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. JIM BOYD CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 11-2559

ON BRIEFS:

Anne R. Ryder, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Acting Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

J. Larry Stine, Esq.; Mark A. Waschak, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA
For the Respondent

DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

In March 2011, the Occupational Safety and Health Administration inspected a trench dug by Jim Boyd Construction, Inc. (JBC) at a construction worksite located on the U.S. Marine Corps Logistics Base in Albany, Georgia. Following the inspection, OSHA issued JBC two citations alleging a total of four violations of OSHA's excavation standard. The willful characterization of Citation 2, Item 1, is the only issue on review.[1] In that item, the Secretary

[1] This is the second time this case has come before the Commission. *See Jim Boyd Constr., Inc.*, 24 BNA OSHC 1152 (No. 11-2559, 2013) (remand order).

alleged that JBC violated 29 C.F.R. § 1926.652(a)(1), which requires that the walls above a trench shield be sloped back so that the base of the slope is below the top of the shield.[2]

Following a hearing, former Administrative Law Judge Ken S. Welsch affirmed the violation but characterized it as serious, stating that "[a]lthough on a technical level it could be argued that [JBC] substituted [its] judgment" for that of the cited standard, the company "had reason to believe that the construction of the trench was acceptable" because third-party safety personnel did not object to its design. For the reasons that follow, we reverse the judge's decision, affirm the violation as willful, and assess a penalty of $27,500.

BACKGROUND

At the time of the inspection, the trench measured approximately 600 feet in length, and ranged from 12 to 16 feet in width and 2 to 12 feet in depth. The trench's nearly vertical walls were, as stipulated by the parties, composed of Type B soil, and in most areas the ground on either side of the trench was covered by a 12-to-18 inch thick concrete slab. Inside the trench were numerous, pre-existing pipes that crisscrossed the trench and each other. For the project, JBC rented trench shields that measured 6 to 8 feet in height. The trench shields were not installed uniformly, and several areas of the trench's walls were left unprotected. The only unprotected areas at issue on review are the portions of the trench walls that extended from 2 to 4 feet above the tops of some of the shields.

JBC's supervisor at the worksite, superintendent Daniel Layfield, was the company's only employee to testify at the hearing. He acknowledged that the trench shields were "[p]robably not" in compliance with § 1926.652(a)(1), but stated that he had "installed [them] to the best of [his] ability." Layfield explained that the trench's pre-existing pipes made stacking the shields (so that they would rise above the top of the trench's vertical walls) difficult, and that he believed stacking them would have increased the risk of contacting overhead power lines

[2] Section 1926.652(a)(1) generally requires use of a cave-in protective system "designed in accordance with paragraph (b) or (c) . . . ." Paragraph (b), which applies to sloping and benching systems, requires that when a trench shield does not extend up to the top of a trench, the soil on each side of the shield must be sloped back so that the top of the shield rises at least 18 inches above the top of the vertical portion of the walls. 29 C.F.R. § 1926.652(b); 29 C.F.R. pt. 1926, subpt. P, app. B, fig. B-1 (Vertically Sided Lower Portion). Paragraph (c), in relevant part, requires that the employer follow the shield manufacturer's tabulated data, which here requires that the ground above the shield also be sloped, starting at a point six inches below the top of the shield, with a maximum allowable slope of 1:1. 29 C.F.R. § 1926.652(c)(2). For deeper trenches, the tabulated data state that employers may stack the shields.

when hoisting pipe into the trench. He admitted that beyond considering whether to stack the shields, he "did nothing else to the ditch" because he believed "[t]here was no hazard." According to Layfield, his belief was based on the fact that safety representatives from the marine base, and from the project's construction manager and general contractor, had all inspected the trench and "had no problem with what [he] had installed."

DISCUSSION

I. Characterization

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (quoting *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995)), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). In proving a violation was willful, "it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation," as "such evidence is already necessary to establish any violation . . . ." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). Instead, the Secretary must show that "the employer was actually aware, at the time of the violative act, that that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (quoting *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999)) (emphasis omitted).

Before the judge and again on review, the Secretary argues that the excavation violation was willful because Layfield knew the trench shields did not comply with § 1926.652(a)(1), but disregarded the standard's sloping requirement because he believed the trench was safe. To prove intentional disregard, the Secretary must show that the employer (1) had a heightened awareness of the "applicable standard or provision prohibiting the conduct or condition" and (2) "consciously disregarded the standard." *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1239-40 (11th Cir. 2002) (quoting *J.A.M. Builders Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)); *see also Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1611 (No. 87-2007, 1992) ("To show intentional disregard of a standard, there must be evidence that the employer knew of the applicable standard prohibiting the condition and that it consciously disregarded it.").

