United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>FIORE CONSTRUCTION CO., INC.<br>Respondent. | OSHRC Docket No. 99-1217 |

## ***DECISION***

Before: ROGERS, Chairman; and EISENBREY, Commissioner.

BY THE COMMISSION:

At issue before the Commission is the willful characterization of a violation of the Occupational Safety and Health Act, 29 U.S.C. § 651-678, ("the Act"). The Secretary alleged that Fiore Construction, Inc. ("Fiore") violated 29 C.F.R. § 1926.652(a)(1) by failing to provide cave-in protection for its employees working at an excavation site located in Exeter, New Hampshire.[1] A penalty of $55,000 was proposed. Judge Michael H.

[1] The cited provision requires as follows:

> **§ 1926.652 Requirements for protective systems.**
> (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.

Schoenfeld affirmed the violation as willful and assessed the proposed penalty.[2] For the following reasons, we affirm the violation as willful and assess a penalty of $40,000.

## BACKGROUND

Fiore is engaged in underground utility work and, at the time of the inspection, was replacing an 18-inch cast iron water line from inside a trench. It is undisputed that the trench was approximately eight feet deep, ten feet wide, and thirty feet long, and contained no trench box or shoring. Fiore also does not dispute that two of its employees were working inside the trench at the time of the inspection. Upon analyzing a soil sample taken from a spoil pile located at the side of the trench, compliance officer David Berard concluded that the trench was dug in previously excavated soil that consisted of one-third gravel and two-thirds sand, and therefore, could be considered Type B soil. According to Berard, the trench had vertical, unsloped walls and soil was sloughing off the trench walls as vehicles drove past the excavation.

Berard testified that when he questioned Fiore's foreman at the worksite, Larry Lizotte, Jr., about OSHA's excavation requirements, Lizotte told Berard that he was aware OSHA had excavation standards and that he "probably wasn't in compliance" with OSHA's cave-in protection requirements. At the hearing, Lizotte conceded that OSHA's standards required the use of a trench box under the conditions which existed at the time of the inspection, but he claimed that it was not possible to use one because of the location of the main water line pipe. However, he acknowledged that a trench box had been previously used at the worksite and admitted that an alternative means of protection, such as shoring, could have been used.

The record also establishes that since 1993, Fiore has been cited for five previous

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[2] Fiore was also cited for two serious violations of the Act, neither of which is before the Commission on review.

willful violations of § 1926.652(a)(1). Four of these violations were issued in 1993, and the fifth was issued in 1995. All five violations were affirmed through formal settlement agreements with OSHA, four as unclassified violations under § 17(a) of the Act and one as a serious violation.

## DISCUSSION

The Commission has defined a willful violation as one which is "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." Valdak Corp., 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (93-239, 1995), aff'd, 73 F.3d 1466 (8th Cir. 1996). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference. . . ." Hern Iron Works, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,256-57 (No. 89-433, 1993) (citations omitted). The Secretary must establish 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 Corp., 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,591 (No. 96-0265, 1999). See also Johnson Controls, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, p. 41,142 (No. 90-2179, 1993) (citing Brock v. Morello Bros. Constr., 809 F.2d 161, 164 (1st Cir. 1987)). The Commission has held that a supervisor's willful actions or omissions may be imputed to an employer. George Campbell Painting Corp., 18 BNA OSHC 1929, 1934, 1999 CCH OSHD ¶ 31,935, p. 47,390 (No. 94-3121, 1999); Tampa Shipyards, Inc., 15 BNA OSHC 1533, 1537, 1990-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992)

In affirming the violation of § 1926.652(a)(1) as willful, the judge relied primarily on the testimony of foreman Lizotte, finding that Lizotte "proceeded with the trenching operation without installing a trench box which he knew was required by OSHA regulations under the circumstances present . . . ." Fiore challenges this conclusion, claiming that the

Secretary offered no evidence to establish that Lizotte had "sufficient 'familiarity with the standard's terms' to constitute 'heightened awareness.'" Fiore also contends that the judge erred in relying upon Lizotte's testimony, claiming that Lizotte's statements regarding his awareness of the trench's violative condition referred only to his knowledge at the time of the hearing, not at the time of the inspection.

