



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

George Cairns & Sons, Inc.,

Respondent.

OSHRC Docket No. **03-2005**

Appearances:

Karin Froom, Esquire
Office of the Solicitor
U. S. Department of Labor
Boston, MA
For Complainant

Jerrold Solomon., Esquire
Attorney at Law
Newton, MA
For Respondent

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

DECISION AND ORDER

George Cairns & Sons, Inc. (Cairns) is engaged in utility installation and road construction. On September 11, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite in North Conway, New Hampshire. As a result of this inspection, respondent was issued a Citation and Notification of Penalty. Respondent filed a timely notice, contesting the citation and proposed penalty. A hearing was held in Concord, New Hampshire, from December 6, 2004, through December 8, 2004. For the reasons that follow, Citation No. 1, Item 1, is modified and affirmed as a serious violation and a penalty of \$7,000.00 is assessed.

Joint Stipulations of Fact

In the Joint Pretrial Statement filed in this matter on June 25, 2004, the parties submitted the following Stipulated Facts:

1. George Cairns & Sons, Inc. (Cairns) is a corporation with a place of business at 8 Ledge Road, Windham, New Hampshire, operating a company engaged in excavation, utility installation, road construction and related activities.

2. Cairns is engaged in interstate commerce within the meaning of the Occupational Safety and Health (OSH) Act.

3. The Secretary of Labor conducted an inspection of the Amethyst Road / Route 16 intersection in North Conway, New Hampshire worksite (“worksite”) on September 11, 2003. As a result of that inspection, on October 10, 2003, the Secretary issued a Citation and Notification of Proposed Penalty (the “Citation”) which alleged a willful violation of 29 C.F.R. §1926.652(a)(1) and proposed a penalty of \$44,000.

4. Cairns timely filed a Notice of Contest regarding the Citation.

5. The Secretary timely filed a complaint before the Commission.

6. Cairns timely filed an Answer to the Complaint.

7. Cairns had been cited with a willful violation of 29 C.F.R. §1926.652(a)(1) as a result of three prior investigations:

a) Inspection Number 302535232, Willful Citation 1, Item 1, Issued on or about August 9, 1999; Original penalty \$42,000; amended penalty \$22,000.

b) Inspection Number 112884291, Willful Citation 1, Item 1, Issued on or about December 1, 1995; Original Penalty \$42,000; amended penalty \$20,000; and

c) Inspection Number 109621292, Willful Citation 2, Item 1, Issued on or about January 4, 1994. Original Penalty, \$10,500; amended penalty \$5,650.

8. Each of the three prior willful citations of 29 C.F.R. §1926.652(a)(1) issued to Cairns was resolved by an informal settlement with OSHA retaining the willful characterizations and reducing the proposed penalties.

9. Mr. Jeff Jacobs was the foreman and competent person at the worksite on the day of the inspection and directed the work on site.

10. On the day of the inspection, Cairns was excavating at the worksite in order to make a connection between the new main water line on Route 16 in North Conway, N.H., and the existing branch line for Amethyst Road.

11. The soil at the worksite excavation was substantially Type C soil.

12. Two Cairns employees on site, Foreman Jeff Jacobs and Dennis Reilly, worked in the excavation. The distance from the road surface to the bottom of the recently installed connection pipe was at least 5 ½ to 6 feet.

13. The excavation was not protected by a trench box for the time that the employees worked on the day of the inspection.

14. Foreman Jeff Jacobs was aware of the requirements of 29 C.F.R. §1926.652(a)(1).

15. Superintendent Darren Beck was aware of the requirements of 29 C.F.R. §1926.652(a)(1).

16. Superintendent Darren Beck was the superintendent during the 1999 inspection which resulted in the issuance of a willful citation of 29 C.F.R. §1926.652(a)(1).

17. During the year preceding the investigation, Cairns employed between 35 and 80 employees during relevant times.

18. Cairns was hired to replace two miles of water pipe, with connections, in downtown North Conway, N.H., to replace the road surface and to add new sidewalks along N.H. Route 16.

19. The job began in April 2003, continued through the fall, and shut down for winter. Work resumed in April 2004. It is expected to be completed in the fall of 2004.

20. The main line water pipe was 12-inch CCDI pipe. Tie-ins were expected to be 8-inch pipe. Some branch lines were smaller.

