

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.  
ASM-Sanders, Inc.,  
Respondent.

OSHRC Docket No. **09-1158**

Appearances:

Rolesia B. Dancy, Atlanta, Georgia  
For Complainant

Mary Lou Hill, Greenville, South Carolina  
For Respondent

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

**DECISION AND ORDER**

ASM-Sanders, Inc. (ASM), was the subcontractor for mechanical and HVAC work for a new building on Warner Robins Air Force Base in Warner Robins, Georgia. On March 5, 2009, a polyvinyl chloride (PVC) pipe being tested for leaks exploded, and a section of the pipe struck welder Jacky Brown in the head, killing him. Occupational Safety and Health Administration (OSHA) compliance officer Caliestro Spencer inspected the site. Based upon Spencer's inspection, the Secretary issued two citations to ASM on July 9, 2009.

Item 1 of Citation No. 1 alleges a serious violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), for permitting employees to test a PVC pipe using compressed air. The Secretary proposed a penalty of \$6,300.00 for Item 1. Item 2 of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1926.651(c)(1) for failing to provide a safe means of egress from an excavation 4 feet or more in depth. The Secretary proposed a penalty of \$ 6,300.00 for Item 2.<sup>1</sup>

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<sup>1</sup>At the hearing, the Secretary withdrew Item 3 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.651(i)(1).

Item 1 of Citation No. 2 alleges a willful violation of 29 C. F. R. § 1926.652(a)(1), for failing to provide an adequate protective system in an excavation 5 feet or more in depth. The proposed penalty for this item is \$ 63,000.00.

ASM timely contested the citations. The court held a hearing in this matter on February 4 and 5, 2010, in Macon, Georgia. The Secretary and ASM have filed post-hearing briefs.

At the hearing, ASM moved to dismiss the complaint, claiming compliance officer Spencer denied ASM its right to accompany Spencer during his inspection. The court deferred ruling on ASM's motion. The parties each addressed the motion to dismiss in their post-hearing briefs. For the reasons discussed more fully below, ASM's motion to dismiss is denied.

ASM contends the Secretary failed to prove it violated the cited standards. In its answer, ASM asserted the affirmative defense of employee misconduct, but did not adduce any evidence of employee misconduct at the hearing or address the issue in its post-hearing brief.

The court vacates Item 1 of Citation No. 1. The court affirms Item 2 of Citation No. 1 and assesses a penalty of \$ 6,300.00. The court affirms Item 1 of Citation No. 2, reclassifies the violation as serious, and assesses a penalty of \$ 7,000.00.

### **Background**

Benham Constructors, LLC, was the general contractor for the construction of a building located at 170 Milledgeville Road at Warner Robins Air Force Base (AFB) in Warner Robins, Georgia. Benham hired ASM as a subcontractor to perform mechanical work and to install chill water lines from the chill water plant to the new building. In March 2009, Greg ("Dawg") Arra was ASM's superintendent on the project, and Andre Maldonado was an ASM worker.

ASM hired Dublin Mechanical to install the underground steam line and perform welding on the project. The Dublin employees on the site were owner Jacky<sup>2</sup> Brown and his helper Adam Westberry. Brown and Westberry were not employees of ASM.

By March 5, 2009, ASM had already installed pipe from the chill plant to a highway used for access to the AFB. From the highway, ASM had to install the pipe below pre-existing utilities. Thus, ASM needed to install the pipe at a downward angle. ASM was using 6-inch "Schedule 80"

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<sup>2</sup>In the transcript and briefs, Brown's first name is spelled "Jackie." In the time sheets Brown himself provided to ASM, however, his first name is spelled "Jacky" (Exh. R-6).

PVC pipe, manufactured by Perma-Pipe. The Perma-Pipe was covered with 2 inches of insulation, and another 2 inches of hard casing. ASM used sections of angled transition pipe. ASM had previously (either the day or the week before) discovered a leak in the pipe. On the morning of March 5, 2009, Arra made repairs to the transition pipe. With him were Maldonado, Brown, and Westberry.

Arra used sandpaper to smooth the ends of the pipes to be joined, then treated the sections with solvent and cement. The workers then slid the two sections of pipe together. The workers left for lunch and returned at approximately 12:30 P.M..