We agree with the judge. The record establishes that Lizotte had more than 12 years of excavation work experience, and had completed a 40-hour OSHA excavation training course.[3] When Lizotte was questioned by compliance officer Berard during the inspection, Berard testified that Lizotte said he "probably wasn't in compliance" with the requirements of the cited standard. At the hearing, Lizotte conceded that at the time of the inspection, he "knew" that OSHA's standards required him to use a trench box. Lizotte also testified that he had previously used a trench box at this worksite, and he was able to identify the use of shoring materials and sloping as additional means of cave-in protection. This testimony is consistent with Lizotte's admission to Berard, and also demonstrates Lizotte's knowledge of OSHA's cave-in protection requirements.

Under these circumstances, we find that Lizotte had a heightened awareness of the requirements of § 1926.652(a)(1), yet made a conscious decision not to use cave-in protection in the cited trench. See Pentecost Contracting Corp., 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 43,965, p. 43,965 (No. 92-3788, 1997) (conscious disregard established where supervisor was aware of trenching standard's requirements yet failed to

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[3] Fiore attempts to diminish the significance of Lizotte's OSHA training by noting that he attended the course in 1994 and was given no subsequent training in the five years leading up to the current violation. However, the cave-in protection requirements of § 1926.652(a)(1) have not changed in the time since Lizotte attended the OSHA training and any knowledge which he would have obtained about such requirements remained relevant to the type of work in which Fiore was engaged. Furthermore, we note that Lizotte spent an entire week attending this course in excavation safety and has since performed nothing but excavation work as a Fiore employee.

provide appropriate means of egress upon observing trench's noncompliant condition). As a supervisory employee, Lizotte's intentional disregard is imputable to Fiore.[4] Accordingly, we affirm the § 1926.652(a)(1) violation as willful.

## PENALTY

The Secretary proposed a penalty of $55,000 for the willful violation of § 1926.652(a)(1). In calculating this penalty, the Secretary gave Fiore no credit for its small size because of the company's prior history of trenching violations. The judge criticized the Secretary's "withholding of credit for a small sized company on the basis of its past history of OSHA violations. . . ." However, he found that a "very substantial penalty" was required and assessed the proposed penalty amount. While we agree with the judge that a substantial penalty is warranted here, we conclude that Fiore should be given some credit for its size.[5] Therefore, taking into account Fiore's prior citation history and its small size, we find that a penalty of $40,000 is appropriate.

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[4] In view of this clear evidence of Lizotte's imputable willfulness, we find it unnecessary to reach the issue of whether Fiore's prior citation history provides an additional basis for finding a willful violation.

[5] Although the record does not definitively establish the number of Fiore's employees, we note that the Secretary reduced the penalties proposed for the two other citation items not at issue here in a manner consistent with the reductions she gives for employers with fewer than 25 employees.

**ORDER**

We affirm a violation of § 1926.652(a)(1) and assess a penalty of $40,000 (Willful Citation 2, Item 1).

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: May 1, 2001

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>FIORE CONSTRUCTION CO., INC.,<br>Respondent. | Docket No. 99-1217 |

Appearances: Kevin E. Sullivan, Esq.
U.S. Department of Labor
Boston, Massachusetts
For Complainant

Barrett A. Metzler, C.S.P.
Northeast Safety Management, Inc.
Columbia, Connecticut
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

