

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant,  
v.  
John Carlo, Inc.,  
Respondent.

OSHRC Docket No. **04-1405**

Appearances:

Michael Hagan, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia  
For Complainant

George E. Spofford, IV, Esq., Glenn Rasmussen Fogarty & Hooker, P.A., Tampa, Florida  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

John Carlo, Inc. (JCI) is a corporation engaged in the installation of sewer and waterlines. The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation of respondent's jobsite at its Wesconnett Boulevard Project in Jacksonville, Florida. This investigation began on March 31, 2004. As a result of this inspection and investigation, respondent was issued two citations. A hearing was held in Jacksonville, Florida, from November 15, 2005 through November 18, 2004. Prior to the hearing, the parties settled Citation No. 1, Item 2 by amending the alleged violation of 29 C.F.R. § 1926.301(h)(1) to an "other" violation with no penalty. Remaining at issue are the violative conditions alleged in Citation No.1, Item 1 and Citation No. 2, Item 1. For the reasons that follow, Citation No.1, Item 1 is vacated and Citation No. 2, Item 1 is affirmed and a penalty of \$50,000.00 is assessed.

## Background

Respondent, JCI, had a jobsite in Jacksonville, Florida on March 31, 2004. This jobsite was part of a road improvement project known as the Wesconnett Boulevard Project. At this project, JCI installed PVC sewer line down the middle of an existing roadway. At one location, the new line was to be installed approximately 12 feet below an existing flexible 2 inch diameter gas line that was perpendicular to the sewer line. Running parallel to the proposed location of the pipe there also were buried gas, water, and telephone lines.

On March 30, 2004, and March 31, 2004, respondent's crew was laying a sewer line at the intersection of Anderson Road and Wesconnett Boulevard in a 14.5-foot-deep excavation in Type C soil. The crew worked inside two stacked trench boxes on March 30, 2004. The bottom box was 8 feet high and the top box was 6 feet high. Pipe was laid that day up to the location where the gas line crossed the trench for the sewer line.

On March 31, 2004, respondent's crew removed the top trench box, pulled the bottom box under the perpendicular gas line and prepared the bottom of the trench to lay one 13-foot-long joint of the pipe. Two employees entered the 14.5-foot deep trench and worked inside the 8-foot-high trench box for at least 20 to 30 minutes. The trench walls above the box were not sloped. While these employees were in the trench, a large clay ball dislodged, fell into the trench and killed one employee.

## Joint Stipulations of Fact

At the hearing, the parties stipulated as follows:

1. The Review Commission has jurisdiction.
2. John Carlo, Inc., was engaged in an industry that affects interstate commerce.
3. The cited standard applies with regard to the trenching violation.
4. The trench was not in conformity with the cited standard.
5. The soil involved at the trench site was type C soil.
6. At and before the workplace accident on March 31, 2004, respondent's project superintendent, Lester (Sonny) Cox, knew of OSHA's applicable trenching and excavation standards' provisions requiring the use of trench boxes, sloping or shoring or some combination of these according to the conditions at the worksite, and of respondent's applicable trenching and excavation employee safety rules.

7. Respondent's foreman, James Jacobs, was Respondent's highest ranking supervisor at the cited workplace at the time of the accident on March 31, 2004.
8. Subsequent to the cave-in at the trench at Respondent's cited workplace, i.e., identified by OSHA's Inspection File No. 306750035, which is the inspection site located on Anderson Road and Wesconnett Boulevard, Jacksonville, Florida, Respondent was able to slope the trench walls back to the proper angle, i.e., at less than the maximum allowable slope for the type of soil at the cited location and to complete its laying of the pipe at that location without moving or removing or having the TECO Energy/People's gas line(s) removed.
9. Respondent's safety manual addresses safe trenching practices.
10. Respondent conducted some oral tool box talks at the cited workplace.
11. Respondent's foreman, James Jacobs, was terminated as a result of the accident that gave rise to the citation, and the official separation notice indicates that Respondent would rehire Jacobs.

In her pre-hearing statement, the Secretary made the following statement: "Respondent's written safety program was adequate on the date of the accident, March 31, 2004, although the parties disagree that it was effectively communicated and enforced at the cited worksite, particularly so much of it as concerns trench safety."

At hearing, the Secretary moved to amend the word "adequate" to "generally adequate". Over objection, the motion was granted. The Secretary was granted the right to address the accuracy of certain provisions of respondent's safety program.

Late on the third day of the hearing, Respondent moved to amend its affirmative defense of employee misconduct to include the conduct of its project superintendent, Lester Cox. Over objection, that motion was granted. The Secretary was given the opportunity to meet that defense. After overnight consideration, the Secretary chose to address this defense in her post hearing brief.

### Discussion

The Secretary has the burden of proving the violation:

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 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).

