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SECRETARY OF LABOR, Complainant, v. E.L. DAVIS CONTRACTING CO., Respondent.	OSHRC Docket No. 92-35

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case involves one serious and one willful citation issued to E.L. Davis Contracting Co. ("ELD" or the "company"), a pipeline installation company, after part of an excavation in which two of its employees were working in Atlanta, Georgia, caved in. The citations alleged numerous violations of safe excavation practices. Judge James D. Burroughs affirmed all the serious and willful citation items on review and assessed substantial penalties. We affirm his decision with one modification.

Background

ELD had a $597,000 contract with the City of Atlanta to repair or replace a sewer line. The cave-in that led to the citations occurred on the evening of July 29, 1991, while two company employees were in an excavation using a jackhammer to trim concrete structures. The top part of the 20 to 22-foot deep excavation was square-shaped with 10-to-11 foot sides. A sewer pipe from which liquid flowed ran through the top part of the excavation while at the bottom was a manhole through which sewage flowed. The

excavation was dug in previously disturbed and unstable soil and, as set forth below, had no protective system in violation of 29 C.F.R. § 1926.652(a)(1).

I. *Serious Citation 1, Item 1 -- Adequacy of Safety Program*

This item alleges that ELD violated 29 C.F.R. § 1926.20(b)(1)[1] by not, among other things, developing, implementing, and enforcing safety rules requiring the use of protective equipment and prohibiting employees from entering an unsafe excavation.

Facts

The company had no written safety program at the time of inspection. Company owner Ernest Leon Davis testified that instead, he was on the job "a hundred percent of the time," and gave his employees verbal safety instructions prior to or when they were hired, and that these instructions were constantly re-emphasized on the job. Two employees were in the excavation when the cave-in occurred. Oscar Baker, one of the employees, had only been working for ELD for about two-or-three hours. He was wearing tennis shoes and was not wearing a hard hat. Brown Hardnett, the other employee, was not wearing a hard hat either. Davis testified that he had instructed Baker that he had to have safety shoes before he could start work but that Baker "begged" him to be permitted to use tennis shoes until he could acquire safety shoes. Davis noted, however, that about ninety percent of employees wore tennis shoes while working. Davis further stated that Baker had been instructed to wear a hard hat but "refused." Davis testified that he thought Baker had pulled off his hard hat and left it at the top of the excavation.

Judge's Decision

The judge affirmed the citation item, finding that ELD had no written safety program at the time of the inspection and that, if it had an oral one, it was not adequately enforced

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[1] Section 1926.20(b)(1) provides:

> **§ 1926.20 General safety health provisions.**
>
> . . . .
>
> (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

because evidence established that employees were permitted to work in the excavation without hard hats or safety shoes. The judge further stated:

> E.L. Davis expressed an inability to compel employees to wear personal protective equipment . . . The truth is that he does not care. He lacks commitment and concern for the safety of his employees.
> E.L. Davis knew that his instructions to wear hard hats and safety shoes were being ignored. He took no steps to enforce the rules. He took no action to prohibit employees from entering an unsafe excavation. Employees were knowingly permitted to enter a 22-foot deep excavation which contained an open sewer, had no protective system, and which had not been tested for poisonous gases or oxygen deficiency.

The judge found that the violation was serious, holding that the failure to wear safety shoes while operating a jackhammer exposed employees to the possibility of broken bones and severe lacerations and the failure to wear hard hats exposed the employees to possible head injuries from flying and falling objects.

Discussion

We conclude that the judge's findings as to the violation and the serious characterization are clearly supported by the evidence. ELD's claim that Davis instructed and trained all employees at the time of hiring and throughout their employment is not supported by the record, particularly where employees, admittedly under Davis's direct supervision, were allowed to work in a noncomplying excavation. Therefore, we affirm the alleged violation of section 1926.20(b)(1) and find the violation serious.

II(a). ***Serious Citation 1, Item 2(a) -- Instructions on Excavation Safety***

This item alleges a serious violation of 29 C.F.R. § 1926.21(b)(2)[2] due to ELD's

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[2] Section 1926.21(b)(2) provides:

> **§ 1926.21 Safety training and education.**
> . . . .
> (b) *Employer responsibility.*
> . . . .
> (2) 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.

The penalty proposed for grouped items 2a and 2b was $4,500.

failure to provide its employees with safety instructions regarding the excavation work they were performing. In addition to the facts also applicable to the preceding item, the record reveals that a jackhammer was being used in the excavation to chip concrete. Davis testified that he instructed his employees on the hazardous conditions that could occur in an excavation and on the procedures to use if they did occur. Davis testified that he told employee Baker "that people can have reactions from the heat factor off a sewer line and they can feel faint . . . and if they have any reactions that they feel like is not normal in [sic] their own decision to come out of there immediately or we'll get them out." Elsewhere, Davis testified that he told employees not to go into "holes" unless they were instructed to do so, to "maintain the entrance and exits and ladders," "to be aware of any availing conditions down there that could change at any time," and to "get out of there" if a man "smell[ed] a little something different" or began "getting a little dizzy." Davis also testified that he did not consider the excavation "that dangerous." The compliance officer testified that employee Baker told her he had not received any safety training.

Judge's Decision

The judge affirmed this alleged violation after finding that employees had not been trained and were not aware of the hazardous conditions in which they were working. The judge found the violation was serious.

Discussion

"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 Constr. Co.*, 15 BNA OSHC 1614, 1619, 1991-93 CCH OSHD ¶ 29,681, p. 40,243 (No. 89-2019, 1992). Employers must model their rules on the applicable OSHA requirements. *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 n. 6, 1993 CCH OSHD ¶ 30,231, p. 41,621, n. 6 (No. 90-1106, 1993).

We find that the safety instructions presented in the record fall short of what is required for compliance with the cited standard. They lack the required specificity and completeness and they are not consistent with the terms of relevant OSHA standards. *See* cases cited in *El Paso Crane*, 16 BNA OSHC at 1425, n. 6 & 7, 1993 CCH OSHD at p. 41,621, n. 6 & 7.