## DECISION AND ORDER

*Background and Procedural History*

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) (the Act). As in Docket No. 99-1847, Respondent's work site in Exeter, New Hampshire, gives rise to this matter. In this instance, a site at a different street location was inspected on May 26, 1999, by a Compliance Officer (CO) of the Occupational Safety and Health Administration (OSHA). As a result of this inspection, Fiore Construction Company, Inc., (Respondent) was issued one citation on June 14, 1999 alleging serious violations of the construction safety standards at 29 C.F.R. § 1926.651(c)(2), requiring safe trench egress, and 29 C.F.R. § 1926.652(c)(3)(iii), requiring that a copy of the trench's protective system design be available at the work site. Respondent was also issued a citation alleging a willful violation of 29 C.F.R. §

1926.652(a)(1), requiring that employees in an excavation be protected from cave-ins by an "adequate" protective system. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Boston, Massachusetts. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

*Jurisdiction*

Complainant alleges, and Respondent does not deny, that it is an employer engaged in excavation and installation of underground utilities. It is undisputed that at the time of this inspection, Respondent was engaged in excavating and replacing water and sewer lines in Exeter, New Hampshire. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

*Discussion*

The Secretary opened her case with the testimony of a staff writer/photographer for a local newspaper who described some conditions at the worksite and identified several photographs she took. The inspecting CO testified about his inspection, observations and the basis for the issuance of each citation item. The OSHA Area Director of the Concord, New Hampshire, office gave testimony as to the classifications of the alleged violations and the bases for the classifications and proposed penalty amounts. For Respondent, a foreman and an excavator operator gave testimony as to conditions and operations at the work site.

The following decision, findings and conclusions are based upon the citations, the pleadings and the record as a whole, considering all of the testimony, documentary and photographic evidence.

Citation 1, Item 1
29 C.F.R. § 1926.651(c)(2)

This item alleges a violation of the cited standard in that "[a] ladder or some other equivalent means of access and egress from an excavation was not provided while employees were working in

the excavation."[6]

The cited standard, 29 C.F.R. § 1926.651(c)(2), provides as follows:

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

The newspaper reporter testified that she was present at the worksite on May 24 or 25, 1999, and identified photographs she had taken at that time. (CX-1-4). Her photographs clearly depict an excavation of a depth over the worker's head and having sides with little or no sloping.

The CO stated that he measured the dimensions of the trench with the help of Respondent's foreman and the company owner. (Tr. 17) According to the CO, the trench was 8 feet deep, if not more, and, although the width varied, it was "approximately" 10 feet wide and "approximately" 30 feet in length. (Tr. 18) The CO described one end of the trench as an earthen "slope with a rough soil" that had been previously excavated. On cross-examination, he stated that he observed employees slipping while attempting to exit the trench by going up the ramp. (Tr. 46, 48) He stated that "crawl(ing)" up the 45-degree slope with loose soil at one end of the trench was the way employees exited the trench since there was no ladder in place, although there were ladders at the site. (Tr.18, 45) Based upon these observations, but without actually walking on the ramp or asking employees if it was safe, the CO opined that the ramp was not an "other safe means of egress." (Tr. 46) He stated that the employees had to travel "about" or "approximately" 25 feet to exit the trench. (Tr. 18-19, 61-62). The CO's photographs of the trench were entered into evidence without objection. (Tr. 20; CX - 5-8)

The parties agree in their post-hearing briefs that the issue here is whether the ramp was a "safe" means of egress. (Sec. brief, p. 11, Resp. brief, p.3) The Secretary's evidence is the CO's

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[6] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds,* 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

testimony that employees slipped while attempting to go up the ramp and his description of employees skidding backwards while exiting. Respondent's foreman, on the other hand, testified that he used the cited ramp without any trouble even when carrying tools. (Tr. 91) Compared with the conclusive responses of the foreman, however, the CO's statements are more persuasive, especially since the foreman's idea of "no problems" might include staggering or unsteady walking up the ramp. Moreover, the CO's explanation of what test he applied, that is, the safety equivalent of a ladder, together with his detailed description of employees slipping, warrants according the CO's testimony more evidentiary weight. I thus find the CO's testimony more persuasive.