Alleged Serious Violation of 29 C.F.R. § 1926.250(a)(1)

The Secretary in Citation No. 1, Item 1 alleges that:

Materials stored in tiers were not stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse:

- a. On or about April 5, 2004, in the laydown area, the concrete pipes were not stored in a manner to prevent them from rolling, exposing employees to the hazard of being crushed by the pipes.

The standard at 29 C.F.R. § 1926.250(a)(1) provides:

All materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse.

Concrete pipes, each weighing over 6600 pounds were stored in respondent's laydown area, stacked in tiers no more than two pipes high. Pipes 8 to 10 feet long, 48 inches in diameter, were stacked with large diameter ends alternating with narrow ends. The concrete pipes were stored on sand. The Secretary presented insufficient evidence to prove that respondent's method of stacking the concrete pipes failed to prevent them from rolling. The Secretary has, therefore, not shown respondent's noncompliance with the terms of the standard. The alleged violation of 29 C.F.R. § 1926.250(a)(1) is vacated.

Alleged Willful Violation of 29 C.F.R. § 1926.652(a)(1)

The Secretary in Citation No. 2, Item 1 alleges that:

Each employee in an excavation was not protected from cave-ins by an adequate protective system in accordance with paragraph (b) or (c) of this section:

- a. On or about March 31, 2004, employees working in the 14 feet, 6 inches deep trench were not adequately protected from the hazard of a trench collapse.

The standard at 29 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The parties stipulated that the cited standard, 29 C.F.R. § 1926.652(a)(1) is applicable and that the trench was not on conformity with that standard. They further stipulated that the soil involved at the trench was Type C soil. The Secretary's compliance officer measured the depth of the trench on March 31, 2004 and determined it to be 14.5 feet deep. One 8-foot-high trench box was in that trench on that date. No other form of shoring or shielding was used by respondent to protect employees in the excavation on that date. It is undisputed that two employees of the respondent worked in the trench inside the trench box for at least 20 to 30 minutes on the morning of March 31, 2004; and that a large clay ball dislodged, fell into the trench and killed one employee. Prior to March 31, 2004, respondent's crew stacked a 6 foot high trench box on top of the 8-foot-high box to protect employees working in the 14.5-foot-deep trench. The stacked boxes were used up to the point where a gas line crossed the trench. The gas line passed over the trench about 12 feet above the bottom of the trench. Respondent's foreman, James Jacobs was the highest ranking supervisor at the trench at the time of the accident (Stipulation No.7). Respondent's project superintendent knew of the applicable OSHA trenching and excavating standards (Stipulation No. 6). After the accident, respondent was able to adequately slope the trench walls without moving the gas lines.

(Stipulation No.8).

Respondent, through its foreman, James Jacobs, had knowledge of the violative conditions at the worksite on March, 31, 2004, the day of the accident. He was aware of the requirements of 29 C.F.R. § 1926.652(a)(1). He directed the work on March 30, 2004, the day prior to the accident, and used two stacked trench boxes to protect employees up to the location where the gas line crossed the trench. At that point all work ceased. On March 31, 2004, prior to the accident, the foreman removed the top box, pulled the lower box under the gas line and directed two employees to enter the inadequately shored trench to lay one 13-foot section of sewer pipe. Jacobs testified that three weeks before the accident he became aware that the gas line would cross the trench at this location.

The Secretary has established a violation of 29 C.F.R. § 1926.652(a)(1). The violation was a serious violation in that there was a substantial probability that death or serious physical harm could result from the violative conditions. Without adequate protection by shoring or sloping,

employees working in this excavating were exposed to the hazard of cave-in of the walls of the excavation. Cave-ins result crushing injuries. Here one employee died.

### Wilfulness

To establish a violation as willful, the Secretary must prove that it was committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Lanzo Construction Co.*, 20 BNA OSHC 1641 (No.97-1821, 2004), affirmed *Lanzo Construction Co. V. OSHRC*, 21 BNA OSHC 1432 (11th Cir. 2005) (defining willfulness as an intentional disregard of or plain indifference to OSHA requirements).

The Secretary must show that the employer was actually aware, at the time of the violative act, 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. *Propellex Corporation*, 18 BNA OSHC, 1677 at 1684 (No. 96-0265, 1999). John Carlo, Inc. is a corporation which acts through its agents. To understand the state of mind of a corporation, the state of mind of its agents acting on its behalf must be determined. Respondent's agent on this jobsite was James Jacobs, its foreman. He was the competent person on site and directed the work of other employees. Lester "Sonny" Cox, respondent's project superintendent, was also a corporate agent and a competent person in this jobsite. He directed and had responsibility for all work done by respondent's employees on the project. He was the direct supervisor of Jacobs on this jobsite.