We also note that these inadequacies are exacerbated by the particular problems of the work force that owner Davis knew he was dealing with,[3] which had a high turnover rate and a lack of experience and that therefore could not be expected to be particularly knowledgeable about excavation hazards and the safety precautions required to deal with those hazards. *See Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,902, p. 40,811 (No. 90-2668, 1992)(what is obvious to experienced supervisor may not be obvious to inexperienced employee). Therefore, we affirm the alleged serious violation of section 1926.21(b)(2).

II(b). *Serious Citation 1, Item 2(b) -- Confined Space Hazard Instructions*

The Secretary alleges that ELD failed to comply with 29 C.F.R. § 1926.21(b)(6)(i)[4] by not instructing employees who entered the excavation on July 29, 1991, as to the hazards involved and the precautions to take in confined spaces.

Facts

Davis conceded that the excavation was a confined space. He testified generally that he instructed his employees "as to what hazardous conditions could happen and what procedures to use in case they did," and more specifically:

> I told him that the conditions -- that people can have reactions from the heat factor off a sewer line and they can feel faint . . . and if they have any reactions that they feel like is not normal in their own decision to come out of there immediately or we'll get them out.

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[3] Owner Davis testified that the company basically had only about five employees "maximum" working for it at any one time and that because the employees were "just a temporary type" who would "work awhile and [be] gone," in a year's time the company would "wind up with a hundred or two [hundred employees] on the record."

[4] Section 1926.21(b)(6)(i) provides:

> **§ 1926.21 Safety training and education.**
>
> . . . .
>
> (b) *Employer responsibility.*
>
> . . . .
>
> (6)(i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Davis further testified that he instructed his employees to:

> maintain the entrance and exits and ladders . . . and the proper shoes and to be aware of any availing conditions down there that could change at any time . . . [like] under flowing conditions like that, you could have a chemical change where nobody in the world could detect it except the man might smell a little something different. So he's instructed to get out of there . . . if they felt any conditions that they felt was affecting them to come out of the hole . . . if they felt they was getting a little dizzy or whatever . . . .

The CO testified that employees had not received proper instruction under the cited standard and that, in particular, they had not been trained in the use of emergency equipment. She also testified that there was no such equipment on the site for them to use even if they had been trained.

Judge's Decision

The judge affirmed the citation item after concluding that Davis failed to instruct his employees as required by the standard. The judge found the violation was serious.

Discussion

The safety instructions owner Davis provided to his employees were not sufficient to comply with the cited standard. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 320 (5th Cir. 1979) (inexperienced employees, not ordinarily having "common sense" coming with job familiarity, require more specific guidance from company). The tenor of owner Davis's instructions suggested that employees could save themselves if they started to feel dizzy or smelled "something different" in a confined space. However, the hazards posed by toxic, flammable, or oxygen deficient atmospheres, see 29 C.F.R. § 1926.21(b)(6)(ii), are not always overcome by resort to the senses. *See Power Fuels, Inc.*, 14 BNA OSHC 2209, 2212-2213, 1991-93 CCH OSHD ¶ 29,304, p. 39,345 (No. 85-166, 1991). The failure to provide employees with instructions regarding emergency equipment that the standard specifies, or even to provide the equipment itself, are also glaring omissions. We therefore find that ELD failed to comply with the cited standard. The violation was serious because the consequences of not having information obtained through training on how to use emergency equipment could result in death or serious physical harm.

Penalties for Items 1, 2(a), and 2(b)

Judge's Decision

The judge found that Davis was a small company that employed five people at the time of the inspection but had a history of prior excavation violations. The judge found that Davis nonetheless made "[l]ittle effort . . . to comply with safety standards, and no training was provided to his employees," and was due no credit for good faith. The judge found that the gravity of the violation was high, but he reduced the $9,000 penalty proposed by the Secretary for these items to $6,000 because he found that the standards cited in items 1 and 2(a) and 2(b) were cited "primarily for the same purpose."

Discussion

We see no reason to disturb the judge's analysis of the facts and his assessment of a $6,000 penalty. While ELD claims that the judge's penalty assessments fail to take into account the company's small size, the judge specifically noted that ELD "is a small company that employed five people at the time of the inspection," and took that fact into account. The gravity of the violations is high because they involve employees working in an unprotected excavation over 20 foot deep. ELD also has a history of prior violations, having been found to have violated OSHA standards in 1983 and 1987 for failing to slope or shore excavations in which employees worked. In 1983, a cave-in occurred and an employee was hospitalized. See *E.L. Davis Contracting Co.*, 88/9/A3, 13 BNA OSHC 1678, 1988 CCH OSHD ¶ 28,180 (No. 87-846, 1988)(ALJ). Moreover, we agree that ELD deserves no credit for good faith, particularly inasmuch as owner Davis testified that he purposely failed to pay the penalties assessed against him in the 1983 and 1987 cases.[5] We also find that the judge did not exceed his discretion in assessing a combined penalty for items 1, 2(a), and 2(b), *see H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981), an action not opposed by the Secretary.

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[5] When Davis was asked by the Secretary's attorney here whether it was true that Davis had not even paid "one penny" of the $4,000 penalty assessed in the 1987 case, Davis testified, "That's correct because I'm not going to pay anything that I don't owe and I didn't owe that." When questioned about a $240 penalty against his company in the 1983 case, owner Davis similarly testified that he had not paid any of it because "I didn't feel like I owed it."

III. *Serious Citation 1, Item 7 -- Inspection by Competent Person*

This item alleges that ELD violated 29 C.F.R. § 1926.651(k)(1)[6] by not having the excavation inspected by a "competent person" when conditions such as leaking water, vibrations from passing traffic, and jackhammer use inside the excavation could weaken the walls of the excavation.