The classification of the violation as "serious" is somewhat problematic. Respondent's post-hearing argument, made in passing, that no hazard has been shown, is rejected, in that the failure to comply with the standard reasonably raises the inference of a hazard which has not been rebutted. See, *Austin Bridge Co.,* 7 BNA OSHC 1761 (No. 76-93, 1979). Respondent's other argument, that the Secretary has not shown that the violation was serious, is also rejected.

Under § 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident, rather than the likelihood of the accident occurring, which is considered in determining whether a violation is serious. *Dravo Corp.,* 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied,* 639 F.2d 772 (3d Cir. 1980). While it is not necessary for the occurrence of the accident itself to be probable, the Secretary must show that the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.,* 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980). For example, the Commission has found a violation to be serious where the evidence showed only that the hazard was a fall of 10 to 15 feet. *P.P.G. Industries, Inc.,* 6 BNA OSHC 1050 (No. 15426, 1977).

The CO's assessment that employees on the ramp could slip or fall "to an eight foot depth" is inconsistent with the facts and logic when applied to walking up the 45 degree ramp.(Tr. 57-58) Since the ramp was the entire width of the excavation, the only possible "fall" while walking on it could have been to the ground on which the employee was actually standing.

The Secretary, abandoning the CO's position at the hearing, argues in her post-hearing brief that the "distance the employees had to travel" (established as "approximately" 25 feet), plus the difficulty employees had exiting from the trench, resulted in an "increased likelihood of employees

being seriously injured or killed if the trench collapsed." (Sec. brief, pp. 11-12) (Citation omitted). The degree of "increased likelihood" of serious injury or death is not, however, apportioned between the length of the excavation and the condition of the ramp and there is no evidence in that regard. Nonetheless, I find that the Secretary has established, albeit marginally, the likelihood of serious injury or death. Given the notoriously high degree of hazard in the event of trench collapse, it is reasonable to infer that any significant burden on an exposed employee's ability to escape quickly and effectively would increase the probability of serious injury or death resulting from such a collapse. Accordingly, I find that the violation of the cited standard is serious. For the reasons set forth in the testimony of the OSHA Area Director, the proposed penalty of $800 is found to be appropriate. (Tr. 68-71)

Citation 1, Item 2
29 C.F.R. 1926.652(c)(3)(iii).[7]

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[7] The cited standard, 1926.652(c)(3)(iii), is shown below in italics, within the context of the sub-section in which it appears:

> (c) Design of support systems, shield systems, and other protective systems. Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, **in the alternative**, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:
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> * * *
>
> (c)(1) Option (1) - Designs using appendices A, C and D. Designs for timber shoring in trenches
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> * * *
>
> (c)(2) Option (2) - Designs Using Manufacturer's Tabulated Data.
>
> * * *
>
> (c)(3) Option (3) - Designs using other tabulated data.
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> * * *
>
> *(c)(3)(iii) At least one copy of the tabulated data, which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored*

(continued...)

This citation item alleges that "[c]opies of the trench box certifications for the trench boxes used on 5/26/99 were not made available upon request by the Secretary's representative on site."

The CO testified that he "requested certification" on May 26, 1999, for the two trench boxes Respondent had at the site but that none was "forthcoming" (Tr. 25-26). Moreover, none was received by June 14, 1999, the date the citations were issued and although one was received "eventually," the CO did not know about the others. (Tr. 26)

Respondent avers that the cited standard does not apply. For the following reasons, Respondent's argument is accepted.

On cross-examination, the CO maintained that the cited standard applied to trench boxes, such as the ones in this case, which were manufactured elsewhere by others and used by Respondent as well as boxes constructed by the cited employer. (Tr. 43-45) The CO's explanation is specious. Subsection "c" clearly presents requirements stated in the alternative (c1, c2, c3 or c4). The nature of the trench support system dictates which one of the alternative sets of requirements applies. In this case, Respondent was using a trench box constructed by a commercial manufacturer. As Respondent points out in its post-hearing brief, the CO apparently ignored other parts of the cited standard which make it apparent that the section cited by OSHA is intended to apply to trench support systems constructed by the employer using them. The clearly alternative wording of the several subsections distinguishes this case from those in which the Commission held that the headings or titles of standards provided only guidelines.[8]

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[7](...continued)

> *off the jobsite, but a copy of the data shall be made available to the Secretary upon request.*
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> * * *
>
> (c)(4) Option (4) - Design by a registered professional engineer.

