

Secretary of Labor,

Complainant,

v.

George B. Hardee Construction Company, Inc.,

Respondent.

OSHRC Docket No. 01-1660

Appearances:

Marsha L. Semon, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama  
For Complainant

Thomas M. Galloway, Jr., Esq. and Thomas O. Gaillard, III, Esq.,  
Galloway, Smith, Wettermark & Everest, L.L.P., Mobile, Alabama  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**DECISION AND ORDER**

George B. Hardee Construction Company, Inc. (GBHC) is a construction contractor working in the Mobile, Alabama, area. In March 2001 GBHC installed a storm sewer pipeline for the City of Mobile. Following his observation of trenching work on March 30, 2001, Occupational Safety and Health Administration (OSHA) Compliance Officer Brian Smith inspected the worksite. As a result of the inspection, OSHA issued to GBHC serious, willful, and repeat citations on August 23, 2001. GBHC timely filed a notice of contest.

Citation No.1 is classified as serious and alleges two violations. Item 1 alleges a violation of § 1926.100(a) for failing to provide protective helmets for employees working in an excavation where the possibility of head injury existed. Item 2 alleges a violation of § 1926.651(k)(1) for failing to have a competent person conduct inspections of the excavation prior to the start of work and as needed throughout the shift.

Citation No. 2 is classified as willful (or in the alternative as repeat) and alleges a violation of § 1926.652(a)(1) for failing to use an adequate protective system to protect employees in an excavation from cave-ins.

Citation No. 3 is classified as repeat (or in the alternative as serious) and alleges two violations. Item 1 alleges a violation of § 1926.21(b)(2) for failing to instruct employees to recognize and avoid unsafe conditions and for failing to advise them of the applicable regulations

related to working in an excavation. Item 2 alleges a violation of § 1926.651(c)(2) for failing to have a stairway, ladder, ramp or other safe means of egress in excavations more than four feet in depth, so as to require no more than 25 feet of lateral travel for the employees.

The hearing was held on March 21, 2002, in Mobile, Alabama. GBHC does not contest the violation (failing to wear hard hats) or the penalty for Citation No. 1, item 1 (Tr. 6). The Secretary contends that she established each of the alleged violations. GBHC disagrees and asserts that it had a competent person (Darnell Witherspoon) on site; that the excavation did not exceed 5 feet and, thus, did not require a protective system; that it held safety meetings; and that it had a safe means of egress from the trench. Both parties submitted post-hearing briefs, and the case is ready for decision.

For the reasons that follow, it is determined that the Secretary established the underlying violations and the proposed classifications of the violations but that some further reduction in the penalties was appropriate.

### **Background**

GBHC is a construction contractor in Mobile, Alabama, specializing in laying underground pipe. The corporation is owned by George B. Hardee, Sr., and his son, George B. Hardee, Jr. (who has worked for the company since 1976) (Tr. 85). GBHC was originally a sole proprietorship owned by George B. Hardee, Sr., which incorporated in 1995 or 1997. At the time of the inspection, GBHC had approximately 100 employees (Tr. 41).

Its contract with the City of Mobile required GBHC to widen, resurface, and lay 100 feet of a storm sewer pipeline. The excavation was to commence at the outlet point at Bolton Branch Creek, to proceed north to northwest for approximately 16 feet, and then to parallel Navco road to the intersection of McVay Road (Tr. 61-62, 117, 141). The pipeline would discharge into Bolton Branch Creek (Tr. 17-18; Exh. C-7). Since the pipeline was to run under the concrete parking lot and driveway of a Conoco service station, part of that slab had to be excavated to lay the pipe (Exhs. C-2, C-5, C-6).