Throughout this project, respondent's crew used stacked trench boxes to protect employees laying sewer pipe in trenches. At least five months before the collapse on March 31, 2004, respondent's General Superintendent, John Solich, and Project Superintendent, Lester Cox, were aware that a gas line crossed the intended path of the trench at the location of the collapse. The crew used stacked trench boxes on March 30, 2004, up to the exact point where the gas line crossed the trench. Upon reaching that location work stopped. The stacked boxes were left in the trench against the gas line. Cox and Jacobs met on that date to decide how to proceed. They knew at that time the stacked boxes would not pass under the gas line. They met again before work began on March 31, 2004.

Barry Brown, respondent's pipelayer working in the trench at the time of the collapse, was in the jobsite office when Cox and Jacobs met on both days. While he knew the conversation on

March 30, 2004 involved a decision on how to work in the area of the gas line, he did not hear exactly what was said by either Cox or Jacobs. Mr. Brown testified that at the meeting on March 31, 2004, he was told by both Cox and Jacobs to pull the stacker box and slope back as far as they could. This involved removing the top trench box and pulling the 8-foot-high bottom trench box under the gas line to install one section of pipe.

Brown testified that under the direction of Jacobs, the crew removed the top trench box. Jacobs operated the trackhoe to remove the box from the trench, to dig under the gas line and to pull the bottom box into position under the gas line.

James Jacobs, respondent's foreman, testified that he first became aware of the gas line crossing the trench path three weeks before the collapse. He saw the locator flags and was told about this condition by his superintendent. Jacobs discussed this situation again with his project superintendent one week before the accident. At that time, Jacobs and Cox discussed how they would go under the gas line. Regarding that conversation, Mr. Jacobs testified as follows:

Q. Specifically, what did you talk about with Mr. Cox as to the plan for dealing with the gas line?

A. I had asked him how did they have planned for us to go under them gas lines to get our pipe in the ground.

Q. You asked Mr. Cox whether he had plans for how you were to go under the gas line?

A. Yes, sir.

Q. At the time that you had that conversation with Mr. Cox were you referring to any site plan?

A. Yes.

Q. Was it Exhibit C-3 that you were - - a document like C-3 or C-3 that you were looking at?

A. Yes, sir.

Q. What was his answer?

A. He told me we was going to have to pull the trenchbox and I told him, I said, "With the existing utilities in the ground and everything and us not knowing where the gas main was coming with the two-inch service on it and everything," I told him, I said you know, "Tell me what we're suppose to do."

And he said, "What you're going to have to do is, is pull your trenchbox and do not dig it no wider than six foot,"

(Tr. 443)

Cox and Jacobs met again on March 29, 2004, two days before the accident. They first met that day before work at the jobsite office. Mr. Jacobs testified as to that conversation as follows:

A. I had asked him again.

Q. You had asked him what again?

A. About pulling - - I asked him, I said, "Are you sure that's the way we need to do this?" And he says, "Yes, pull the trenchbox."

And that's when I brought up to him, I said, "We're not going to be able to slope it." And he says, "I understand that."

And he told me, he says that they had bid this job to be no wider than six foot because of the fill that we was - - the good fill we were bringing back in to put back in to put back in and taking the old fill out.

Q. So he told you that they had bid the job at no wider than six feet?

A. Yeah.

Q. And fill, are you talking about - -

A. Good suitable dirt to go back in.

Q. So you called to his attention at that time that if you did what he said, that you would not be able to slope the trench?

A. Yes, sir.

Q. Slope it outside the trenchbox?

A. Yes, sir.

Q. Did he say anything at all to you at that time besides referring to the bid the job for six feet?

A. No, sir, no other than the existing utilities underground and the gas line and the phone lines was another reason why.

(Tr. 448 - 449)

Cox and Jacobs had another conversation later that afternoon at Jacobs trench site. That discussion related to the gas line. Mr. Jacobs testified as to the nature of that conversation as follows:

Q. And what was the conversation at that time?

A. About the gas lines and the phone lines and the existing utilities.

Q. And did you ask any questions about what you were to do?

A. Yes, sir.

Q. What was the question that you asked?

A. I asked him were we still going to pull the stacker box off the trenchbox. He says, "Yes, do it like I told you to do it." I said "Okay."

(Tr 449 - 450)

Mr. Jacobs' conversations with management about this situation were limited to Mr. Cox, his boss and direct line supervisor.

On the morning of the accident, Mr. Cox and Mr. Jacobs met again at the project site office to discuss the procedure to be used that day at the location of the gas line. Mr. Jacobs testified that he understood his instructions from Cox were to pull the stacker box and not to slope the trench any wider than six feet. He told his crew that the walls were to be straight up and down with no slope. He then pulled the top stacker box off the bottom box and pulled the bottom trench box under the gas line with the trackhoe. Mr. Jacobs testimony is consistent with the testimony of Mr. Brown regarding conversations with Mr. Cox at the project office on March 31, 2004, and subsequent actions taken by Jacobs and his crew.