Facts

Davis, who had been in the pipeline installation business for over 40 years, considered himself the competent person on this jobsite and one capable of identifying and anticipating jobsite hazards. He did not consider the excavation to be particularly hazardous and, as mentioned above, permitted two employees without sufficient protective clothing to work in the unprotected excavation.

Judge's Decision

The judge affirmed the citation item. He found:

> [Owner Davis] is not considered capable of identifying existing and predictable hazards. He lacks commitment to a safety program, and his attitude negates his good judgment on identifying hazards. His judgment was clouded. There were recognizable and predictable hazards at the site. A competent person would have recognized the hazards and shown more concern for the safety of employees. The fact that E.L. Davis may have been well qualified to identify other safety hazards at the site does not prohibit a determination that he is not a competent person. *See Secretary v. Ed Taylor Constr. Co.*, 938 F.2d 1265, 1272 (11th Cir. 1991).

Elsewhere in his decision, the judge also stated that although Davis assumed the role of "competent person," he failed to recognize as hazardous a confined space which had no

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[6] Section 1926.651(k)(1) provides:

> **§ 1926.651 General requirements.**
>
> . . . .
>
> (k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure to protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

protective system and in which there was an open sewer. The judge found the violation was serious because "[t]he failure to have the excavation inspected by a competent person exposed employees to possible cave-in of the excavation walls and their suffocation, crushing or death."

Discussion

A "[c]ompetent person" is "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b). Davis had the authority to promptly correct hazards and may well have had the requisite experience, but he permitted two employees to work in an excavation in which they were exposed to safety and health hazards that violated numerous OSHA standards. In doing so, he clearly demonstrated, and we so find, that he was not a "competent person" because he was not "capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees." *See Ed Taylor*, 938 F.2d at 1271 (inability to identify potential hazard evidence of incompetence). We therefore affirm this citation item and find that the judge properly characterized it as serious.

Penalty

The judge assessed the $4,500 penalty proposed by the Secretary. For the reasons stated earlier and because we find this violation to be of high gravity, we see no reason to disturb the judge's assessment and therefore affirm his $4,500 penalty amount.

IV(a). ***Willful citation 2, Item 1a: Excavation Lacked Protective System***

This item (grouped with Item 1(b) below) alleges that ELD willfully violated section 1926.652(a)(1)[7] by failing to provide its employees working in the inadequately sloped

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[7] Section 1926.652(a)(1) provides:

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

(continued...)

excavation with cave-in protection designed in accordance with 29 C.F.R. § 1926.652(c). At issue on review is whether the violations were willful.

Facts Bearing on Willfulness

A construction inspector for the City of Atlanta, Stanley Marshall, testified that on the day before the cave-in, Davis had attempted to utilize hydraulic jacks to protect the excavation, but the jacks had malfunctioned. Marshall "suggested to him [Davis] that he try to find some alternative means of shoring the hole." However, when Marshall viewed the excavation again on the day of the cave-in, the excavation was not sloped, shored or sheeted, even though two employees were working in it. Davis testified that the employees were ordered into the trench because of "[t]he demand of the job to get that manhole out of there and clear that intersection . . . ."

As noted earlier, ELD's past history includes violations of OSHA standards for failures to slope or shore excavations in which employees were working; one of these citations was issued after a cave-in that resulted in the hospitalization of an ELD employee. The record also shows that Davis had previously ignored the advice of a City of Atlanta inspector to protect a trench in 1987. In addition, Davis has purposely failed to pay penalties assessed against him in prior OSHA cases. When Davis was asked by the Secretary's attorney in the instant case whether it was true that Davis had not paid even "one penny" of a $4,000 penalty assessed in the 1987 case, Davis testified, "That's correct because I'm not going to pay anything that I don't owe and I didn't owe that . . . . We're too broke to go around here paying something we don't owe." When asked about a $240 penalty assessed against his company in the 1983 case, Davis testified that he had not paid any of it because "I didn't feel like I owed it."

Judge's Decision

The judge found the violation was willful, primarily because of (1) the two prior occasions on which ELD had violated OSHA excavation standards, (2) ELD's failure to pay and accept responsibility for the penalty assessments arising from the 1983 and 1987 OSHA

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[7](...continued)

(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.

citations, and (3) ELD's failure on two separate occasions to protect excavations after having been advised to do so by Atlanta city inspectors.

Discussion

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." *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990). Davis allowed at least three employees to work in the unprotected excavation following the failure and removal of the hydraulic jacks. This was done despite his knowledge of the Act's excavation and trenching requirements gained through prior citations, and despite the Atlanta city inspector's suggestion that he provide the excavation with some alternative means of protection. These factors establish that ELD had a heightened awareness of the Act's requirements and yet simply chose to ignore them. *See Id.* (willful violation found where company president ignored CO's observation that trench not properly shored). Although ELD's excavations were sometimes protected on this project and ELD had tried to protect this excavation with jacks, these factors do not affect the willfulness of the violation.

Brock v. Morello Bros. Constr., Inc., 809 F.2d 161 (1st Cir. 1987) and *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8th Cir. 1981), both of which are cited by ELD, are distinguishable. Those cases involved workplaces that were not as obviously unsafe as this one and employers who took far greater steps to protect their employees than did ELD here. In our view, *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) is closer to these facts. There, the fact that a foreman had ordered a trench box did not preclude a willful finding because he "consciously continued the trenching operations" while waiting for the trench box to arrive. We therefore agree with the judge that this violation was willful.

IV(b). *Willful citation 2, Item 1b -- Engineer-Approved Protection System*

This item -- grouped by the Secretary with Item 1a -- alleges that ELD violated 29

C.F.R. § 1926.652(b)(4)(i)[8] by failing to use a protective system in the excavation that was approved by a registered professional engineer ("RPE"). Here, also, only the willfulness of the item is at issue.

Facts

After the cave-in had occurred, ELD cut an "approved" trench box structure in two to create a 10-foot by 10-foot box and installed it in the excavation. Davis and one of his employees were working in the excavation with the modified trench box when the compliance officer arrived at the site.

