

Secretary of Labor,

Complainant,

v.

Fields Excavating, Inc.,

Respondent.

OSHRC Docket Nos.
01-0447 and 01-0975 (Consolidated)

Appearances:

Heather A. Joys, Esq., Linda Hastings, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For Complainant

Douglas J. Segerman, Esq., McFadden, Winner & Savage, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Fields Excavating Inc. (Fields) is a small sewer and water pipeline installation company located in Ohio and owned by Jeffery Fields. In response to a complaint, on February 6, 2001, Occupational Safety and Health Administration (OSHA) compliance officer James Denton inspected Fields's worksite on Havener Road in South Webster, Ohio. As a result of the inspection, the Secretary issued to Fields a one-item citation on February 27, 2001.

On May 3, 2001, James Denton and fellow OSHA compliance officer Charles Shelton inspected a Fields's worksite at Xenia, Ohio. Following that inspection, the Secretary issued to Fields another one-item citation on May 10, 2001.

For both citations the Secretary asserts that Fields willfully violated § 1926.652(a)(1) by failing to have a protective system in place to prevent cave-ins. On August 7, 2001, the cases were consolidated for further proceedings, including for hearing and decision. A hearing was held in Columbus, Ohio, on February 26 and 27, 2002. The parties filed briefs, and the case is ready for decision.

The Secretary contends that she met her burden of proving that Fields willfully violated the standard at the two separate locations. Fields contends that the conditions did not violate the standard at the Havener Road worksite and that, while a violation existed at Xenia, it was the result of supervisory

employee misconduct. For the reasons that follow, the Secretary established the existence of the violations, both of which were properly classified as willful.

Discussion

The standard at issue governs protection from cave-ins and sets forth the types of protective methods which are appropriate for various soils and trench configurations. Section 1926.652(a)(1) provides:

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

In order to establish the violation of the standard, the Secretary has the burden to prove: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994). The parties dispute only the second and fourth elements of proof.

The Havener Road Inspection – the February 27, 2001, Citation

Since 1992 Fields has installed over 1.3 million feet of trenched pipeline at various depths ranging from 4 to 35 feet (Tr. 408). For normal sewer installations, Fields places the pipe anywhere from 4 feet to 30 feet deep; for a water line it typically places the pipe so that it has 4 feet of cover (Tr. 339-340).

In January and February 2001, Fields was to lay an 8-inch sewer pipeline along an area paralleling Havener Road in South Webster about 20 feet from the roadway (Tr. 82). The sewer line ran between two streams, a larger one and a smaller "creek." The proposed pipeline paralleled and then intersected the creek (Exhs. C-5; R-1). Having sunk a 9 foot, 5-inch deep wet-well a month earlier, Fields began to connect the wet well and to lay the pipeline on February 6, 2001. February 6 begun as overcast with drizzling rain; it started to rain hard later that afternoon (Tr. 151, 153).

On February 6, 2001, Fields's crew consisted of superintendent Warren Lambert, leadman and trackhoe operator Thomas Hern, and pipelayers John Jones, Arthur Reaper, and Mark Norris. Also on site was Gary Summe, an inspector for SEICO, Inc., a third party responsible to insure that the specifications were met and to authorize payment for work done. Summe did not have expertise in the installation process or in safety, although he was generally familiar with both (Exh. C-2; Tr. 150-151, 178).

When the crew laid the first “stick” of pipe (one 13-foot section of 8 inch sewer pipe), the backhoe accidentally hit an incorrectly marked gas line. Work stopped while the crew waited for the gas company to repair it (Tr. 156-157, 195). According to SEICO’s Summe, when the gas service repairman arrived “he started really going crazy,” saying “Man, this and this, they don’t have a trench box” (Tr. 158), and becoming “totally spastic because of the depth” of the excavation (Tr. 162). The gas repairman related an incident involving a multi-fatality cave-in, which occurred when employees failed to use trench boxes. Summe went to Lambert and asked him “Ed, are you going to put a box in?” According to Summe, Lambert replied, “No, when we get past the creek, we’ll be about 5 foot deep” (Tr. 158). Lambert knew that the gas repairman was not “real pleased with the area” (Tr. 196). He denies the discussion with Summe, whose opinion Lambert dismissed as worthless (Tr. 220).

