasonable grounds to believe that a violation or hazard exists." *Id.* § IV.

¶14 Here, because the Notice of Alleged Safety or Health Hazards form was triggered by information from ADOSH consultant Garton, it should have been called a "referral" -- a fact Norton admitted at the hearing. But, an unsafe condition like the one Garton noted is also covered by an "emphasis program," which could prompt a complaint investigation regardless of the source of the information. And as Norton testified and ADOSH policy specifies, an investigation can be triggered by either a complaint or a referral. Norton testified that the "potential for a cave in and employees getting killed" prompted him to request the investigation.

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<sup>8</sup> An emphasis program identifies serious or important hazards that receive extra attention from ADOSH.

¶15 Rockford claims that ADOSH misrepresented the nature of the investigation -- an act that vitiates Freeman's consent to it. The ALJ disagreed with Rockford's characterization of ADOSH's actions and we concur with the ALJ that there is evidence to support ADOSH's position. Norton testified that he could not remember whether he asked that the investigation be conducted "as a complaint or emphasis" and that he was "still unclear as to how it got to be classified as a complaint inspection." Snover testified that he believed it was a "complaint inspection." Freeman testified that he could not remember whether Snover "mention[ed] the phrase complaint investigation," but that he "didn't feel like I had anything to hide . . . didn't have a problem with [Snover] talking to the [workers] or anything like that."

¶16 On this record, the question whether Freeman was the victim of misrepresentation is one of credibility. The ALJ determines witness credibility and resolves conflicts in the evidence. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973); *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). "When more than one inference may be drawn, the [ALJ] may choose either, and we will not reject that choice unless it is wholly unreasonable." *Johnson-Manley*, 159 Ariz. at 13, 764 P.2d at 748. On this record, we find no error.



B. Employer Consent

¶17 Rockford also contends that ADOSH had a "policy" that required investigators to inform the employer of its right to refuse inspections. But Arizona law holds otherwise.

¶18 "[U]pon presentation of credentials, [ADOSH] shall be permitted to inspect places of employment, question employees, and investigate conditions, practices or matters in connection with employment . . . . No employer or other person shall refuse to admit [ADOSH] representatives to any such place or refuse to permit any such inspection if the proper credentials are presented and the inspection is made at a reasonable time." A.R.S. § 23-408(A). If an inspection is "refused," an ADOSH representative can file a complaint in superior court and "request an injunction against continued refusal to permit an inspection." *Id.* at (H).

¶19 Snover presented his credentials to Freeman, explained the inspection process, and gave him a copy of the complaint and the Arizona Occupational Safety and Health Act. Freeman expressed no concern about the investigation and participated. Snover testified that he did not inform Freeman of a right to refuse the inspection because he "wasn't aware that [Freeman] had a right to refuse." Snover denied receiving any training in an ADOSH policy that required compliance officers to do so. No

ADOSH policy on this topic was admitted into evidence during the hearing.

¶120 As evidence that an ADOSH policy on this topic exists, Rockford points to deposition testimony from three ADOSH employees that compliance officers "always" inform an employer representative of that right. At the hearing, however, Rockford cross-examined all three employees concerning their deposition testimony, and each clarified their testimony -- consistently maintaining that ADOSH policy does not require compliance officers to tell work site employees that they can refuse the inspection. Again, we give substantial deference to the ALJ's resolution of conflicting evidence and questions of credibility. On this record, we find no error.

## *II. CITATION 1, ITEM 1*

¶121 Rockford next contends that the ALJ erred when he failed to vacate citation 1, item 1 because ADOSH (1) failed to show that any employee was in the area of the trench that exhibited cracking, and (2) failed to prove that Freeman was aware of a situation which could result in a cave-in. We disagree.

¶122 A serious violation is a condition or practice in a place of employment that violates a standard or regulation and produces "a substantial probability that death or serious physical harm could result, unless the employer did not, and

could not with the exercise of reasonable diligence, know of the presence of such condition or practice.”<sup>9</sup> A.R.S. § 23-401(12). To prove a violation, ADOSH must prove (1) the applicability of the standard, (2) the existence of non-complying conditions, (3) employee exposure or access to the hazard created by the violation, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the condition. *Sec’y of Labor v. Dun-Par Eng’red Form Co.*, 12 BNA OSHC 1962, 1986 WL 53522, 4 (No. 82-928, 1986).

¶23 Here, Citation 1, item 1 alleged a violation of 29 CFR 1926.651(k)(2)<sup>10</sup> when

[t]he competent person did not remove employees from a trench that showed evidence of a situation that could result in possible cave-in. The trench slopes showed signs of cracking and drying out, protective systems were inadequate or not used, the soil had previously been disturbed and showed signs of failure, and the trench was subject to vibration from a nearby active railroad track.

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<sup>9</sup> Citation 1, item 1 was classified as a willful serious violation. We discuss the willful aspect in section III.

<sup>10</sup> That statute provides: “Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.”

