

Secretary of Labor,  
Complainant,

v.

Anderson Utility Construction, LLC,  
Respondent.

OSHRC Docket No. 99-1261

## APPEARANCES

Frances B. Schleicher, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Michael A. Anderson, Esq.  
Horton, Maddox & Anderson, PLLC  
Chattanooga, Tennessee  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

## **DECISION AND ORDER**

Anderson Utility Construction, LLC (AUC), is in the business of installing underground utility pipes. On May 14, 1999, two members of AUC's crew were seriously injured when the trench in which they were working collapsed at a construction site in Fort Oglethorpe, Georgia. Occupational Safety and Health Administration (OSHA) compliance officer Kurt Petermeyer investigated the accident from May 17 to May 26, 1999. As a result of Petermeyer's inspection, the Secretary issued two citations to AUC on June 28, 1999.

Item 1 of citation no. 1 alleges that AUC committed a serious violation of § 1926.21(b)(2) for failure to instruct each employee in the recognition and avoidance of unsafe conditions. Item 2 of citation no. 1 alleges a serious violation of § 1926.651(c)(2) for failure to provide a ladder or other safe means of egress from the trench.

Item 1a of citation no. 2 alleges a willful violation of § 1926.652(a)(1) for failure to use a protective system in the trench. Item 1b of citation no. 2, which alleged a willful violation of § 1926.651(k)(1) for failure to have a competent person conduct daily inspections of the site, was withdrawn by the Secretary at the beginning of the hearing (Tr. 5).

The parties stipulated to jurisdiction and coverage in their agreed prehearing statement filed on November 29, 1999. The hearing was held on December 1, 1999, in Atlanta, Georgia. AUC denies the alleged violations and asserts the affirmative defense of unpreventable employee misconduct.

For the reasons set out below, the court finds that the Secretary established that AUC's training was inadequate (item 1 of citation no. 1) but failed to establish that AUC did not provide a ladder in the trench (item 2 of citation no. 1). The court also finds that AUC was not using an adequate protective system in the trench, but the violation was not willful (item 1a of citation no. 2).

### Background

Larry Anderson, owner of AUC, had worked in and around trenches for 30 years at the time of the hearing (Tr. 304). Anderson had incorporated AUC approximately 10 months before the accident (Tr. 299).

AUC had been contracted to install an 8-inch sewer line for a newly developed residential area, located at the 2700 block of Lakeview Drive in Fort Oglethorpe, Georgia (Tr. 128). Two other contractors were on the site: a contractor (not named at the hearing) "doing some odd and end jobs" (Tr. 270) and Elite Drilling and Blasting Company, Inc. (Tr. 256). Elite had been on the site for approximately two weeks at the time of the trench collapse, doing the explosive work on the project (Tr. 257, 317).

On the morning of May 14, 1999, AUC had six employees on the site: owner and acting supervisor Larry Anderson; his son Randy; laborer Glenn Mills; Victor (last name unknown); and two pipelayers, brothers Ernesto and Luis Rojas (Tr. 127, 314-315). Mills gathered supplies and equipment for the pipe laying operation and Victor handed the pipe down to the Rojas brothers, who were the only employees actually working in the trench. Larry Anderson was operating the excavator (Tr. 24).

The trench was approximately 69 feet long, 4 feet wide, and 7 to 8 feet deep (Tr. 201). The trench walls were vertical and the trench was dug in type C soil (Tr. 17, 139-140, 275). Elite

was blasting underground rock 300 to 400 feet away (Tr. 265). A trench box was in the trench, but the Rojas brothers were not working inside the trench box (Tr. 31, 38, 41, 43).

On May 14, 1999, the crew began work at approximately 7:00 a.m. At approximately 9:30 a.m., Ernesto Rojas heard Victor say, "Watch out," as an 8-foot long section of the west wall collapsed, trapping the Rojas brothers. The brothers were 10 to 12 feet away from the trench box at the time of the collapse (Exh. C-8; Tr. 147, 206-207)

After working for several hours, rescue personnel were able to extricate Ernesto and Luis Rojas from the trench. Ernesto Rojas suffered a broken pelvis, a punctured bladder, and cuts on his right hand and arm (Tr. 41-42). The record does not detail Luis Rojas's injuries, other than to say "he was hurt in the stomach" (Tr. 40).