Judge's Decision

The judge affirmed a willful violation, stating that the use of the unapproved trench box "was a continuation of E.L. Davis's intentional disregard and plain indifference toward the safety of his employees." He found that owner Davis had "no way of knowing if it [the modified trench box] would be effective as a protective system" and that, after two cave-ins, Davis should have made reasonable inquiries as to the requirements of the Act to protect his employees.

Discussion

We find that the Secretary failed to establish that the violation was willful. Although Davis admitted at the hearing that the modified trench box was not approved by an RPE, the Secretary does not claim and the record does not show that Davis knew that he was violating the cited standard when he put the non-complying box into the excavation.

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[8] Section 1926.652(b)(4)(i) provides:

> **§ 1926.652 Requirements for protective systems.**
>
> . . . .
>
> (b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:
>
> . . . .
>
> (4) *Option (4)—Design by a registered professional engineer.* (i) Sloping and benching systems not utilizing Option (1) or Option (2) or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer.

However, the Secretary asks the Commission to find the violation willful because it can "be inferred that Davis'[s] attitude toward the OSHA requirements was such that he would not have complied with the standard even if he had known of it," citing *Carabetta Enterp.*, 15 BNA OSHC 1429, 1991-93 CCH OSHD ¶ 29,543 (No. 89-2007, 1991). We are unable to do so. Although the record demonstrates that ELD has often violated OSHA trench and excavation standards, we cannot conclude on this record that ELD would not have complied with this standard had it known of the standard's existence. Although it was not cited as serious, the seriousness of the violation is evident from the record. We therefore find that the violation was serious. *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1597, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985).

V. *Penalties*

Although we reduce the characterization of item 1(b) to serious, we affirm the $60,000 penalty assessed by the judge for combined items 1(a) and 1(b) for the reasons he gave:

> Davis has ignored the OSHA standards that are applicable to his business operations. The penalty proposed for the willful citation must be of sufficient amount to convince E.L. Davis that OSHA is not a paper tiger. The standards have been enacted for employees' safety and must not be ignored. Davis has been cited three times for the same violation . . . . In the present case and one previous case, he was informed by a City of Atlanta inspector prior to a cave-in of the need for an adequate protective system . . . In both instances he ignored the warning and continued to act and operate by ignoring the standards. He has shown little concern for employees' safety. He lacks commitment toward enforcing a safety program. He has continued to ignore small penalty assessments . . . and openly boasts that he has not paid the fine [in OSHRC Docket No. 87-846] and that he does not owe it. This attitude has no respect for the law or for the safety of its employees.

We believe that the stakes are too high to allow this company to continue to operate in this manner. We would expect that payment of this penalty will bring a new appreciation to the company of the vital importance of complying with OSHA regulations. *See D & S Grading Co. v. Secretary of Labor*, 899 F.2d 1145, 1148 (11th Cir. 1990). However, if the penalties we assess in this case fail to induce future compliance by the company, we will consider extraordinary remedies against this or any other company owned by E.L. Davis in future cases that come before us.

Order

For the reasons stated above, we affirm Serious Citation 1, item 1, alleging a violation of 29 C.F.R. § 1926.20(b)(1), as a serious violation. We affirm Serious Citation 1, item 2(a), alleging a violation of 29 C.F.R. § 1926.21(b)(2), as a serious violation. We affirm Serious Citation 1, item 2(b), alleging a violation of 29 C.F.R. § 1926.21(b)(6)(i), as a serious violation. For purposes of penalty, we combine the aforementioned items 1, 2(a), and 2(b) of Serious Citation 1 and assess a total penalty of $6,000. We also affirm Serious Citation 1, item 7, alleging a violation of 29 C.F.R. § 1926.651(k)(1), as a serious violation; we assess a $4,500 penalty.

With respect to Willful Citation 2, item 1(a), alleging a violation of 29 C.F.R. § 1926.652(a)(1), we affirm the subitem as a willful violation. With respect to Willful Citation 2, item 1(b), alleging a violation of 29 C.F.R. § 1926.652(b)(4)(i), we downgrade the subitem from its alleged willful characterization and affirm it as a serious violation. We assess a combined penalty of $60,000 for subitems 1(a) and 1(b) of Willful Citation 2.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: September 29, 1994

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-0035
E. L. DAVIS CONTRACTING CO.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on September 29, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 29, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-0035

NOTICE IS GIVEN TO THOSE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
E. L. DAVIS CONTRACTING COMPANY
Respondent.

OSHRC DOCKET
NO. 92-0035

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 24, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0035

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. E. L. DAVIS CONTRACTING CO., Respondent.	OSHRC Docket No. 92-35

APPEARANCES:

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Atlanta, Georgia
For Complainant

Emerson Carey, Jr., Esquire
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For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

E. L. Davis Contracting Co. (Davis) contests a serious citation alleging violations of (1) § 1926.20(b)(1), for failure to initiate and maintain a safety program, (2a) § 1926.21(b)(2), for failure to instruct employees in the recognition and avoidance of unsafe conditions, (2b) § 1926.21(b)(6)(i), for failure to instruct employees in the hazards of confined space and precautions to be taken in the use of protective emergency equipment, (3) § 1926.28(a), for failure to require employees to wear safety-toe footwear

while operating a jackhammer in an excavation, (4) § 1926.100(a), for failure to require employees to wear protective helmets while working in an excavation, (5) § 1926.651(g)(1)(i), for failure to perform atmospheric testing in an excavation prior to employees entering, (6) § 1926.651(g)(2)(i), for failure to have emergency rescue equipment readily available where hazardous atmospheric conditions exist, and (7) § 1926.651(k)(1), for failure to have the excavation and adjacent areas inspected by a competent person. In the alternative, the Secretary alleges a violation of § 1926.651(k)(2), for failure to remove employees from hazardous conditions until the necessary precautions have been taken. Davis further contests a willful citation alleging a violation of (1) § 1926.652(a)(1), for failure to have a protective system in the manhole excavation and (2) § 1926.652(b)(4)(i), for failure to have a protective system approved by a registered professional engineer.