After lunch, Brown asked Westberry and Maldonado to help him test the pipe for leaks. Brown asked Westberry to pressurize the line to 100 psi for the test. Brown got into the trench to see if the repair had worked. Maldonado was working outside the trench and above Brown. Arra was working approximately 100 feet away putting bedding into the trench. When the line was pressurized to approximately 70 psi, the pipe exploded and a section of it struck Brown in the head. Maldonado was knocked backwards off his feet. Maldonado called to Arra. Arra told Maldonado to call 911. The pipe then exploded in another location, knocking Arra down as he tried to reach Brown. Emergency personnel arrived at the worksite and entered the excavation. Jacky Brown was pronounced dead at the site.

As daylight was fading on March 5, compliance officer Caliestro Spencer arrived at the worksite. The security police for the U. S. Air Force had secured the site. Spencer decided to begin his inspection the next day. On the morning of March 6, 2009, Spencer held an opening conference with the contractors and subcontractors on the site. He took witness statements from the workers and AFB personnel. Spencer inspected the trench. He took photographs and measurements of the trench. At the location where the employees had been working on March 5, the trench was 5 feet, 8 inches deep, and 5 feet, 1 inch wide.

Based upon Spencer's inspection, the Secretary issued the instant citations on July 9, 2009.

#### **ASM's Motion to Dismiss**

Section 8(e) of the Act states, "[A] representative of the employer . . . shall be given the opportunity to accompany the Secretary or [her] authorized representative during the physical

inspection of any workplace under subsection (a) for the purpose of aiding such inspection.” ASM claims Spencer failed to give Carmine Squatriglia, its representative, the opportunity to accompany Spencer on his inspection. ASM moved to dismiss the citations “for the reason that the evidence shows that the Department of Labor manipulated the situation to exclude ASM from its investigation and to deny them the right to be present during the Department of Labor’s investigation and to take concurrent data and be present during his investigation” (Tr. 424).

Carmine Squatriglia is Director of Environmental Health and Safety for Sanders Brothers, Inc. ASM is a fully owned subsidiary of Sanders Brothers. Squatriglia testified he received a call on March 5, 2009, during which he was informed there had been a fatality at the AFB. Squatriglia arrived at the site late that night and checked into a hotel.

The next morning, Squatriglia went to the worksite and met with Jamie Ahlstrom, Benham’s safety representative, and site manager Gary Weiler. He requested permission to visit the accident site, but was informed that base security had secured the site and was treating it as a crime scene. Squatriglia then went to ASM’s trailer. While he was there, Spencer arrived and held an opening conference with ASM. Spencer had those present sign an attendance sheet. He explained OSHA’s procedures to the ASM employees. Spencer then left the trailer.

At approximately 10:30 a. m., an Air Force representative, David Decker, came to ASM’s trailer and announced the Air Force had released the site to OSHA. Spencer returned to the trailer. Squatriglia stated:

[Spencer] asked to speak privately with either Andy Maldonado or Adam Westberry. . . . [B]efore he left the trailer with Andy Maldonado, . . . I asked him if I could accompany him or be present during the interview, the discussion. And Mr. Spencer informed me that I did not have the right to do that. I reminded him that the man was still my employee and that he was being paid and I was paying him for his time, and I would appreciate the right to be present when he was being interviewed. He, again, refused.

(Tr. 415).

Spencer stated no one from ASM accompanied him on during his inspection. Squatriglia, however, testified that when Maldonado returned to the trailer after Spencer interviewed him, Maldonado told him that he and Spencer “walked around the site and looked at the scene of the accident” (Tr. 415).

Spencer testified he invited Arra to go with him, and that Arra declined. Arra denied that Spencer invited him to accompany Spencer during the inspection, and stated that he would have joined Spencer had he been invited. Arra's testimony is credited over Spencer's on this point.

Squatriglia stated that, once Spencer completed his inspection, he informed Squatriglia that the site was now open to him. Squatriglia went to the accident site and entered the excavation using a ladder. Shortly thereafter, the safety engineer for the Corps of Engineers arrived and informed Squatriglia that the site was closed and everyone had to leave. Squatriglia was allowed to inspect the trench on March 7, 2009.