#### Citation No. 1

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer 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).

#### Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The citation alleges that employees "were not trained in the hazards associated with working in a trench or excavation." 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.

In determining the scope of an employer's duty under a broadly worded standard such as § 1926.21(b), an employer may reasonably be expected to conform its safety program to any known duties and must include those measures for detecting and correcting hazards that a reasonably prudent employer similarly situated would adopt. *Pressure Concrete Constr. Co.*, 15

BNA OSHC 2011 (No. 90-2668, 1992). Such instructions must address matters specific to the worksite about which a reasonably prudent employer would have instructed its employees. *Id. at* 2016. Section 1926.21(b)(2) contains no additional requirement that an employer effectuate required instructions; the failure to comply with a safety rule cannot establish a violation of § 1926.21(b)(2). *Dravo Engineers and Constructors*, 11 BNA OSHC 2010 (No. 81-748, 1984).

Ernesto and Luis Rojas both stated that AUC failed to provide them with any training in trench safety (Tr. 42, 71, 102, 119-120). It is noted that the Rojas brothers are suing AUC for negligence (Tr. 71).

Compliance officer Petermeyer testified that he interviewed all six AUC employees who were at the site at the time of the accident. He determined that AUC failed to provide the required safety training (Tr. 129-130, 160-161, 192). Specifically, Petermeyer asked Larry Anderson for his training records. In response, Anderson gave Petermeyer documentation showing only his own training. AUC had no written program and held no scheduled safety meetings. There is no evidence of safety rules pertaining to trenches (Tr. 212-213).

Larry Anderson testified that he taught his employees safety “every day” and emphasized that “accidents could happen” (Tr. 274). Anderson concluded that Ernesto Rojas was an experienced pipelayer trained in safety because he came in “with his own hard hat” (Tr. 288). Anderson would instruct employees while the work was in progress, stopping an employee if he saw something wrong. However, he did not, in the words of Petermeyer, “discuss the hazards involved with the trench, what employees need to do if they identify hazards that the employer is not aware of; what things they need to do in case that there are issues with the trench in regards to inaccurate drainage” (Tr. 161). Also, the purpose of the training is to prevent the first accident. Anderson’s reactive approach of instructing an employee *after* observing an unsafe condition is not adequate training that meets the purpose of the standard.

The only detailed instructions Anderson testified to were the ones he gave to Ernesto Rojas when he asked to be the lead pipelayer (Tr. 290):

Anderson: I said, “Listen, you’re in charge. The pipelayer runs the ditch. He’s not only responsible for the pipelaying, he’s responsible for the safety. Anything that might go wrong, he’s down there and he sees firsthand.” That’s the discussion we had before I ever put him down in there.

Q.: And, you made him aware of that. What specific instructions did you give him as the man in charge of the trench to ensure that they worked safely?

Anderson: They're not to come out of that trench box or not to see a ladder out of the back, going out the back of the trench box. Anything that is over the four-foot deep or if it looks like it has a hazard of a cave-in, we need a shoring system in the ditch.

Anderson gave these instructions to Ernesto Rojas only after he asked to be made lead pipelayer. Petermeyer's interviews with the other employees establish that AUC gave no safety training to employees in non-supervisory positions.

"An employer complies with section 1926.21(b)(2) when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards." *Concrete Construction Co.*, 15 BNA OSHC 1614, 1619 (No. 89-2019). Training by former employers does not fulfil this requirement. *Supermason Enterprises, Inc.*, 16 BNA OSHC 1446, 1448 (No. 92-2235, 1993).

The Secretary has established a violation of § 1926.21(b)(2). AUC did not provide information to its employees regarding the nature of trenching hazards or the means of preventing or avoiding trenching hazards. Failing to train employees in trench safety could result in death or serious physical injury should they ignore or not notice hazardous trenching conditions. The violation is serious.