We find that Layfield's hearing testimony, along with evidence of his work experience, establishes a heightened awareness of the cited standard's requirement that is imputed to JBC. *See Fluor Daniel*, 295 F.3d at 1239-40 (awareness of cited requirements established through the testimony of the employer's safety officer, the employer's existing knowledge of the danger, and a prior emergency at the employer's facility); *Conie Constr.*, 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995) (supervisor's heightened awareness established by previous violation of similar standards and testimony "that he had received specific training about the most recent OSHA regulations on excavations" imputed to employer in finding willfulness). At the hearing, Layfield demonstrated his knowledge of the cited requirement by testifying that § 1926.652(a)(1) requires "the starting of your slope . . . 18 inches below the top of your box," but where there is no sloping, like in the trench at issue here, "[y]ou would have to stack the box[es]." Layfield clarified that he had this knowledge before the OSHA inspection, explaining that prior to the inspection he had actually considered stacking the shields. In addition, the record shows that he had extensive trenching experience—at the time of the inspection, Layfield had been engaged in excavation work for more than twenty-five years and had completed at least three trench safety courses, including one that specifically covered OSHA's Subpart P excavation standards.

We also agree with the Secretary that Layfield's testimony establishes conscious disregard. According to Layfield: (1) he knew the trench was "probably not" in compliance with the cited standard; (2) he had actually considered stacking the shields to make the trench compliant; and (3) he chose not to stack the shields because he believed that stacking would increase the risk of contact with overhead power lines. *Fluor Daniel*, 295 F.3d at 1240; *Kaspar Wire Works*, 18 BNA OSHC at 2181. Layfield's contemporaneous consideration of whether to stack the shields (a means of complying with the standard) shows that he knew the trench was not in compliance at the time of the violation.[3] JBC's only rebuttal to Layfield's testimony is its claim that there is no reference in time to when he reached his stated conclusions, and therefore his testimony cannot establish conscious disregard. JBC ignores, however, that in explaining

[3] At the hearing, JBC argued that Layfield's belief that complying with the cited standard would create a greater hazard is evidence that the violation was not willful. JBC, however, has never asserted the greater hazard defense and such evidence only shows that JBC was not plainly indifferent to employee safety—it does not change the fact that Layfield knew of the cited requirement and chose not to comply with it.

why he decided not to stack the shields, Layfield's testimony shows that he made that decision *at the time the violation occurred*—"I *felt* like it would bring more hazards to try to stack this box with the overhead utilities . . . ." (Emphasis added.)

In sum, the record establishes that JBC—through its supervisor, superintendent Layfield—had a heightened awareness of the cited requirement and consciously disregarded it. Thus, the Secretary has established that the violation was willful.

II. Good Faith Effort Defense

In rejecting the violation's willful characterization, the judge concluded that JBC "had reason to believe that the construction of the trench was acceptable." As the Secretary argues on review, the judge's conclusion actually rests on the good faith belief defense to willfulness, even though he never explicitly identified it as such in his decision. *See Sec'y of Labor v. Williams Enters., Inc.*, 876 F.2d 186, 188-89 (D.C. Cir. 1989) (judge's "failure to *label* his analysis with its correct name" does not "free him from the standards developed by the Commission for [his] line of reasoning"). The Commission, and many circuit courts, have long held that a violation is not willful if the employer shows that it "exhibited a good faith, reasonable belief that its conduct conformed to law, . . . or [] it made a good faith effort to comply with a standard or eliminate a hazard." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (citations omitted).[4]

On review, JBC has expressly waived the good faith belief defense, claiming that it is not "assert[ing] a 'good faith' substitution of judgment defense."[5] The company does assert, however, that it "made good faith *efforts* to comply with the standard" which, it claims, should obviate willfulness. (Emphasis added.) The test for good faith is an objective one—"whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions." *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1202 (No. 91-

[4] In contrast, the Eleventh Circuit (to which this case could be appealed based on the worksite's location in Georgia) has held that an employer's "good faith disregard of the regulations" or good faith "*belief* that its alternative program meets the objectives of OSHA's regulations" is "irrelevant" to whether a violation was willful. *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1153 (11th Cir. 1994) (emphasis added); *Fluor Daniel*, 295 F.3d at 1240 ("Allowing a willful violation to be imposed only in cases of bad faith would unduly restrict OSHA's authority to impose its most severe sanction, and thus undermine the congressional purpose of creating a strong and effective federal job safety statute.") (internal quotation marks and citations omitted).

[5] Given JBC's waiver of this defense, we do not address it.

