

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

DeWitt Excavating, Inc.,

Respondent.

OSHRC Docket No. **10-1515**

Appearances:

Melanie Paul, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Michael G. Murphy, Esquire, Greenberg Traurig, P.A., Orlando, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

DeWitt Excavating, Inc. (DEI) is an underground utility contractor with its office in Winter Garden, Florida. On February 18, 2010, a DEI crew was installing a force main pipe in an excavation along Colonial Drive (State Route 50) in Winter Garden, Florida. As a result of an inspection of the excavation by the Occupational Safety and Health Administration (OSHA), DEI received a citation on June 30, 2010. DEI timely contested the citation.

The citation alleges a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to provide cave-in protection for three employees working in an excavation approximately 8 feet deep. The citation proposes a penalty of \$ 35,000.00.

The hearing was held on January 21, 2010, in Orlando, Florida. Jurisdiction and coverage were stipulated (Tr. 4). The parties have filed post-hearing briefs.

DEI denies the willful classification and proposed penalty. As an affirmative defense, DEI asserts unpreventable supervisory misconduct by its foreman (DEI's Post Trial Brief). DEI does not

dispute its noncompliance with § 1926.652(a)(1) as alleged in the citation (Tr. 5).¹

As more fully discussed, DEI's violation of § 1926.652(a)(1) is affirmed as willful and a penalty of \$ 25,000.00, is assessed.

The Inspection

DEI is engaged in the business of installing underground utilities in central Florida. It is a State of Florida certified underground utility and excavation contractor. DEI is a family-owned business which started in Flint, Michigan in 1954 by Dale DeWitt. DEI moved to its current location in Winter Garden, Florida in December 1979 and is operated by the founder's five children. Tom DeWitt is DEI's vice president and field superintendent. DEI employs approximately 162 employees and its annual volume of business exceeds \$20 million (Tr. 70, 205-206).

On January 12, 2010, DEI began work on a contract with the City of Winter Garden to replace underground utilities for approximately 2.25 miles along Colonial Drive (State Route 50). Colonial Drive is a 4-lane highway, regularly used by trucks and automobiles traveling across the state. The project is part of a larger DOT project to widen Colonial Drive to six lanes. DEI's contract was originally to be completed in 240 days, but was extended to one year because of contract modifications. On the day of the OSHA inspection, DEI had three crews working under the responsibility of superintendent Dennis Scowden and three foremen (Tr. 31, 170-171, 202, 249).

On February 18, 2010, superintendent Scowden, at approximately 7:00 a.m., assigned foreman Tony Shaffer's crew to elevate a 12-inch force main pipe to a higher elevation to make room for a new sewer pipe. Mr. Shaffer had been employed with DEI for six months. The crew began by hand digging a hole to locate the force main pipe and any other utility pipes in the area. Once the force main and utility pipes were located, the trackhoe dug the excavation to the depth of the force main (8 feet deep) so that the crew could attach a 90-degree fitting and a 45-degree fitting. Once the fittings were attached, the force main pipe was elevated to the higher elevation (Exh. C-3; Tr. 113, 124, 145, 172).

¹ Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

At approximately 2:50 p.m., OSHA safety compliance officer (CO) Donald Freeman who was driving along Colonial Drive, observed employees in the excavation and called his office for authorization to inspect the excavation. After receiving the authorization, CO Freeman initiated an OSHA inspection. There were three employees in the excavation installing the fittings. Foreman Shaffer, a tailman who was assisting the leadman in the excavation, and the trackhoe operator were standing on the side the excavation (Exhs. C-2B, C-2C; Tr. 23-24, 110, 130-131).

The excavation was 6 feet long, 4 feet wide and 8 feet deep. The north wall, adjacent to Colonial Drive, was almost vertical. Exposed utility pipes were observed along the north wall. The east and west walls were also almost vertical. The south wall was sloping to approximately 53 degrees. The excavation lacked shoring, shielding, or other cave-in protection. The trackhoe was located on the edge of the excavation's west wall. The soil was classified as Type C soil (Exhs. C-1, C-2A; Tr. 24- 25, 27).