On March 30, 2001, four GBHC employees were on site. Darnell Witherspoon operated the trackhoe; Raymond Morland was the grade engineer; and laborers Kenneth Porter and Ira Carter worked inside the excavation (Tr. 16, 17, 94, 122, 141). Pursuant to OSHA's national emphasis

program on trenching and excavations, once compliance officer Smith observed the GBHC excavation, he proceeded to inspect it. Smith parked at the Conoco service station and approached the excavation. Smith estimated that the excavation was over 5 feet deep, was 40 inches wide at the top, and was about 20 feet long. At that time one section of the concrete pipeline had been laid. The pipe measured 8 feet long with an outside diameter of 42 inches (36 inch inside diameter plus 3-inch walls on each of two sides) (Tr. 104). Smith observed that the west trench wall had no appreciable slope and that the east wall was virtually vertical (Tr. 13-14, 33, 45-47).

At the area near the Bolton Branch Creek outlet, Smith observed Porter working directly beneath the excavator bucket at the north end of the pipe and Carter standing towards the southern end of the pipe. Smith took a photograph of Porter with the bucket above him (Exh. C-1; Tr. 29, 101). Smith asked Porter to identify the superintendent, and Porter pointed to Raymond Morland (Tr. 15, 17).

Smith held an opening conference with Morland, who also identified himself as the job superintendent for GBHC. Morland acknowledged that the two employees in the excavation were GBHC employees (Tr. 16). Morland told Smith that he usually shot grade, but because of the rush on the project he had to help with other work too. Morland explained that an engineer for the City of Mobile informed him that the City wanted that portion of the pipeline completed by the end of that day (Tr. 37-38). Smith asked Morland to request the employees to exit the excavation because they were in a hazardous situation, and Morland complied (Tr. 16-17).

Smith measured the depth of the excavation on both sides at three areas (Exh. C-7; Tr. 23, 79-80). Using a steel measuring tape, he measured from the bottom of the excavation to the bottom of the 6-inch concrete slab which had been cut at the top of the excavation (Tr. 69, 80). Smith found that the excavation was 7 feet deep where Porter had been working; was 6½ feet at a nearby area where footprints were seen; and was 5 feet, 2 inches deep where Carter had been working (Exh. C-7; Tr. 25-26, 70).

Smith noted that the soil of the excavation was sandy clay. The trench walls were obviously fissured, a fact Smith's photograph substantiated (Exh. C-10; Tr. 26, 34). He visually and manually examined the soil and classified it as Type C (Tr. 26, 33, 34). Smith also took a soil sample from inside the excavation, which OSHA's laboratory in Salt Lake City, Utah, concluded was "texture:

sand; structure: granular; Type: C” (Exh. C-14, C-15; Tr. 33). GBHC agrees with the Type C soil classification (Tr. 148).

Smith discussed with Morland the types of protective systems (sloping, trench box, shoring) required for excavations and suggested use of hydraulic shoring (Tr. 47-48). After approximately 45 to 60 minutes at the worksite, Smith left to retrieve safety literature for GBHC from his OSHA office (Tr. 60). When he returned with the literature 45 minutes later, work had resumed and the excavation had been partially backfilled (Tr. 61, 62).

Smith stated that someone (he believes it was Morland) told him that the trench was no longer deeper than 5 feet (Tr. 62). George B. Hardee, Sr. was now on site; and Smith discussed the penalties and protective systems with him (Tr. 61).

### **DISCUSSION**

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving:

(a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Part 1926 construction standards apply to GBHC’s excavation work. GBHC does not dispute the general applicability of the cited standards. Two employees were exposed to the conditions inside the excavation.

At least one, and possibly three, supervisors were on site directing the pipelaying work. According to Hardee, Jr., GBHC had three foremen on site: Witherspoon, who was in charge of the excavation, laying the pipe, and the safety of the excavation; Morland, who was the grade engineer in charge of the grades, *i.e.*, the elevation of the pipe; and Charles Robinson, who was the labor foreman who could discipline the laborers for safety violations.