Although Fields disputes Summe’s depth dimension, according to Summe the excavation was approximately 10 feet deep at the point where the gas line broke (Tr. 162). Before the gas repairman agreed to enter the excavation, leadman Hern partially backfilled earth into it. The gas repairman entered the excavation and repaired the break. Shortly thereafter, superintendent Lambert left for another worksite (Tr. 219, 273).

Two employees continued to work in the excavation as the crew proceeded digging toward the creek. That morning OSHA’s Cincinnati office received a telephone complaint which asserted that on Havener Road in South Webster employees were working in an unsafe excavation and there was the potential for a cave-in. Denton received the assignment, traveled to the site, and began his inspection at 2 p.m. By that time the first sections of the excavation were backfilled, and a new portion was opened up for about 20 feet (Tr. 16). Also around that time, Hern hit a diversion pipe which Fields earlier placed in the creek to channel water away from the excavation. After the pipe was hit, water began flowing into a lower portion of the excavation. Denton observed employees Arthur Reaper and John Jones working near the middle of the excavation, which they exited a short time later by climbing up the trench wall.

Measurements

Using his engineering rod, Denton measured the excavation where the pipe ended and where the employees exited (Exh. C-5; Tr. 16-17, 242, 282). Denton measured 6 feet horizontally between the tops of the two trench walls. The depth of the two sidewalls was not the same. Denton measured the depth of the Havener Road (south) side of the excavation wall to be 7 feet. He estimated, rather than measured, the

depth at the north trench wall to be at least 5 feet deep. Denton considered it unsafe to walk over to that side of the trench to measure it (Tr. 27-28). Denton estimated the width of the bottom of the excavation to be between 3 to 4 feet wide (Tr. 115).¹

Superintendent Lambert testified that he had not measured the trench walls and usually did not do so. He relied on his visual observations to determine the depth of excavations (Tr. 215).

Soil Classification

Protective systems for an excavation deeper than 5 feet, not dug in stable rock, consist of sloping, benching, use of a shoring or shield system, or use of some other approved protective system. Fields asserts that it properly sloped the Havener Road excavation. The degree of slope required depends upon the classification of the soil in which the trench is dug. Soil classification is “a method of categorizing soil and rock deposits in a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability” based on the soil’s unconfined compressive strength and other factors (Subpart P, App. A).

Examples of Type A soil are clay, silty or sandy clay, or clay loam. However, no soil is Type A if certain conditions exist, such as fissures, heavy vibration, or other factors which signal a less stable composition. Examples of Type B soil include angular gravel, silt, or silt or sandy or clay loam. Again, soils which may meet the compressive strength for Type B will be classified as Type C if other factors, such as fissured walls, vibration, or varying soil layers reduce soil stability. Type C soil includes granular soils such as gravel, sand, and loamy sand. Submerged soil from which water is freely seeping can also cause a soil to be classified as Type C. The degree of moisture in the soil is a factor which can reduce soil stability (Subpart P, App. A).

While the Secretary claims that the soil was Type C, Fields argues that the soil was Type A, or as Jeffrey Fields admits “maybe B” (Tr. 352). Fields’s safety consultant witness James Vaughan testified that the soil was not Type C, but was either Type A or Type B “in its original state” (apparently meaning without the addition of the water) (Tr. 454). Fields relies on the recollections of Lambert and its pipelayer Reaper for proof that the soil was Type A. Lambert’s testimony was uncertain. He believed that he “would have” tested the soil at the wet well (or as he said in his deposition, at the gas line break) and that it was Type A “if I remember correctly” (Tr. 192-193, 212-214). Reaper’s testimony was likewise

¹ Fields’s employees recalled that they used a 24 inch to 30-inch bucket and that the bottom of the trench was about that width (Tr. 250, 273).

unconvincing on the point. Reaper had received no formal safety training on excavations since 1997 and was confused about soil classifications. His testimony appeared coached and was controverted by other credible evidence (Tr. 235-236, 243-245, 251, 253).

To prove that the soil was Type C, the Secretary points to Denton's observations and soil tests and the testimony of Summe. Denton described the sidewalls as "a brown, clay-type substance, but it was very saturated; it was very wet" (Tr. 25). He observed "pieces of the side wall coming off and falling into the excavation. It was very loose, very soft material" (Tr. 25). Although water from the diversion pipe began flowing into the base of the excavation, the area where Denton measured (and where the employees were exposed) was located towards the middle of the excavation and had not yet been affected by the diversion pipe. The soil was very wet before the pipe broke (Tr. 114-115). From the spoil pile near the area where he measured, Denton retrieved a clump of previously excavated soil. Denton performed the basic thumb penetration test and then inserted a penetrometer (a small pocket device which gives a rough reading of soil types) into the soil. Denton concluded that the soil was Type C. He testified that since the walls were saturated with water, were sloughing off, and had cracks and fissures, it could not be classified as anything other than Type C.