#### Item 2: Alleged Serious Violation of § 1926.651(c)(2)

The Secretary alleges that AUC committed a serious violation of § 1926.651(c)(2), which provides:

A stairway, ladder, ram 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.

The question of whether AUC provided a ladder in the trench was a major point of contention at the hearing. AUC claims that it had a ladder at the site and in the trench the entire time employees were in the trench. The Secretary contends that AUC had no ladder on the site.

The Rojas brothers were adamant that there was no ladder in the trench. They were questioned extensively about this at the hearing. Ernesto Rojas, who is 5 feet 6 inches tall, stated that there was no ladder or ramp in the trench. He entered the trench by jumping into it and exited the trench, he said, by climbing the 7 foot high trench wall (Tr. 17, 21). Ernesto Rojas stated that he had requested a ladder but AUC refused to provide one. He stated emphatically that at no time during the project did AUC place a ladder in the trench (Tr. 61-64). Exhibit R-1 is a photograph of the trench collapse with rescue personnel at the scene. In the foreground is an aluminum ladder. Ernesto Rojas stated that rescue personnel had brought the ladder to the site as part of their rescue equipment (Tr. 72, 87).

Luis Rojas also stated that AUC provided no ladder for the trench and that he had to jump in and climb out of the trench (Tr. 92). He also claimed to have asked AUC for a ladder, which the company refused. Luis Rojas testified regarding how he entered and exited the trench (Tr. 114-116):

Q.: And, you had jumped in a seven-foot hole, knowing you didn't have any ladder to get out; that you had to crawl back up the vertical walls?

Luis Rojas: Yes.

...

Q.: I was asking you how you climbed the vertical wall?

Luis Rojas: We have to climb them. You know, I don't know how I did it, but I did it.  
Just climb.

Q.: That's how you do it?

Luis Rojas: Yes, you just climb.

Q.: How tall are you?

Luis Rojas: Do what?

Q.: How tall are you?

Luis Rojas: How tall? I think about five-five or five-six; something like that.

...

Q.: You jumped into a seven-foot-deep trench without a ladder?

Luis Rojas: Yes.

Luis Rojas's description of how he climbed out of the trench is notably lacking in details. Although English is Luis Rojas's second language, he demonstrated a sufficient command of the language to describe other actions and events with specificity.

Petermeyer concluded that AUC failed to provide a ladder based on the statements of the Rojas brothers and of Morris Simpson, the leader of the rescue operation. Petermeyer testified that he spoke with Simpson "in depth, and he stated that there was no ladder on the job site at that time (Tr. 132).

Petermeyer recounted his interviews with AUC owner Larry Anderson (Tr. 132-133):

[I]nitially, [Anderson] said there was a ladder in the first interview and I had that documented with him. Initially, he stated there was a ladder on the job site, and it was placed outside to the south side of the trench box. Initially, that's what his statement referred to.

And, then midway through his interview, he stated, after I questioned that the ladder was placed outside of the trench box and I brought up that was an issue because the employees had to go to the unprotected area to use the ladder. Then, he changed his story and said the ladder was located inside of the trench box.

Then, another interview, which was approximately a week later after the initial interview, which is also documented, he stated that he ran over the ladder as he was moving the excavator after the accident occurred. He got on the excavator to move it in place where he could try to shore the trenching to extricate one employee or both.

Anderson stated that he never runs an operation "without a step ladder" (Tr. 273). He testified that when Ernesto and Luis Rojas exited the trench prior to explosive work by Elite, they exited "[b]y use of a step ladder" (Tr. 285). Anderson said that if he saw an employee attempting to climb out, he would shut down the job and discuss the safety hazard with his employees (Tr. 285). Anderson insisted that there was a ladder in the trench the day of the collapse (Tr. 299). Interestingly, AUC's counsel did not show Exhibit C-1, the photograph of the site with a ladder in the foreground, to Anderson for identification of the ladder.