The record establishes that Spencer did deny Squatriglia the opportunity to accompany him during his inspection of the accident site. Spencer was aware Squatriglia was on the site. They exchanged words regarding Squatriglia's right to be present at the ASM employees' interviews. While Spencer correctly exercised his authority [under § 8(a)(2)] in preventing Squatriglia from attending the interviews, he was put on notice that Squatriglia, as ASM's parent company's safety director, wished to participate in OSHA's inspection.

ASM has failed, however, to establish that it was prejudiced by Spencer's denial of its right to accompany Spencer on his inspection. The Commission has dismissed cases where OSHA failed to give the employer any opportunity to accompany the compliance officer during the inspection, but only when the employer was able to show its defense was prejudiced by OSHA's failure. *Western Waterproofing Co.*, 560 F.2d 947 (8<sup>th</sup> Cir. 1977), *Pullman Pwr. Prods.*, 8 BNA OSHC 1930 (No. 78-4989, 1980) *aff'd* 655 F.2d 41 (4<sup>th</sup> Cir. 1981).

ASM does not claim it was prejudiced by Spencer's failure to include Squatriglia during his inspection. Squatriglia had an opportunity to inspect the trench briefly the day Spencer inspected it, and he was able to complete his inspection on March 7. Squatriglia did not take photographs or measurements of the trench. ASM offers no alternative measurements demonstrating Spencer's were inaccurate. ASM's motion to dismiss is denied.

#### **Citation No. 1, Item 1: Alleged Serious Violation of § 5(a)(1)**

The Secretary alleges ASM committed a serious violation of § 5(a)(1), the general duty clause. Section 5(a)(1) requires that each employer "[s]hall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

In order to prove a violation of section 5(a)(1), the Secretary must show that a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard.

*Arcadian Corporation*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004).

\_\_\_\_\_ In Citation No. 1, Item 1, the Secretary alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of being struck [by] sharp pieces.

Compressed air was used to test PVC . . .

“Among other methods, one feasible and acceptable abatement method to correct this hazard is to:”

[1.] Only use material with shatter resistant properties. (Reference Plastic Pipe Institute document).

2. Follow manufacturer recommendation on application.

On or about March 5, 2009, at 170 Milledgeville Road, Warner Robins Air Force Base, Georgia:

a) Employees were exposed to a struck by hazard when an eight inch insulated PVC pipe chill water system approximately 300 feet long was filled with compressed air to 100 PSI to test for leaks.

The Secretary must prove that a condition or activity in the workplace presented a hazard. The Secretary contends using compressed air to test a PVC pipe creates a hazard to employees. The facts of this case unfortunately provide ample proof that testing the PVC pipe using compressed air did create a hazard. Brown was struck and killed by a piece of pipe being tested.

The Secretary failed to present sufficient evidence to prove ASM had actual or constructive knowledge that pneumatic testing was being done on March 5, 2009. The record establishes Arra had supervised pneumatic testing of PVC pipes at least twice on the site prior to March 5. The citation, however, applies only to the testing conducted on March 5 that resulted in Brown’s death. Arra did not know until the pipe exploded that Brown, owner of respondent’s subcontractor, had taken it upon himself to leak-test the pipe.

Arra testified that after they repaired the pipe that morning, he told Maldonado, Brown, and Westberry that they would not test the pipe until the next day. He was emphatic on this point:

I said we would test it in the morning. . . . I told it to all three of them. They said when do you want to test this pipe, when are we going to do that. I said we're not going to touch that pipe until in the morning. We're going to let it set up and cure out and make sure everything is right. I said, we've got enough to do until tomorrow. We'll check it in the morning. Everything's all right, then we'll bed that in and we'll be able to start on the steam line after that.

(Tr. 284).

When asked how he knew everybody heard and understood his instructions, Arra said:

We were all in the same truck together. Everybody heard me. . . . I talked plain and everybody heard me and everybody said okay.

(Tr. 346-347).

After returning from lunch, Arra and Maldonado went to speak with another contractor about bedding for the pipes. Arra thought Brown and Westberry were preparing the steam line for installation the next day. At some point, Maldonado left Arra with the other contractor and went to help Brown and Westberry. Brown asked Westberry to connect the pipe to the compressor and fill it with air. Westberry stated that testing the pipe that afternoon was Brown's idea and Arra was not present when it occurred.