While Fields's employees minimize any problems with wet conditions, Summe supports the conclusion that the soil between the creek and the stream was especially wet. Summe testified that "[t]he ground was saturated due to ground water" (Tr. 155). "Tom [Hern] had to keep peeling [the excavation] back because it was – it kept falling in. It was saturated; the ground was saturated," a fact that Summe recorded in his contemporaneous reports (Tr. 157, 168). "After they got past the gas line, . . . – you know, it was a sloppy mess. I mean, it was a mess that day. But they had to keep pulling – laying it back, so that they, you know, could keep the ditch opened up" (Tr. 169).

Denton had 23 years of experience with OSHA and had made many excavation inspections (Tr. 14). Summe had approximately 5 years of experience as a construction inspector in the installation of pipes (Tr. 152). Summe had no continuing relationship with Fields and is considered a neutral third party. On the other hand, Fields's employees at the Havener Road project had a continuing financial relationship with Fields, and some displayed selective memories of events. They may have had concerns that a determination by Jeffery Fields that they caused Fields to receive an OSHA citation could translate into

monetary repercussion for them.² Finally, the inspection videotape verified the exceedingly wet condition of the soil and some sloughing off of a portion of the trench wall (Exh. C-3; Tr. 21-24).³ It is concluded that the soil, which may have carried a different classification in other circumstances, was properly classified as Type C.

Sloping

The maximum allowable slopes for excavations are: for Type A soil, 3/4 foot horizontal to 1 foot vertical (3/4:1, or 53° from the horizontal); for Type B, 1:1 (or 45°); and for Type C, 1½:1 (or 34°). Fields argues in its brief that the soil was Type A and that the excavation was sloped at 2:1, more than was required for a Type C soil. Fields relies on employee testimony that they had sloped (and always sloped) the excavations at 2:1 (Tr. 227). Fields asserts that when the “natural slope” of the land lying between the stream and the road is taken into account, the excavation was sloped at 2:1. The argument was only generally presented, without providing measurements or showing how the natural “lay of the land” specifically affected the dimensions of the excavation (Exh. R-13). While the lay of the land may have created conditions where the north side of the excavation was higher than the south’s, the depth of both sides required cave-in protection (Tr. 189). Any other conclusion ignores the physical reality of the excavation as employees experience it from inside it.

Based upon the dimensions of the excavation, it is clear that Fields had not sloped the excavation at 1:1 (required for Type B soil), at 1½:1 (required for Type C soil), and certainly not 2:1 (required by Fields’s purported workrule). The excavation on Havener Road was inadequately sloped to comport with § 1926.652(a)(1).⁴

² As discussed *infra*, Fields withheld a projected \$10,000 bonus from Mark Linkfield on the Xenia project when Jeffery Fields concluded Linkfield’s unsafe actions precipitated the OSHA fine.

³ The perspective shown by the inspection videotape was not initially clear. The excavation wall can be seen where the last section of sewer pipe was laid (Tr 22).

⁴ Whether the soil was properly classified as Type B or Type C makes no difference to the existence of a violation. The soil was improperly sloped even for Type B soil (Tr. 112). Indeed (although not proven since the Secretary failed to take complete measurements), with only 6 feet between the top walls, it is questionable whether the excavation was sloped sufficiently for Type A soil.

Knowledge

“In order to satisfy her burden of establishing knowledge, the Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the . . . violative condition.” *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). “The participation of the company’s own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability” (*Kerns Bros. Tree Service*, 18 BNA OSHC 2064, 2071-72 (No. 96-1719, 2000), concurring opinion, quoting *Pennsylvania Power & Light Co.*, 737 F.2d 350, 358 (3rd Cir, 1984). Reasonable diligence includes such considerations as the adequacy of work rules and training programs, the adequacy of supervision, anticipation of hazards, and measures taken to prevent violations. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001), citing *Pride Oil Well Serv.*, 19 BNA OSHC 1809, 1814 (No. 87-692, 1992). On a daily basis Fields digs and works in excavations which can be as deep as 30 feet. Cave-in hazards are inherent in the work. As discussed in the context of the employee misconduct defense, Fields’s training and safety measures were deficient.

