

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

Secretary of Labor,

Complainant

v.

A. G. Carter Construction Company,

Respondent.

OSHRC Docket No. **08-0236**

Appearances:

Kristina T. Harrell, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Danny B. Joyner and Rick Ackerman, Safety Consultants, Safety & Security Consultants, Inc., Brewton,
Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

A. G. Carter Construction Company (AGC) is engaged in earthmoving and the installation of underground utilities in Prattville, Alabama. On August 15, 2007, AGC was installing the underground sewer and water lines for a new residential development when the site was visited by the Prattville Fire Department. Although the Fire Marshal considered the trench used to install the utilities unsafe, he accepted AGC's representation of abatement. On August 22, 2007, after receiving a second report of an unsafe trench at the site, the Fire Marshal contacted the Occupational Safety and Health Administration (OSHA) who inspected the site that day. As a result of OSHA's inspection, AGC received serious and willful citations on January 22, 2008.¹

¹OSHA issued AGC a willful citation on April 17, 2008, involving an inspection along Wetumpka Road, Prattville, Alabama. The citation also included violations of § 1926.651(j)(2) and § 1926.652(a)(1). AGC contested this citation (OSHRC Docket No. 08-0624) and a hearing was held on August 15, 2008. The decision was issued February 2, 2009.

The serious citation alleges AGC violated 29 C.F.R. § 1926.20(b)(1) (Item 1) for failing to maintain a general safety and health program; 29 C.F.R. § 1926.21(b)(2) (Item 2) for failing to instruct each employee in the recognition and avoidance of unsafe conditions; 29 C.F.R. § 1926.651(c)(2) (Item 3) for failing to have a safe means of egress from the trench; and 29 C.F.R. § 1926.651(h)(1) (Item 4) for failing to prevent water accumulations in the trench. The serious citation proposes total penalties of \$7,050.00.

The willful citation alleges AGC violated 29 C.F.R. § 1926.602(a)(4) (Item 1) for operating a front end loader with defective brakes; 29 C.F.R. § 1926.652(j)(2) (Item 2) for failing to keep the spoil pile at least two feet from the edge of the trench; and 29 C.F.R. § 1926.652(a)(1) (Item 3) for failing to protect employees in the trench from cave-ins by an adequate protective system. The willful citation proposes a penalty of \$7,000.00 for each alleged violation.

After timely contesting the citations, a hearing was held in Montgomery, Alabama on August 14, 2008. AGC was represented by two safety consultants. The parties stipulated jurisdiction and coverage (Tr. 5). Also, the parties stipulated the violations as alleged in the citations including the applicability of the cited standards, AGC's noncompliance with the cited standards, employees' exposure to the cited unsafe conditions, and AGC's knowledge of the cited unsafe conditions (Tr. 171-180).

AGC denies the willful classifications and the reasonableness of the proposed penalties. The parties filed post hearing briefs on these issues.²

For the reasons discussed, the willful classifications for Items 2 and 3 are affirmed and total penalties of \$16,000.00 are assessed. The willful classification for Item 1 is amended to serious.

Background

AGC is a small earthmoving and underground utility contractor in Prattville, Alabama. AGC has less than five employees. The company is owned by Alton G. Carter who has operated the business for 54 years. Carter is 71 years old and has a third grade education (Tr. 278-280).

On August 15, 2007, after receiving a telephone call from a citizen about an unsafe trench at the end of Pine Street, Fire Marshal Dallis Johnson of the Prattville Fire Department asked Lt.

²Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

Ted Hughes to visit the site and assess the potential hazards. Upon entering the site, Lt Hughes observed an AGC employee in the deepest part of the trench installing a water line. Lt Hughes called Fire Marshal Johnson to the site (Exhs. C-1, C-2; Tr. 22, 27-28).

After observing the trench, Fire Marshal Johnson was concerned about the lack of ladders in the trench, the failure to have a trench box or sloping of the walls to prevent cave-ins, the nearness of the spoil pile to the trench's edge, and the accumulation of water in the trench from artesian wells. Johnson estimated the trench was approximately 10 feet deep, 4 to 6 feet wide, and 100 feet long. While on the site, he observed the spoil pile sloughing off into the trench (Exhs. C-4, C-6; Tr. 30, 34, 40, 42, 74, 77).

When Carter arrived at the site, he agreed that "he knew what needed to be done and that he was going to talk with his guys, and they were going to get a trench box out on the site and that the corrections would be made to ensure that it was a safe site, and that it would be taken care of" (Tr. 48-49, 76). Based upon Carter's representations, Johnson left the site but instructed his officers to monitor the situation (Tr. 50-51).