On cross examination, Mr. Jacobs testified concerning his conversations with Mr. Cox about the procedures to be used in the trench at the location of the gas line as follows:

Q. Is it your understanding or is it your testimony that Mr. Cox told you that the trench walls would be vertical from the pipe invert, the bottom of the pipe, straight up to the surface of the ground without any attempt to slope them back?

A. No, sir. He told me once I pulled the stacker box, because I told him, I said, "You know that we're not to be able to slope it." He says, "Yes, I understand that. Y'all be careful."

Q. How did you interpret that? Does that mean you were not to slope it at all or slope it back as best you can slope it back in conformity with John Carlo rules? How did you understand that?

A. The way I took it from Sonny was, was not to slope it.

\* \* \*

A. Mr. Cox told me - - I asked him whenever we got to that point and everything, I said "We're going to pull the trenchbox and we're not going to be able to slope the banks back." And he said, "Right."

Q. And how far - - what was your understanding how far were you suppose to use this operation without any slope?

A. Just to get under the gas line and that was it.

Q. Did you perform any sloping or any benching or anything like that when you installed or when you attempted to do the work in that vicinity?

A. No, sir.

Q. Why didn't you go to a John Carlo superior? Why didn't you go to someone else when Mr. Cox told you this?

A. Because my job was to tell Sonny and Sonny's job was to go to the higher man. That's why we have a superintendent on the job.

\* \* \*

Q. And at the time that your crew members entered this trench, did you understand that that trench was not in conformity with OSHA guidelines?

A. Yes, sir.

Q. And was it your understanding Mr. Cox was essentially telling you to dig this trench not in conformity with OSHA guidelines?

A. They way I took it, yes, sir, the way he explained it to me, because I asked Mr. Cox about once I pulled the stacker box, about getting steel sheets out here to drive down beside this trenchbox, and he said John Carlo wouldn't do that.

(Tr. 465 - 469)

Mr. Jacobs reiterated emphatically that Mr. Cox told him that they could not slope the trench because of the way they bid the job plus the existing utilities in the ground. Subsequent to the accident, Chris Wynette supervised Jacobs at this location during the installation of sewer pipe under the gas line. Jacobs told Wynette that, after the accident, other trenchboxes were brought in since the trench could only be dug six feet wide. This statement to Wynette after the accident is consistent with Jacobs' testimony about his discussions with Cox and is consistent with Brown's testimony.

Lester Cox was respondent's project superintendent and directly supervised James Jacobs and his crew. He testified that he had three or four discussions with Jacobs about installation of the sewer pipe at the location of the gas line. He testified that Jacobs was to accomplish the crossing of the gas line as follows:

A. Well, first thing - - It was my understanding the first thing we was going to do was to locate the existing utilities and see how they would directly affect our ditch line. And then that would determine to whether - - on how we would approach it as far as making the actual excavation and installation at the time.

\* \* \*

A. Number one, we didn't know if it was going to be in direct conflict with our pipe line. Number two, we didn't know how deep they were and whether we could create enough slack in the existing utilities across the ditch to allow both trench boxes to be used. And that's why we had to find out where they were and how deep they were.

Q. And which utilities are these? Are these utilities that are perpendicular to your trench line crossing or were they parallel?

A. Perpendicular.

(Tr 646)

Mr. Cox later testified that he was pretty confident they would need to remove the top trench box because of the perpendicular gas lines. Cox stated that he met with Jacobs at the jobsite field

office on the morning of the accident. He testified that there was a question about whether the stacker box could be used, depending on the depth of the gas line. When questioned whether, during planning on March 31, 2004, he knew if it was possible to slope the trench, Mr. Cox responded:

- A. We didn't know. We knew it was going to be difficult. I mean, that morning, we had talked about it and, you know, I said to him, I said, "Peewee, we've got to find all these existing utilities before we figure out how we're going to attack this a hundred percent." That's the way it was left when we left the office that morning.

(Tr. 647-648)

Cox testified that Jacobs never told him he could not slope or use the stacked trench box. Cox said his understanding was that Jacobs would stop the work if he could not slope due to the proximity of the gas line or parallel utilities. Cox denied telling Jacobs he wanted vertical walls on the trench at the area of the gas line or that he wanted the narrowest trench. When he arrived at the accident site, the trench walls were nearly vertical. Cox stated that a week or so before the accident he met with Jacobs in the office about safety issues relating to the trench and gas line where the accident occurred. John Solich, the project general superintendent and Tom Kelecus, the project manager were present during this meeting. Cox testified that they decided "to uncover existing utilities, find the locations and depth, and base our plan of attack from that." (Tr. 677).