Knowledge of the violation is thus properly imputed to Fields through its supervisors. Superintendent Lambert states that the trench would be difficult to slope (because the pipeline lay between the road and the creek). Before he left the site, he made the operable decision on how much to slope and not to use a trench box. He continued on this course even after the gas repairman’s and Summe’s safety concern were relayed to him. (*See North Landing*, 19 BNA OSHC 1465,1472 (No. 96-0721, 2001) (supervisor’s performance of similar work without precautions led to awareness that precautions would not be taken for crew’s later work). Further, during the OSHA inspection the involvement of leadman Hern in the violation was sufficient to impute knowledge to Fields (Exh. C-2(6); Tr. 18). Fields failed to exercise reasonable diligence at Havener Road and could have known of the violative conditions.

The Secretary established the four elements of a violation of § 1926.652(a)(1) at Havener Road. The violation is affirmed.

Xenia Inspection -- the May 10, 2001, Citation

The next OSHA inspection occurred on May 3, 2001. Towards the end of the one-year project in Xenia, Ohio, Fields was installing a 20-inch ductile iron water main when inspected by OSHA (Tr. 36, 298-299, 372). Mark Linkfield was the superintendent, competent person, and excavator operator for the

Xenia part of the project. Linkfield usually supervised five employees. On May 3, Linkfield directed the work and operated the excavator. At his direction, employee Mike Zollman entered the trench to assist with placing each new section of pipe. He stooped to grease the gasket of the pipe, to join the two parts, and to test for leaks (Tr. 122).

Without dispute, the Xenia excavation was dug 10 feet deep (six feet from the top of the pipe), was 6 feet wide at the top of the excavation, and was 4 feet wide at the bottom. The excavation was 30 to 36 feet in length. The trench walls were nearly vertical. The soil was Type C at the bottom (granular soil with stones and gravel) and Type B (clay/loam) at the top of the wall (Exh. C-4; Tr. 41, 48, 141, 299). That combination of soils results in a soil classification of Type C. The vertical walls of the excavation should have been sloped 1½ :1 on each side (App. B, Diagram B-1.4). No trench boxes were used (Tr. 123). The trackhoe operating 10 to 15 feet away and heavy traffic on the nearby road created the potential for ground vibration (Exh. C-4; Tr. 125).

The Xenia violation occurred at the direction of superintendent Linkfield, Fields's designated competent person for excavation safety. Based on the same considerations which imputed superintendent Lambert's knowledge to Fields at Havener Road (and which defeats the employee misconduct defense), Linkfield's knowledge is properly imputed to his employer.

The Secretary established the elements of a violation of § 1926.652(a)(1) at Xenia. The violation will be affirmed unless Fields proves it resulted from isolated employee misconduct.

Employee Misconduct Defense Unproven

Fields contends that superintendent Linkfield was solely responsible for the violation since he ignored Fields's well-established, communicated, and enforced work rule regarding the use of trench boxes or sloping in excavations. In order to negate a violation on the grounds of employee misconduct, Fields bears the burden to prove that: (1) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to its employees; (3) it took steps to discover violations of those rules; and (4) it effectively enforced the rules when violations were discovered. *E.g.*, *CMC Electric, Inc.*, 19 BNA OSHC 1001, 1003 (No. 99-3801) (6th Cir. 2000).

Fields asserts that it had a workrule on use of either a trench box or "proper" sloping. Supervisors made the decision whether to use trench boxes, sloping, or neither of them. Fields purchased trench boxes in 1997, and they were available on the jobsite. As far as sloping, Jeffery Fields testified that the company

had an oral workrule which required that all excavations over a certain depth must be sloped at 2:1, regardless of the soil type. The existence of such a work rule is questionable.⁵ Fields also argues that its employee knew that the OSHA standards require sloping, which Fields considers to be the equivalent of having a work rule regarding sloping. This approach is rejected. The employee misconduct defense requires an established work rule designed to prevent a specific violation from occurring. The employer cannot generally refer its employees to the OSHA standards and expect the employees to know with any accuracy what is required for compliance. In these circumstances, a reference to OSHA or to a 2:1 rule became, in effect, unspecific. Lambert described how he applied Fields's workrule (184-185):

A. They have standard sloping that – we have books from OSHA that tell us to do – I'm not saying th[ose] books are wrong, but we do what we feel is safe or better. You know, if we don't feel like OSHA's standard is what we're feeling is right, we do even more. We just you know, get it back away from the people.

