

In *R. Williams Construction Co. v. OSHRC*, the court considers whether citations for violations of specific OSHA standards by a construction contractor should be upheld. Although safety regulations might seem bureaucratic or nitpicky, the potential consequences of failing to adhere to them—in this case, the death of a worker in a trench collapse—are sobering.

R. Williams Construction Co. v. OSHRC

464 F.3d 1060 (9th Cir. 2006)

OPINION BY CIRCUIT JUDGE FLETCHER:

Petitioner R. Williams Construction Co. (“Williams” or “the Company”) petitions for review of a final order of the Federal Occupational Safety and Health Review Commission (the “Commission”), affirming violations of the Occupational Safety and Health Act (“OSHA”) in the wake of a trench collapse and death of an employee at a construction site in Santa Ynez, California. We deny the petition for review.

On September 19, 2002, a trench collapse at a sewer-construction project at the Chumash Casino Project in Santa Ynez, California, killed Jose Aguiniga, a Williams employee, and seriously injured [Adam Palomar,] another Williams employee. On the day of the collapse, the trench was ten to twelve feet deep and between three and four feet wide at the bottom. The trench was about thirteen feet wide at the top and more than forty feet long. The sides of the trench rose vertically from the bottom for approximately five feet, after which they sloped backwards at about a forty-five degree angle. An earthen slope at the west end of the trench provided the workers’ only access to and egress from the bottom. Ground water seeped into the soil continuously.

Williams used a number of submersible pumps to remove the ground water that seeped into the trench. Although the pumps could be pulled up and cleaned from the top of the trench, it was the practice to do so from inside the trench. Palomar and Aguiniga . . . were generally responsible for cleaning the pumps and did so as needed throughout any given workday without receiving specific instructions. On the day before the accident, a hydraulic jack shoring system, which supported the trench wall, had been removed. On the day of the accident, Palomar and Aguiniga entered the unshored trench to clean the pumps, remaining there for about fifteen minutes. As the two were exiting the trench, the north wall collapsed, burying Aguiniga completely and Palomar almost completely. Aguiniga died, and Palomar was severely injured.

OSHA conducted an investigation and cited the Company for safety violations. The first citation charged the

Company with failing to instruct its employees in the recognition and avoidance of unsafe conditions and in the regulations applicable to their work environment, as required by [regulation]. The second citation charged the Company with failing to ensure that no worker would have to travel more than 25 feet to reach a safe point of egress, as required by [regulation]. The third citation charged the Company with failing to ensure that a “competent person”—i.e., one with specific training in soil analysis and protective systems and capable of identifying dangerous conditions—performed daily inspections of excavations for evidence of hazardous conditions, as required by [regulation]. The fourth violation charged the Company with failing to ensure that the walls of the excavation be either sloped or supported, as required by [regulation]. The Secretary of Labor (the “Secretary”) designated the first three violations “serious” in nature and proposed penalties of \$7,000 for each violation. The Secretary designated the fourth violation “willful” in nature and proposed a \$70,000 penalty, for a total penalty of \$91,000.

The ALJ [OSHRC administrative law judge] conducted a two-day hearing, during which several Williams employees provided testimony. Sergio Lopez and Rick Dzamba stated that they did not know that Adam Palomar and Jose Aguiniga were in the unshored trench when the wall collapsed. However, both Lopez and Dzamba had provided contrary statements to the general contractor immediately after the accident, which suggested they knew that the two men were working in the unshored trench. Based on these contradictions and their demeanor during the hearing, the ALJ determined that Lopez and Dzamba were not credible.

Joseph Goforth, an employee who started working for Williams four days before the trench collapse, testified that he occasionally worked in the trench and received no training when he started work. He was not told of any rules or shown a safety manual. No one discussed safety the day of the trench collapse.

Palomar testified that he worked for Williams for approximately nine months prior to the accident and had never received any training in trench safety. He testified that there was no safety meeting at the beginning

of the workday on September 19, 2002. He was never told not to enter the trench and did not know who his supervisor was. He received all of his work instructions from Sergio Lopez, who acted as translator because Palomar speaks only Spanish.