GBHC’s knowledge of the violative conditions may be imputed to it through these supervisory employees. Darnell Witherspoon allegedly directed the work activities of the two

employees in the excavation (Tr. 106, 113, 114, 117, 135, 136). Morland was initially considered the supervisor by at least one laborer and by himself. “Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). “[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The only remaining element of proof which needs to be addressed is whether the conditions which existed violated the standards. If a violation is shown, a proper classification for the violation must be determined

**Alleged Serious Violation of § 1926.651(k)(1)**

Citation No. 1, item 2, alleges that GBHC did not have a competent person inspect the trench to protect employees from cave-in hazards. Section 1926.651(k)(1) provides:

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Section 1925.650 defines competent person:

*Competent person* means 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.

The Secretary argues that GBHC had no competent person on site and thus no competent person could have made the necessary inspections. The Secretary considers Morland to have been the supervisor and the only one who could have been “authorized” to correct excavation hazards. Morland, admittedly, had not been trained and did not know how to classify soil in an excavation and was not a “competent person” (Tr. 37).

GBHC counters that Witherspoon, who was operating the excavator, was the supervisor in charge of the safety of the men in the trench (Tr. 135-136). Witherspoon had competent person training, which he received about 12 years earlier, on shoring, trenching, and hazmat from his previous employer, Ciba-Geigy (Tr. 107, 136, 140). Witherspoon had lost his competent person card some time earlier, and Hardee, Jr., had never requested proof of Witherspoon's status as a competent person. GBHC argues that Witherspoon inspected the excavation the morning of OSHA's inspection and continued to look over the employees while he operated the excavator (Tr. 146, 147, 153).

Based upon the facts of the case as well as on an observation of the witnesses as they testified, it appears that the alleged designation of Witherspoon as the authorized competent person was an afterthought. Undoubtedly, Morland thought he, not Witherspoon, was the supervisor. While admitting that he was not a competent person, Morland explained to Smith that GBHC had competent persons at "*other* jobsites in the downtown area" (Tr. 39) (emphasis added). Morland was apparently unaware that GBHC considered Witherspoon to be a competent person. Hardee, Jr., did not recall that he had informed Morland that Witherspoon was in charge. Although Witherspoon saw Morland order the two employees out of the excavation, he did not question Morland's assertion of authority. Witherspoon did not identify himself to Smith as the crew's supervisor; the two only discussed the hardhat issue (Tr. 142, 143, 149).

It is anticipated that a competent person would have at least an elementary knowledge of OSHA's soil classification and protective systems. Even if Witherspoon's authority to correct safety hazards was coextensive with Morland's, Witherspoon could not be considered a competent person as defined by the standard. Although perhaps knowledgeable and competent about the pipelaying process from a production perspective, Witherspoon was not "capable of identifying existing and predictable hazards" in an excavation. *See E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2051 (No. 92-35, 1994) (inspector who permitted two employees to work in an excavation in which they were exposed to safety and health hazards that violated numerous OSHA standards was not a competent person); and *Ed Taylor Construction Co.*, 15 BNA OSHC 1711, 1717 (No. 88-2463, 1992) (employer's safety inspectors who were not capable of identifying confined space entry hazard and applicable OSHA standards are not "competent persons").

Witherspoon appeared confused about soil classifications and sloping requirements. When asked how he inspected the trench in question, Witherspoon replied (Tr. 148):

A. Well, you look at the soil. See the material, either a clay type of material or it's a sand material, I guess what you call A, a little bit of sand probably like a C. It was more like a C type. It was good material, you know. It had clay in it.

\* \* \*

Q. What does Type C soil mean to you?

A. It's more clay in it. It will bond together. It will hold together.

According to OSHA's soil classification system, Type C soil is the most unstable, having a low compressive strength, and is "granular" such as gravel, sand, and loamy sand (App. A, Subpart P). Type A, on the other hand, is the most cohesive, often characterized by the existence of clay (App. A, Subpart P). Excavations in Type C soil permit a maximum allowable slope of horizontal to vertical of 1½:1, but Witherspoon believed that Type C soil required horizontal to vertical sloping of 4:1 (Tr. 141).

