

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 92-3788

PENTECOST CONTRACTING CORP. ,

Respondent.

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

I. Introduction

Following an inspection on July 9, 1992, Pentecost Contracting Corporation (“Pentecost”) was issued three citations alleging violations of the trenching standard by the Occupational Safety and Health Administration (“OSHA”). Review Commission Administrative Law Judge John H. Frye, III affirmed as serious Item 1, alleging a violation of 29 C.F.R. §1926.651(c)(2),¹ and Item 3, alleging a violation of 29 C.F.R. §1926.652(a)(1).² Item 2, alleging a violation of 29 C.F.R. §1926.651(k)(2),³ was declared

¹29 C.F.R. §1926.651(c)(2) provides:

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

²29 C.F.R. §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.

³29 C.F.R. §1926.651(k)(2) provides:

(k) *Inspections.*

(continued...)

moot. The issue before us on review is whether the judge properly characterized the violations as serious rather than willful.⁴

II. Facts

On the day of the inspection, OSHA compliance officers William Donovan and Scott Schrilla were traveling along a public road when they observed two employees working within a trench that appeared to be over five feet deep and unprotected by an adequate employee protective system, as required by section 1926.652(a)(1). After receiving authorization from their supervisor to conduct an inspection, the compliance officers began an examination of the site.

The trench at issue, labeled “T-4,” was part of a construction project along Kensico Road in Thornwood, New York. The entire trench was approximately 70 feet long, three feet wide, and generally four and one-half feet deep. The area where Pentecost employees Jose Fernandez and Luiz Diamo were working was approximately five feet long, with a depth of five and one-half to six feet. The trench soil was classified as type C, the least stable category. Compliance officer Donovan described the walls as “weeping” (manifesting the presence of ground water), and saw evidence of spalling (breaking apart of soil on the walls) and graveling (bits of soil rolling off walls). The crown and the base of the trench appeared to be the consistency of mud. Donovan testified that those conditions indicated the hazard of a potential cave-in.

³(...continued)

(2) 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.

⁴Our briefing notice addressed all three items of the citation before Judge Frye, including the alleged violation of 29 C.F.R. §1926.651(k)(2), declared moot by the judge. The Secretary chose not to address this item, stating only that “the Commission’s Direction for Review did not include that violation.” We construe the Secretary’s decision not to address this item as an abandonment of the issue, and will not, therefore, examine this aspect of the judge’s decision.

When they began the inspection, the compliance officers requested employees Fernandez and Diamo to exit the trench. There was no ladder, ramp, or stairs within that portion of the trench, so the employees exited the trench by climbing from the excavation. The employees had been in the trench for approximately one hour. At the time, there was no supervisor on the site; however, Tom Castello, Pentecost's superintendent for the trenching project, arrived shortly thereafter.

This was not the first time the Kensico Road project had been inspected by compliance officers Donovan and Schrilla. On May 18, 1992, the same compliance officers inspected a trench in the project referred to as "T- 1." A second inspection took place on May 18 and 19, 1992 of trenches "T-2" and "T-3." Compliance officer Donovan testified that at the time of the earlier inspections, he reviewed problems at the sites and the applicable provisions of the trenching standard with several of Pentecost's supervisors, including superintendent Castello. He also provided them with copies of the applicable standards. Both of these inspections produced separate citations alleging violations of the same standards at issue here -- an alleged serious violation of section 1926.651(c)(2) and an alleged willful violation of section 1926.652(a)(1). *Pentecost Contracting Corp.* (No. 92-3789)(consolidated).⁵ Prior to these 1992 citations, Pentecost had been cited for, but did not contest, a willful violation of former section 1926.652(b) (failure to slope or support trench walls more than five feet deep in unstable or soft soil) and a serious violation of former section 1926.652(h) (inadequate means of egress from trench).

Pentecost president John Quintano testified that the May inspections gave Pentecost a "wake-up call" regarding trench safety. Project field engineer Dominick DeSanto testified that the safety program "got 100 percent more stringent," and that weekly safety meetings were held to communicate the safety program to supervisory employees. Excavation safety

⁵Pentecost stipulated to the existence and the characterization of the violations which arose from the May 1992 inspections, but contested the penalties, which the judge grouped. This grouping led Pentecost to seek attorney's fees under the Equal Access to Justice Act, 5 U.S.C. §504. The judge's denial of this request is currently on review before us.

was discussed with the laborers at “tool box” meetings at the work site. Compliance officer Donovan, however, testified that superintendent Castello told him that Pentecost did not adequately enforce this safety program.⁶

III. Analysis

A willful violation of the Occupational Safety and Health Action of 1970, 29 U.S.C. §§ 651-678 (“the Act”), is one committed with an “intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *L.E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, p. 41,132 (No. 90-945, 1993)(quoting *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). “It is differentiated from other types of violations by a ‘heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.’” *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is an objective one, that is, “whether the employer’s belief concerning the factual matters in question was reasonable under all of the circumstances.” *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993).

The Secretary’s prior inspections at the Kensico Road project established that Pentecost had a heightened awareness of the requirements of the cited standards.⁷ See, e.g., *Donovan v. Williams Enterp.*, 744 F.2d 170, 180 (D.C. Cir. 1984); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 781 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976).

⁶Tom Castello was no longer employed by Pentecost at the time of the hearing, and did not testify.