Davis is in the pipeline installation business. It is owned by E. L. Davis (Tr. 8). At all times pertinent to this proceeding, it was working on a $597,000 contract with the City of Atlanta to repair or replace a sewer line (Tr. 8). Work on the contract commenced in February, 1991. Davis was laying 36-inch pipe (Tr. 44). On July 29, 1991, Davis had progressed up Harris Street and was working at the corner of Peachtree Center and Harris Street.

On the evening of July 29, 1991, a slight cave-in occurred around 9:00 p.m. Oscar Baker and Brown Hardnett were in the excavation. E. L. Davis had been in the excavation (Tr. 8-9, 14). Additional employees were on the site but were not in the excavation. Baker had been working for the company only a matter of two or three hours. This was his first day at work (Tr. 8-9).

The dimensions of the excavation were approximately 11 feet by 11 feet. The depth of one side of the excavation measured 20.5 feet. The other side of the excavation measured 22.5 feet deep. The excavation contained a manhole in which an active sewer flowed. The employees were in the excavation using a jackhammer to trim some concrete structures (Tr. 12, 14, 23).

E. L. Davis was at the excavation at all times operations were being performed and was aware of the existing conditions. He had been inside the trench on several occasions. Additional employees had also been inside the trench prior to the cave-in. E. L. Davis had

been informed by the City of Atlanta inspector that it would be necessary to utilize a protective system in the excavation. The hydraulic jacks on the site were leaking. They were installed and immediately malfunctioned because of the leak. The jacks were removed from the excavation, and no type of protective system was utilized. The excavation was not sloped. There was some support from existing utility lines (Tr. 14-15).

As a result of the accident on July 30, 1991, Kathleen Gilliam Ragan was assigned to conduct an inspection. She proceeded to the site on that date and identified herself to the City of Atlanta persons who were at the site. She was informed that the contractor was E. L. Davis. He was not at the site at the time she arrived. She proceeded to measure the area with an engineering rod and to take photographs of the excavation. As a result of her investigation, serious and willful citations were issued to Davis on November 13, 1991.

The Allegations

Burden of Proof

In order to establish a violation of the standard, the Secretary has the burden to show by a preponderance of the evidence that (1) the standard applies to the cited conditions, (2) its terms were not met, (3) employees had access to the violative conditions, and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Ormet Corporation*, 14 BNA OSHC 2134, 2135, 1991 CCH OSHD ¶ 29,254 (No. 85-531, 1991). Davis had full knowledge of all of the violative conditions. E. L. Davis, the owner and operator, was present at the jobsite and made several trips into the excavation. According to him, he had an oral safety program because he was at the site at all times and was aware of the conditions under which the employees worked.

Item 1 - Alleged Violation of § 1926.20(b)(1)

The Secretary alleges that Davis failed to initiate and maintain a safety program. Section 1926.20(b)(1) provides:

> (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Davis had no written safety program at the time of the cave-in. E. L. Davis contends that he is the embodiment of the company's safety program (Tr. 18-19). He is always on the job and orally instructs employees (Tr. 18). According to him, employees had been instructed when hired (Tr. 26). Exhibit C-3 purportedly represents Davis's oral safety program which was reduced to writing after the inspection (Tr. 21). No documentation of the safety program was offered at the time of the inspection.

Even if Davis had a safety program, it did not meet the requirements of the standard. There was no enforcement. E. L. Davis allowed employees to work without hard hats and to wear tennis shoes. He claims to have instructed Oscar Baker that he had to have safety shoes to work in the excavation (Tr. 18). Baker was wearing tennis shoes and was allowed to work (Tr. 19). E. L. Davis expressed an inability to compel employees to wear personal protective equipment (Tr. 18-19). The truth is that he does not care. He lacks commitment and concern for the safety of his employees.

E. L. Davis knew that his instructions to wear hard hats and safety shoes were being ignored. He took no steps to enforce the rules. He took no action to prohibit employees from entering an unsafe excavation. Employees were knowingly permitted to enter a 22-foot deep excavation which contained an open sewer, had no protective system, and which had not been tested for poisonous gases or oxygen deficiency.

There was no provision for frequent and regular inspection of the work site by a competent person. E. L. Davis, who assumed the role of "competent person" on the jobsite, failed to recognize as hazardous a confined space which had no protective system and in which there was an open sewer (Tr. 24, 49). While E. L. Davis has forty years' experience in the business, he lacks the necessary commitment needed for a viable safety program. Experience without commitment negates a strong safety program. A competent person gains insight and knowledge from his experiences. This helps prepare the individual with the knowledge to maximize employees' safety. The lack of commitment and poor attitude expressed by E. L. Davis interceded and prohibited him from exercising good judgment.

The violation is affirmed.

Item 2a - Alleged Violation of § 1926.21(b)(2)

The Secretary alleges that employees had not received safety training relative to the type of work they were performing. Section 1926.21(b)(2) states:

> (2) 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.

The standard requires that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations. This means supervisory personnel advise employees of the hazards associated with the actual dangerous conduct in which they are presently engaging. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1992 CCH OSHD ¶ __ (No. 91-282, 1992). E. L. Davis did not consider the excavation to be particularly hazardous (Tr. 22-23).

Employees had not been trained in safety and were not aware of the hazardous conditions in which they were working (Tr. 71). One employee who had been on the job two or three hours was instructed that he could not enter the excavation without wearing proper shoes and a hard hat. In spite of this instruction, the employee was allowed to work in the excavation without either. Additional employees were instructed as to where they were to work in the excavation, but the rules as to protective equipment requirements were not enforced. Davis employed two transient persons at the site who were not familiar with the safety requirements.

The violation is affirmed.