Cox gave a statement to the Secretary's compliance officer on March 31, 2004, after the accident. He stated that he had discussed with Jacobs not using the top part of the trench box because the utilities were in the way. He also said the trench wall could not be cut back because utilities were in the way. (Exhibit C-23)

On April 2, 2004, Cox gave a more detailed statement to the Secretary in his capacity as project superintendent. This statement was made three days after the accident and in it Cox stated in part:

We did not stop the job when we encountered the gas lines to better protect the upper half from cave ins because we thought we had it figured out. We removed the top trench box and just used the lower one. We only had one jointed pipe to put in and we thought we could get it done. Once the trench is dug, it takes approximately 15 minutes to install 1 section of pipe. I can't say we thought of a different way, or using sloping or shoring in addition to the trench box in that area (accident site area). I had not gotten to the accident area of the site that morning until the accident so I

can't say what James was thinking at that time. We had discussed the gas lines, and other utilities since Monday - to remind him to be careful and not hit/break any of them. We had also discussed seeing if the gas lines in that area were going to have enough slack to work around them, as we had with the other lines, to still use two trench boxes but that was about it.

(Exh. C-24)

Barry Brown testified he, as part of Jacobs' crew, found the exact location of the gas line on March 30, 2004, the day before the accident. The crew dug the area by hand on that day to locate the perpendicular gas line.

Brown described the actions of the crew at the end of work on March 30, 2004 as follows:

Q. Did you - - on the day before the accident occurred, at the end of the work day, did your crew remove the trenchboxes and fill in what had been done?

A. They did not remove the trenchboxes. They left the trenchboxes up against the gas main and decided that we could not go under the gas main with the trenchboxes, so we had to regroup and figure out what we was going to do.

(Tr. 344)

This testimony is consistent with that of James Jacobs as to the sequence of events on the days prior to the accident. The gas line, according to Brown was located on March 30, 2004. Since the crew knew the location of the gas line at the end of that workday, there was no need to continue to look for that line on March 31, 2004, as Cox indicated in his testimony. Jacobs and Brown knew on March 30, 2004, that the stacked trench boxes would not pass under the gas line.

Cox's testimony that on March 31, 2004, he did not know that Jacobs' crew could not slope or use the stacked trench boxes lacks credibility. His testimony is inconsistent with the testimony of James Jacobs and Barry Brown. It is also grossly inconsistent with his detailed statement given to the Secretary on April 2, 2004 (Exhibit C-24). In that statement, he admitted that the job was not stopped to protect the upper half of the trench from cave-in when the gas line was encountered. He admitted that the top box was removed and only the bottom box was used. He admitted that no other method of shoring or sloping was considered. He reasoned that exposing employees to the hazard of cave-in was acceptable since "We only had one jointed pipe to put in and we thought we could get it done. Once the trench is dug, it takes approximately 15 minutes to install 1 section of pipe." (Exh. C-24).

I accept this statement as an accurate reflection of the true state of mind of Lester Cox, respondent's project superintendent, on the date of the collapse, March 31, 2004. That statement is consistent with the testimony of James Jacobs, respondent's foreman and Barry Brown, respondent's employee in the trench at the time of the accident.

After observing the demeanor and hearing the testimony of Cox, Jacobs and Brown, I find the testimony of Lester Cox to lack credibility and no weight is given to that testimony. His testimony was inconsistent with the testimony of Mr. Jacobs and Mr. Brown. It was also diametrically opposed to and inconsistent with his own statement given in his capacity as respondent's project superintendent on April 2, 2004. That statement, given only three days after the accident, more accurately reflects Mr. Cox's state of mind as events unfolded on March 31, 2004 and during the days and weeks leading up to the cave-in. I further find the testimony of James Jacobs and Barry Brown to be credible. Testimony of both witnesses was consistent with each other, internally consistent, and consistent with the statement of Mr. Cox in Exhibit C-24.

Respondent, through Cox and Jacobs, was actually aware, at the time of the violative act, that the act was unlawful. Respondent is a corporation which acted through its agents, James Jacobs, its foreman, and Lester Cox, its project superintendent. Both Cox and Jacobs knew their decisions and actions violated 29 C.F.R § 1926.652(a)(1). Both knowingly and deliberately proceeded to expose employees to the hazards of cave-in of the excavation walls without protection of employees by shoring or sloping.

Both Cox and Jacobs had competent person training required by 29 C.F.R Subpart P-Excavations. A competent person is defined in 29 C.F.R § 1926.650 (b) as follows:

*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.

Respondent is in the business of digging trenches and other excavations. It does this every day of every week to lay sewer pipe. The standard violated by respondent sets forth the basic requirements to protect employees in excavations with protection from cave-in. Respondent knew the requirements of this standard and deliberately chose to ignore those requirements. It was more expedient to place employees in an unprotected trench for 15 minutes to lay one joint of pipe than to take the time to adequately shore or slope the trench to protect employees.