(Emphasis and italics added.)

[8] Chairman Cleary, speaking for the Commission in *Wray Electric Co.*, 6 BNA 1981, 1984 (No. 76-119, 1978), presented the following cynosure:

> Titles and headings are '. . . tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.' *Brotherhood of Railroad Trainmen v. Baltimore & Ohio*

(continued...)

Based on the foregoing, I conclude that the Secretary has failed to demonstrate that the cited standard applies, a necessary element of her *prima facie* case. Accordingly, this item is VACATED.

Citation 2, Item 1
29 C.F.R. § 1926.652(a)(1)[9]

This citation item alleges that "[e]mployees were working in an excavation which was not properly protected with either sloping, shoring, or some other equivalent means." The alleged violation was classified as "'willful," and a penalty of $55,000.00 was proposed.

The newspaper reporter stated that she had visited the work site on either May 24 or 25 and saw a person working in the excavation. There were no trench boxes in place at that time . (Tr. 11) Her photographs clearly depict an excavation of a depth over the worker's head and with sides with little or no sloping.

The CO testified that upon his arrival at the work site, he observed the trench. He described the walls as vertical and unsloped. (Tr.18) He also stated that Respondent's foreman at the site, who had had OSHA training, admitted that the trench "probably" did not meet OSHA's requirements. The CO performed two simple soil tests on a sample taken from a spoils pile made up of soil which the Foreman described as having been "taken out of this excavation" and which "had similar characteristics to what the sides of the walls were...." On cross-examination, the CO more clearly identified the location from which the soil sample was taken. (Tr. 48; CX-7) He believed that the sample had come from soil taken out of the excavation but did not know exactly where within the excavation the soil had been. He conceded that he did not know if it had been soil which was part

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[8](...continued)
*Railroad,* 331 U.S. 519, 529 (1947).

[9] The cited standard, 29 C.F.R. § 1926.651(a)(1), and relevant exceptions, provide;

> (a)(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:
> (a)(1)(i) Excavations are made entirely in stable rock; or
> (a)(1)(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.

of a cushion underneath the previously installed utilities. (Tr. 47) He did state that he had "reached down" about one foot into the side of the trench to retrieve the sample. (Tr. 49) Based upon his observations, the CO opined that the information given to him by the Foreman regarding the soil sample was accurate. (Tr. 23) The CO formed the opinion that the excavation had been dug in Type B soil. (Tr. 20-23, CX - 9) He believed that the site of the excavation had been "previously disturbed" because there were other utilities in the ground in the immediate vicinity of the excavation. (Tr. 24) Inasmuch as the soil was previously disturbed, it could not, according to the CO, be classified as Type A, leaving only Type B or C as possible classifications. (Tr. 25)

Respondent's foreman testified that he had been doing excavating and utility work for several years. (Tr. 89-90) He was present during the inspection, and he had been at the location for about six weeks. (Tr. 91) He completed the OSHA 40 hour safety course as well as hazardous materials training after the inspection. (Tr. 92, 108). The foreman described the pipe which Respondent was installing at the time of the inspection as "24-inch concrete pipe" having an inside diameter of 24 inches and an outside diameter of 30 inches except at the end or "bell," which "would be close to 30 inches" in diameter. (Tr. 92-93, 96). The foreman frankly admitted that in his opinion a trench box should have been in use at the time of the inspection. (Tr. 95) He also testified a bit later that the previously installed pipe would have interfered with the installation of the new pipe. (Tr. 98) Nonetheless, he agreed that he could have used other means of protection against trench collapse. (Tr. 99) He stated that he believed that he did not need the trench box in use at that location because "I had sloped because with the type of material that was there . . . (the trench) was safe...." (Tr. 100)