Item 2b - Alleged Violation of § 1926.21(b)(6)(i)

The Secretary alleges that employees were required to enter confined spaces without receiving instructions as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required for the job. Section 1926.21(b)(6)(i) provides:

> (6)(i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

The excavation in which the employees were working was a confined space. This fact was recognized by E. L. Davis (Tr. 27-28). The excavation was approximately 11 feet by 11 feet and approximately 20.5 to 22.5 feet deep. It qualifies as a confined space.

E. L. Davis contends that he instructed the employees to maintain the entrance, exits, and ladders and to be aware of any conditions which could change at anytime. The standard is clear. Employees are to be instructed as to the nature of the hazard, precautions to be taken, and in the use of protective and emergency equipment. "Evidence that the employees were unaware of particular safety requirements, because of a lack of specific instruction, establishes a violation." *R & R Builders, Inc., supra*, 15 BNA OSHC at 1390. Davis failed to instruct his employees as required by the standard.

The violation is affirmed.

Item 3 - Alleged Violation of § 1926.28(a)

The Secretary alleges that Davis violated § 1926.28(a) by failing to have employees wear appropriate personal protective equipment. Section 1926.28(a) provides:

> (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

E. L. Davis stated that he instructed Baker to wear safety shoes. At the same time, he was aware that he was wearing tennis shoes (Tr. 18). E. L. Davis testified, "Well, he only had tennis shoes on which about ninety percent of them do" (Tr. 18).

Section 1926.28(a) is a general standard. In order to establish a violation under this standard, the Secretary must establish that a reasonable, prudent employer concerned about the safety of the employees in the circumstances involved would recognize the existence of a hazardous condition and provide the required protection. *Advance Bronze, Inc. v.*

Secretary, 917 F.2d 944 (6th Cir. 1990). This test may be satisfied by, among other things, evidence that other employers in the industry provide the particular protective equipment or opinion testimony from persons familiar with the working conditions.

Davis was aware of the need for employees to wear safety shoes. While E. L. Davis informed employees that safety shoes were required, he took no positive action to insure that they were worn. He was responsible for requiring his employees to wear safety shoes. A conscious decision was made to permit employees to work without safety shoes. No effort was made to enforce the standard.

The violation is affirmed.

Item 4 - Alleged Violation of § 1926.100(a)

The Secretary alleges employees were not wearing protective helmets. Section 1926.100(a) provides:

> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

E. L. Davis admits that employees were working in the excavation, which was 20.5 to 22.5 feet deep, without wearing hard hats (Tr. 19). He stated, "Well, they won't wear them" (Tr. 19). There is no evidence that he took any positive steps to enforce the standard.

The excavation was neither sloped, shored nor equipped with an approved protective system (Tr. 34). Employees were exposed to the hazard of being hit in the head by falling objects or dirt from a cave-in (Tr. 80). The standard requires employees to wear hard hats. E. L. Davis clearly recognized the need to wear hard hats. He wore one for his own protection and made them available to employees (Exh. C-5; Tr. 65). He knowingly allowed employees to work without protective helmets and asserts that he is virtually powerless to force employees to wear them (Tr. 18-19). This is not a viable defense. *E. L. Davis Contracting Co.*, 13 BNA OSHC 1678, 1988 CCH OSHD ¶ 28,180 (No. 87-846, 1988).

An employer can rebut the prima facie imputation of knowledge if it can demonstrate that it "effectively communicated its work rule requiring the wearing of hard hats to employees and that the rule was effectively enforced through supervision adequate to detect

failures to comply and discipline sufficient to discourage violations." *I.T.O. Corporation of America*, 11 BNA OSHC 1562, 1565-1566, 1983 CCH OSHD ¶ 26,583 (No. 80-2369, 1983). E. L. Davis was aware of the violations. No steps were taken to enforce the rule (Tr. 19). The violations were allowed on a continuing basis. Davis' attitude continues to be the same as determined by Judge Paul L. Brady in Docket No. 87-846, in which the following was quoted from the transcript:

> Q. What do you say to Ray Dumas when you catch him in a ditch for instance, and he doesn't have a hard hat on? What do you do to him?
>
> A. Well, we try to make them get their hard hats. We can't enforce it.
>
> Q. Do you ever fine them? Have you ever fined Ray Dumas or anybody?
>
> * * *
>
> A. You can't get them to appear every day. How you going to fine them?
>
> Q. Have you ever withheld pay?
>
> A. We just beg them. We don't have no authority over them no more.

The violation is affirmed.

Item 5 - Alleged Violation of § 1926.651(g)(1)(i)

The Secretary alleges that Davis failed to test the atmosphere of the excavation before allowing employees to enter. The standard provides:

> (i) Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter excavations greater than 4 feet (1.22 m) in depth.

The excavation was a confined space. E. L. Davis recognized this fact (Tr. 27). The excavation was 20.5 to 22.5 feet deep and contained an open sewer. The standard required Davis to test the atmosphere for poisonous gases and oxygen deficiency. The intent of the standard is that the atmosphere be tested by competent persons using equipment designed and approved for that purpose. E. L. Davis asserted that he satisfied this standard by relying on his sense of smell to determine if harmful substances were present in the excavation. He was aware that this approach was inadequate as evidenced by the following exchange between Davis and counsel for the Secretary (Tr. 32):

Q. In other words, you conducted a smell test?

A. Yeah, that's about as good as I know of.

Q. Mr. Davis, isn't it true that some poisonous gases have no smell?

A. Well, them people that got killed a few weeks ago out at the river found that out; they went in and one of them died . . . .

Q. They couldn't smell the gas, could they?

A. Well, they couldn't smell it.

In spite of the fact that there was no protective system in the excavation and there was an open sewer in a confined space, E. L. Davis did not consider the excavation unsanitary or dangerous. His lack of commitment and concern of safety of employees is clearly evidenced by the following exchange (Tr. 24):

Q. And you didn't find anything with all those conditions that would lead you to tell them, [employees] 'Don't go down in the excavation?'