21. At the time of the OSHA inspection, September 11, 2003, Cairns had 4 crews working in North Conway.

22. The job was a union job with workers from the Laborer's and Operating Engineers' unions.

23. Darren Beck was the superintendent in charge of all crews.

24. On September 11, 2003, a crew was connecting the main line to an existing branch line that provided water service to residents on Amethyst Hill Road in North Conway. Amethyst is a dead-end street with approximately 6 houses on it.

25. Jeff Jacobs was the foreman of the crew.

26. During the morning, the crew opened an excavation to expose a recently-installed connecting line, and to find the existing branch line to connect to.

27. At the top, the excavation was approximately 22 feet by 25 feet. It was bordered by Amethyst Hill Road on the north, Route 16 on the west, a retail store and gas station on the south and open land and a portion of Amethyst Road on the east.

28. The excavation extended approximately halfway into Amethyst Hill Road.

29. Superintendent Darren Beck was present at the Amethyst excavation on September 9, 2003, at approximately 9:15 a.m. for approximately 15 (fifteen) minutes. He was not there again until several hours later when he responded to a call that an OSHA inspection was taking place there.

30. There was a second Cairns' excavation open in North Conway, N.H. on September 11, 2003 which was observed by the CSHO, Christopher Bills, who was responsible for the instant citation. It was approximately one mile from the first one. The CSHO determined that there were no violations in connection with the second excavation.

31. After 1999 to date, there have been no citations issued to Cairns which have become final orders of the Commission.

32. In August 2003, Cairns was issued a citation for violation of 29 C.F.R. §1926.652(a)(1) for work in North Conway. The citation was classified as Serious. The proposed penalty was \$750. At the informal conference on the case the citation was withdrawn by OSHA on September 23, 2003.

33. The CSHO's determinations as to the depth of the excavation and the slope of the walls were all derived from the CSHO's use of a device known as an inclinometer, an engineering rod and a calculator.

Discussion

On the second day of the hearing, respondent moved to strike certain testimony of the Secretary's compliance officer, Christopher Bills, regarding admissions of respondent's foreman and its superintendent. That testimony was given on the first day of the hearing. Mr. Bills was complainant's first witness. The second witness, respondent's foreman Jeffrey Jacobs, testified on direct examination after Mr. Bills on the first day of the hearing. Respondent's counsel waited until

the second day of hearing, after direct testimony of the second witness, Mr. Jacobs, to object to specific testimony of the first witness on the first day of hearing. Counsel failed to move to strike the testimony at the time the testimony was elicited. He cross-examined Mr. Bills. He also questioned the foreman and the superintendent during the hearing. Both testified subsequent to Mr. Bills.

By failing to make a timely objection and motion to strike, respondent waived its objection to admissibility of the testimony relating to out-of-court admissions by respondent's foreman, Jacobs, and superintendent, Beck. I will, however, allow for respondent's objection to go to the weight, if any, that will be given to Mr. Bill's testimony relating to those admissions against interest.

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

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

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).

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

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

- a. Amethyst road intersection with White Mountain Highway - An employee in an excavation was not protected by either properly sloping or shoring of the excavation walls.

The George Cairns & Sons, Inc. was previously cited for a Willful Violation of the Occupational Safety and Health Standard which was contained in OSHA inspection number 302535232, Citation Number 01, item number 01, issued on August 9, 1999.

And

The George Cairns & Sons, Inc. was previously cited for a Willful Violation of Occupational Safety and Health standard which was contained in OSHA inspection number 112884291, Citation number 01, Item number 01, issued on December 1, 1995.

And

The George Cairns & Sons, Inc. was previously cited for a willful violation of the Occupational Safety and Health standard which was contained in OSHA inspection number 109621292, Citation number 02, Item number 01, issued on January 4, 1994.

In the Citation issued on October 10, 2003, the Secretary alleged that the violation was willful. In her complaint, the Secretary alleged that the violation was willful or serious.

The standard at 29 C.F.R. §1926.652(a)(1) provides:

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The standard is clearly applicable. The Secretary has alleged that an employee in an excavation at this site was not protected from cave-ins by shoring or sloping. Paragraphs (b) and (c) describe the design and configuration requirements of shoring and sloping systems. The cited standard incorporates by reference paragraphs (b) and (c) and requires that employees be protected by a system designed in accordance with one of those two paragraphs. The standard is applicable where, as here, the violative condition alleged is allowing an employee to work in an excavation without an adequate protective system. The reference to paragraphs (b) and (c) is sufficient notice to an employer as to how systems must be designed to provide adequate protection.

