

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

J. B. Coxwell Contracting, Inc.,

Respondent.

OSHRC Docket No. **06-1228**

Appearances:

Robert Lewis, Jr., Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Eric J. Holshouser, Esquire, Coffman, Coleman, Andrews, & Grogan, Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

J. B. Coxwell Contracting, Inc. (JBC) is engaged in the business of heavy highway construction. On March 20, 2006, JBC was constructing an underground concrete junction box for a storm drain system in Green Cove Springs, Florida, when the excavation was inspected by Occupational Safety and Health Administration (OSHA). As a result of the OSHA inspection, JBC received serious and willful citations on July 7, 2006, alleging violations of OSHA's excavations standards at 29 C.F.R. § 1926.650 *et seq.* JBC timely contested the citations.

The serious citation alleges JBC violated 29 C.F.R. § 1926.651(c)(2) (Item 1) for the lack of a safe means of egress from the excavation; 29 C.F.R. § 1926.651(h)(1) (Item 2) for failing to prevent water accumulation in the excavation; and 29 C.F.R. § 1926.651(e) (Item 3) for suspending a 1,900 pound concrete pipe above the head of an employee. The serious citation proposes total penalties of \$4,544.00.

The willful citation alleges JBC violated 29 C.F.R. § 1926.652(a)(1) (Item 1) for failing to utilize adequate cave-in protection for employees working in an excavation 6 feet 8 inches in depth. The willful citation proposes a penalty of \$45,000.00.

The hearing was held in Jacksonville, Florida, on January 23, 2007. The parties stipulated jurisdiction and coverage (Tr. 4-5). Post hearing briefs were filed on May 14, 2007.

JBC denies the alleged violations and asserts it was in compliance with OSHA's excavation standards. JBC also denies the willful classification and claims unpreventable employee misconduct as to the alleged violation of § 1926.652(a)(1) (Tr. 26-27).

For the reasons discussed, the Secretary failed to establish the alleged serious violations of § 1926.651(h)(1) (Citation 1, Item 2) and § 1926.651(e) (Citation 1, Item 3). JBC's unpreventable employee misconduct is rejected. The serious violation of § 1926.651(c)(2) (Citation 1, Item 1) and the willful violation of § 1926.652(a)(1) (Citation 2, Item 1) are affirmed. A total penalty of \$20,000.00, is assessed.

The Inspection

JBC's business is heavy highway construction which includes installing underground storm drain systems. In business since 1983, JBC has offices located in Jacksonville, Florida. JBC employs approximately 500 employees (Tr. 242, 277).

In 2006, JBC contracted to enhance the storm drain system and to resurface the road for almost a three mile section of U.S. Highway 17 (Orange Street) in Green Cove Springs, Florida. JBC designated Larry Porterfield as project superintendent. Project pipe foreman Spessard (Shep) Preslar and backfill foreman Dowaine Vason also worked at the project. The three supervisors were also designated "competent persons" (Tr. 25-26, 32-33, 184, 217, 225, 227, 231, 242).¹

On March 20, 2006, JBC's crew was working at the intersection of U.S. Highway 17 and Walberg Street in Green Cove Springs, Florida. The crew was constructing a underground concrete junction box in an excavation and beginning to install the drain pipe going north from the junction box (Exhs. R-1A, R-2; Tr. 220-222).

¹A "competent person" is "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 make prompt corrective measures to eliminate them." 29 C.F.R. § 1926.32(f).

At approximately 9:00 a.m., Clay County Fire and Rescue Captain Eugene East drove to the worksite and observed the excavation. Captain East described the excavation as a large opening with a concrete junction box in the middle. He estimated the excavation was 8 feet deep and 20 feet across in both directions. East saw approximately five employees in the excavation constructing the junction box. He did not observe shoring, a trench box, or other cave-in protective systems. East saw fissures and sloughing off along the excavation's walls. He also testified there was water in the bottom of the excavation which he estimated was 6 inches deep around the junction box. A ladder was seen against an excavation wall which employees used to access the excavation. Based upon his observations of the excavation, Captain East telephoned the Jacksonville OSHA office (Exhs. J-2A-2H, C-8, C-9; Tr. 143-148, 155, 158, 162, 165, 167, 180). As part of his training in trench rescue, East is familiar with OSHA's excavation requirements (Tr. 142).