Knowledge of the March 5 pneumatic testing cannot be imputed to ASM. Only two ASM employees were on site: Arra and Maldonado. Maldonado had no supervisory authority on the site. Arra was ASM's superintendent. He had given explicit instructions not to test the pipe until the next day. It was not foreseeable that Brown would ignore Arra's instructions.

The Secretary has failed to establish ASM had either actual or constructive knowledge that Brown intended to test the pipe on March 5, 2009. Further discussion of Industry or Employer recognition of the hazard is unnecessary in this case since a determination has been made that ASM lacked the requisite knowledge of the violative conditions on March 5, 2009.

The alleged violation of section 5(a)(1) of the Act is vacated.

**Citation No. 1, Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.651(c)(2)**

The Secretary has the burden of proving the violation by a preponderance of the evidence.

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.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The standard at 29 C. F. R. § 1926.651(c)(2) provides:

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.

In Citation No.1, Item 2, the Secretary alleges:

29 C. F. R. § 1926.651(c)(2): A stairway, ladder, ramp, or other safe means of egress was not located in trench excavations that were 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:

On or about March 5, 2009, at 170 Milledgeville Road, Warner Robins Air Force Base, Georgia:

a) Employees were exposed to a cave-in hazard when a ladder was not provided for them to access/egress a trench approximately 6 feet deep.

#### (a) Applicability of the Standard

The cited standard is found in Subpart P (Excavations) of OSHA's construction standards. The standard at 29 C. F. R. § 1926.650(a) provides, "This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." The trench at issue was more than 4 feet in depth. The cited standard applies to the trench.

#### (b) Noncompliance with the Standard's Terms

The Secretary contends ASM failed to provide a safe means of egress from the trench. ASM disputes this contention, arguing that (1) employees safely exited the trench using pre-existing utilities in the trench as steps, and (2) it provided a ladder that was located in the trench within 25 of where its employees were working.

The width of the trench was crossed by a number of pipes, cables, and a large concrete electrical duct bank (Exh. C-10). The working space in the trench was cramped due to the various utilities. ASM chose not to place a ladder in the immediate area of the trench where the employees

were working. Instead, Arra, Brown, and Maldonado “climbed on the pipes, stepped on the electrical duct bank, and got out of the trench” (Tr. 36).

ASM argues the pipes and duct bank provided a safe means of egress. Spencer testified otherwise, stating that the use of the utilities is not safe because “anytime you stand on utilities, utilities can burst, break, crack, exposing you to another hazard. . . . You crack the sanitary sewer line, you’ve got the trench filling with water” (Tr. 37).

The court agrees with Spencer’s assessment. The pre-existing utilities were not designed as a means of egress. ASM ran the risk of damaging the utilities and creating additional hazards for its employees. Furthermore, the use of the utilities is not the equivalent of the use of a ramp or a ladder. A ramp provides an easily walkable surface, that gradually slopes to safe ground. A ladder projects upwards from the top of the trench wall, providing employees handholds to grab above the trench. In the event of a cave-in, employees could use the ladder to pull themselves up and out of the trench. The pipes and the duct bank, however, all lie beneath the top of the trench wall. In the event of a cave-in, employees would have no means of pulling themselves up. If they were partially engulfed by dirt, they would have nothing to grab, but could only claw at the dirt walls. It is concluded the use of the utilities as steps was not a safe means of egress.

ASM claims it had a ladder in the trench on the other side of the utilities while its employees worked in the trench. Arra stated the ladder was located approximately 10 feet away from where the employees were working, on the other side of a chain link fence that crossed the top of the trench. David Bostick is an EMT for Houston Medical Center, a private hospital contracted to provide ambulance service for the AFB. He responded to the 911 call made by Maldonado. Bostick stated there was no ladder in the trench when he arrived at the site. He asked a man he assumed was a worker (he was wearing a hard hat) for a ladder. Bostick stated the worker “brought it over to that part of the ditch for me to climb down into” (Tr. 161).

Assuming the ladder was 10 feet away on the other side of the utilities, it was not readily accessible for an emergency situation. Arra described how he would access the ladder if he needed it:

We would step on the duct bank, step down and reach right there under the fence and drug it right under to us. I mean, it wasn’t no big deal. We had done it before if we needed it. . . . We could have stepped on this pipe, stepped on the duct bank and then

step back down on the ground and just reach right there and grab it and just drag it to us. Because on the fence, there was a big hole under it.