Witherspoon contended that a trench box was not used on that job because the excavation was never over 5 feet deep (Tr. 137-138). As discussed below, it is determined that the excavation reached a depth of 7 feet. Witherspoon was unaware that any steps were needed to protect the employees in the excavation he was digging. He was unaware that under certain circumstances a fissured trench wall, such as he would have observed that day, could require protection, even if less than 5 feet high. Additionally, Witherspoon was unaware that employees in the trench were exposed to potential head injuries even if, as he states, he did not take the front-end loader bucket directly over them (something which Smith disputes) while he dug or placed the pipe into the excavation (Exh C-1; Tr. 14, 152).

On cross-examination, Witherspoon testified for the first time that he measured the excavation that morning at one location near the telephone booth and found it to be about 4 feet deep. He did not measure the trench again when Smith was making his inspection (Tr. 148). If the excavation measured only 4 feet at one point in time, Witherspoon dug the excavation deeper as the work progressed, a fact he ignored.

Witherspoon was not a competent person as defined by the standard, nor did he perform inspections which were sufficient to meet the requirements of the standard. Consequently, the violation of § 1926.651(k)(1) is established.

### **Serious Classification**

Under § 17(k) of the Act a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U. S. C. § 666(k). Failure to have a competent person inspect the excavation could result in failure to take proper corrective action to prevent a cave-in and subsequent serious injury or death. Therefore, the violation of § 1926.651(k)(1) is affirmed as serious.

### **Alleged Willful Violation of § 1926.652(a)(1)**

The Secretary alleges in Citation No. 2, item 1, that GBHC did not provide a protective system for employees in a trench which had nearly vertical walls and was as deep as 6½ and 7 feet. Section 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The methods for protecting employees from cave-ins in an excavation deeper than 5 feet, not dug in stable rock, are sloping, benching, shoring systems, shield systems or other protective systems which support the walls of the excavation. Section 1926.652. The parties disagree on whether the excavation was deeper than 5 feet.

GBHC alleges that it did not need any protective system in the trench because it was always less than 5 feet deep. At one point on the morning of OSHA's inspection, Witherspoon allegedly measured the trench and found it to be about 4 feet deep. After the OSHA inspection, Hardee, Jr., also measured the trench and found it to be between 4 to 4½ feet deep. However, Hardee, Jr.'s, measurement was taken when the excavation had been partially filled after Smith left the site (Exhs. R-2, R-3; Tr 62, 85-86).



Five months after the OSHA inspection, GBHC asked civil engineer Robert Harper of Harper and Garrett Engineering (the engineering firm for the project) to take elevation shots of the flow line of the pipe (Exh. R-9, Tr. 159). Harper measured the flow line at approximately 10-foot intervals from where the pipeline came out at the head wall of the creek through the next 61 feet of the pipeline (Tr. 161). Harper determined the grade, projected what the elevation of the pipe was below the surface elevation and sketched his projection (Exh. R-9; Tr. 162). Harper admits that the elevation shots only give a rough idea of the depth of the storm sewer pipe and could not provide the actual depth of the excavation while it was under construction (Tr. 167). Based on Harper's elevation shots, Hardee, Jr. concluded that the elevation of the pipe was less than 5 feet at all seven of the elevation shots (Exh. R-5, Tr. 103).

GBHC has not convincingly countered Smith's careful measurements. Witherspoon alleged that he only measured the depth of the excavation once and did not measure at other locations or during the times Smith inspected the excavation. Hardee, Jr. took his measurement after the OSHA inspection and presumably after more dirt had been added to decrease the depth of the excavation.

As stated, Smith measured on both sides of three locations where he observed employees working or nearby where he saw footprints (about 4 feet from where Porter worked). These areas measured from 5 feet, 2 inches to 7 feet deep (Exh. C-1, C-7; Tr. 25-26, 70). Smith did not include the 6-inch depth of the concrete pavement in his measurements (Tr. 80). Smith also observed and photographed 5 foot, 8 inch Porter in the excavation and noted that the trench walls were over his head. The photograph appears to verify Smith's assertion, even given the perspective issues common to photographed exhibits (Exh. C-1). Smith's specific measurements are determined to be more credible than GBHC's measurements at times before and after the inspection.