After Lt. Hughes notified him of the lack of improvement, Fire Marshal Johnson returned to the Pine Street site on August 22, 2007. A new trench had been dug which ran perpendicular to the trench observed on August 15. Johnson estimated the new trench was approximately 10 feet deep, 3-5 feet wide and 100 feet long. He observed an AGC employee in the deepest part of the trench and the spoil pile, 4-6 feet high, within two feet of the trench's edge. The trench also lacked a ladder and a trench box, although one was located within 50 feet (Tr. 51-53, 117).

Fire Marshal Johnson notified OSHA on August 22, 2007 of the conditions because he was no longer convinced AGC would comply and he lacked the authority to stop the work (Tr. 53-54). OSHA safety compliance officer Brian Smith, who was working nearby, met with Johnson and went to the AGC trench site. When he arrived at approximately 9:15 a.m., Smith observed three employees leaving the trench. He saw one employee climbing the trench's wall on his hands and knees. The employees had been working in the trench for about 30 minutes (Exh. C-8; Tr. 55, 97-99, 139).

When Carter arrived at the site, Smith presented his credentials and explained the conditions which he considered unsafe. Smith photographed and measured the trench. The trench was 11 feet 4 inches deep, 3 feet wide at the bottom, 4 feet wide at the top, and 85 feet long. The trench's east

and west walls were near vertical where the employees were working. There was no ladder in the trench. Although a soil analysis showed Type B soil, Smith classified the soil as Type C because of the water accumulation in the trench (Tr. 99, 104-106, 108-109, 117).

As a result of the OSHA inspection, the serious and willful citations were issued to AGC on January 22, 2008.

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.* were applicable to AGC's trenches on August 15 and 22, 2007 and that the conditions at the trenches did not comply with the cited standards as alleged in the serious and willful citations. AGC, also, does not dispute it knew of the cited conditions and its employees were working in the excavations, exposed to the alleged cited standards (Tr. 171-180).

The parties agree the issues for determination involve the reasonableness of the proposed penalties and the application of the willful classification.

In determining a reasonable penalty, the Review Commission is the final arbiter in assessing a penalty for violations under the Occupational Safety and Health Act (Act). Under § 17(j) of the 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. The gravity is considered the principal factor. In evaluating gravity, it "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 following adjustment factors are applied in assessing a penalty on each citation item. With 3-5 employees, AGC is considered a small employer and entitled to credit for size. AGC is also entitled to a penalty reduction for history because there is no evidence of prior OSHA citations during its 54 years in business. Although AGC was cooperative during the inspection, it is not entitled to good faith credit because of the willful violations and the lack of a safety program and training. Throughout the hearing, Mr. Carter seemed not interested in the proceedings and disengaged from his representatives. He showed respect to the court, but it is unclear whether he appreciated the seriousness of the situation.

In determining the appropriateness of the “willful” classification, the Review Commission considers “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). The Secretary needs to show more than 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).

A willful violation, however, is not appropriate if the employer acted in good faith. The test of good faith is whether the employer’s belief concerning a factual matter or 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).

Serious Citation No. 1
Item 1 - Alleged Violation of § 1926.20(b)(1)

The citation alleges AGC failed to have a safety program. Section 1926.20(b)(1) provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Based upon the parties’ stipulation, AGC did not have a safety program and the violation was serious. CO Smith testified such safety programs could prevent employees’ exposure to unsafe conditions such as cave-in hazards and the lack of adequate brakes on earthmoving equipment (Tr. 194, 210).

Applying the adjustment factors as discussed, a penalty of \$500.00 is reasonable. AGC's business is underground utility installation. Its employees were observed on two occasions, working in deep trenches with water accumulation and the lack of cave-in protection, safe egress, and spoil piles at the edge. These conditions may have been prevented if AGC's had implemented a safety program.

Item 2 - Alleged Violation of § 1926.21(b)(2)

The citation alleges AGC failed to instruct its employees in the recognition and avoidance of unsafe conditions. Section 1926.21(b)(2) provides:

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.

Based upon the parties' stipulation, AGC did not instruct employees in the unsafe conditions to which they may be exposed during their normal work. Carter testified safety training was provided to employees but this was in the early 1970s (Tr. 267). As evident by the number of unsafe conditions observed on August 15 and 22, the need for current employee safety training is demonstrated. Such regular safety instruction to employees may have prevented the unsafe trench conditions.