The situation of the gas line crossing the path of the trench was not an unexpected situation. Top management officials of respondent knew about this condition for several months prior to the accident. John Solich, respondent's general superintendent met with Cox in October or November, 2003 to discuss the situation. As a result of that meeting, they asked the gas company to move the gas line. As of March 31, 2004, the gas line had not been relocated. Respondent bought this company from Milestone Carlo on January 1, 2004, according to the testimony of Gordon Wall, respondent's safety manager. After the purchase, Solich had several other meetings and discussions with Cox and other management officials to discuss this condition prior to the accident date. Respondent considered this situation to be its greatest liability on this jobsite. While this was the first gas line to cross the trench path, other utilities crossed respondent's trenches previously on this project.

Respondent's safety manual contains detailed sections entitled Excavation, Trenching and Shoring Policy and Trench Safety Policy (exhibit R-8). The Secretary stipulated at the hearing that this safety manual was generally adequate as it related to trench safety. A thorough review of this safety manual indicates a heightened awareness by respondent of the hazards resulting from failing to protect employees in trenches by shoring or sloping.

Respondent argues that it has concern for employee safety and made a good faith effort to accomplish safety for its employees. This case arose at a jobsite in Jacksonville, Florida. The applicable case law is that of the Eleventh Circuit Court of Appeals. That court does not recognize a good faith defense to an allegation of willfulness. *Lanzo Constuction Co. v. OSHRC*, 21 BNA OSHC, supra at 1434. While the Review Commission does recognize such defense, respondent has failed to meet its burden even under Review Commission case law. *See e.g. Lanzo Construction Co.*, 20 BNA OSHC, supra at 1648 and cases cited therein. Here, there was no effort to comply with the requirements of the standard or otherwise protect employees working in the trench from cave-in of trench walls above the level of the 8 foot high trench box. The top 6.5 feet of the vertical trench were not shored, sheeted or sloped. Respondent knew this and decided to take a chance based on expediency. Respondent gambled that it could get in, lay the pipe and get out without a cave-in. This is not a good faith approach to protecting employees or complying with the law. Respondent's actions show intentional disregard of the requirements of the Act and plain indifference to those requirements and to employee safety. Under Review Commission law and the law of the Eleventh Circuit, respondent willfully violated 29 C.F.R § 1926.652 (a)(1).

### Unpreventable Employee Misconduct

In order to establish that the violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct, respondent must prove that

(1) it has established work rules designed to prevent the violations, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered.

*Jensen Construction Co.*, 7 BNA OSHC 1477 (No. 76-1538, 1979)

Here, respondent has made a progressive argument as to the employees that it alleges engaged in unpreventable employee misconduct. In answer to Complainant's interrogatories, respondent stated that James Jacobs, its foreman, and Comer Lindley, the deceased employee working in the trench engaged in unpreventable employee misconduct. (Exhibit C-1).

Respondent claimed in those responses that Lester Cox told Jacobs to slope the sides of the trench or use stacker trench boxes on the day of the collapse. Respondent stated that Jacobs engaged in misconduct by failing to slope the trench and by removing the stacker box.

Respondent in further answer to the Secretary's interrogatories, stated that Comer Lindley engaged in employee misconduct by failing to abide by instructions of his foreman to face the open side of the trench.

At the end of the third day of trial, respondent moved to amend its answer to add a third individual as engaging in unpreventable employee misconduct. It requested that Lester Cox be added to the list. Respondent alleged that Cox's misconduct was based on failure to adequately supervise. The Review Commission maintains a liberal policy regarding amendments to pleadings, even during trial. Since respondent had previously pled this defense, its motion to expand to include Cox was granted. The Secretary was granted the opportunity to meet this modification to respondent's defense and chose to address it in her brief.

Respondent's claim that Comer Lindley engaged in misconduct is rejected. Gordon Wall, respondent's safety manager, testified that respondent has no rule prohibiting employees from having their backs to the open end of a trench box. No evidence was presented that he was instructed by Jacobs to face the open end. He could not have performed his work in such position since he would be facing away from the pipe he was trying to position.

James Jacobs did remove the top stacked trench box and did not slope the trench walls above the bottom trench box. His actions do not constitute unpreventable employee misconduct. As discussed at length above in this decision, his actions were in accordance with instructions given him by his direct supervisor, Lester Cox, the project superintendent. He specifically followed the direct orders of Cox, the highest ranking supervisor for respondent on this project: Jacobs had several discussions with Cox and other management officials during which he questioned how management wanted him to lay the one length of sewer pipe under the gas line. He raised safety concerns with Cox during several discussions until and including those held on the day of the accident. In the final analysis, he was ordered by Cox to perform the job by removing the top box and placing the pipe with the trench walls unsloped above the bottom trench box.