* * *

Q. Do you have a general rule of thumb as to how far you're going to set back an excavation?

A. Yes, Generally, yes.

Q. What is that?

A. Safe.

The only formal training on excavation safety for all employees occurred in 1997 at Jeffrey Fields's home (Tr. 337). Around the same time supervisors completed the 10-hour OSHA training course on excavations (Exh R-8). No employee hired after 1997, including Zollman, received any formal excavation safety training. Of the booklets, manuals, safety talks, or reminders given to employees at any time, only one booklet, Keller's "OSHA Excavation Standard Handbook" (Exh. R-6), sets out specific OSHA sloping requirements. That booklet, and others, are given to newly hired employees. Fields tells them to read the manuals "and, hopefully, they would do it" (Tr 384). Employees turn in a short open-book quiz at the back

⁵ Because a general 2:1 sloping rule would entail far more extensive excavating than required even for the least stable soil; because neither of the inspected excavations was consistent with OSHA's requirements for sloping, much less a 2:1 rule; and because employees seemed unsure of what constituted a 2:1 slope, it is possible the "rule" was more contrived than real. For example, Reaper replied to respondent's counsel (Tr. 227):

A. Well, we always [did] on the sloping, if we [weren't] using a box and it was good ground, we would do two-to-one, and in the booklet it says one to one and a half (*sic*). I asked him about that.

Q. What did he say?

A. Use whatever we was comfortable with.

Q. So you used two-to-one?

A. Two-to-one.

of the booklet, but according to Zollman they received no feedback from the quiz (Exh. R-6, p.21-22; Tr. 129).

Fields primarily relied on its supervisors to enforce safety. Linkfield considered his decision not to use a trench box or to slope “just a call I made that day” (Tr. 313). Zollman explained that whether cave-in protection was used “was up to our supervisors” (Tr. 24). Fields’s superintendents directed how the excavations were configured, and both excavations resulted in violations of the standard. “Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his supervision.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). As indicated, a supervisor’s participation in the violation does not by itself establish that a safety program is inadequate. Yet, safety infractions by supervisors are evidence of poor communication and implementation of a safety program. Further, not only the supervisors were involved in the violation. At least five other employees participated in the pipelaying process at these locations. At Xenia no one objected when Zollman was sent into the unquestionably hazardous excavation (Exh. C-4). *See Falcon Steel Co.*, 16 BNA OSHC 1179,1193 (Nos. 89-2883, -3444, 1993) (seven employees not wearing safety belts, not merely one; “cumulative effect” of seven belies that conduct was isolated).

Finally, its defense also fails because Fields had only a “paper” enforcement system in place to punish violations of its workrule (or of the OSHA excavation standard). Since Jeffery Fields started managing the company in 1992, he never had occasion to give more than verbal direction while on a jobsite. He never felt it necessary to issue either a verbal or written reprimand for a violation of the company’s safety rules, except after the Xenia citation (Tr. 397-398). Likewise, superintendent Lambert never reprimanded any of his crew for safety violations over an extended period of 7 to 10 years (Tr. 181). The instant citations were the second and third OSHA inspections, and trenching violations were asserted after each inspection.

Jeffery Fields stated that he made surprise inspections at his worksites to detect safety violations. During the approximately 1 year Xenia project, Zollman remembered seeing Jeffrey Fields once (Tr. 127). Fields offered one instance of its enforcement of its disciplinary system. The Xenia inspection occurred on May 3, 2001, and the citation was issued on May 10. On May 18 Fields notified Linkfield and Zollman that each was suspended for 30 days “due to the severity of the safety infraction” (Exh. R-12, R-14).

Jeffery Fields explained why he delayed penalizing the two employees until after he received the OSHA citation (Tr. 409):

- A. Once the facts became known, yes. I wasn't aware of the facts until the citation. You know, he was saying six to seven foot deep; they were saying ten foot deep. Until I [saw] the video and knew exactly what it was, there wasn't going to be any [discipline]. Once I found out the true facts, yes, sir.