Because the excavation was more than 5 feet deep, a protective system was required. The excavation was dug in Type C soil, with fissures in the trench wall. GBHC should have used the recommended hydraulic shoring, a trench box, sloping, or some other approved method to protect employees against cave-ins. Thus, the violation of § 1926.652(a)(1) is affirmed.

#### **Willful Classification**

The Secretary classified the violation as willful (or in the alternative, as repeat) arguing that GBHC intentionally disregarded the requirement to provide a protective system in the excavation.

“It is well settled that 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.” *Continental Roof Systems, Inc.* 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). “A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation.” *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). However, it is not enough for the Secretary simply to show that an employer was aware of conduct or conditions constituting the alleged violation. Nor may an employer’s “knowledge of a standard and a subsequent violation of that standard” automatically prove willfulness. *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1265 (No. 76-3743, 1980).

Here, the Secretary relies on two previous violations of § 1926.652(a)(1) to show a heightened awareness of the violation: a citation issued in April 1987 to George B. Hardee Construction, sole proprietorship, for violation of the same standard resulting in a cave-in fatality; and a citation issued on August 4, 2000, to GBHC, which was informally settled (Exhs. C-16, C-17; Tr. 50-51). Although Hardee, Jr. worked in his father’s business during the time the sole proprietorship was cited following the trenching fatality, the April 1987 citation was issued more than 14 years before the current citation. There is little information in the record regarding this citation.

The August 2000 citation, however, was only one year before the instant citation. That citation alleged that one of GBHC’s superintendents chose to forego the use of a trench box where it was necessary but inconvenient to use at a water main (Exh. C-16; Tr. 90-91). As part of the informal settlement, GBHC agreed that in the future it would train certain of its employees as competent persons; that all employees would be trained on trenching hazards; and that if the excavation reached depths greater than 5 feet, a competent person would inspect it and keep records of the inspections (Exh. C-16).

Given the substantial penalties OSHA recommended in the instant case, the parties’ abbreviated presentations at the hearing left questions unanswered. In reaching a decision on the proper characterization of the violation, GBHC’s, Hardee’s and the supervisors’ actions were carefully reviewed. The Secretary must show that the employer possessed “a ‘state of mind . . . such

that, if he were informed of the [standard], he would not care.’” *Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051 (No. 90-2179, 1993). The Commission holds that a supervisor’s willful actions may be imputed to an 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).

The area to be excavated was near a road and through the gas station parking lot. Morland came to do a “rush” job since the city wanted that part of the line completed that day (Tr. 37-38). It would have been slower to use the hydraulic shoring or a trench box for areas of the excavation which were deeper than 5 feet and, in any event, GBHC had trained neither Witherspoon nor Morland to be aware of those concerns. The previous citation and the settlement agreement brought the requirement to protect employees in excavations to GBHC’s attention. GBHC made representations for future action.

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 the circumstances.” *Morrison-Knudson Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993). The Secretary points to the flow line respondent’s engineer submitted. Engineer Harper’s diagram shows that the flow line at the approximate point where Porter stood (Smith’s deepest measurement of 7 feet) was 2.95 feet above sea level. The top of the pavement was 8.5 feet above sea level (Exh R-5). Therefore, the depth from the level of the ground beneath the pavement to the flow line of the pipe was at least 5.05 feet. To this depth must be added the 6-inch thickness of the two pipe walls. The Secretary maintains that GBHC should have been aware that the excavation was destined to be over 5 feet, even in the planning stage. Given the need to add some gravel to the bed and given the process of digging, GBHC could reasonably have anticipated that the excavation could be deeper than 5 feet.