After CO Freeman arrived, the employees exited the excavation and foreman Shaffer telephoned DEI's office which was less than one-quarter mile from the excavation. The south wall was sloped more and backfill placed in the excavation to lower its depth. Then, the employees re-entered the excavation and completed their work. The employees finished the project and the hazard abated before CO Freeman left the site. During this time, DEI's vice-president Tom DeWitt arrived at the site. (Exh. C-2K; Tr. 28, 41, 43, 99).

CO Freeman took photographs of the excavation and interviewed the employees. He also interviewed the employees at DEI's office on April 6, 2010 (Tr. 43, 48). Based on the CO Freeman's inspection, DEI received the willful citation for violation of § 1926.652(a)(1) on June 30, 2010.

The parties stipulate the following facts (Tr. 5-6):

1. On February 18, 2010, DEI's employees were working in a trench alongside the roadway at 14257 Colonial Dr., Winter Garden, Florida 34787 ("the worksite").
2. On February 18, 2010, the trench at issue in which DEI's employees were working was not made entirely of stable rock.
3. The north side of the trench was adjacent to the roadway.

4. DEI owns several trench boxes.
5. DEI's offices are located on Colonial Drive, approximately .25 of a mile from the worksite.
6. Tony Shaffer was DEI's foreman and was in charge of the worksite and trench at issue on February 18, 2010.
7. Tony Shaffer was directing the employees' work in the trench when the OSHA Compliance Officer arrived on site.
8. DEI was not using a trench box.
9. The south wall of the trench was sloped at approximately 53 degrees.
10. The south wall of the trench was not sloped to meet the requirements set forth in 29 C.F.R. § 1926.652.
11. The south wall of the trench was not benched to meet the requirements set forth in 29 C.F.R. § 1926.652.
12. Tom Jackson was the competent person on the worksite and inspected the trench in the morning of February 18, 2010, before the work began.
13. Tom DeWitt did not prevent the employees from re-entering the trench after he came on site to meet with OSHA.
14. Complainant's Exhibit 14, the lab analysis of the soil sample taken from DEI's worksite, is a true and accurate and authentic copy of the lab results received by OSHA. The parties stipulate that the report is admissible and that there is no need for the Secretary to call the Lab Analyst to testify at the hearing.
15. DEI is a state-certified underground utility and excavation contractor with the state of Florida.
16. The Florida Trench Safety Act, Florida Statute 553.62, 553.62 incorporated the Occupational Safety and Health Administration's excavation safety standards, 29 C.F.R. § 1926.650 Subpart P, as the state standard.
17. DEI was previously cited by OSHA for a similar violation of lack protection in a trench

or excavation under 29 C.F.R. § 1926.652(a)(1), which became a final order on or about June 12, 2009.

DISCUSSION

The Secretary has the burden of proving a violation.

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

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation

Serious Violation of § 1926.652(a)(1)

The citation alleges that “At 15840 Colonial Dr. Winter Garden, Fl - on or about 02/18/10, employees in the process of installing a force main pipe were exposed to a cave-in/engulfment hazard while working in an unprotected trench eight foot in depth with nearly vertical walls. No protection system (shoring, shielding, sloping) was provided for employee protection.”

Section 1926.652(a)(1) provides that:

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.

DEI does not dispute the application of the excavation standard at § 1926.652(a)(1) to its force main pipe project along Colonial Drive. The exceptions involving stable rock or excavations less than 5 feet in depth are not applicable.

Also, DEI does not dispute that its crew failed to comply with the requirements of §1926.652(a)(1) and that three employees were exposed to an unprotected excavation at the time of OSHA's arrival. The excavation was 8 feet deep and the walls were not shored, shielded, adequately sloped, or otherwise protected from a cave-in. The south wall of the excavation was sloped to only 53 degrees. The other three walls were almost vertical. An excavation, 5 feet or more in depth, dug in Type C soil, requires shoring or slopping, at an angle not steeper than 1 ½ horizontal to 1 vertical (34 degrees).

