SECRETARY OF LABOR, Complainant, v. C.E.M. PLUMBING, INC., Respondent.	OSHRC Docket No. 95-0676

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

I. Background

The Respondent, C.E.M. Plumbing, Inc. ("C.E.M."), was cited for two violations of the trenching standard following an inspection on February 16, 1995. The second citation alleged a willful failure to protect employees from cave-ins by any of the protective systems required in 29 C.F.R. §1926.652(a)(1), and proposed a penalty of $10,000.[1] Review Commission Chief Administrative Law Judge Irving Sommer affirmed the citation as serious, and assessed a penalty of $750.

The issues before us are the judge's reduction of the characterization of citation two from willful to serious, and the appropriateness of the penalty he assessed. For the reasons that follow, we affirm the judge.

[1]The first citation alleged a serious violation of 29 C.F.R. § 1926.651(j)(2), for C.E.M.'s failure to keep the spoils pile at least two feet from the edge of the trench. The judge affirmed the citation as serious, and assessed the proposed penalty of $750. That citation is not before us.

II. Facts

On February 16, 1995, Occupational Safety and Health Administration ("OSHA") Compliance Officer Richard Mendelson was traveling through Westbury, New York en route to conduct a planned inspection. On Old Country Road, a "major commercial thoroughfare," Mendelson observed a trench that appeared to be deeper than five feet, and employees working within the excavation. Mendelson contacted his acting area supervisor and received permission to initiate an inspection.

When he arrived on the site, he observed one employee, Dominic Abbatiello, exiting the trench. The trench was approximately 17 to 20 feet long, 8 feet wide, and 6 feet deep, with vertical walls that were not sloped or shored. The floor of the trench was banked, creating walls that ranged from 3 to 6 feet high. In the citation, OSHA alleged that C.E.M. violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") by failing to protect the employees working in the trench from cave-ins by any of the protective systems required in §1926.652(a)(1).[2] The entire excavation was completed in one hour, and the employees were exposed to the hazard for at least 15 to 20 minutes. The job was in the final stages of completion when the compliance officer arrived at the site, and the employer began the process of back-filling the excavation immediately following the inspection.

C.E.M. president Carlo Lonardo testified that he was aware that protection was required during some excavations. He testified that C.E.M. did own a trench box, but that it was too large to fit into this excavation, and was normally used for deeper jobs. Employee/foreman Abbatiello testified that a trench box was normally used in excavations

---

[2]Section 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

over six or seven feet. Employee Elvis Harris estimated that shoring had been used on 50 other jobs, and a trench box had been used on 30 other jobs.

The compliance officer testified that C.E.M. president Lonardo told him that he could not afford to shore the trench, and that he would not have received the bid for the job if he had included the cost of shoring. Lonardo, however, believed the trench was safe because he thought that a vast tree root system running through the trench stabilized the excavation. He also believed that the surrounding soil was hard clay. When asked whether C.E.M. would comply with the trenching standards in the future, Lonardo's testimony was not clear.

III. Analysis

A willful violation is one which 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, 1993-95 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-0264, 1994), *aff'd,* 73 F.3d 382 (D.C. Cir. 1995). "It 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.'" *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). "A violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard." *Williams Enterprises Inc.*, 13 BNA OSHC 1249, 1259, 1986-87 CCH OSHD ¶ 27,893, p. 36,591 (No. 85-355, 1987).

The judge found that the Secretary failed to establish that C.E.M. committed a willful violation of the Act. He relied primarily on Lonardo's lack of specific familiarity with OSHA regulations and on what Lonardo said he would have done had he known of the cited regulation:

> It is clear from the testimony at hearing that Lonardo, though generally familiar with soil types and available safety measures, was not familiar with specific OSHA regulations, was unaware of OSHA soil classifications, and completely misunderstood OSHA sloping and shoring requirements. C.E.M. had no history of prior OSHA citations. Lonardo believed that the trench cited

> in this matter did not require shoring, that there was no danger of cave-in because of the cohesive clay soil, and an extensive root system supporting the soil. Though Lonardo remained convinced of his position and the safety of the trench throughout the hearing he also stated, both at the hearing and during the inspection, that he would have complied with the regulation had he been aware of it.

The Secretary bases her willful characterization on allegations that C.E.M. president Lonardo chose not to use safety protection purely for financial reasons, some indications that Lonardo would not comply with the standard in the future, and the lack of evidence that would "mitigate" against a finding of willfulness. In addition, the Secretary argues that the judge's credibility determinations may be reversed as unreliable.

We find no basis for reversing the judge. There is evidence that cost was a factor in C.E.M.'s failure to comply with the cited standard. However, in those cases in which the Commission has found violations willful based on an employer's failure to comply with the Act because of the cost of compliance, the employer was aware of the requirements of the standard or the need to abate the hazard but chose not to comply. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1181-82, 1993-95 CCH OSHD ¶ 30,059, p. 41,331(No. 89-2883, 1993)(consolidated); *Valdak Corp.*, 17 BNA OSHC 1135, 1137, 1993-95 CCH OSHD ¶ 30,759, pp. 42,740-41 (No. 93-0239, 1995) *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Coleco Industries Inc.*, 14 BNA OSHC 1961, 1967, 1991-93 CCH OSHD ¶ 29,200, p. 39,074 (No. 84-546, 1991). Here, there was no showing that C.E.M. was aware of the standard's requirements or that it made such a deliberate decision to violate them.

Nor does the record establish that C.E.M. was indifferent to the requirements of the Act. Clearly employers are not free to substitute their own judgment for the provisions of a standard. *Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978), *cert. denied*, 439 U.S. 965 (1978). An obstinate refusal to comply is an element of willfulness. *Id.; see Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1123, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993)(willfulness can be established by a showing that "an employer harbored a 'state of mind . . . such that, if he were informed of the [applicable standard], he would not care.'"), *citing Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987). However, "[t]he willfulness charge relates to the employer's underlying state of mind when it committed the violation." *Monfort of Colorado Inc.*, 14 BNA OSHC 2055, 2062, 1991-93 CCH OSHD ¶ 29,246, p. 39,186 (No. 87-1220, 1991). Lonardo's statements at the hearing regarding his future compliance intentions may evidence his and C.E.M.'s mind-set at the time the violation occurred. However, considered as a whole, we find Lonardo's testimony on this point to be confused and contradictory and not indicative of a willful state of mind.[3]

Finally, the only credibility determination by the judge that the Secretary appears to be challenging is the judge's observation that Lonardo "would have complied with the regulation had he been aware of it." However, we do not rely on this determination. As we stated earlier, although Lonardo's statements regarding his future compliance with the Act might evidence C.E.M.'s mind-set at the time of the violation, they are too confusing to

---

[3]For example, the Secretary relies on the following cross examination testimony as support for the assertion that C.E.M. president Lonardo evidenced an intent to avoid future compliance with the Act:

> Q If you were doing a job similar to this one, *tomorrow...would* you have done the job any differently?
>
> A No.

In our view it is difficult to ascertain the meaning of the question or the response.

establish plain indifference or intentional disregard. We, therefore, find no need to examine the credibility determination challenged by the Secretary.

With the exception of the Secretary's argument that the violation be found willful, neither party takes issue with the validity of the penalty assessed by the judge, and we find no reason to disturb it.

IV. Order

Accordingly, we affirm the judge's decision. Citation 2, item 1 is affirmed as a serious violation of the Act and a penalty of $750 is assessed for that item.

/s/
Stuart E. Weisberg
Chairman

/s/
Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: February 18, 1997