The excavator operator, with about 30 years of experience, had also been on the job for about six weeks prior to the inspection. (Tr. 106) The trench box had been used earlier on the job, and he was apparently putting it into the trench when he felt it was needed. (Tr. 105) The employees working in the trench were his son, a nephew and a friend. (Tr. 106). He stated that the ground was "so hard" that the walls of the trench box started to "bend" when he tried to push it deeper into the trench. (Tr. 106)

The Secretary correctly argues that since the trench was dug in "previously disturbed" soil, regardless of how the soil might have tested, it could not be classified as Type A. (29 C.F.R. § 1926.651, Appendix A). The requirements of the standard cannot be superceded by the excavator operator's opinion, regardless of his experience and/or observations. The testimony and photographs

demonstrate that two, if not three, employees worked in the trench and were thus exposed to the hazard of collapse.

Respondent attacks the CO's soil sampling, asserting that it either came from a spoils pile that may or may not have been in the area of the trench which was 8 feet deep. Respondent also asserts that if the CO had "reached down about a foot," he would have taken the sample from part of the asphalt sub-layer of the roadway. In sum, Respondent would have me disregard the sample. In addition, Respondent relies on the testimony of its excavator operator, who described the soil as gray/green with rocks, the very definition of stable soil. Respondent maintains that the photographs of the excavation show the "hardness" of the soil in several ways. Respondent's arguments are rejected. An excavation 8 feet deep, 10 feet wide and 30 feet long dug in and around previously disturbed (Type B or C) soil requires sloping, sheeting, shoring or other means of trench collapse protection. There was none here, and Respondent was in violation of the cited standard.

The Secretary also alleges that this violation is willful. A willful violation is committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered a conscious disregard or plain indifference to the standard, *i.e.*, *General Motors Corp., Electro-Motive Div*., 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated). "Willful" describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.*, 595 F.2d 309, 318-319 (5th Cir. 1979) *(General Electric*).

The Secretary maintains that the violation is "willful" because there was a "conscious, intentional, deliberate decision (on the part of the foreman) not to use a trench box when he knew it was contrary to OSHA requirements." (Sec. brief, pp. 9-10) Moreover, the Secretary believes the $55,000 proposed penalty to be appropriate in light of the high degree of hazard associated with trench collapse, the lengthy duration of exposure and Respondent's "extensive history" of prior violations of this standard. Respondent, on the other hand, argues that the violation cannot be willful within the meaning of the Act because the testimony of the excavator operator, who is the father of the foreman, shows that he "used his experience to determine that he was excavating in solid rock." Solid rock would not have required the use of a trench box. Respondent views the failure to use a

trench box as "ordinary negligence" based on an error by the excavator operator. (Resp. brief, p. 9). As to penalty, Respondent maintains that without specific proof as to the likelihood of a collapse "all penalty calculations must be at their absolute minimums and all adjustment factors . . . should be at their maximums for the lowest possible penalty." (*Id.*).

Because the foreman proceeded with the trenching operation without installing a trench box which he knew was required by OSHA regulations under the circumstances present, I conclude that the violation was willful as that term is used in the Act and under Commission precedent. The Secretary correctly relies on testimony of both the CO and the foreman demonstrating that the foreman was significantly experienced, that he had attended a 40-hour OSHA course prior to the date of the inspection, and that he knew at the time that OSHA regulations required a trench box under the conditions present. (Tr. 17, 89, 92, 94-95, 99-100) Even if the foreman's testimony that the presence of an "old pipe" would have "interfered" with the installation of a trench box is taken to be an argument of impossibility or infeasibility of compliance (neither of which was specifically argued by Respondent), the defenses could not be sustained because the foreman soon thereafter testified that other forms of protective systems could have been used. (Tr. 88-89). The facts in this case highlight the difference between conduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. This case is the essence of willful under *General Electric* and its progeny. This is not a case of scienter or evil intent in the classic sense or one of reckless disregard. It is one in which there was a violation with the full knowledge of the foreman that the conditions constituted a failure to comply with the regulations. Accordingly, I conclude that Respondent's violation of the standard at 29 C.F.R. § 1926.652(a)(1) was willful. Citation 2, Item 1 is thus AFFIRMED.