The only other eyewitness testimony regarding the ladder came from Norman Collingsworth, president of Elite Drilling and Blasting Company (Tr. 256). Collingsworth, a neutral third party with no connection to AUC, testified persuasively that on the day of the accident the Rojas brothers exited the trench using a ladder on the three occasions Elite warned them of an impending blast (Tr. 260). Collingsworth stated that the ladder was inside the trench

box but was not part of the trench box (Tr. 261, 267). He described it as an extendable aluminum ladder (Tr. 267-271). Collingsworth explained that he did not leave the trench site after telling Anderson that the employees needed to exit the trench, but stayed to make sure the employees actually exited it. Collingsworth stated, “Even when I tell someone something, we have to make sure the area is secure before we blast. . . . That’s something I have to do. I have to make sure there is no one in the trench before I blast” (Tr. 268).

The evidence regarding the presence of a trench ladder is contradictory. Anderson’s statements to Petermeyer were inconsistent, and the ladder Collingsworth described does not seem to be the “step ladder” Anderson insisted he had in the trench. However, it is the Secretary’s burden to establish that the standard was violated. She has failed to show by a preponderance of the evidence that no ladder was in the trench. The testimony of the two witnesses in the best position to know if a ladder was used, the Rojas brothers, is compromised. The brothers have a financial interest in a finding that AUC was negligent. Their testimony became vague when details were called for. They offered no credible explanation of how they, each approximately 5 feet 6 inches tall, scaled 7-foot vertical walls to exit the trench.

The only eyewitness who testified credibly and convincingly on the subject of the ladder is also the only neutral witness. Collingsworth was unequivocal in stating that he stood and watched Ernesto and Luis Rojas exit the trench three times on the morning of the collapse by climbing a ladder located in the trench box. Collingsworth’s testimony is credited above all the other witnesses. Item 2 is vacated.

#### CITATION NO. 2

##### Item 1a: Alleged Willful Violation of § 1926.652(a)(1)

The Secretary alleges that AUC committed a willful violation of § 1926.652(a)(1), which provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) and (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.

Paragraph (b) addresses the use of sloping and benching systems to prevent cave-ins. AUC was not utilizing a sloping and benching system to protect the employees; the walls of the trench were vertical.

Paragraph (c) addresses the use of support systems, shield systems, and other protective systems. At the time of the trench cave-in, there was a trench box, measuring 20 feet long and 4 feet high, at the end of the trench nearest the excavator.<sup>1</sup>

Petermeyer testified that the trench was 69 feet long, 7.1 feet deep, and 4 feet wide (Tr. 134). Larry Anderson disputed the depth, claiming that the trench was 7.1 feet deep only at its deepest point. Anderson stated that at the point of the cave-in the trench was 5½ to 6 feet deep. He explained that he bid on jobs based on engineer's drawings (Tr. 291): "I have a set of drawings made by engineers on the project. That's how we bid our jobs; on our cuts. You get a different price for deep cuts and shallow cuts, and that's how we base our prices on doing the job a lot is the depth of dirt that has to come out of the cut." Anderson claimed that over 50 per cent of the trench was less than 7 feet deep (Tr. 291).

Petermeyer's testimony regarding the depth of the trench is given more weight than that of Anderson. Anderson was estimating the depth based on what he bid. Petermeyer gave detailed testimony explaining how he used a trench rod to measure the depth of the trench every 5 feet. The only measurement he estimated was the length of the trench (Tr. 134, 201). It is determined that AUC's employees were working in an excavation greater than 5 feet deep, dug in Type C soil, whose walls were not sloped or benched. Section 1926.652(a)(1) applies to the trench and requires the use of a protective system.