OSHA safety compliance officer Peter Lasavage, who was assigned the referral, arrived at the excavation site at approximately 1:45 p.m., on March 20, 2006, to conduct an inspection. Upon his arrival, Lasavage observed employees in the excavation working around the storm drain junction box. The excavation was located in the center of Highway 17. Lasavage's measurements of the excavation were 20 feet wide, 21 feet long, and 6 feet, 8 inches deep. He classified the soil as Class C soil. Lasavage described the walls of the excavation as almost vertical and not shored or benched. While conducting the inspection, Lasavage testified he observed an employee climbing the east wall of the excavation using a shovel as a prop. He did not see a means of egress from the excavation. The ladder was leaning against the junction box in the center of the excavation. Lasavage observed water in the bottom of the excavation although he did not consider it an amount sufficient to make the excavation unsafe (Tr. 28, 30-31, 34, 36-37, 39-40, 43-44, 78, 82-83, 101). Lasavage concluded the onsite OSHA inspection at approximately 5:30 p.m. (Tr. 35).

As a result of the OSHA inspection, the serious and willful citations for alleged violations of the excavation standards were issued to JBC on July 7, 2007. For their failure to exercise proper judgements, JBC gave letters of reprimand and suspensions for one week without pay to superintendent Porterfield and foreman Preslar. Foreman Vason received only the reprimand letter (Exhs. R-4, R-5, R-6 R-7; Tr. 194, 200, 235, 237, 266-267, 289-291).

Discussion

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).

There is no dispute OSHA's excavation standards at Subpart P, § 1926.650 *et. seq.* are applicable to JBC's worksite in Green Cove Springs, Florida, on March 20, 2006. Also, JBC does not dispute that its employees were working in the excavation constructing the junction box and its supervisors were at the excavation aware of its condition.

Serious Citation No. 1, Item 1 - Alleged Violation of § 1926.651(c)(2)

The citation alleges the ladder was positioned in the excavation to access the junction box and not as a means of egress from the excavation. Section 1926.651(c)(2) provides:

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

CO Lasavage testified he observed an employee walking up the east wall to exit the excavation (Exh. J-1C; Tr. 54). He opined the employee used a shovel as a prop in climbing the almost vertical wall because there was no ladder for egress from the excavation (Tr. 54). The ladder was leaning against the junction box to assist the employees in constructing the box (Tr. 55, 61). Foreman Preslar acknowledged the employee used the wall to exit the excavation instead of a ladder (Exhs. C-2, C-3; Tr. 56, 59).

JBC argues the cited standard does not apply because it only applies to “trench excavation” and compliance officer Lasavage described it as an “excavation” with its width greater than its depth (JBC Brief, p. 7; Tr. 44). A “trench excavation” is defined at 29 C.F.R. § 1910.650(b) as:

a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m). If forms or other structures are installed or constructed in an excavation so as to reduce the dimension measured from the forms or structure to the side of the excavation to 15 feet (4.6 m) or less (measured at the bottom of the excavation), the excavation is also considered to be a trench.

The excavation was 20 feet wide, 21 feet long, and 6 feet, 8 inches in depth. Based on these measurements, the worksite was an excavation. Section 1926.650(b) defines an “excavation” as “any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.”

In the center of the excavation, JBC was constructing a cement junction box which was 6 feet, 8 inches square and 5 feet, 6 inches high (Tr. 245). Because the junction box reduced size of the excavation from the sides to less than 15 feet, the excavation dug by JBC is also considered a “trench excavation.” Therefore § 1926.651(c)(2) does apply in this case.

JBC’s argument that if applicable, the employee was less than 4 feet deep when observed by Lasavage is immaterial to finding a violation. Lasavage testified the employee was at the bottom of the excavation (Tr. 54). He also saw another employee exit the excavation the same way (Tr. 58). Regardless of whether the employee was at the bottom of the excavation or on the side, the standard requires a safe means of egress when the excavation is 4 feet or more. The standard’s application is not based on where the employee is located in the excavation; but rather, upon the depth of the excavation. See, *Ford Development Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-1505, 1992) *aff’d*, 16 F.3d 1219 (6th Cir. 1994), (the cave-in protection standard is violated when employees were working on top of a pipe 3 ½ feet deep in an excavation over 5 feet deep).

JBC’s argument that climbing the walls of the excavation was a safe means of egress is also rejected. The standard contemplates a means such as a ladder, ramp, or stairway to exit the excavation; not the almost vertical wall of the excavation in this case. JBC agrees the walls were

not sloped to 34 degrees which is the maximum allowable slope for excavations less than 20 deep in Class C soil (JBC Brief, p. 3; Tr. 222). See § 1926, App B, Table B-1.