* * * John (J.P.) Williams testified that he was the supervisor at the Santa Ynez worksite and was responsible for employee safety at the site. He admitted that he never looked at the company safety manual, which was located behind the seat of his truck; he also had not been trained as an OSHA “competent person” or received any other safety training other than on the job. He was unfamiliar with OSHA sloping and trenching requirements and did not conduct any physical tests on the soil in the trench. J.P. Williams stated that the crew talked about safety “all the time.” However, he could not say when and where any specific rules—for instance, rules against entering the trench when it was unshored—were discussed. Williams stated that he and Dzamba were in charge of checking the trench the day of the accident but could not remember what, if any, warnings were provided to employees that day.

* * * Based on the testimony at the hearing, the ALJ affirmed the citations. However, the ALJ downgraded the one “willful” violation to “serious,” reducing the penalty for that particular violation from \$70,000 to \$7,000. The ALJ reduced the penalties for each of the remaining violations from \$7,000 to \$5,000, based on the fact that Williams is a small employer with no history of prior injuries or OSHA violations. This resulted in a total penalty of \$22,000.

Williams violated [an OSHA regulation] for failing to instruct each employee in the recognition and avoidance of unsafe conditions and for failing to eliminate other hazards: Williams provided no training in trenching hazards to at least the two employees working in the trench; moreover, no Williams supervisor was familiar with OSHA regulations. Williams argues that although Palomar testified that he did not receive instructions regarding trench safety when he was first employed by Williams, there was no evidence “that Mr. Palomar had not received instructions on trench safety on some [other] occasion during his employment with Petitioner (nine months).” Williams seems to take the position that unless the Secretary can prove the absence of a conversation on trenching hazards, substantial evidence is lacking. But the Secretary is not required to prove a negative; moreover, evidence of broad neglect of safety is sufficient to support the ALJ decision.

Williams also violated [another OSHA regulation] by providing only one safe means of egress at the east end of the 45-foot trench. Although it appears that at least one of the pumps was located more than 25 feet away from the ramp, the exact location of the pumps, or the precise location of Palomar and Aguiniga vis-a-vis the ramp at the

moment of the trench collapse, is immaterial. An employee working less than 25 feet from an exit may find it necessary to venture further from the egress point to satisfactorily complete a job. It is reasonably predictable that such an employee, already within a “zone of danger,” will become exposed to the danger itself. Thus, we hold that this regulation applies regardless of whether the employees were exposed to the actual danger at the time of the collapse. A violation is established so long as employees have *access* to a dangerous area more than 25 feet from a means of egress.

In addition, Williams violated [another OSHA regulation] for failing to designate a “competent person” with sufficient training and knowledge to identify and correct existing and predictable hazards. No supervisor at the Company was familiar with the basic standards applicable to the worksite or otherwise “capable . . . of identifying and correcting existing and predictable hazards in their surroundings.” We disagree that the Company discharged its OSHA duties merely by relying on the general work experience of Dzamba and J. P. Williams or “common sense.”

The Company also violated [OSHA] for failing to protect employees from cave-ins: Williams had reason to know that its employees would enter the trench on the day of the cave-in and had actual knowledge that two of its employees entered the trench prior to the cave-in. It is unavailing for Williams to argue that *employees* must take greater care to avoid placing themselves in harm’s way or that management can “expect an employee . . . not [to] intentionally place himself in danger.” Such a claim misconstrues the purpose of the OSHA safety standards.

Williams failed to instruct its employees in proper safety measures and made no effort to ensure that employees not enter the trench on the day of the collapse. The ALJ findings, and the reasonable inferences drawn from them, easily satisfy the substantial-evidence standard. Consequently, the ALJ’s decision affirming the citations is affirmed.

CASE QUESTIONS

1. What was the legal issue in this case? What did the court decide?
2. What exactly did the employer do or fail to do that violated the OSH Act?
3. Why was it “unavailing for Williams to argue that *employees* must take greater care to avoid placing themselves in harm’s way”? What role, if any, should employees’ actions have in determining liability under the OSH Act?
4. Ultimately, these violations that caused, or at least contributed to, the death of an employee and serious injuries to another resulted in a \$22,000 fine for the employer. Is that a just outcome? Are the penalties for violations of OSHA standards sufficient?