The Commission has often held that in determining appropriate penalties for violations, including those classified as willful, "due consideration" must be given to the four criteria under § 17(j) of the Act, 29 U.S.C. 666(j). Those factors include the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight."

In support of the appropriateness of the $55,000 proposed penalty, the Secretary points to Respondent's "extensive history" of non-compliance with trenching standards (CX-18), the fact that

the decision was not a "momentary" one, *i.e.*, the trench was open and unprotected for at least two days, and its "consistency with past penalty decisions." (Citations omitted.) The testimony, however, demonstrates that while the size of Respondent resulted in a 60 per cent "credit" when applied to the serious violation, any "credit" for the small size of the company was withheld regarding the willful violation "due to the history of the company." (Tr. 42, 70). Clearly, the withholding of a credit for a small sized company on the basis of its past history of OSHA violations is mixing apples and oranges. Looking at Respondent's history, however, gives cause for further consideration. The OSHA Area Director who authorized the issuance of the citations and approved the proposed penalty calculations testified that he considered Respondent's "history" to include five or six willful citations issued to it. (Tr. 73-74) Each of the prior cases, however, was settled with the specific provision that the violation was "recharacterized" as a "generic Section 17" violation. Thus, as affirmed by the prior settlement agreements, the prior citations for trenching violations bear no classification as willful, repeated, serious or other-than-serious. The Secretary cannot have it both ways. I conclude that the Secretary cannot agree to reduce or eliminate the "classification" of an alleged violation in order to assist in settling a case, incorporate that accord into a binding agreement and then later rely on the mere allegation of willfulness in the earlier citations in support of a classification or history consideration in a later case. That being said and applied here, Respondent's history of five prior violations of this trenching standard, regardless of classification, indicates that a very substantial penalty is warranted. Indeed, even without classification, Respondent has shown itself to be unimpressed by its prior trenching violations. There appears to have been little teaching value in the previous citations, settlement agreements and penalties. I find that Respondent's history of violations of this very standard is the single most important element in the consideration of an appropriate penalty. Thus, while the proposed penalty of $55,000 for this willful violation could be reduced under the application of an adjustment for its small size, I also hold that it could be substantially raised based solely on Respondent's history of prior violations. Under these circumstances, I find that the penalty proposed by the Secretary, $55,000, is appropriate for the willful violation. Accordingly, a penalty of $55,000 is assessed for the violation as affirmed in Citation 2, Item 1.

## *FINDINGS OF FACT*

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

## *CONCLUSIONS OF LAW*

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Citation 1, Item 1 and Citation 2, Item 1.

4. Both violations of the Act found above were serious within the meaning of § 17(k) of the Act.

5. The violation of the Act as alleged in Citation 2, Item 1 was willful within the meaning of § 17(a) of the Act.

6. Respondent was not in violation of § 5(a)(2) of the Act as alleged in Citation 1, Item 2.

7. A civil penalty of $800.00 is appropriate for the serious violation of the Act as described in Citation 1, Item 1.

8. A civil penalty of $55,000.00 is appropriate for the willful violation of the Act as described in Citation 2, Item 1.

## ORDER

1. Citation 1, Item 1 and Citation 2, Item 1 are AFFIRMED.
2. Citation 1, Item 2 is VACATED.
3. A total civil penalty of $ 55,800.00 is assessed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: 6/19/00
Washington, D.C.