(Tr. 313-314).

Arra's scenario is a multi-step process which culminates in the employee actually dragging the ladder under the fence and then setting it up. This process is unnecessarily complicated in the face of an emergency. Even if the ladder was located where Arra said it was, employees were impeded from reaching it by the various utilities crossing the trench. The Secretary has established ASM failed to comply with the standard.

(c) Employee Exposure

Arra, Maldonado, and Brown worked in the trench on March 5, 2009. They were exposed to the hazard of being in a trench during a cave-in without a safe means of exit.

(d) Employer Knowledge

Arra was ASM's superintendent on the site. He was one of the employees using the utilities to exit the trench. His knowledge of this means of egress is imputed to ASM. *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program").

The Secretary has established ASM's violation of 29 C. F. R. § 1926.651(c)(2). The Secretary classified Item 2 as serious. Under § 17(k) of the Act, a serious violation exists "if there is a substantial probability that death or serious physical harm could result from" the violative condition. It is well-established that cave-ins are highly dangerous and often fatal. Item 2 was properly classified as serious.

**Citation No. 2, Item 1: Alleged Willful Violation of 29 C. F. R. §1926.652(a)(1)**

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

In Citation No. 2, Item 1, the Secretary alleges:

29 C. F. R. § 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C. F. R. § 1926.652(c). The employer had not complied with the provisions of 29 C. F. R. § 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one half horizontal to one vertical (34 degrees measured from the horizontal): On or about March 5, 2009, at 170 Milledgeville Road, Warner Robins Air Force Base, Georgia:

- a) Employees working in a trench approximately 6 feet deep were not protected from a possible cave-in when a protective system (trench box or sloping) was not used.

#### (a) Applicability of the Standard

The standard at 29 C. F. R. § 1926.652(a)(1) applies to all open excavations made in the earth's surface. It is undisputed that the cited standard applies to ASM's trench at the worksite.

#### (b) Noncompliance with the Standard's Terms

ASM hired a subcontractor, PIC, to excavate the trench. PIC used a method called hydro-excavation to dig. Hydro-excavation is used when excavating around existing utilities because the use of conventional machines might damage the utilities. In hydro-excavation, water from a high-pressure wand cuts into the dirt, which is then vacuumed out into a vacuum truck. Arra and Maldonado used shovels to clear dirt from the utilities in the trench by hand. In addition to being superintendent, Arra was ASM's competent person on the site. Arra took no measurements of the excavation (which exceeded 200 feet in length), but "eyeballed" its depth based on where the top of the wall came to on his torso. Arra testified the trench was chest high to him in the area ASM was working on March 5, and thus he did not believe it exceeded 5 feet. Squatriglia took no independent measurements of the trench, although he had the opportunity to do so.

Spencer measured the depth of the trench to be 5 feet, 8 inches. The trench was excavated in soil that had previously been excavated when various utilities were installed. Because the trench

was excavated in previously disturbed soil, the soil is classified as Type C. The walls of the trench were not sloped or shored, and ASM was not using a trench box or any other form of protective system.

Despite taking no measurements of the trench itself, ASM disputes the accuracy of Spencer's measurement. ASM claims Spencer deliberately chose a spot where he could place the end of his measuring tape in a "small scooped-out area" (ASM's brief, p. 29). Exhibit C-3 is a copy of a photograph Spencer took showing the end of the measuring tape at the bottom of the trench. The area ASM refers to as "scooped out" was dug by hand by ASM to clear the area under pipe that is next to the ladder. Arra stated he dug out an area 2 feet wide and 6 inches deep to clear the pipe. Subtracting the extra 6 inches from Spencer's measurement of 5 feet, 8 inches, the trench is still deeper than 5 feet. Arra testified the area shown in Exhibit C-3 is the area where ASM was working on March 5. The pipe shown in the photograph is the one that exploded. Spencer's depth measurement of 5 feet, 8 inches, is credited as accurate.

The Secretary has established ASM violated the terms of 29 C. F. R. § 1926.652(a)(1). The trench exceeded 5 feet in depth and was not sloped, shored, or otherwise protected against a cave-in.