JBC's claim employees could travel from the top of the junction box to the top of the trench box is rejected as speculative and not shown by the record. No witness discussed this method as the designated means of egress.

JBC, through its superintendent and foremen who were present on site, knew the condition of the excavation and that its employees were working in the excavation to construct a junction box without a means of egress. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel). When a supervisory employee has actual or constructive knowledge of an unsafe condition, knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). Foreman Preslar acknowledged that an employee climbed the wall of the excavation to exit. He stated that "when OSHA arrived they didn't use the ladder, they left the trench box and climbed the side of the trench walls." (Exh. C-3, p. 2).

Without a ladder to egress the excavation, JBC's violation of § 1910.651(c)(2) is properly classified as serious. The violation is not *de minimus* as argued by JBC (JBC Brief, p. 8). JBC's noncompliance was not technical and did not provide employees a sufficient level of safety protection as required by the standard. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1571 (No. 88-611, 1992).

A violation is serious under §17(k) of the Occupational Safety and Health Act (Act), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

The supervisors of JBC were present at the excavation site. Foreman Preslar actually saw the employee climbing the wall of the excavation (Tr. 56, 59-60). The supervisors' knowledge of the lack of a means of egress is imputed to JBC. The employee exiting the excavation by climbing the wall because there was not a ladder, was subject to serious harm or death if there was an

emergency requiring prompt egress (Tr. 55). The excavation was approximately 7 feet deep and the walls were almost vertical.

A serious violation of §1910.651(c)(2) is established.

Serious Citation No. 1, Item 2 - Alleged Violation of § 1926.651(h)(1)

The citation alleges JBC did not provide a means to prevent water accumulations in the excavation. Section 1926.651(h)(1) provides:

Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

OSHA's citation as to the accumulation of water in JBC's excavation is based on the observations of Captain East of Clay County Fire and Rescue. Captain East testified he saw water accumulation around the junction box under construction. He estimated the accumulation was less than 6 inches in depth based upon not being able to see the employees' feet in the water (Tr. 64, 165). East did not observe any de-watering equipment at the excavation (Tr. 165). Although Lasavage saw some water accumulation during his OSHA inspection in the afternoon, he did not consider it sufficient to support a violation of §1926.651(h)(1) (Tr. 43, 63).

JBC does not deny the accumulations of water at the excavation. According to JBC, the water occurred when it opened an existing storm drain in order to tie in the new line (Tr. 231). JBC claims it took measures to prevent or to remove water accumulations. Superintendent Porterfield testified he implemented three measures to reduce the water accumulation. In addition to installing an underground sock drain and placing sand bags in active storm drains to prevent water from flowing into the new sections, a 3-inch diaphragm pump was installed to draw down the water table prior to constructing the cement junction box (Tr. 231-232).

The testimony of Porterfield is not contradicted by the Secretary's witnesses. Neither Captain East nor compliance officer Lasavage asked JBC about its methods to remove water accumulations (Tr. 116, 165). Although, JBC's contracts for de-watering equipment appear dated after OSHA's

inspection on March 20, 2006, Porterfield's testimony about a de-watering system is not refuted by the Secretary's evidence. Porterfield's testimony is also supported by the fact the water accumulation lowered from approximately 6 inches in depth to a "no violation" accumulation observed by Lasavage in less than 4 hours (Exh. R-3; Tr. 261). The Secretary failed to show that these de-watering systems were not adequate or that there was a hazard to employees posed by the water accumulation in this case.

The record fails to establish a violation of § 1926.651(h)(1).

Serious Citation No. 1, Item 3 - Alleged Violation of § 1926.651(e)

The citation alleges a 1,900 pound concrete pipe was suspended by digging equipment over the head of an employee in the excavation. Section 1910.651(e) provides:

No employee shall be permitted underneath loads handled by lifting or digging equipment. Employees shall be required to stand away from any vehicles being loaded or unloaded to avoid being struck by any spillage or falling materials. Operators may remain in the cabs of vehicles being loaded or unloaded when the vehicles are equipped in accordance with § 1926.601(b)(6), to provide adequate protection for the operator during loading and unloading operations.

The Secretary relies on the written statement of lead pipe fitter Isreal Hernandez as the sole basis for this alleged violation (Exh. C-1; Tr. 70). In his statement, Hernandez indicates that at 11:00 a.m., a 1,900 pound concrete pipe was lifted by digging equipment over the head of an employee in the excavation. Hernandez was directing the lift. CO Lasavage did not observe the incident when he was on site.