The explanation is unconvincing. Even at 6 to 7 feet deep, the excavation violated Fields's 2:1 workrule, as well OSHA's trenching standard. The explanation also ignores the fact that Fields received the video after, not before, the men had been suspended. In addition to Linkfield's 30-day suspension, he forfeited his projected \$10,000 bonus, which was "probably paying attorney's fees" related to the OSHA case (Tr. 370). It is concluded that the May 18, 2001, suspension was prompted by receipt of the OSHA citation. At the time of the violations Fields did not have an effective system in place to enforce company workrules.

Fields failed to establish the elements of the isolated employee misconduct defense. Accordingly, the violation of § 1926.652(a)(1) is affirmed.

Willful Classification

The Secretary alleges that the violations are willful.

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶ 30,059, p. 41,330 (No. 89-2883, 1993) (consolidated); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 CCH OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavation and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n. 3, 1995-97 CCH OSHA ¶ 31,228, p. 43,788, n. 3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & -0638, 2000).

Fields argues that since there was a good faith disagreement about the extent of the slope and the soil classification, the violation at Havener Road cannot be considered willful. It contends that any willful

actions by its superintendents should not be imputed to Fields because of the existence of its safety procedures.

Prior Citation

The Secretary contends that Fields had a “cavalier” attitude towards trenching safety. Based on a 1998 violation of § 1926.652(a)(1), the Secretary asserts that Fields had a “heightened awareness” of OSHA’s excavation standards and also that its employees may not be complying with them. Item 3 of that April 3, 1998, citation alleged that Fields laid a 4-inch pipe in a 6-foot trench, which was not properly sloped or otherwise protected from cave-ins. Fields contested the citation but later informally settled it, and the violation became a final order.⁶ The Secretary contends that the previous citation did not change Fields’s conduct, and accordingly did not change the conduct of its supervisors. A supervisor’s willful actions may be imputed to the employer, as would a supervisor’s knowledge of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (No. 86-360, 1992). “The key to whether a supervisor’s actions are willful is the supervisor’s state of mind.” *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1934 (No. 94-3121, 1999). Also relevant is the company’s actions and policies regarding safety.

Willfulness-- The Havener Road Citation and Fields’s Response to it

The company’s response to receiving the 1998 citation was minimal. After the 1998 citation, Fields sent its supervisors a copy of the 29 C.F.R. § 1926 excavation standards (but without the appendices which describes how to implement the standards) (Exh. R- 10). Fields told its supervisors to read the standards. Linkfield stated that he read and understood them at the time.

Beyond the 1998 citation, Denton recommended a willful classification, concluding that the superintendent was trained on the excavation standards and thus made a knowing decision to ignore them. The undersigned does not agree that training Fields’s supervisors in 1997 and handing out the standards in 1998 made Lambert’s decision at the Havener Road jobsite willful. It is one factor in assessing Lambert’s state of mind, however, as is the fact that Lambert was the competent person on the job.

The strongest evidence of a willful state of mind comes from testimony related to the gas repairman. Lambert admits that he knew the gas repairman was visibly upset by the excavation. He was

⁶ Whether the Havener Road citation was a “repeated” violation was not pled or tried (Tr. 173).

not sure whether the repairman said something to him about the trench box. Summe recalls that he then went to Lambert with those concerns and asked if he would use the trench box and was told, “No, when we get past the creek, we’ll be about 5 foot deep” (Tr. 158). Among other interpretations, Lambert’s response could mean that the excavation was deeper than 5 feet, but past the creek the excavations would be less than 5 feet and cave-in protection would not be needed. Or, as Lambert suggests, it could mean that the excavation was deeper than 5 feet; and the crew would slope until crossing the creek, when they would use trench boxes. A trench box was available a few hundred feet away (Tr. 50).

Hern had to partially backfill before the gas repairman would enter the excavation. Summe’s description of the crew having to continuously peel back the excavation indicates unstable soil at the point the gasline was hit. Summe believed the excavation was probably about 10 feet at this point, but his testimony does not establish the dimension. It was only an estimate made after a passage of time. Before the inspection Summe did not know that sloping was an acceptable alternative to use of a trench box. He had no reason to focus on the degree of slope of the excavation. The undersigned will not speculate as to whether Lambert failed to properly slope the excavation at the point where the gasline broke, although some circumstances appear to point to the fact that he had not.