A. Not particularly. Everybody does it.

The violation is affirmed.

Item 6 - Alleged Violation of § 1926.651(g)(2)(i)

The Secretary alleges that Davis violated § 1926.651(g)(2)(i), for failure to have emergency rescue equipment at the site. The standard provides:

> (i) Emergency rescue equipment, such as breathing apparatus, a safety harness and line, or basket stretcher, shall be readily available where hazardous atmospheric conditions exist or may reasonably be expected to develop during work in an excavation. This equipment shall be attended when in use.

The dimensions of the excavation constitute a confined space. E. L. Davis acknowledges this fact (Tr. 27). Section 1926.21(b)(6) assumes that hazardous atmospheric conditions may be reasonably expected to exist in confined spaces. *Secretary v. Ed Taylor Construction Co.*, 938 F.2d 1265, 1272 (11th Cir. 1991). The hazards normally associated with confined spaces were in this case aggravated by the presence of an open sewer. The standard required Davis to maintain emergency rescue equipment at the worksite. Davis admits that it had none (Tr. 33). E. L. Davis was on the worksite while employees were working in the confined space and was aware of the conditions.

The violation is affirmed.

Item 7 - Alleged Violation of § 1926.651(k)(1)

The Secretary alleges that Davis violated § 1926.651(k)(1), by failing to have the excavation inspected by a competent person prior to commencing work. The standard provides:

> (k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

"Competent person" is defined by § 1926.650(a) as:

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

E. L. Davis contends that he was the "competent person" on the job site during the time when the violative conditions allegedly existed. He testified, "After forty years experience, I definitely consider myself quantified [*sic*] to make those decisions" (Tr. 21).

While Davis has forty years' experience and considers himself to be qualified to make the decisions that had to be made, he is not considered capable of identifying existing and predictable hazards. He lacks commitment to a safety program, and his attitude negates his good judgment on identifying hazards. His judgment was clouded. There were recognizable and predictable hazards at the site. A competent person would have recognized the hazards and shown more concern for the safety of employees. The fact that E. L. Davis may have been well qualified to identify other safety hazards at the site does not prohibit a determination that he is not a competent person. *See Secretary v. Ed Taylor Construction Co., supra.*

The Secretary has pleaded in the alternative a violation of § 1926.651(k)(2) in the event E. L. Davis was determined to be a competent person. This issue has been decided under the Secretary's primary position.

Classification of Violations

The Secretary submits that the violations were serious within the meaning of section 17(k) of the Act. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. The Secretary need not prove that an accident is probable. It is sufficient if an accident is possible and the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Division*, 8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980). The Secretary must also establish that the employer knew or with the exercise of reasonable diligence should have known of the existence of the violation. The knowledge element is directed to the physical conditions which constitute a violation. *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977).

The failure to wear safety-toe footwear in the excavation while operating a jackhammer exposed employees to broken bones and severe lacerations. The failure to wear a protective helmet while in the excavation exposed employees to the danger of head injury from falling or flying objects. Depending on the size of the object that hit the employee, he was in grave danger. The failure to conduct atmospheric testing in the excavation before allowing employees to enter exposed them to unknown conditions which could have resulted in their death. Davis had nothing to indicate that there was an appropriate level of oxygen within the excavation. The failure to have emergency rescue equipment at the site exposed employees to needless delay which could have resulted in their death before such equipment could be brought to the scene. The failure to have the excavation inspected by a competent person exposed employees to possible cave-in of the excavation walls and their suffocation, crushing, or death.

The failure to initiate and maintain a safety program, instruct employees in the recognition and avoidance of unsafe conditions, and to instruct employees as to the necessary precautions and the use of protective and emergency equipment when entering an excavation resulted in serious violations being committed by Davis. The conditions employees were exposed to as a result of these deficiencies necessitates classifying these violations as serious.

Willful Citation

Item 1a - Alleged Violation of § 1926.652(a)(1)

Section 1926.652(a)(1) provides, in pertinent part:

> *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 . . . .

On July 29, 1991, two Davis employees were working in an excavation which was approximately 20.5 to 22.5 feet deep in previously disturbed and unstable soil which had no protective system. The two employees were injured when dirt from the walls of the excavation caved in. E. L. Davis was aware of these conditions. He was on the jobsite when

the employees entered the excavation, and he was there on a regular basis when work was being performed. These facts are sufficient to establish a violation of the cited standard.

The Secretary alleges the violation was willful. A willful violation is one "involving voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute." *Georgia Electric Co. v. Marshall*, 595 F.2d 309, 319 (5th Cir. 1979); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1423 (D. C. Cir. 1983); *cert. denied*, 466 U. S. 937 (1984). Willfulness involves misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *E.g., Georgia Electric Co., supra*; *Ensign-Bickford Co., supra*.

An employer's intentional disregard of or plain indifference to its safety obligations under the Act can be established in various ways. Proof of prior citations for the same or similar standards is relevant to establishing a violation as willful. *See Cedar Construction Co. v. OSHRC*, 587 F.2d 1303, 1305-1306 (D. C. Cir. 1978); *Empire-Detroit Steel v. OSHRC*, 579 F.2d 378, 385-386 (6th Cir. 1978); *F. X. Messina Construction Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974). Evidence showing that the employer deliberately disregarded a known safety requirement, *see, e.g., RSR Corporation v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985), or consciously failed to remedy an obvious and serious hazard, is also pertinent.

The record is replete with evidence establishing Davis's intentional disregard of or plain indifference to safety obligations under the Act. Davis has been cited on two previous occasions for failure to slope or shore excavations in which employees were working. On these occasions, there was a cave-in and employees were taken to a hospital. *See E. L. Davis Contracting Co., supra*. Davis has not shown any desire to comply with safety standards designed to protect the health and safety of employees. When asked about a $240 penalty assessed against Davis in a previous case, E. L. Davis boasted that he had not paid a penny of the penalty because "I didn't feel like I owed it" (Tr. 39). E. L. Davis was then asked about a $4,000 penalty assessed by Judge Paul L. Brady in Docket No. 87-846. The following dialogue took place (Tr. 42):

> Q. Isn't it true that you were assessed a penalty in that case of $4,000?