In addition to the noncompliance with the requirements of § 1926.652(a)(1) and employees' exposure, the record establishes, without dispute, DEI's knowledge of the conditions at the excavation. Foreman Shaffer was present on site and directed the work of the three employees in the excavation. He was responsible for employees' safety on the job and the enforcement of the company safety rules (Tr. 113-114, 136-137). Mr. Shaffer testified that he knew the excavation needed cave-in protection before OSHA arrived (Tr. 125). He was aware of the OSHA excavation requirements and had received competent person training from another employer (Tr. 116).

Foreman Shaffer's knowledge of the condition of the excavation as a supervisor is imputed to DEI. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994) (An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel).

A violation § 1926.652(a)(1) is established and not disputed by DEI.

Supervisory Employee Misconduct

DEI asserts supervisory employee misconduct as to foreman Shaffer. Mr. Shaffer was the only DEI supervisor on site at the time of the OSHA inspection and was aware of the rules governing excavations. Mr. Shaffer had installed approximately 3,500 feet of pipe along this same road including other instances of where the same force main pipe was lowered or raised (Tr. 142). Superintendent Scowden testified that Mr. Shaffer had previously completed a similar excavation, approximately 300 feet west of the inspection site, and steel plates were used to provide the necessary shoring (Tr. 174, 176). DEI argues that its reliance upon Mr. Shaffer to comply with its excavation requirements was objectively reasonable. Mr. Shaffer's noncompliance was supervisory employee misconduct.

In order to establish the affirmative defense of unpreventable employee misconduct, the employer must show that (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). When the alleged misconduct is that of a supervisory employee, DEI must also establish that it took all feasible steps to prevent the unsafe condition, including adequate instruction and supervision of its foreman. *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). In the *Archer Western* case, the Commission observed that “where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors’ duty to protect the safety of employees under his supervision . . . A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Id.* at 1017.

DEI’s Work Rule

The parties do not dispute that DEI had an appropriate work rule which addressed the requirements of § 1926.652(a)(1). The DEI safety rule provides that “the walls and faces of trenches 5 feet or more deep and all excavations in which employees are exposed to danger from moving ground or cave-in shall be guarded by a shoring system, sloping of the ground, trench box or some other equivalent means.” (Exh. R-2, Tab 3, Part P).

Employees’ Training

Although Mr. Shaffer has worked 12 years in underground utilities and has received competent person training with another employer, the record fails to show that DEI satisfied the training requirement of the affirmative defense. Mr. Shaffer testified that he was not familiar with DEI’s safety manual and was not provided safety training as foreman by DEI (Tr. 135-136). Other than reviewing his application when hired, it was not shown that DEI verified Mr. Shaffer’s experience or understanding of the safety rules regarding excavations (Tr. 117-118). Prior training by other employers does not relieve DEI of its responsibility to ensure its employees, particularly supervisors such as foremen, are properly trained in recognizing and avoiding excavation hazards.

DEI presented documented tool box talks for the past four years as evidence of its training of employees. The weekly tool box talks were generated as part of the payroll and were at best one page topic sheets that foremen read aloud to their crews on Friday afternoons before they received their pay. The tool box talks lasted less than 10 minutes (Tr. 207-208, 247). The documented tool box talks relevant to excavations, Exhibits R-3 (week 4/13/06), R-4 (week 4/21/06), R-5 (week 5/12/06), R-6 (week 1/5/07), R-7 (week 7/20/07), R-8 (week 12/12/08), and R-9 (week 9/18/09), are sign-in sheets. The sheet identify generally the topics discussed such as “excavation and backfill,” “excavation,” “trenching and excavation checklist,” “trenching and excavation,” or “trenching.”

Such tool box talks fail to establish an adequate training program. Although its principal business, the sheets identify only seven tool box talks over a four year period which involved excavation training. The documents do not describe the specific information read to the employees. Also, the sign-in sheets do not show any training for the employees involved in this case, Tony Shaffer, the trackhoe operator, and the three employees in the excavation.