Respondent failed to comply with the terms of the standard at 29 C.F.R. §1926.652 (a)(1). The parties stipulated that the excavation at issue was not protected by a trench box while employees worked on the day of the inspection (Stipulation No. 13). No evidence was presented

to show that any other form of shoring or shielding was used by respondent to protect employees in the excavation.

The parties stipulated that the soil at the worksite excavation was substantially Type C soil. They also stipulated that the distance from the road surface to the bottom of the recently installed connection pipe was at least 5.5 to 6 feet. At the hearing, Jeffrey Jacobs, respondent's foreman, testified that the pipe itself was 5.5 to 6 feet down and the excavation floor was about 6 inches below the pipe. Jacobs' testimony establishes that the excavation was, at this location, at least 6 to 6.5 feet deep. While working on the pipe connection, Mr. Jacobs was about 4 feet from the excavation wall. At that point he could reach out and touch the earthen wall of the excavation behind the vertical portion of the pipe.

Christopher Bills, the Secretary's compliance officer, testified that he determined the depth of the excavation and angle of slope on all four walls using an engineering rod, an inclinometer and a scientific calculator. At the hearing, he demonstrated his methodology in determining excavation depth and the angle of the slope of the excavation walls. Respondent's counsel inquired as to the methodology used by Mr. Bills by *voir dire* examination. Mr. Bills' methodology was based on basic principles of geometry and trigonometry. After reviewing testimony, Exhibit R-1, and the in-court demonstration by Mr. Bills, I find the methodology used by him to determine excavation depth and slope angles to be acceptable. Mr. Jacobs made no measurements of the angle of slope or the depth of the excavation. Subsequent to Mr. Bills' inspection, Darren Beck, respondent's superintendent, measured only the lateral dimensions of the top of the excavation. He did not measure the dimensions of the bottom of the excavation. He did not measure the depth, width, or length of the excavation. He also made no determination of the angle of slope of the excavation walls. Mr. Beck only approximated the depth of the excavation from his lateral measurements at the top of the excavation.

Mr. Bills' measurements, while questioned by respondent's counsel, are uncontroverted. He testified that the depth of the excavation ranged from 7.2 feet to 10.3 feet and the angle of slope of the walls ranged from 45 degrees to 70 degrees (Exh. C-4).

One side of the excavation exhibited sloughing. This excavation was dug in Type C soil, described by Mr. Bills as granular, non-cohesive. The maximum allowable slope for excavation

walls is 1.5:1 or 34 degrees for excavations less than 20 feet deep. (See 29 C.F.R., Part 1926, Subpart P, Appendix B, Table B-1).

Respondent failed to comply with the terms of the standard by not protecting its employees in the excavation from cave-ins by shoring, shielding or other protective system, or by sloping the excavation walls at an angle no greater than 34 degrees.

Respondent's employees had access to the violative conditions and were exposed to the hazard of cave-in while working in the excavation. Two employees of Cairns, the foreman Jeffrey Jacobs and Dennis Reilly, worked in the excavation (Stipulation No. 12). Buckets used by employees in the excavation were found 1.5 feet to 2 feet from the wall behind the riser pipe. An employee standing in that location could touch the wall determined by Mr. Bills to have been sloped at a 70 degree angle.

Respondent, through its foreman, Jeffrey Jacobs, had knowledge of the violative conditions. Jacobs was the foreman and competent person at the worksite on the day of the inspection and directed respondent's work on site (Stipulation No. 9). Jacobs was aware of the requirements of 29 C.F.R. §1926.652(a)(1), (Stipulation No.14). He first measured to determine whether a trench box would fit into the confined area. When he realized that he could not use the box for protection in this situation, Jacobs attempted to slope the excavation walls as required by the standard. He thought he was close to compliance. Without first assuring that the walls were sloped properly, he and another employee entered the excavation.

The Secretary has established a violation of 29 C.F.R. §1926.652(a)(1). The violation was a serious violation in that there was a substantial probability that death or serious physical harm could result from the violative conditions. Without adequate protection by shoring or sloping, employees working in this excavation were exposed to the hazard of cave-in of the walls of the excavation. Cave-ins result in crushing injuries often resulting in death.