It is unclear whether GBHC changed its operations in any way after being cited in August 2000. It did several things to enhance safety after the current citations, but little or nothing was

shown to have been done after the earlier one. GBHC had a heightened awareness of the illegality of ignoring use of safety protection in the excavation. The violation is properly classified as willful.<sup>1</sup>

**Alleged Repeat Violation of § 1926.21(b)(2)**

Citation No. 3, item 1, alleges that GBHC failed to instruct employees who were exposed to hazards about the hazards associated with their work and the applicable OSHA regulations. The standard requires an employer to instruct its employees to recognize and avoid the hazards that are specific to the work about which a reasonably prudent employer would have been aware, in this case about the hazards inherent in excavating and pipelaying. Section 1926.21(b)(2) provides:

(b) *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

An employer's instructions must be modeled on the applicable standards and must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7 (No. 90-1106, 1993); *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd without published opinion*, 158 F.3d 583 (5<sup>th</sup> Cir. 1998). Employers must provide more than "weak admonitions" or "vague advice" for safety training and hazard recognition in order to give its employees the opportunity to protect themselves. *Anderson Excavating and Wrecking Co.*, 17 BNA OSCH 1890, 1892 (No. 92-3684, 1997).

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<sup>1</sup> If the violation was not classified as willful, it would be "repeat," and would also carry an enhanced penalty. To be considered repeat, the prior and instant violations result in "substantially similar hazards." *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979), *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990). The Secretary established substantial similarity "by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing." *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994). Not only was the § 1926.652(a)(1) standard the same as cited on August 4, 2000; but the earlier violation concerned employees working in an excavation that was 49 feet long, 14 feet wide, and between 6.5 to 9-feet deep without a protective system. The supervisors in both cases considered the use of any protective system unnecessary.

GBHC contends that it held weekly safety meetings, including one on March 21, 2001 (Exh. R-4).<sup>2</sup> In addition, Witherspoon testified that on the morning of the inspection, he told Porter and Carter to “always watch everything around you” in the trench (Tr. 151). According to Smith’s interview with the two employees who worked in the excavation, GBHC did not provide any training on the hazards of trenching and excavations or the applicable regulations. Smith stated that Porter told him that he was never trained in the hazards of working in a trench; and, although he had been working at GBHC for about six months, this was his first day in a trench (Tr. 52, 81). Carter testified that no one at GBHC had taught him about excavations or trenches (Tr. 133). Witherspoon’s vague safety admonition to “watch everything” is not sufficient to instruct employees in hazard recognition. Also, there was no evidence that GBHC had a written safety program.<sup>3</sup>

The employees did not receive instructions or training in the recognition and avoidance of excavation hazards and the applicable regulations. Accordingly, a violation of § 1926.21(b)(2) is affirmed.

#### **Repeat Classification**

The repeat classification is based on a citation issued to “George B. Hardee Construction Co., Inc.” on August 4, 2000 for serious violation of § 1926.21(b)(2) because employees were not instructed in the recognition and avoidance of unsafe conditions and regulations applicable to trenching on a worksite in Mobile, Alabama (Exh. C-16). That citation became a final order based on an informal settlement agreement (with a reduction in penalty) between the parties (Exh. C-16). This prior citation was for violation of the same standard under substantially similar conditions as the instant citation.

Thus, the violation of § 1926.21(b)(2) is affirmed as repeat.

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<sup>2</sup> The March 21 safety meeting was nine days before the inspection. The only reference to excavation safety is: “make sure trench box is up against bank before you get down in hole” (Exh. R-4). A trench box was not used at this inspection site. Employee Porter is not listed as being in attendance at this safety meeting (Exh. R-4).

<sup>3</sup> Since the citations were issued, Hardee, Jr. stated that GBHC has hired a full-time safety person who put together a safety and health manual for employees (Tr. 118-119).

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**Alleged Repeat Violation of § 1926.651(c)(2)**

Citation No. 3, item 2, alleges that GBHC did not provide a ladder or other safe means of egress for employees working in a trench between 6.5 to 7 feet deep. Section 1926.651(c)(2) provides:

(2) *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.