Lester Cox was the only superintendent and respondent's highest ranking supervisor on this project. He has over forty years experience in underground experience. He was a superintendent for twenty years and a foreman before that for ten years. He supervised all crews in all areas of the project including pond excavation, field site work, grading and the work of three pipe crews. He scheduled the crews and equipment for the entire project. Cox supervised all foremen on the site. He met with the foremen on the field office and visited the crews daily, dealing with problems and compliance with safety and other regulations. He dealt with existing utility conflicts and hazards. Cox had full authority to stop work and to hire and fire employees. Cox monitored safety on the project. When Cox was not present, the foremen had responsibility for safety.

To determine whether the violation was the result of unpreventable employee misconduct, the evidence must be analyzed generally under the *Jensen* test. In addition, where, as here, the respondent alleges that Cox and Jacobs, supervisory employees, were engaged in misconduct there is an additional analysis required by the Review Commission in *Archer-Wester Contractors, Ltd.* 15 BNA OSHC 1013 (No. 87-1067, 1991).

The Secretary first stipulated prior to hearing that respondent's safety program was adequate on March 31, 2004. At the hearing, the Secretary's motion to amend was granted to stipulate that respondent's safety program was generally adequate. The complainant presented evidence showing respondent's safety manual contained material errors as to OSHA's trenching requirements regarding the appropriate degree of sloping for Type C soil (34° v. 45°) and the minimum height of a trench box above surrounding soil ( 12" v. 18"). Seven other errors in its safety manual were noted by the Secretary's compliance officer and set forth on page 28 of the Secretary's brief. Respondent did not correct these obvious errors or communicate the correct information to employees on this project prior to the accident on March 31, 2004.

By misstating the degree of sloping and the minimum height of a trench box above the surrounding soil, respondent failed to establish specific work rules designed to prevent this violation. By misstating these requirements, the work rules do not eliminate employee exposure to the hazard covered by the standard.

Respondent did not have all of its training programs in place in Florida on the date of the accident. Gordon Wall, respondent's safety director, testified that on March 31, 2004, respondent had tool box talks and oral communication of safety in place on this project. Wall admitted that Cox and Jacobs did not receive respondent's annual kickoff safety training for supervisors. He also admitted that Cox and Jacobs did not receive total training as of the accident date. Both Jacobs and Cox had competent person training relating to trench safety. Both received this training long before they went to work for the respondent. Neither received this or other safety training from the respondent. Even though neither of these supervisors received adequate safety training by respondent, they were responsible for communicating safety information to employees through discussion, tool box talks and on-site supervision.

Employees were given copies of respondent's safety manual, but no effort was made to assure the employees understood its contents. Lester Cox gave Comer Lindley a copy of the safety manual, but Lindley did not sign the form indicating that he received it. Cox did not determine whether Lindley understood the contents of the Safety manual. He also failed to determine whether Lindley had prior safety training, and Lindley did not attend the Monday site safety meeting before the accident. Respondent failed to adequately communicate its work rules to its employees on this project.

Several months before the accident, John Solich, respondent's general superintendent and Lester Cox, the project superintendent, knew the exact location that the gas line would cross the path of the sewer line to be installed. Multiple discussions were held to discuss the gas line situation, considered by respondent's managers to be their greatest liability on the project. Five months before the collapse, Solich and Cox sought to get the gas line relocated by the owner of the line. This did not happen. After purchasing the company on January 1, 2004, respondent knew for months it needed to devise a method to safely install the sewer pipe below the gas line. The result of management meetings was to deal with the problem when it actually arose. When the gas line was reached, respondent decided to remove the top stacker box and place the pipe with exposed vertical dirt walls over six feet above the heads of its employees. Respondent took initial steps to discover violations or hazards. It ignored the violative condition, however, when it was encountered and knowingly exposed its employees to the hazard of cave-in. Taking steps to discover violations necessarily includes addressing and correcting those violations when they are discovered. Respondent failed to address and correct the violative conditions at issue.

Gordon Wall, respondent's safety manager, testified that the company had a progressive disciplinary system and produced records of reprimand for various employees throughout to the company. Respondent claims it enforced its work rules by this disciplinary system. Contrary to this claim, Cox admitted he only called violations to the attention of employees and he never provided more severe discipline to an employee for a safety rule violation. No evidence was presented that respondent's management on this project issued anything other than verbal warnings to employees for safety violations prior to March 31, 2004. Evidence of verbal reprimands alone suggests an ineffective disciplinary system on this project. *See GEM Industrial Inc.*, 17 BNA OSHC 1861, at

1864 (No. 93-1122, 1996) (and the cases cited therein). Here, both the project superintendent and the foreman participated in the noncomplying conduct. This also suggests ineffective enforcement of work rules. See *GEM Industrial Inc.*, supra at 1865.