Willfulness

To establish a violation as willful, the Secretary must prove that it was committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Spirit Homes, Inc.*, 20 BNA OSHC 1629 (Nos. 00-1807 & 00-1808, 2004); *Williams Enterprises, Inc.*, 13 BNA OSHC 1249 (No. 85-0355, 1987).

The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corporation*, 18 BNA OSHC, 1677, at 1684 (No. 96-0265, 1999).

In *Spirit Homes, Inc.*, *supra* at 1630, the Commission, following longstanding precedent, stated:

It is well established that a willful charge is not justified if an employer has made an objectively reasonable, good faith effort to comply with the standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete.

Willful violations require an employer to have a certain state of mind. Cairns is a corporation which acts through its agents. To understand the state of mind of a corporation, the state of mind of its agents acting on its behalf must be determined. Respondent's agent on this jobsite was Jeffrey Jacobs, its foreman. He was the competent person on site and directed the work of other employees of Cairns.

I cannot examine the heart and mind of Mr. Jacobs, but only that which was observed and read, the evidence presented at trial. Mr. Jacobs' evolving state of mind in attempting to protect employees working in the excavation on September 11, 2003, is exemplified in his testimony on direct examination by the Secretary's counsel at the hearing:

Q. So, what were you doing at this job site on that day?

A. There was a new water connection to an old existing water main on that road.

Q. What time did the job start?

A. 6:30 in the morning.

Q. What were you going to have to do to do this connection?

A. In the process of digging down to the new main that was left for us and finding the old existing main and tying them both together.

Q. How did that digging go?

A. Slow.

Q. What did you do to get the job done? Did an excavator do all the digging?

A. Hand work and the excavator.

Q. Did you know where all the utilities were at that time?

- A. A rough idea.
- Q. Were the utilities where you expected to find them?
- A. No.
- Q. How did you find out about the utilities?
- A. We had a Dig Safe. They would come out and give us a rough mark or where they would be.
- Q. And, then you would continue to dig where they were?
- A. Yes, by hand.
- Q. By hand. And, you got down to some depth and you found out that the utilities were not exactly where you expected to find them?
- A. Correct.
- Q. About what time did you start finding out that the utilities weren't where you thought they should be?
- A. It was around 8:30, quarter of 9:00.
- Q. And, at about what depth of the excavation or how deep was it at that point?
- A. Three and a half feet.
- Q. Did you expect to use the trench box on site that day?
- A. Yes.
- Q. What was the trench box that you expected to use?
- A. There were several on the job. At the time, my most used one was 16-by-12.
- Q. Is that the one you expected to use?
- A. Yes.
- Q. What were the other ones on site?
- A. There was another one 24-feet-by-6-feet, and there were other spreaders on the job to be acclimated. I can't remember the exact amount and exact lengths of each one.
- Q. I'm sorry, when you say, "other spreaders," those are trench boxes?
- A. They are parts of boxes. You could make it either wider or narrower.
- Q. Where were they compared to your jobsite?
- A. About half a mile away.
- Q. At the time, did you know what existed; what your choices were for trench boxes?
- A. Yes.

- Q. So, at some point during the morning, you found the utilities of that fiber-optic cable?
- A. Fiber-optic, there was electric and cable.
- Q. When you determine that the trench box you had wasn't going to fit?
- A. Sometime before lunch time.
- Q. Would it have been about 11:00, 11:30?
- A. Possibly. I'm not sure of the exact time.
- Q. How did you determine that trench box wasn't going to fit?
- A. Using a tape measure, measuring and looking at the dimensions of the wire, existing pipes and existing utilities.
- Q. Did you have the measurements in your head and try to figure it out from that?
- A. No, I pulled the tape across the trench one way, and then the other way, and tried to see if the box would fit on any angle.
- Q. And, there was just no way that the one you had was going to fit?
- A. I couldn't see it happening at the time, correct.
- Q. At the time, did you have measurements for the other boxes so you could think about whether one of those would fit?
- A. Yes.
- Q. If one of those had fit, it wouldn't have been too big a deal to go get one of them?
- A. Absolutely not.
- Q. But, none of those were going to fit?
- A. Not that I could see at the time.
- Q. So, you had, I think you told me there might have been two or three other choices?
- A. Yes.
- Q. But, none of them were going to fit?
- A. Not that I could see.
- Q. And, the trench box you had with you had worked under other similar circumstances?
- A. Not similar to this one, no.