It is undisputed that on May 12, 1999, two days before the trench collapse, AUC's employees were working in the trench without a trench box or any other form of protective system. Both Ernesto and Luis Rojas testified that they worked in the trench on May 12 and the

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<sup>1</sup>At the hearing the Secretary introduced evidence showing that, even if the employees had been working inside the trench box, the trench box was inadequate to meet the requirements of § 1926.652(a)(1) (Tr. 148-152). AUC challenged the Secretary's evidence, claiming that the Secretary had not cited it for having an inadequate trench box (Tr. 166-168). The single instance specified in the citation as a violation of § 1926.652(a)(1) states: "(a) 2700 Block of Lakeview Drive: Employees were working in a trench over 5 feet deep, outside of a protective system, on or about May 14, 1999." No mention is made of the inadequacy of the trench box. Accordingly, evidence of the inadequacy of the trench box will not be considered for purposes of establishing a violation or for classifying the violation as willful.

trench box was not in the excavation (Tr. 15-16, 91). They stated that Randy Anderson was the supervisor that day and that he saw them working in the trench without any form of protective system (Tr. 15, 18, 90).

Larry Anderson was not on the site that day and had no personal knowledge regarding the use of the trench box. Collingsworth, who presumably was blasting on the site that day, was not questioned regarding the use of the trench box on May 12. It was noted previously in this decision that the Rojas brothers are suing AUC for negligence and that their testimony on the ladder issue was less than credible. However, they are the only eyewitnesses who testified regarding whether a trench box was in use on May 12. Randy Anderson, who was supervising AUC's crew on May 12, is the son of AUC's owner. AUC did not call him as a witness. Therefore, the Secretary's evidence that AUC failed to use a trench box on May 12 is unrefuted and establishes a violation of § 1926.652(a)(1).

It is apparent from the circumstances of the trench collapse that the Rojas brothers were also not protected by the trench box on May 14. Ernesto and Luis Rojas testified that when they began work on the morning of May 14, the trench box was located on the ground near the trench. Larry Anderson only put the trench box in the trench after the Rojas brothers complained because rocks were falling into the trench and hitting them on their backs (Tr. 23, 25-26, 97). Ernesto Rojas stated that they had been working in the trench for approximately 30 minutes and had laid one pipe before Larry Anderson put the trench box in that morning (Tr. 25, 85).

Larry Anderson testified that he set the trench box in the excavation before the Rojas brothers entered the trench and denied that rocks were falling from the sides of the trench onto the employees (Tr. 306-309, 311). He stated he was unaware that the Rojas brothers were working in the trench outside of the trench box at any time until the west wall collapsed. Their work did not require them to work outside the trench box. Anderson stated that his work on the excavator kept him from watching the employees all the time. The excavator was located approximately 30 feet from the trench (Tr. 25, 284, 296-297). Collingsworth testified that the three times he went to the trench on May 14, he observed the Rojas brothers working in the trench box. He never saw them working outside the box (Tr. 261).

Ernesto Rojas stated that he and his brother were in the trench box when they leveled the gravel that Anderson dumped into it with the excavator (Tr. 32). Otherwise, they usually worked outside the trench box in full view of Larry Anderson (Tr. 30, 33, 41). Ernesto Rojas acknowledged, however, that Anderson told him to get back inside the trench box (Tr. 44-45). Luis Rojas testified that he worked outside the trench box and that Anderson never told him to get back in it (Tr. 102, 109). The Rojas brothers were trapped 10 to 12 feet from the trench box at the time of the collapse (Tr. 206-207).

The record establishes that the employees worked outside the trench box. It is uncontroverted that the work performed on May 12 was done without the trench box present. The fact that Ernesto and Luis Rojas were trapped in the unprotected part of the trench establishes that they were working outside the trench box on May 14.

In order to show employer knowledge of a violation, the Secretary must show that the employer knew, or, with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). Reasonable diligence includes adequate supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991).

When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer and the Secretary satisfies his burden of proving knowledge without demonstrating any inadequacy or defect in the employer's safety program. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995).

Supervisor Larry Anderson claims that he was unaware that the employees were working outside the trench box. Anderson should have known where they were located in the trench. He was working 30 feet away in an elevated position. With the exercise of reasonable diligence, Anderson could have ensured that they were using the protective system. He was aware, or should have been aware, of what the employees were doing and where they were working. Furthermore, on May 12, 1999, supervisor Randy Anderson permitted the Rojas brothers to work an entire shift in the trench without using a protective system. The violation is affirmed.