Applying the adjustment factors as discussed, a penalty of \$500.00 is reasonable. The lack of trench cave-in protection, ladders, brakes on earthmoving equipment and means to reduce water accumulations demonstrates the need for AGC's employees to receive safety instruction.

Item 3 - Alleged Violation of § 1926.651(c)(2)

The citation alleges AGC failed to provide a ladder or other means of egress from the trenches on August 15 and 22, 2007. 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.

Based upon the parties' stipulation, there were no ladders or other safe means of egress from the trenches on August 15 and 22, 2007. The trenches were approximately 10-11 feet deep and employees were observed in the trenches. The lack of ladders was discussed with Carter on August 15, 2007 prior to OSHA's inspection. Carter assured Fire Marshal Johnson corrections

would be made. However, when Fire Marshal Johnson returned to the site on August 22, 2007, there was still no ladder in the trench. When CO Smith arrived, three employees were exiting the trench by climbing the near vertical walls.

Applying the adjustment factors as discussed, a penalty of \$1,000.00 is reasonable. Four employees were observed in the trenches on two separate occasions. The walls of the trenches were near vertical and more than 10 feet.

Item 4 - Alleged Violation of § 1926.651(h)(1)

The citation alleges AGC 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.

Based upon the parties' stipulations and the witnesses' observations, the presents of running water in the bottom of the trenches on August 15 and 22, 2007 is established (Exhs. C-5, C-6). The water came from artesian wells. Although Carter agreed to make corrections on August 15, the water was still accumulating in the August 22 trench. Employees were in the trench installing the utilities. Because of the water, the soil classification for the trenches was Type C, the most unstable soil classification.

Applying the same adjustment factors as discussed above, a penalty of \$1,000.00 is reasonable for violation of § 1926.651(h)(1). AGC had a pump in the August 15 trench (Tr. 43-44, 283). However, the pump was obviously inadequate based upon the amount of water throughout the trench. There is no showing a pump was present in the August 22 trench.

Willful Citation No. 2
Item 1 - Alleged Violation of § 1926.602(a)(4)

The citation alleges a front end loader did not have adequate brakes. Section 1926.602(a)(4) provides:

All earthmoving equipment mentioned in this 1926.602(a) shall have a service braking system capable of stopping and holding the equipment fully loaded, as specified in Society of Automotive Engineers SAE-J237, Loader Dozer-1971, and J319b, Scrapers-1971. Brake systems for self-propelled rubber-tired off-highway equipment manufactured after January 1, 1972 shall meet the applicable minimum performance criteria set forth in the . . .

Based upon the parties' stipulation, AGC's violation of § 1926.602(a)(4) is established. With regard to the willful classification, the record shows that on August 22, 2007, CO Smith observed a front end loader in operation. When he inquired about the brakes, Carter explained the loader had brakes but they were not in good working order (Tr. 161-162). Foreman Wayne Laister, who also knew the brakes were not working, told Smith the "employees were instructed by Mr. Carter not to use the front end loader on a public roadway because it did not have brakes" (Tr. 184). According to AGC, the loader was used about eight hours a week at the worksite (Tr. 166, 190). The loader was observed working within 15 feet of the trench (Tr. 187). When asked by Smith to test the brakes, the operator said "what brakes." He claimed the loader was stopped by lowering the bucket to the ground (Tr. 162-163). Smith understood the brakes had been in same condition for over a year. Also, AGC owned another loader that could have been used on the site (Tr. 183, 190).

A willful classification for AGC's violation of § 1926.602(a)(4) is not established. Although the brakes were inadequate, Smith did not test the brakes to determine whether they were still serviceable. The record fails to show AGC's heightened awareness of the illegality of the condition. Carter testified the loader had been in the shop to fix the brakes and that he understood the loader would be working in an area where employees were not working (Tr. 284-285).

A penalty of \$1,000.00 is reasonable for AGC's serious violation of § 1926.602(a)(4). The brakes on the loader were inadequate. Although Smith did not test the brakes, he observed the operator lowering the bucket to stop the loader. Also, the loader was observed working within 15 feet of the trench while employees were in the trench.