Q. I mean, similar - - along this project, you have been performing a similar job, or the end result was supposed to be about the same, and the others were more routine?

A. Yes. There weren't as many - - I didn't have as many obstructions or utilities in the way.

Q. Yes, this was an unexpected situation?

A. Yes.

Q. You hit utilities in places you didn't expect?

A. Yes, correct.

Q. Did you consider - - as soon as you figured out that the trench box wasn't going to fit, did you consider getting another trench box?

A. I considered trying to slope the trench the best I could.

(Tr. 293-298)

Mr. Jacobs further testified about his attempts to slope the excavation walls and his state of mind regarding that slope:

Q. So you said you considered the slope to comply with the OSHA standards?

A. Yes.

Q. Were you able to slope enough?

A. I believe it was close to what it should have been

Q. But you knew that you hadn't been able to slope enough?

A. Looking back at it now, no, I didn't. But, I believed at the time I was close.

(Tr. 299-300)

It is clear from his testimony and demeanor throughout the hearing, that Jacobs thought he was in compliance or at least close to compliance with the requirements of the standard when work was performed at this site on September 11, 2003. I find his testimony to be forthright, not evasive, and credible. Attempts by Jacobs to further slope the excavation walls were tempered by the local fire department's requirement to keep a road immediately adjacent to the excavation open as an emergency fire lane. This road was later closed to permit additional sloping, but Jacobs did not consider this to be an option at the time of the inspection. His decisions were made in an ever-changing environment as he discovered additional obstacles to shoring and sloping. The dynamics of this situation must be considered in determining his state of mind when he was deciding on the

course of action to be taken in protecting the excavation from cave-in. He was in a tight situation, hoping to position a trench box or slope the excavation to protect respondent's employees.

While Jacobs demonstrated sufficient knowledge to establish a violation of the Act, his decisions and actions do not rise to the level of reckless disregard of the requirements of the Act or plain indifference to employee safety. His state of mind appears to be that of an individual attempting to protect employees rather than of a person plainly indifferent to their safety while working in the excavation.

Jacobs' actions at this site must be considered in context with his previous actions and method of operation on this project. Cairns was replacing water-pipe over a distance of about two miles along Route 16 in North Conway, New Hampshire.

Work progressed at a pace of about 200 feet per day and involved eleven to twelve excavations each day. This was a two-year project. Respondent, through its vice president, Glenn Cairns, and superintendent, Darren Beck, insisted on 100% compliance with OSHA regulations and protection of employees in excavations at all times by shoring, using trench boxes or sloping 1.5 to 1, treating all soil as Type C soil. Mr. Jacobs appears to have consistently adhered to this policy.

Independent witnesses testified favorably regarding Mr. Jacobs' and Cairns' attitude toward employee safety on this project. Michael Carpenter, contract administrator of this job for the New Hampshire Department of Transportation, described Cairns as the safest outfit he had ever witnessed. He said that respondent did far more than other contractors in providing safety for employees. He testified that Jacobs put safety on the same level as production.

Blair Moody, a civil engineer with the New Hampshire Department of Transportation, had responsibility to oversee this project for compliance with plans and specifications. He observed Jacobs' work daily. Mr. Moody stated that Jacobs always used a trench box or sloped the excavation walls on lateral excavations on this project. He described Jacobs' attitude toward safety as far beyond any other contractor.

Two other independent witnesses, Joel Irish, a project consultant, and Joe Smith, the water and sewer foreman for the North Conway Water precinct, offered additional testimony that all excavations were shored or sloped by Jacobs and Cairns on this project. They both attested to the safety consciousness of both Jacobs and the respondent on this job. After observing the demeanor and testimony of these independent witnesses, I find their testimony to be extremely sincere, consistent, and highly credible. This project extended over two miles and lasted more than two years. During that time, multiple excavations dug by respondent were observed by these four

witnesses. Their testimony is based on first-hand knowledge of respondent's work practices relating to protecting employees from cave-ins while working in excavations.

Testimony of these individuals is persuasive evidence of the habit and routine practice of Cairns and Mr. Jacobs in complying with OSHA regulations and in protecting employees working in excavations on this project. I find their testimony to be supportive of respondent's assertion that in recent years, Cairns and its employees have consistently and diligently attempted to comply with OSHA excavation standards and protect employees from the hazards of cave-in. It is also evidence that Mr. Jacobs' regular practice while working in excavations on this project was to comply with the standards and protect employees.