At the hearing, Hernandez did not deny making the statement, although he could not remember making the statement and was unable to read it (Tr. 214, 216).

From observing Hernandez and reviewing his testimony, it is clear to the court that Hernandez's understanding of English was minimal. When asked his full name and spell his last name, Hernandez testified "I don't understand it literally in English" (Tr. 213). He lacked the ability to read English. He could not recite the English letters to spell his name. Also, his demeanor during his testimony suggested someone who was impressionable and easily manipulated by any person in authority.

Accordingly, the court is not giving weight to Hernandez's signed statement. The written statement lacks specific details about the incident and what prompted the statement. It was not shown what questions were asked or that Hernandez understood the questions and actually meant his response to be what Lasavage recorded. Hernandez's statement lacks corroboration. Even if the incident occurred, the record fails to establish JBC knew or should have known of the incident. Hernandez's lead pipe fitter position was not shown to be supervisory whose knowledge is imputed to JBC.

Without Hernandez's statement, a violation of § 1926.651(e) is not established.

Willful Citation No. 2, Item 1 - Alleged Violation of § 1926.652(a)(1)

The citation alleges JBC failed to utilize a cave-in protection system to protect employees in an excavation 6 feet, 8 inches in depth. 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 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 agree the soil at the excavation in issue was Class C soil.² According to JBC, it considers all soils in Florida as Class C (Tr. 247). JBC does not assert and the record does not show the excavation was dug in stable rock or was less than 5 feet in depth. Therefore, the excavation was not exempt from the cave-in protection requirements of § 1926.652(b) or (c).

The excavation was 21 feet long, 20 feet wide, and 6 feet, 8 inches deep. The excavation's walls were almost vertical; not sloped to 34 degrees (Tr. 222). JBC does not dispute the excavation lacked a cave-in protection system such as proper sloping or shoring (Tr. 78, 82, 222, 266-267). Although a trench box was present on site, it was not used in the excavation (Tr. 223).

²Class C soil is considered cohesive soil with an unconfined compressive strength of 0.5 ton per square foot (tsf) or less or granular soils including gravel, sand, and loamy sand or submerged soil or submerged rock that is not stable or material in a sloped, layered system where the layers dip into the excavation. Appendix A, to Subpart P, § 1926.650 *et. seq.*

In the center of the excavation, JBC was constructing a cement junction box where several drain pipes were joined (Tr. 243). The junction box was 6-feet, 8-inches square and approximately 5 feet, 6 inches high (Tr. 245).

JBC stipulates a violation of § 1926.652(a)(1). JBC does not dispute the depth of the excavation exceeded 5 feet and it did not have the required cave-in protection (Tr. 20). There is no dispute employees were in the excavation constructing the junction box. Porterfield stated six employees were in the excavation (Exh. C-4, pp. 1-2).³ Vason and Preslar agreed that three employees were working in the excavation (Exhs. C-2, C-11, p. 3, C-12, p. 1).

JBC argues that because the supervisors were adequately trained in excavation safety and it enforced all policies relating to excavation safety, the supervisors' knowledge of the violative condition should not be imputed to JBC (JBC Brief, p. 11). However, if their knowledge is imputed, JBC asserts a violation is still not appropriate based on supervisory employee misconduct.

Generally, the actual knowledge of a foreman or other supervisory employee is imputed to the employer. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996) (“When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfied her burden of proving knowledge without having to demonstrate any inadequacy in the employer’s safety program.”). An employer can avoid imputation of knowledge based on supervisory misconduct by establishing that it “took reasonable measures to prevent the occurrence of the violation.” *Dover Elevator Co.*, supra. at 1286.

In this case, JBC concedes that despite its training and enforcement efforts, project superintendent Porterfield misapprehended what the OSHA cave-in protection standard requires. Porterfield testified he erroneously believed the standard applied only to trenches and not this excavation because of its size; 20 feet wide, 21 feet long (JBC Brief, p. 12).

³During the hearing, JBC argued Exhibits C-4 and C-11 should be suppressed because Porterfield and Vason were not allowed to have a management representative present when interviewed by Lasavage on March 27, 2006 (Tr. 56, 194, 229, 263). There is no objection to Porterfield and Vason statements on March 29, 2006 because representatives were present during these interviews (Exhs. C-5, C-12). Exhibit C-4 and C-11 were admitted into evidence based on Lasavage’s denial that he did not allow representatives; the failure of Porterfield and Vason to exercise their right to refuse to be interviewed; and, the lack of prejudice shown by JBC (Tr. 92, 230). Also, it is noted Porterfield and Vason did not dispute anything in their statements (Tr. 194).