⁷Although we find that the May 1992 inspections gave Pentecost a heightened awareness of the requirements of the cited standards, the citations that resulted from those inspections did not issue until after the July 1992 inspection.

Compliance officer Donovan testified that he reviewed the excavation standards with Pentecost supervisors, including superintendent Castello, and pointed out apparent violations that are similar to the citations currently before us. Specifically, employees were working unprotected in trenches deeper than five feet and did not have access to appropriate means of egress.

As the record demonstrates, however, when the compliance officers arrived at the worksite on July 9, 1992, two employees were working in a trench that was five and one-half feet deep without any of the protective measures that are required by section 1926.652(a)(1) for trenches deeper than five feet (unless excavated entirely in stable rock), or the means of egress in trenches deeper than four feet required by section 1926.651(k)(2). The trench exhibited a number of conditions that are associated with cave-in hazards: the walls were weeping, and there was evidence of the breaking apart of soil on the walls and of bits of soil rolling off of the walls. Superintendent Castello told the compliance officers that he had inspected the trench earlier in the day when it was four and one-half feet deep. The record does not indicate the time of that inspection, but the weather conditions on that day were clear and Pentecost does not suggest that the condition of the trench changed during the time between superintendent Castello's inspection and the OSHA inspection.

Thus, prior to the inspection, Castello observed the trench when it was in a noncomplying condition yet he made no effort to have the trench sloped or shored or to ensure that exit ladders would be located in the trench when employees Fernandez and Diamo began working in the excavation.⁸ As a supervisor, Castello's intentional disregard of the standards is imputable to his employer. *Conie Constr. Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-264), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995). This showing of intentional disregard by a supervisor satisfies the Secretary's initial

⁸Under section 1926.652(a)(2)(1)(ii), employees working in excavations under five feet in depth need not be protected by a protective system if "examination of the ground by a competent person provides no indication of a potential cave-in." Here, because there is no evidence that the trench's condition was materially different at the time of Castello's examination (other than in depth), the trench was not in compliance during this examination.

burden of proving willfulness. Pentecost may defend against this showing of willfulness by establishing that it made reasonable good faith efforts to comply with the requirements of the Act. *L.R. Willson and Sons, Inc.*, 1997 CCH OSHD ¶ 31,262, p. 43,890 (No. 94-1546, 1997).

Testimony by field engineer DeSanto indicated that Pentecost made some efforts to comply with the Act and prevent future violations following the May inspections. He testified that the safety program was “100 percent more stringent,” and that the contents of the weekly safety meetings were “much greater.” Although Pentecost offered examples of safety meeting notes and safety checklists, beginning on May 20, 1992, none of the evidence presented substantiated the safety program improvements asserted by DeSanto and Pentecost president John Quintano.⁹ Compare *L.R. Willson and Sons, Inc.*, 1997 CCH OSHD at pp. 43,890-91 (Violation was not willful, based on evidence of specific examples of training, safety meetings, progressive system of discipline, and testimony by the compliance officer praising the safety program.); *Beta Construction Co.*, 16 BNA OSHC 1435, 1438, 1445, 1993-95 CCH OSHD ¶ 30,239, pp. 41,645, 41,652 (No. 91-102, 1993), *aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995)(Employer presented extensive evidence of safety program, good faith manifested through establishment and implementation of comprehensive safety program.). Furthermore, compliance officer Donovan testified that superintendent Castello stated that this safety program was not adequately enforced. We therefore find that the evidence of improvements in its safety program that Pentecost presented at the hearing was not sufficient to outweigh the evidence of its conscious disregard for employee safety. We conclude that Pentecost willfully violated section 1926.651(c)(2) by failing to provide an appropriate means of egress from trench “T-4,” and

⁹The safety meetings notes consist of topic lists and the signatures of those in attendance. The value of these notes is limited, given the lack of testimony indicating the meetings’ substance. In addition, the record includes little explanatory testimony concerning the safety checklists.

section 1926.652(a)(1) by failing to employ an adequate protective system for the employees working within this excavation.

IV. Penalty

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. Pentecost is a small employer. The gravity of these violations is moderate, based on the indications of a potential cave-in, the depth of the trench, and the low probability of serious injury should a cave-in occur. Although we have found that Pentecost has not established sufficient good faith to negate a willful characterization, Pentecost's increased safety efforts, including the weekly safety meetings, are relevant indicators of good faith for the purpose of penalty determination. *See V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875-76, 1993-95 CCH OSHD ¶ 30,485, p. 42,110 (No. 91-1167, 1994). Based on the section 17(j) factors, and noting the good faith efforts demonstrated by the company, as well as its small size, we assess a penalty of \$10,000 for each willful violation.

Accordingly, we:

- 1) Affirm Item 1, alleging a violation of 29 C.F.R. § 1926.651(c)(2), as willful, and assess a penalty of \$10,000.
- 2) Affirm Item 3, alleging a violation of 29 C.F.R. § 1926.652(a)(1), as willful, and assess a penalty of \$10,000.
- 3) Affirm the judge's dismissal of Item 2, alleging a violation of 29 C.F.R. § 1926.651(k)(2).

/s/

Stuart E. Weisberg
Chairman

/s/

Velma Montoya
Commissioner

/s/

Daniel Guttman
Commissioner

Dated:April 25, 1997