#### Unpreventable Employee Misconduct

AUC claims that any violation of § 1926.652(a)(1) resulted from unpreventable employee misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

AUC claims that Ernesto and Luis Rojas failed “to follow firmly established safety measures” (AUC’s brief, p. 2). The record shows that AUC did not have such measures in place. AUC did not provide safety training to its employees. AUC did not have established work rules requiring employees to be in the trench box while they were working in the trench. There is no evidence that AUC disciplined employees for violating safety rules. Supervisor Randy Anderson permitted employees to work without a trench box on May 12. “[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.” *National Realty and Constr. Co. v. OSHRC*, 489 F. 2d 1257, 1267 (D.C. Cir. 1973).

AUC has failed to establish the affirmative defense of unpreventable employee misconduct.

#### Willful Classification

The Secretary alleges that AUC's violation of § 1926.652(a)(1) is willful. A violation is willful if it is committed with intentional, knowing, or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994). To find willfulness under the first prong involves determining that the employer had a "heightened awareness," rather than simple knowledge, of the violative conditions. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-35, 1987).

A willful violation is:

differentiated from other types of violations by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference. However, a violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective--whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances.

*General Motor Corp., Electro-Motive Division*, 14 BNA OSHC 2064, 2068 (No. 82-630 et al., 1991).

Larry Anderson took competent person training courses and attended a refresher training course one week prior to the accident. He was aware of OSHA's training and excavation standards (Tr. 153-154, 304). AUC had no previous history of violating OSHA standards (Tr. 224).

On May 14, AUC had a trench box in the trench and Ernesto Rojas testified that Larry Anderson told him to get inside the trench box more than once.

The court finds that the Secretary failed to establish that AUC's violation of § 1926.652(a)(1) is willful. Although the Rojas brothers were obviously working outside of the trench box at the time of the wall collapse, it is not clear from the record how long they were actually exposed. Larry Anderson claims that on May 14 he never saw them outside of the trench box, and Collingsworth testified that the three times he went to the trench they were in the trench box.

The testimony of Ernesto and Luis Rojas gives the impression that they spent a minimal amount of time in the trench box, but their testimony is of dubious value. They were evasive and self-contradicting witnesses who have a financial interest in a determination that AUC acted willfully. Although their testimony that they did not use a trench box on the day of May 12 is unrefuted, the court is reluctant to find a willful violation based on the questionable testimony of two unreliable witnesses. The violation is classified as serious.

#### Penalty Consideration for the Citations

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.

AUC is a small employer with approximately 9 employees (Tr. 225). It has no history of previous violations (Tr. 224).

The gravity of item 1 of citation no. 1, the failure to train employees in trench safety as required by § 1926.21(b)(2), is high. AUC did not train its employees to recognize and avoid trench hazards. Two employees were required to work in the trench. Luis Rojas testified that he had no experience in underground pipe installation (Tr. 108). The possibility of a cave-in was ever-present. The Rojas brothers were seriously injured as a result of their failure to follow OSHA's safety standards. The court finds a penalty of \$2,000.00 is appropriate.

The gravity is also high for the violation of item 1a of citation no. 2, for the failure to ensure that the employees worked inside the trench box. The gravity of the violation is evident from the serious injuries suffered by the Rojas brothers. The court finds a penalty of \$7,000.00 is appropriate.

#### **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:

Serious Citation No. 1

1. Item 1, alleged violation of § 1926.21(b)(2), is affirmed and a penalty of \$2,000 is assessed.
2. Item 2, alleged violation of § 1926.651(c)(2), is vacated.

Willful Citation No. 2

1. Item 1a, alleged violation of § 1926.652(a)(1) ,is affirmed as serious and a penalty of \$7,000 is assessed.
2. Item 1b, alleged violation of § 1926.651(k)(1), is withdrawn by the Secretary.

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/s/  
KEN S. WELSCH  
Judge

Date: June 12, 2000