JBC's knowledge is established by showing knowledge of the physical conditions constituting the violation; it is not required that it understood the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). JBC does not dispute its supervisory personnel on site were aware of the conditions of the excavation at the time of OSHA's inspection. Both the project superintendent and foremen were designated competent persons. The superintendent and foremen were present at the excavation while the work was performed on March 20, 2006, and thus were aware of the excavation's physical condition and its lack of cave-in protection.

As supervisors, their knowledge of lack of cave-in protection is imputable to JBC.

Unpreventable Employee Misconduct

JBC asserts the violation of § 1926.652(a)(1) was due to unpreventable supervisory/employee misconduct (Tr. 20-21, 26). To establish the affirmative defense of unpreventable employee misconduct, JBC must show (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated the 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. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

When supervisory employees are involved in the alleged misconduct, the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under their supervision. *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). "In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Danis-Shook Joint Venture XXV*, 19 BNA OSHC 1497 (No. 98-1192, 2001), *aff'd* 319 F.3d 805, 811 (6th Cir. 2003).

Although JBC has a written safety program, provides safety training to employees, invests in safety equipment, and disciplines wrongdoers, JBC failed to show its work rules, training, and monitoring of this worksite was adequate to address noncompliance in this case (Exhs. R-8, R-9; Tr. 284-285). JBC's unpreventable supervisory/employee misconduct defense is rejected.

JBC's failure to comply with the cave-in protection requirements was not solely due to superintendent Porterfield's misconduct. JBC had three supervisors (a project superintendent, senior

foreman, and pipe foreman) on the project who were aware of the lack of cave-in protection. The three supervisors were also designated the “competent persons” who should have known the excavation cave-in protection requirement for this project (Tr. 32, 33, 74).

Porterfield erroneously believed the excavation was safe without cave-in protection because of its size. Foreman Preslar stated he thought the site looked safe because “the hole was so large” (Exh. C-3, p.2). Foreman Vason testified he was unaware it violated OSHA standards because of the size of the excavation (Tr. 199). However, Vason recognized the excavation was unsafe because of the vertical walls (Tr. 191). He did not tell anyone or take corrective action because he did not believe it was his responsibility (Tr. 192). He speculated that “if I had voiced my opinion to him [Superintendent Porterfield] at the time of him performing his job, tempers might have flared, and I just minded my business and went to the other end” (Tr. 192).

JBC does not dispute the excavation should have had a cave-in protective system. The erroneous interpretation by superintendent Porterfield and foremen show a lack of adequate training. JBC’s work rule in this case generally refers the employees to OSHA’s excavation regulations. The work rule states:

Employees will not enter excavations in excess of five feet deep, except in cases where the excavation conforms to the requirements of the OSHA regulations. This shall include placing excavation spoil at least two feet away from the excavation. (Exh. R-8, p. 8, III-C).

The work rule allowed the superintendent to avoid requiring cave-in protection for employees working in an excavation in excess of 6 feet, 8 inches in depth. Based on his training, Porterfield mistakenly decided the excavation did require cave-in protection (Tr. 223). Despite his reprimand, Porterfield still believes the excavation complied with OSHA standards even though JBC acknowledges cave-in protection should have been installed (Tr. 20, 237). Porterfield’s misunderstanding reflects serious deficiencies in JBC’s training and work rules.

Based on the number of supervisors/employees involved in the misconduct, an employer is not entitled to argue unpreventable misconduct. “Where all the employees participating in a particular activity violate an employer’s work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.” *Gem Industrial Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) aff’d, 149 F.3d 1183 (6th Cir. 1998). In addition to the three supervisors, there

were at least three employees in the excavation who apparently did not comply with JBC's work rule.

With regard to its disciplinary program in this case, JBC disciplined the supervisors for failing to exercise proper judgement; not for violating OSHA standards or a JBC's work rule (Tr. 273, 291, 293). This tacitly shows JBC's recognition of deficiencies in its work rule and training.

Willful Classification

JBC's violation of § 1926.652(a)(1) is classified as "willful." The Review Commission considers "[i]t 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). It is not enough for the Secretary to show an employer was aware of the conduct or conditions constituting the alleged violation. "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).