Without question, however, Lambert received a warning from the gas repairman that should have put him on notice that others seriously questioned the safety of the excavation. His response was to dismiss the warnings out of hand. No changes were made in the pipelaying procedures; and at the time Denton arrived, a trenching violation was documented. Having considered all of the above, it is concluded that Lambert’s actions at the Havener Road excavation were made with plain indifference to the safety of the crew under his direction.

Willfulness--The Xenia Citation

After receipt of the Havener Road citation in February 2001, Jeffery Fields spoke with his employees and Summe and concluded that Fields did nothing wrong. Accordingly, the company instituted no change to avoid similar occurrences.

There can be little doubt that the violation in Xenia was willful. Having been trained in 1997, Linkfield was designated as the competent person to protect employees in the excavations. Linkfield knew that the standards required use of sloping or trench boxes; that the soil was unstable Type C; that the deep, vertical trench walls constituted a hazard; and that trench boxes were available but would require more

time to use. Without using cave-in protection, he sent Zollman to work inside the excavation anyway. Linkfield felt free to make this decision as “his call” (Tr. 313). Linkfield’s willful state of mind is imputed to Fields. The Xenia violation is properly classified as willful.

In making a determination on willfulness in these instances, Fields’s conduct as an employer was also weighed. Fields would be incorrect to conclude that the willful characterization was due solely to the actions of its two superintendents. Fields allowed its supervisors wide discretion in how they achieved production. The company echoed the understanding of the superintendents that everyone “knew what to do,” “these guys do this every day. We don’t measure every slope, every bank”(Tr. 393, 397). The employees may have been experienced and skilled in pipelaying. However, Fields had not made it clear to employees in any concrete way how to implement the requirements for safety in the excavations. The vague “2:1” rule which incorporated “natural sloping” was the equivalent of telling employees to slope “properly” or “safely.” Fields’s “hands off” attitude played a part in the characterization of the violations. In light of the previous citations and the circumstances of the violations, a failure to clarify the company’s safety program amounted to plain indifference to the safety of its employees.

Penalty

The Commission has authority to assess a penalty amount based upon the factual findings. In arriving at an appropriate penalty, the Commission gives “due consideration” to the size of the employer’s business, the gravity of the violation, the employer’s good faith, and history of past violations. *Hern Iron Works Inc.*, 16 BNA OSHC 1619,1621-23 (No. 88-1962, 1994). These factors are not necessarily accorded equal weight, with gravity being the primary element in the assessment.

The gravity of both violations is high. Although trenching violations are often high gravity violations because of the high incidence of cave-ins and the high likelihood of death or serious physical injury, the instant violations were especially hazardous. The very wet, unstable soil at Havener Road and the deep vertical walls dug in unstable soil in Xenia made cave-ins more likely. The gravity of the Xenia violation is obviously greater than that of the violation at Havener Road. As they entered the excavations to lay new sections of pipe, two employees were exposed at Havener Road (one of whom was on the embankment) and one was exposed in Xenia.

Fields employs approximately 35 employees, many of whom have been with the company for years (Tr. 34). Fields had previous serious violations, and no credit is afforded for past history. Only minimal

credit is allowed for good faith. Although not usually considered in a penalty calculation, after the Xenia citation Fields instituted additional safety procedures, which is considered a positive factor. Fields had only a “paper” safety program, and its supervisors could choose production over safety. The Secretary argues that the penalty for the Xenia violation should address the fact that Fields recouped a \$10,000 bonus from Linkfield. She suggests that only a substantial penalty is appropriate.

Overriding many other considerations, however, is the fact that Fields is a very small employer. Although small employers have the same responsibility to protect the safety of their employees as do large ones, the same penalty has a greater effect on a small company. The Secretary reduced the calculation of her recommended penalty almost by half in recognition of that fact. The willful characterization of the violations carries an enhanced penalty, but some further reduction for the small size of the company is made.

Based on all of the above, a penalty of \$9,500 is assessed for the Havener Road citation and a penalty of \$20,000 is assessed for the Xenia citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that:

1. The violation of § 1926. 652(a)(1) at Havener Road, South Webster, Ohio is affirmed as willful and a penalty of \$9,500 is assessed.
2. The violation of § 1926. 652(a)(1) at Xenia, Ohio is affirmed as willful and a penalty of \$20,000 is assessed.

/s/
NANCY J. SPIES
Judge

Date: February 21, 2003