#### (c) Employee Exposure

Arra, Maldonado, and Brown worked in the trench on March 5, 2009. They were exposed to the hazard of being seriously injured or killed in a cave-in.

#### (d) Employer Knowledge

Arra worked in the trench the day of Brown's death. He had supervised digging out the additional space below the pipe. A reasonable person in his position would have been aware the trench wall was probably deeper than 5 feet at that point. Reasonable diligence required Arra to measure the trench wall to ensure the trench was in compliance. Arra had constructive knowledge the trench was in violation of 29 C. F. R. § 1926.652(a)(1).

The Secretary has established ASM was in violation of the cited standard.

#### **Willful Classification**

The Secretary classifies this violation as willful.

A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff’d* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

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

The Secretary contends ASM’s violation is willful because, as ASM’s superintendent and designated competent person, Arra was aware of the requirements of 29 C. F. R. § 1926.652(a)(1), yet violated it anyway. Spencer stated that Jamie Ahlstrom, Benham’s safety representative, had ASM remove its employees from the trench on two separate occasion because it was not properly sloped. The Secretary argues Ahlstrom’s warnings served to heighten Arra’s awareness of the violative conditions in the trench.

The Secretary has overstated her case regarding Ahlstrom’s testimony. Ahlstrom testified that the first time she spoke to Arra about the trench, PIC was in the process of hydro-excavating it. It was PIC’s employees she was concerned about. She took her concerns to Arra because ASM had hired PIC. Ahlstrom stated:

Part of the trench that I talked to them about was over on the east side of Building 201, which is a building that the trench runs behind. And [PIC was] hydro-excavating, and it was quite deep. It was probably about 7-foot deep there, and I spoke with Dawg to have him pull the sides back or talk to the hydro-excavators to pull the trench back to make it safer so that those guys could get down in there and finish hydro-excavating.

(Tr. 182).

Following his conversation with Ahlstrom, Arra told PIC to slope the sides of the trench. The second conversation Ahlstrom had with ASM regarding the trench also involved the PIC

employees. Once again, ASM told PIC to slope the trench, and the company did so. Contrary to Spencer's claims, Ahlstrom never saw ASM's employees in an unsafe trench, and she never ordered Arra to remove ASM employees from the trench.

Ahlstrom observed the trench on March 5, 2009, before ASM's employees and Brown entered it. She did not voice any concerns regarding the safety of the trench.

Based on the record, the court determines the Secretary has not established that ASM's violation of 29 C. F. R. § 1926.652(a)(1) is willful. Arra did not believe the trench was deeper than 5 feet. He was wrong in this assessment, but the record does not establish that he had a conscious disregard or plain indifference for the safety of himself and the other employees. The alleged violation of 29 C. F. R. § 1926.652(a)(1) is affirmed as a serious violation.

### **Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, 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.

No evidence was adduced regarding ASM's size. The Secretary did not present evidence ASM had previously been cited for violations of the Act. ASM demonstrated good faith throughout the proceeding.

*Gravity of Item 2 of Citation No. 1*—The gravity of the violation of 29 C. F. R. § 1926.651(c)(2) is moderately high. The use of the utilities to exit the trench was not a safe means of egress, but did provide some assistance for climbing out of the trench. A penalty of \$ 6,300.00 is assessed for Item 2 of Citation No. 1.

*Gravity of Item 1 of Citation No. 2*—The gravity of 29 C. F. R § 1926.652(a)(1) is very high. Workers were in an unprotected trench in Type C soil. Their work required them to bend over in the trench while working on the pipes. The trench was located near a highway, so that it was subject to the vibrations caused by passing vehicles. A penalty of \$ 7,000.00 is assessed for Item 1 of Citation No. 2.

### **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. Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1) of the Act, is vacated;
2. Item 2 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.651(c)(2), is affirmed, and a penalty of \$ 6,300.00 is assessed;
3. Item 3 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1926.651(i)(1); is withdrawn by the Secretary and is vacated; and
4. Item 1 of Citation No. 2, alleging a willful violation of 29 C. F. R. § 1926.652(a)(1), is affirmed as serious, and a penalty of \$ 7,000.00 is assessed.

/s/

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Judge Stephen J. Simko, Jr.

Dated: July 6, 2010