JBC argues the superintendent believed in good faith that cave-in protection was not required in such a large excavation. Porterfield stated "I feel the trench box was not necessary due to the width of the excavation which allowed us to have...an excess of 1 to 1 ½ slope" (Exh. C-4, p.1). Porterfield testified he did not intentionally violate the standard or put employees at risk of an unsafe condition (Tr. 224).

JBC's good faith argument in this case, however, does not excuse it of the willful violation of §1926.652(a)(1). The test of good faith for these purposes is objective--whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances." *General Motors Corp., Electro-Motive Division*, 14 BNA OSHC 2064, 2068 (No.82-630 *et al.*, 1991). An employer's good faith disregard of the regulations is irrelevant under the intentional disregard or plain indifference test. See *Fluor Daniel*, 19 BNA OSHC 1529, 1534 (No. 96-1729, 2001) *aff'd* 295 F.3d 1232, 1246 (11th Cir. 2002). Also, an employer's good faith belief that its alternative program was superior to OSHA's requirement is irrelevant to willful characterization and holding employer committed willful violation because it knew of the standard but chose not to comply. *Reich v. Trinity Industries, Inc.* 16 F.3d 1149, 1155 (11th Cir. 1994).

In this case, the excavation was 21 feet long, 20 feet wide and 6 feet, 8 inches in depth. Based on his testimony, Porterfield made a conscious decision not utilize cave-in protection. His belief that cave-in protection was not required lacks substantial basis in fact and law. The standard by its terms applies to all excavations except in stable rock or less than 5 feet in depth. The cave-in protection standard is not limited to trench excavation. The employees constructing the junction box in the center of the excavation were exposed to a cave in hazard. The employees were within 6 - 7 feet of the excavation's walls to construct the junction box and at the walls to egress from the excavation.

JBC's three supervisors made a knowing, voluntary decision to permit the employees to work in the excavation that was not protected against cave-ins. The supervisors ignored OSHA's clear requirement which applies to all excavations; not just trenches. Other than the size of the excavation, Porterfield did not identify his basis for not requiring cave-in protection such as lack of employees' exposure. The superintendent was on site most the day and the two foremen were on site all day. It is noted JBC's superintendent ignored the concerns of local Fire and Rescue who were on site earlier that day. Superintendent Porterfield substituted his judgment for the provisions of the excavation standard and therefore cannot escape the conclusion that he acted voluntarily with either intentional disregard or plain indifference to the standard. See *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978)(rejecting employer's argument that willfulness was negated because it unilaterally determined that compliance was not necessary). Also see, *J. A. M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1356-1357 (11th Cir. 2000)(even if the employer believed in good faith that the workers had the skill and experience to avoid the hazards, it would not excuse its intentional disregard or plain indifference to its own duties under OSHA).

A willful violation of § 1926.652(a)(1) is established.

Penalty Determination

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty under § 17(j) of the Occupational Safety and Health Act, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

JBC is not entitled to credit for size because it is a large employer with approximately 500 employees (Tr. 62, 277). However, JBC is entitled to credit for history and good faith. JBC has not

received an OSHA citation in the proceeding three years. Its safety program is considered good with written safety rules (Exh. R-8: Tr. 62, 284-285). JBC spends approximately \$700,000.00 per year on safety training, safety equipment, two full time safety managers and an outside consulting firm to conduct site inspections (Tr. 284).

A penalty of \$1,000.00, is reasonable for serious violation of § 1926.651(c)(2) (Citation No. 1, Item 1). JBC had used a ladder earlier to egress the excavation. However, at the time of OSHA's inspection, the ladder was at the junction box and not available to egress the excavation. Lasavage observed one employee climbing the vertical wall of the excavation which contained loose soil to exit the excavation.

A penalty of \$19,000.00, is reasonable for willful violation of § 1926.652(a)(1) (Citation No. 2, Item 1). Employees were in an excavation which was 6 feet, 8 inches in depth. The excavation lacked a cave-in protection system. Three supervisors were present and aware employees were working in an unprotected excavation.

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

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, Item 1, alleged serious violation of § 1926.651(c)(2), is affirmed and a penalty of \$1,000.00, is assessed.
2. Citation No. 1, Item 2, alleged serious violation of § 1926.651(h)(1), is vacated and no penalty is assessed.
3. Citation No. 1, Item 3, alleged serious violation of § 1926.651(e), is vacated and no penalty is assessed.
4. Citation No 2, Item 1, alleged willful violation of § 1926.652(a)(1), is affirmed and a penalty of \$19,000.00, is assessed.

/s/ **Ken S. Welsch**
KEN S. WELSCH
Judge

Date: June 29, 2007