The ALJ determined that the "entire trench" was in violation and that "[w]orkers *in any part* of the trench without proper shoring or sheeting created a substantial probability that death or serious physical harm could result from a cave-in."<sup>11</sup> (Emphasis added.) At the beginning of his inspection, Snover saw workers enter the trench with no protective systems in place. Snover documented "dried and cracked out" soil, and "evidence of loose material . . . alongside the excavation slope" where the men entered the trench. Other parts of the trench also appeared "dry." An employee testified that he entered the trench earlier on June 11 without any protective system in place. Freeman noted on the competent person interview form that he inspected the trench every half hour that day. Norton testified that the competent person inspection "involves evaluating the excavation for potential signs of ground movement in the area where the employees are going to be exposed." Snover testified that the "drying and cracking of the slopes," as well as the "vibrations from a train track" were evidence of a "possible cave-in."

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<sup>11</sup> Rockford does not contest the ALJ's finding or challenge ADOSH's allegations regarding the soil condition or proximity to the railroad track and its vibrations. Issues not clearly raised and argued in a party's appellate brief are waived. *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996). We therefore focus on the cracked soil.

¶124 We conclude that substantial evidence existed to support the ALJ's conclusion.

### III. "WILLFUL" CLASSIFICATION

¶125 Finally, Rockford asserts that ADOSH failed to present evidence of "willful" behavior necessary to support the allegations in citation 1, items 1 and 2.<sup>12</sup> We disagree.

¶126 "The standard of proof for a wilful violation . . . requires evidence that the employer had actual knowledge of the OSHA regulation and acted voluntarily with intentional disregard of or plain indifference to that requirement." *Westenburg*, 193 Ariz. at 270-71, ¶ 48, 972 P.2d at 254-55. "The threshold inquiry to determine if a violation is 'willful' is whether the employer had knowledge of the hazard before the accident." *Div. of Occupational Safety and Health of the Indus. Comm'n of Ariz. v. Ball, Ball and Brosamer, Inc.*, 172 Ariz. 372, 376, 837 P.2d

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<sup>12</sup> Citation 1, item 1 alleged:

The competent person did not remove employees from a trench that showed evidence of a situation that could result in possible cave-in. The trench slopes showed signs of cracking and drying out, protective systems were inadequate or not used, the soil had previously been disturbed and showed signs of failure, and the trench was subject to vibration from a nearby active railroad track.

Citation 1, item 2 alleged:

Employees applying two coat epoxy to steel pipe in an approximately 11 foot deep by 75 foot long trench were not protected from cave-ins by an adequate protective system . . . .

174, 178 (App. 1992). "An employer can be found guilty of a 'willful' violation even if he has a good faith belief that the work area is safe and chooses not to comply with the regulations." *Id.* at 377, 837 P.2d at 179.

¶127 Because Rockford concedes that Freeman had knowledge of the applicable standards we focus on whether the record contained sufficient evidence to determine that Freeman acted with intentional disregard or plain indifference to the applicable standards. We conclude that it did. The work site safety manager testified that he told Freeman on June 7 to "widen the top of the bell holes" on the east trench, but Freeman failed to do so. Garton spoke to Freeman twice about the hazard that existed if employees were to enter the trench without any protective systems in place. Freeman testified that he did not investigate Garton's June 9 assertion because "there was not supposed to be anyone in that ditch." On June 11, Snover saw workers enter the unprotected area of a vertical trench with cracked soil -- a condition Freeman should have recognized during his half-hourly inspections. One worker told Snover that Freeman had directed them to enter the trench and he had done so "multiple times" that morning.<sup>13</sup> Norton testified that the photographs Snover took during the June 11

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<sup>13</sup> Although Freeman testified that he was unaware that the workers were in the unprotected trench, the ALJ found his testimony "not convincing."

investigation showed workers "clearly" exposed to a potential hazard and that he would not feel comfortable putting workers in "any" of the photographed areas without protective systems in place.

¶128 But even more on point was Freeman's testimony that he knew prior to the June 11 investigation that at least one of the sloped bell holes where employees worked without protective measures did not meet ADOSH standards. He testified that space for one was limited by "two old gas lines," but that he put workers there anyway because he "deemed the lesser of the two hazards was to be not quite maybe as wide as I should have been on that [bell hole], as opposed to exposing [those] two natural gas loaded pipelines." On cross-examination, however, he admitted there were "other forms of engineering" that he could have used to ensure the bell holes complied with ADOSH standards.

¶129 In addition, one of the employees identified in citation 1, item 2 testified that Freeman directed him to enter the trench on June 11 and on other occasions even though no protective systems were in place. Although Freeman testified otherwise, the ALJ found his testimony to be unconvincing. See *Royal Globe*, 20 Ariz. App. at 434, 513 P.2d at 972 (the ALJ determines the credibility of witnesses); *Johnson-Manley*, 159 Ariz. at 13, 764 P.2d at 748 (the ALJ resolves evidentiary

conflicts). The employee also testified that he had been in the trench "about six" times on June 11 before Snover arrived, and that he went back into the unprotected trench to finish his work after Snover left.

¶30 The record contains substantial evidence to support the ALJ's decision, and we find no error.

*CONCLUSION*

¶31 For the reasons discussed, we affirm.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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PHILIP HALL, Presiding Judge

/s/

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SHELDON H. WEISBERG, Judge