Item 2 - Alleged Violation of § 1926.651(j)(2)

The citation alleges the spoil pile was within 2 feet of the trench walls. Section 1926.651(j)(2) provides:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Based upon the parties' stipulation, a violation of § 1926.651(j)(2) is established. With regard to the willful classification, the record shows that on August 15, 2007, Fire Marshal Johnson advised Carter about the safety concerns posed by the spoil pile located on the edge of the trench. One of AGC's employees was working in the deep part of the trench, near the spoil pile. Johnson witnessed soil from the pile falling into the trench. In his conversations with Johnson, Carter appeared to understand the dangers posed from spoil piles on the side of the trench (Tr. 49-50).

On August 22, 2007, Carter testified he was trying to save the contractor money (Exh. C-14; Tr. 283). He admitted the trench was not safe with spoil pile on the trench edge (Tr. 155). However, AGC allowed three employees to work in a trench, more than 11 feet deep. The condition regarding the location of the spoil pile existing on August 22 was identical to the condition on August 15, 2007. This establishes AGC's plain indifference to employees' safety by locating the spoil pile on the side of the trench. The willful classification is appropriate.

A penalty of \$5,000.00 is reasonable for willful violation of §1926.651(j)(2). Three employees were in the trench for at least thirty minutes. The spoil pile, 4-6 feet high, was at the trench edge where the employees were working. The employees had been in the trench for at least 30 minutes.

Item 3 - Alleged Violation of § 1926.652(a)(1)

The citation alleges AGC failed to utilize a cave-in protection system to protect employees in an excavation 11 feet 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.

Based upon the parties' stipulation, AGC's violation of § 1926.652(a)(1) is established. With regard to the willful classification, the record shows that on August 15, 2007, Fire Marshal Johnson discussed with Carter the lack of a protective system in the trench to prevent cave-ins. The trench was approximately 10 feet deep and the walls were near vertical. An employee was in the deepest part of the trench. Adding to the cave-in hazard, there was water accumulating in the bottom of the trench and the spoil pile was on the side of the trench. Soil from the spoil pile was observed falling into the trench. Carter told Johnson that he was "going to get a trench box out on site and that the corrections would be made to ensure that it was a safe site." (Tr. 49). Johnson believed Carter understood the need for cave-in protection and the hazard to its employees.

Despite Carter's promise, the trench on August 22, 2007 also lacked cave-in protection. Although a trench box was located within 50 feet of the trench, it was not used in the trench. AGC was trying to save the contractor money. Carter knew the trench was not safe. Three employees were in the trench. The conditions existing on August 22 regarding the lack of cave-in protection were nearly identical to those conditions on August 15, 2007. To show awareness of the hazard, Carter told CO Smith that he had witnessed trench collapses and accidents in the past. He acknowledged that AGC had three trench cave-ins in the past. In one collapse, an employee sustained broken ribs when the side of a 3-foot deep trench fell on him (Exh. C-17; Tr. 155-156).

The willful classification is appropriate for AGC's violation of § 1926.652(a)(1) based on AGC's plain indifference to the lack of cave-in protection and employee safety. As long as employees were in an unprotected trench, Carter's testimony the employees were not laying pipe on August 15 but were "mucking" the area (digging out stumps and grading) is not relevant (Tr. 282-283). The employees were still exposed in a trench, 11 feet deep, without cave-in protection.

A penalty of \$7,000.00 is reasonable for AGC's willful violation of § 1926.652(a)(1). Carter was at the site most the day and his foreman Laister was on the site all day. Three employees were in the trench for at least thirty minutes. Carter understood the need for cave-in protection and ignored the concerns of the local Fire Department.

**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 § 1926.20(b)(1), is affirmed and a penalty of \$500.00 is assessed;
2. Citation No. 1, Item 2, alleged serious violation of § 1926.21(b)(2), is affirmed and a penalty of \$500.00 is assessed;
3. Citation No. 1, Item 3, alleged serious violation of § 1926.651(c), is affirmed and a penalty of \$1,000.00 is assessed;
4. Citation No. 1, Item 4, alleged serious violation of § 1926.651(h)(1), is affirmed and a penalty of \$1,000.00 is assessed;
5. Citation No. 2, Item 1, alleged willful violation of § 1926.602(a)(4), is affirmed as serious and a penalty of \$1,000.00 is assessed;
6. Citation No. 2, Item 2, alleged willful violation of § 1926.651(j)(2), is affirmed and a penalty of \$5,000.00 is assessed; and
7. Citation No 2, Item 3, alleged willful violation of § 1926.652(a)(1), is affirmed and a penalty of \$7,000.00 is assessed.

Date: February 13, 2009

 /s\ Ken S. Welsch
KEN S. WELSCH
Administrative Law Judge