Another indicator of an employer's state of mind for determining whether a violation is willful is that employer's response to prior citations. Cairns was issued citations for willful violations of 29 C.F.R. §1926.652(a)(1) in 1994, 1995, and 1999. After receiving the citation in 1999, Cairns made significant changes in its operations and approach to safety. It informed all superintendents and foremen that they were to comply with OSHA requirements and that failure to do so could result in firing. Key employees, including Beck and Jacobs, were sent to OSHA certified training. Respondent acquired new equipment, valued at about \$250,000, to help field personnel comply with OSHA standards (Exh. R-6). It hired a consultant to make spot inspections along with a safety director to develop its program. Cairns' management implemented weekly safety training talks. The company has adopted a policy requiring shoring or sloping excavation walls 1.5 to 1, treating all soil as Type C soil. Management required 100% safety compliance with all OSHA standards in all work after the 1999 inspection. Respondent provided the employees with training and equipment to achieve this goal. Employees bought into this new safety conscious approach of management. Respondent is a small company with high visibility, working along highways installing new water lines involving work in over 26,000 excavations since 1999. In the past four years, it has not needed to fire or even severely discipline an employee for safety violations.

In response to the violations in this case, Glenn Cairns was angry, and at first considered firing Mr. Jacobs. After weighing the benefits of keeping him with all his skills, experience, and general safety conscious attitude against hiring someone without those attributes, Mr. Cairns decided to keep Mr. Jacobs in the job as foreman. He had four or five conversations with this employee about trenching safety and felt he would work in full compliance in the future. Mr.

Cairns testified that throwing people away doesn't mean you're going to correct the problem. He corrected the situation through persuasion rather than using the club of discipline.

The Secretary argues that the foreman, Jacobs, substituted his judgment for the requirements of the standard, and that this substitution of judgment is no defense to willfulness. That argument is rejected. Jacobs used his judgment in an attempt to comply with the requirements of 29 C.F.R. §1926.652(a)(1). He did not substitute his judgment for the requirements of the standard. While his judgment as to the adequacy of sloping was in error, he thought at the time of his action he was in compliance or close to compliance with the slope of the walls required by the standard. His intent was to comply with the provisions of the standard and not to find his own way to protect employees in lieu of meeting the terms of the standard. The foreman's poor judgment in attempting compliance is not substituting his judgment for the requirements of the standard. It does demonstrate, however, a good faith attempt to comply. While Mr. Jacobs had an awareness of the requirements of the standard, he did not have a heightened awareness of the illegality of his conduct.

Respondent engaged in substantial compliance efforts since 1999, on this project and at this site on September 11, 2003. The violative conditions at issue were an anomaly. There was no conscious or intentional disregard of the requirements of the standard or plain indifference to employee safety. There is no question that respondent, through its foreman, was aware of the requirements of the standard and failed to comply. Respondent had prior violations, but the mere existence of prior violations does not establish willfulness. Here the foreman's efforts to comply were not as effective or complete as possible, but they did not show indifference to employee safety. See *Spirit Homes, Inc., supra* at 1630; See also *Brock v. Morello Brothers Construction, Inc.*, 809 F.2d 161 (1st Cir. 1987). After weighing all the evidence and observing the demeanor of all witnesses in this case, I conclude that the violation, while shown to be serious, was not proven to be willful. The violation of 29 C.F.R. §1926.652(a)(1) is affirmed as a serious violation.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The

Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1679, 1776 (No. 88-0237, 1994).

Cairns is an employer with 80 employees. It has no history of violations which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHA 2201, 2214 (No. 87-2059, 1993).

The foreman and another employee worked in the excavation and were exposed to the hazard of cave-in. If a cave-in occurred, the employees would be crushed and the likely result would be death or serious physical injury. Based on these factors, a penalty of \$7,000.00 is assessed for the violation of 29 C.F.R. §1926.652(a)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation No. 1, Item 1, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is modified and affirmed as a serious violation and a penalty of \$7,000.00 is assessed.
2. That portion of Citation No. 1, Item 1, alleging that the violation was willful, is vacated.

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

Date: June 23, 2005