0637, 2000) (consolidated), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). However, in cases involving conscious disregard (as opposed to plain indifference), "[t]he [employer's] good faith effort" must also have been made in "an effort to comply *with the cited provision[]*." *See Calang Corp.*, 14 BNA OSHC 1789, 1793 (No. 85-319, 1990). *See also Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1648 (No. 97-1821, 2004) ("[A]n employer may defend against a showing of willfulness by producing evidence tending to show that it acted in good faith *with respect to the requirements of the standard at issue*.") (emphasis added), *aff'd*, 150 F. App'x 983 (11th Cir. 2005) (unpublished). Furthermore, the burden of proof for good faith is on the employer. *N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1476 (No. 96-0721, 2001) (citing *Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993)).

According to JBC, Layfield took numerous "actions" to comply with the standard, such as properly installing the trench shields in non-obstructed areas of the trench, considering whether to stack the trench shields in the cited areas, and consulting with three other safety representatives at the worksite.[6] These actions, however, are insufficient to negate willfulness. With regard to the first action, compliance in other areas of the trench is not "an effort to comply with the cited provision[]" in the *deficient areas of the trench*. As to the other actions, although JBC claims they were taken to render the workplace safe, we find they were in lieu of compliance; not an effort to comply. *See Calang Corp.*, 14 BNA OSHC at 1793. Stated simply, the fact that JBC may have believed its "actions" regarding the deficient areas made the trench safe does not constitute a good faith effort to comply with the cited standard.

Throughout its review brief, JBC also repeatedly points to its general effort to comply with *other* excavation requirements (often in different areas of the trench) as an effort to comply

[6] In its review brief, JBC points to statements made by the OSHA compliance officer—such as his "acknowledg[ment] that [JBC] had tried to address [the safety] issue by talking . . . with the rental company that provided the trench boxes, and had correctly installed trench boxes in other portions of the project"—as evidence that it made a good faith effort to comply. Whether any of JBC's asserted efforts constitute a "good faith effort" is a "question of law, and therefore constitutes a legal determination about which the CO was incapable of testifying." *Spirit Aerosys., Inc.*, 25 BNA OSHC 1093, 1096 n.5 (No. 10-1697, 2014) (citing *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000)). Accordingly, "neither the Secretary nor the Commission is bound" by any of the CO's purported legal conclusions. *See GEM Indus., Inc.*, 17 BNA OSHC 1184, 1187 n.6 (No. 93-1122, 1995) ("[N]either the Secretary nor the Commission is bound by an erroneous interpretation of the Act made by a representative of the Secretary.").

with the cited requirement in the deficient areas. However, JBC never identifies specific measures it took to bring the deficient areas of the trench into compliance with the cited requirement. Furthermore, JBC's alleged actions, such as considering whether to stack the trench shields or consulting with other safety personnel, were not attempts to comply with the standard in the cited areas—they merely explain why JBC *believed* its noncompliance was permissible. That belief is irrelevant, as JBC expressly waived the good faith belief defense on review.

JBC further contends that the company's compliance with the cited requirement in the non-obstructed areas of the trench, as well as with several of the excavation standard's other requirements, is inconsistent with a willful state of mind. Compliance in one area of a worksite does not constitute an effort to comply in a completely different area—a willful violation is not limited to situations or areas for which compliance was easy or convenient. *Lanzo Constr.*, 20 BNA OSHC at 1649 (employer's compliance with § 1926.652(a)(1) in other areas of trench did not constitute good faith effort to comply, but instead illustrated "a heightened awareness of the requirements of the standard"); *A.G. Mazzocchi, Inc.*, 22 BNA OSHC 1377, 1388 (No. 98-1696, 2008) (employer's partial compliance did not negate its decision to knowingly violate the standard); *V.I.P. Structures Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (employer's inability to install safety nets at worksite due to mud was not sufficient to negate willfulness).

As for JBC's claim that its compliance with some of the excavation standard's other requirements shows that it "did not do nothing," the company relies on Commission and circuit court cases addressing plain indifference, not conscious disregard. While such compliance might show JBC was not plainly indifferent to employee safety, it has no bearing on whether the company intentionally disregarded the requirement at issue here. *See Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920 (No. 96-0593, 1999) (willful characterization based on conscious disregard, despite evidence of employer's "efforts to comply with the standard"). Moreover, JBC failed to pursue other options for complying with the cited standard, such as sloping the excavation walls, obtaining taller trench shields, or—if complying with the cited requirement was as "extremely difficult" as JBC now claims—using a registered professional engineer (RPE) to design a protective system, as permitted under the standard. *See Calang Corp.*, 14 BNA OSHC at 1793 (requiring employer to show it attempted to comply with *all* alternative means of compliance available under standard); 29 C.F.R. § 1926.652(b)(4)

(sloping/benching designed by RPE), (c)(4) (support, shield, and other systems designed by RPE).