A. Well, you attempted to assess one, yes.

Q. The Judge -- I didn't attempt. The Judge fixed a penalty of $4,000, isn't that true?

A. Well, that's what I received in the mail.

Q. And isn't it true that you didn't pay one penny of that either?

A. That's correct because I'm not going to pay anything that I don't owe and I didn't owe that.

Q. All right, sir.

A. We're too broke to go around here paying something we don't owe.

The arrogance of E. L. Davis in boasting that he has never paid any of the penalties assessed by the Commission in Docket No. 87-846 is evidence of his total disregard for the Act.

E. L. Davis ignored the City of Atlanta inspector, Jerome Marshall, when reminded of his obligation to provide protection for the employees in the excavation (Tr. 46). In Docket No. 87-846, Davis was faced with similar problems. Judge Brady found:

> Fortune testified that he told Davis at the beginning of the project that Davis needed to use some protective devices, such as jacks, to support the trench, which Davis ignored. Although respondent had several hydraulic showing jacks at the work site, they were used less than half the time on the job. Fortune also stated that Davis was on the work site often enough to know that the trench was unsupported (Tr. 13, 42, 46).
>
> The violation was willful.

Item 1b - Alleged Violation of § 1926.652(b)(4)(i)

The Secretary alleges that Davis installed a modified trench box after the cave-in which was not approved by a registered professional engineer. Section 1926.652(b)(4)(i) provides:

(4) *Design by a registered professional engineer.* (i) Sloping and benching systems not utilizing Option (1) or Option (2) or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer.

E. L. Davis admits that on July 30, 1992, the day after the accident, a modified trench box was installed in the excavation. This structure was not approved by a registered professional engineer as required by the standard (Tr. 35, 66). E. L. Davis and an additional employee were working in the excavation with the unapproved trench box when the compliance officer arrived at the site (Tr. 65).

The violation is affirmed.

The Secretary alleges that the violation is willful. The use of the unapproved trench box was a continuation of E. L. Davis's intentional disregard and plain indifference toward the safety of his employees. After two cave-ins, E. L. Davis should have made reasonable inquiries as to the requirements of the Act to protect his employees. According to him, the trench box was a modified makeshift structure which had been prepared overnight. The trench box, as modified, is not used in the construction industry. E. L. Davis had no way of knowing if it would be effective as a protective system. Twenty-four hours after the excavation cave-in, employees were ordered to enter the excavation under conditions which violated the standard. E. L. Davis had no commitment to employees' safety. He was indifferent to their safety. The violation is willful.

Determination of Penalty

The Secretary proposes penalties in the amount of $4,500 each for items 1, 2, 5, 6 and 7 of the serious citation. A penalty of $2,250 had been proposed for items 3 and 4 of the serious citation. Items 1a and 1b of the willful citation have been grouped for purposes of determining a total penalty of $63,000.

While the Secretary has proposed penalties, the Commission is the final arbiter of all penalties in contested cases. *Secretary v. Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give due consideration to the size of the employer's business, the gravity of the violation, the good

faith of the employer, and the history of previous violations in determining an assessment of an appropriate penalty.

The violation of items 1 and 2 of the serious citation are grouped for the assessment of an appropriate penalty. Section 1926.20 is labeled "[g]eneral safety and health provisions." The language used in § 1926.20(b)(1) is nebulous in its reference to "such programs as may be necessary." Section 1926.21 entitled "Safety training and education," specifically informs an employer as to what "such programs specified in § 1926.20(b)(1) must provide. Since the standards are cited primarily for the same purpose, they will be grouped as one violation for purposes of assessment of a penalty.

Davis is a small company that employed five people at the time of the inspection. E. L. Davis, the owner, supervised the work of employees and indicates that he was on the job 100 percent of the time operations were being conducted. He was fully aware of the conditions which faced his employees. Little effort was made by him to comply with safety standards, and no training was provided to his employees. There was no evidence of a good faith effort to conduct his operations with proper concern for safety. Davis has a history of previous excavation violations. The conditions cited were numerous and presented a danger to untrained employees.

After consideration of the criteria specified in section 17(j) of the Act, the following penalties are assessed for the serious violations which occurred at the jobsite.

Serious Citation

Item No.	Assessed Penalty
1, 2 (Grouped)	$6,000
3	2,250
4	2,250
5	4,500
6	4,500
7	4,500

Davis has ignored the OSHA standards that are applicable to his business operations. The penalty proposed for the willful citation must be of sufficient amount to convince E. L. Davis that OSHA is not a paper tiger. The standards have been enacted for employees' safety and must not be ignored. Davis has been cited three times for the same violation at different worksites over different periods of time. In the present case and one previous case, he was informed by a City of Atlanta inspector prior to a cave-in of the need for an adequate protective system. *See E. L. Davis Contracting Co., supra.* In both instances, he ignored the warning and continued to act and operate by ignoring the standards. He has shown little concern for employees' safety. He lacks commitment towards enforcing a safety program. He has continued to ignore small penalty assessments. In Docket No. 87-846, $4,000 was assessed after a trial on the merits before Judge Paul L. Brady. E. L. Davis openly boasts that he has not paid the fine and that he does not owe it. This attitude has no respect for the law or for the safety of its employees. A penalty of $60,000 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing, it is

ORDERED: (1) That the violations as set forth in the serious citation issued to Davis on November 13, 1991, are affirmed and the following penalties assessed:

Item No.	Assessed Penalty
1, 2 (Grouped)	$6,000
3	2,250
4	2,250
5	4,500
6	4,500
7	4,500

(2) That the willful citation issued to Davis on November 13, 1991, is affirmed and a total penalty of $60,000 is assessed for the violations.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: February 24, 1993