It is undisputed that there was no stairway, ladder, or ramp to exit the excavation. Smith observed the two employees exiting the excavation by crawling up the walls of the excavation; one of the employees climbed up on the 36-inch concrete pipe and then crawled out (Tr. 55). Morland told Smith that there was no ladder on site but he could get one (Tr. 55). GBHC unconvincingly argues that employees could exit the excavation at the end of the ditch near the creek bank. The area was not a ramp but an exit into the creek. The excavation was about 20 feet long, and the available walking space beside the pipe was a few inches on either side.<sup>4</sup> Even the 5 foot, 4 inch Carter, who was closest to the creek bank, chose to exit the excavation by climbing the 5 foot, 2-inch trench wall (Tr. 55).

GBHC's method of egress requires employees to climb the walls of the excavation. This is not a "safe" means of egress. Employees attempting to exit the excavation quickly in case of an emergency could slip and fall trying to climb out, and the delay could result in employees being buried in the excavation. Climbing up the walls could even be the cause of a cave-in, especially if the walls are already fissured.

Therefore, a violation of § 1926.651(c)(2) is established.

**Repeat Classification**

The repeat classification is based on the earlier citation issued to "George B. Hardee Construction Co., Inc." on August 4, 2000 for serious violation of § 1926.651(c)(2) because employees were permitted to work in a trench 6.5 to 9 feet deep without a means of egress on a worksite in Mobile, Alabama (Exh. C-16). As stated, that citation became a final order based on an

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<sup>4</sup> The front-end loader bucket was 48 inches, which was the approximate width of the bottom of the excavation.

informal settlement agreement (with a reduction in penalty) between the parties (Exh. C-16). This prior citation was for violation of the same standard under substantially similar circumstances. The violation of § 1926.651(c)(2) is affirmed as repeat.

### **Penalty Assessment**

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act requires that when assessing penalties, the Commission must give “due consideration” to four criteria: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has discretion in the penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Generally, the gravity of the violation is the primary consideration in assessing the penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case the gravity of the various violations is moderate to high. The violations involved exposure of two employees to a possible cave-in where the depth of the excavation exceeded 5 feet. The fact that one of the trench walls was fissured increases the gravity for these violations. OSHA’s recommended penalties did not include a reduction for good faith because the specific violation was classified as either willful or repeat (or a willful violation was included in the citation) (Tr. 41, 52, 54, 58). GBHC held some generalized safety meetings and was cooperative during OSHA’s investigation, but it lacked any focus on safety.

GBHC is a relatively small company with approximately 100 employees. GBHC is entitled to a credit for size. Small employers have the same responsibility to abide by OSHA’s standard as do larger ones. Yet, the same penalty has a greater effect on a smaller company, even when an enhanced penalty for repeat or willful violations is appropriate.

GBHC had prior serious OSHA violations within the previous year and no credit is afforded for past history.

Based on these factors, a penalty of \$2,240.00 is assessed for Citation No.1, item 2; \$20,800.00 is assessed for Citation No. 2, item 1; \$8,960.00 is assessed for Citation No. 3, item 1; and \$3,200.00 is assessed for Citation No. 3, item 2. The total penalty (including \$1,600.00 for Citation No. 1, item 1) assessed is \$36,800.00.

**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) of the Federal Rules of Civil Procedure.

**ORDER**

It is hereby ORDERED:

1. As stipulated, Citation No. 1, item 1, alleging a serious violation of § 1926.100(a) is affirmed and a penalty of \$1,600.00 is assessed.
2. Citation No. 1, item 2, alleging a serious violation of § 1926.651(k)(1) is affirmed and a penalty of \$2,240.00 is assessed.
3. Citation No. 2, item 1, alleging a willful violation of § 1926.652(a)(1) is affirmed as a willful violation and a penalty of \$ 20,800.00 is assessed.
4. Citation No. 3, item 1, alleging a repeat violation of § 1926.21(b)(2) is affirmed and a penalty of \$8,960.00 is assessed.
5. Citation No. 3, item 2, alleging a repeat violation of § 1926.651(c)(2) is affirmed and a penalty of \$3,200.00 is assessed.

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/s/  
NANCY J. SPIES  
Judge

Date: October 21, 2002