Finally, JBC maintains that its "actions" were reasonable because other safety personnel at the worksite approved of the trench's design. However, as explained above, these opinions merely relate to the reasonableness of JBC's belief that the noncompliant aspect of the trench posed no hazard; they do not negate the company's awareness of the standard's requirement and failure to act accordingly. Put another way, even if JBC's belief were somehow relevant to the good faith effort defense, it is not "objectively reasonable" for an employer to ignore a known requirement on the basis that third-party safety personnel did not object. *See V.I.P. Structures*, 16 BNA OSHC at 1875 (emphasizing that "[r]esponsibility under the Act . . . rests ultimately upon each employer . . . ."). Therefore, we find JBC's alleged efforts were not objectively reasonable, and it has not established the good faith effort defense.

III. Penalty

In assessing a penalty, the Commission gives due consideration to: (1) "the size of the business of the employer being charged," (2) "the gravity of the violation," (3) "the good faith of the employer," and (4) "the history of previous violations." OSH Act § 17(j), 29 U.S.C. § 666(j). The gravity of the violation is the "principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

On review, neither party addresses the appropriateness of the penalty. The Secretary proposed a $49,000 penalty, reasoning that the gravity of JBC's violation was high due to the high probability that the trench would collapse, and included a 30 percent reduction on the basis of JBC's small size. Having affirmed the violation as serious, the judge assessed a penalty of $4,500, which included the size reduction and a $400 reduction based on his finding that "JBC ha[d] [not] received [any] prior citations." The judge agreed with the Secretary's gravity assessment, stating that "[t]he violation was of high severity due to the potential seriousness of any injuries had the trench collapsed"—a "possibility" which he stated "was increased" by "the heavy equipment operating in the area" and the "concrete slab" covering the ground adjacent to the trench.

We agree that a reduction for size is appropriate because JBC has only 40 employees, but disagree with the judge's gravity assessment. The company used trench shields in the cited areas of the trench, which we find significantly reduced both the likelihood and severity of potential injury. Thus, we find that the gravity of the violation is moderate. For purposes of determining an appropriate penalty, we also note that the company consulted with safety representatives from the marine base, and from the project's construction manager and general manager. In light of these consultations, coupled with the use of the trench shields, we find that a penalty reduction for some good faith is warranted. *See Aviation Constructors*, 18 BNA OSHC at 1922 ("While we find that [the employer] did not make good faith efforts to comply with respect to the particular provision of the standard at issue here, we nevertheless conclude that [the] overall circumstances should be taken into consideration in assessment of an appropriate penalty [for a willful violation]."); *Manganas Painting Co., Inc.*, 21 BNA OSHC 2043, 2055 (Nos. 95-0103, 2007) (consolidated) (good faith can be mitigating factor in determining penalty for willful violation), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008). Accordingly, we assess a penalty of $27,500.

ORDER

We affirm Citation 2, Item 1 as willful, and assess a total penalty of $27,500.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: November 16, 2016

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER
ON REMAND

On September 26, 2013, the Review Commission remanded to the Court its decision in this matter issued June 13, 2013, to consider the applicability of the Eleventh Circuit decision in *ComTran Group, Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013) which was issued almost two weeks later. In the *ComTran* decision as noted by the Commission, the Eleventh Circuit held that where "the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the misconduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct" such as "evidence of lax safety standards." *Id*. at 1316.

The Review Commission in its Remand Order stated that "[B]ecause it is unclear if the issue of knowledge as presented in the case before us is affected by the court's decision in *ComTran*, we remand this case in its entirety to the judge for him to consider the applicability of the Eleventh Circuit's decision."

Pursuant to the Commission's instruction, the Court held two telephone conference calls with the parties. As a result of the conference calls, the parties filed a Joint Stipulation on Remand on December 2, 2013. The parties stipulated that:

1. Respondent Jim Boyd Construction, Inc. did not raise unpreventable employee misconduct as a defense to the alleged violations in this case.
2. Respondent is not alleging that the actions of its superintendent at the worksite were malfeasance.
3. The decision in the *ComTran* case should not affect the outcome of the decision in this case.

In view of the parties' stipulations, the Court concludes that the *ComTran* decision has no applicability to the Court's decision in *Jim Boyd Construction Inc.* issued June 13, 2013 and the record in this matter does not need any further development.

/s/
KEN S. WELSCH
Judge

Date: December 18, 2013
Atlanta, Georgia