The inadequacy of DEI’s training is shown by the testimony of superintendent Scowden. Mr. Scowden, who is a certified competent person, incorrectly testified that Type C soil is solid rock and did not require any protection (Tr. 186, 187). He was simply wrong. The parties stipulated the soil at this excavation was Type C soil which is the most unstable soil. It is described as granular soils including gravel, sand, and loamy sand.

The record also fails to identify if other types of training were provided by DEI prior to February 18, 2010. There is no showing of new employee orientation training or refresher employee training.² There is no evidence that DEI ensured the employees understood their safety training or that the employees were given copies of DEI’s safety manual (Tr. 248). The trackhoe operator testified that he has not received trench safety training during his three-year employment with DEI (Tr. 266-267). A laborer told the OSHA inspector that he had received no training from DEI (Tr. 43). Foreman Shaffer testified that he was not trained by DEI prior to February 18, 2010 and was not aware of DEI’s written safety manual (Tr. 135-136).

² Although DEI’s safety manual discusses new employee orientation and has a new employee instruction report checklist, DEI presented no documents or evidence that such orientation was performed (Exh. R-2, Tab 2, Sub-Section F, and Tab 5, p. 5).

DEI has failed to establish the training prong of the asserted defense.

Monitoring

DEI's safety manual requires daily inspections of excavations made by a competent person (Exh. R-2, Tab 3, Part P). The manual includes a checklist which details a list of things to check to ensure the safety of the excavation (Exh. R-2, Tab 4, p. 17). DEI maintains that superintendents checked job sites regularly (Tr. 188). Mr. DeWitt testified that daily visual inspections were performed under the responsibility of the foremen and superintendents (Tr. 226).

DEI's alleged monitoring to discover violations is not established. There is no record that its excavation work was regularly inspected to detect hazards. DEI presented no inspection/monitoring documents. A completed checklist as provided in the safety manual was not offered into evidence.

Mr. Shaffer testified that superintendent Scowden was at the site early in the morning and said nothing about the employees working in the unprotected trench (Tr. 125, 152-154). Although Mr. Scowden denied going to the site because of other meetings, there is no showing his replacement, foreman Jackson, inspected Mr. Shaffer's project at any time when the excavation was open (Tr. 189-190).

Mr. DeWitt who arrived after the employees were out of the excavation, allowed them to re-enter the excavation even though he estimated the excavation was still 5 feet to 5 ½ feet deep (Tr. 222, 224-225). Despite adequately sloping the south wall, the other three sides remained almost vertical (Exh. C-2L). If he believed the excavation exceeded 5 feet in depth, Mr. DeWitt should not have allowed the employees to re-enter the excavation without further corrective action such as a shield along the north wall. He failed to say or do anything about the three employees working in the excavation.

DEI has not established regular monitoring of its excavation sites.

Discipline Program

DEI argues it attempted to enforce the cave-in protection rule by counseling Mr. Shaffer immediately after the inspection. He was also moved to another site where his performance was monitored and where it was not expected the excavation would exceed 4 feet in depth. OSHA did

not issue the citation until June 30, 2010. DEI argues further discipline of Mr. Shaffer was impossible because he had quit his job with DEI on March 31, 2010 (Tr. 182-183).

The record fails to show an effective disciplinary program. DEI presented no documented evidence of any discipline to other supervisors or employees for failing to comply with company safety rules. DEI did not identify its disciplinary policy; nor is one found in its safety manual (Exh. R-2). There is no record of employees receiving a verbal reprimand, written reprimand, loss of pay, suspension, or termination for safety rule violations.

After the OSHA inspection in February 18, 2010, neither foreman Shaffer nor any member of his crew received any disciplinary action. DEI acknowledges that Mr. Shaffer was not disciplined for failing to follow its excavation safety rule (Tr. 198, 244). The employees in the crew were not disciplined for failing to follow the safety rule or report violations thereof (Exh. C-7E, Interrogatory No. 7 Response; Tr. 199-200). Mr. DeWitt's "counseling" of foreman Shaffer after the OSHA inspection is not considered discipline. No warning was documented. Moving Mr. Shaffer to an excavation which was not expected to exceed 5-feet in depth deep is also not discipline. Mr. Shaffer did not consider the talk with Mr. DeWitt or his move to another location as discipline (Tr. 133). Mr. DeWitt acknowledges that Mr. Shaffer was not written up, suspended or terminated (Tr. 244).