Termination after an accident or an investigation by OSHA may be considered in determining whether a work rule was effectively enforced. This action must be viewed, however, in conjunction with pre-accident discipline. See *R. Zoppo Company, Inc.*, 9 BNA OSHC 1392, 1396 (No. 14884, 1981). After this accident, both Cox and Jacobs were terminated. Cox's final evaluation was that he was an outstanding employee in all but two categories. In those two, he was rated satisfactory. His work was not rated as unsatisfactory in any category. Jacobs' work was rated as satisfactory in all categories. In both separation notices, respondent indicated that it would rehire both Cox and Jacobs (Exhibit R-27 and R-28). Respondent gave no reason for the discharge of either employee. It checked the reason as "other." It did not check the box "conduct" as the reason for discharge. This is evidence that respondent did not consider the actions of Cox and Jacobs to actually be misconduct. Had respondent concluded that their misconduct resulted in a trench collapse and the death of another employee, surely that would have been reflected in their separation notices. Failure to state valid reasons for discharge, giving both employees high final performance ratings, and stating that the company would rehire both are actions totally inconsistent with respondent's claim that it adequately enforced its safety program and rules.

Respondent claims that unpreventable employee misconduct was that of the two supervisory employees. Where the alleged misconduct is that of a supervisory employee, an employer must show that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee. *Archer-Western Contractors, Inc.*, 15 BNA OSHC 1013 (No. 87-1067, 1991). In that case the Review Commission, citing *Daniel International Co. v. OSHRC*, 683 F.2d 631 (11<sup>th</sup> Cir., 1982) held that:

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. *Id.* A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Id.*

*Archer-Western Contractors, Inc.*, 15 BNA OSHRC, at 1017.

Respondent's management considered the gas line crossing the intended path of the sewer line to be their biggest problem and greatest liability. They sought to have the gas line moved. They had multiple meetings to discuss the situation. They collectively decided to address the situation as it arose. The project superintendent and the foreman met at least twice two days before the accident and again on the morning of the collapse. The project superintendent, Cox, the top supervisory employee for respondent on the project, directly ordered Jacobs, the foreman, to perform the work exactly as it, in fact, was done. Jacobs voiced concerns about Cox's decision, but finally carried out those direct orders.

John Solich, respondent's general superintendent, discussed this situation with Cox on several occasions from at least November , 2003, until shortly before the accident on March 31, 2004. He stated this was not the first time on this project that utilities crossed the trench path although it was the first time for a gas line to intersect the trench. No evidence was presented to show anyone in respondent's upper management supervised or questioned Cox's handling of this situation. Cox had the authority to make the decision to remove the top trench box and allow employees to work in the unshored and unsloped trench.

It was the responsibility of respondent's supervisory employees, Cox and Jacobs, to protect the safety of its employees working in the trench under their supervision on March 31, 2004. Their involvement in the decision to allow employees to work in this unprotected trench is strong evidence that respondent's enforcement of its safety program and rules was lax.

Cox and Jacobs acted consistently with the interests of the respondent, to quickly lay one joint of sewer pipe below the gas line without slowing the progress of the work. They thought they could get in and get out without harm. It was a decision based in concerns for expediency not for safety.

Respondent has failed to prove its defense that the willful violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct by Comer Lindley, James Jacobs or Lester Cox.

## **Penalty Assessment**

Section 17(j) of the Act requires that when assessing penalties, the Commission must give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 177) (No.88-237, 1994).

Respondent is a large employer with over 1,000 employees, 50 employees on this project and 7 employees at this trench. On January 1, 2004, respondent bought Milestone - Carlo. Without evidence as to the nature of the relationship between respondent and Milestone - Carlo, I will not attribute the history of Milestone - Carlo to respondent. While I have found a willful violation, I find that respondent exhibited good faith during the investigation and inspection and in its later abatement of the violative condition.

Generally, the gravity of the violation is the primary consideration in assessing 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 likelihood that any injury would result.” *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (no. 87-2059, 1993).

This was a seven person crew. Two employees worked in the trench for at least 20 to 30 minutes. Trench walls were vertical, with over six feet of unshored unsloped earth above the heads of the employees. Both the project superintendent and the foreman required the work to be done in this manner. Based on these factors, a penalty of \$50,000 is assessed for the willful violation of 29 C.F.R § 1926.652(a)(1).

### **Finding of Fact and Conclusion of Law**

The foregoing decision constitutes the finds of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, Item 1 is vacated.
2. Citation No. 1, Item 2 is amended to “other” and no penalty is assessed.
3. Citation No. 2, Item 1 is affirmed as a willful violation and a penalty of \$50,000 is assessed.

/s/ Stephen J. Simko, Jr.  
STEPHEN J. SIMKO, JR.  
Judge

Date: May 22, 2006