The record reflects that Mr. Shaffer and his crew were the subject of another OSHA inspection two weeks later involving another unprotected excavation (Tr. 163). After the second OSHA inspection, Mr. Shaffer again received no disciplinary action (Tr. 165). Mr. DeWitt testified that he discussed the matter with Mr. Shaffer but "it didn't really threaten his job" (Tr. 228). Mr. Shaffer voluntarily left DEI's employment on approximately March 31, 2010 (Tr. 183-184). He left for a "better opportunity with another company" (Tr. 134).

There is no showing that foreman Tom Jackson, who was the competent person and left in charge by superintendent Scowden, was disciplined (Tr. 45-46, 189-190). Although he classified the soil as type C soil, there is no evidence Mr. Jackson inspected Mr. Shaffer's excavation prior to the OSHA inspection. If superintendent Scowden was unavailable, Mr. Jackson should have inspected the excavation as required by DEI's safety manual. Mr. Jackson did not testify and no record of an

inspection was presented.

Also, despite recognizing a problem with the excavation, none of the crew members reported the problem pursuant to DEI's safety program. There is no record anyone was disciplined for failing to report the problem (Tr. 198-199). DEI's safety manual directs all employees to report "all unsafe conditions, practices or violations" (Exh. R-2, Tab 2, pp. 6-7). At least one laborer in the excavation and the trackhoe operator who had received no excavation training from DEI, were able to recognize the hazard as obvious (Tr. 43, 267). *GEM Industries, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) (Where multiple employees participate in an activity that violates an employer's work rule, "the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rules").

DEI failed to establish an effective disciplinary program. DEI's assertion of supervisory employee misconduct is rejected.

Willful Classification

The Secretary asserts that DEI's violation of § 1926.652(a)(1) was willful. "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). Ignoring obvious violations of OSHA standards may amount to plain indifference.

DEI argues that if a violation of §1926.652(a)(1) is found, it was improperly classified as willful. It claims that the hazardous condition existed specifically with regard to the inadequate (53 degrees) sloping of the south wall of the excavation. DEI claims the excavation only existed for a short time and the condition was abated immediately. The employees exited the excavation within twelve minutes of OSHA's arrival (Tr. 92). After they exited, DEI took steps to mitigate the hazard by reducing the slope before the employees returned. Tom DeWitt did not arrive at the site until after the employees had exited. DEI claims good faith in having a safety program that required compliance and reliance upon its supervisors. Its reliance upon foreman Shaffer to comply was objectively reasonable in light of a similar excavation he had recently completed.

DEI's willful conduct is established and its good faith reliance argument is rejected. DEI's

actions show at least plain indifference to the excavation requirements. The test of good faith for these purposes is “an objective one, *i.e.*, whether the employer’s belief concerning the factual matters in issue was reasonable under all of the circumstances.” *Morrison-Knudson Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993).

DEI is a trenching and excavation company in business since 1954 (Tr. 205). It is a State of Florida certified underground and utility contractor. To obtain certification, DEI passed a competency exam and evaluation by the state (Tr. 6, 233).

Based on the project’s blueprints, DEI knew there were sections that required digging and working in excavations deeper than 5 feet (Exh. C-3; Tr. 57). DEI knew the excavation on February 18, 2010 was expected to exceed 5 feet in depth and failed to ensure cave-in protection was provided. DEI had several trench boxes available and failed to make sure one was on the site (Tr. 129-130, 143).

Foreman Shaffer knew the excavation needed cave-in protection (Tr. 125). Although not certified, he received competent person training in 2006 from another employer (Tr. 116). Mr. Shaffer testified he did not get a trench box because he felt pressured by the superintendent to get the job done quickly (Tr. 124-125). He considered DEI’s work environment as hostile, due to superintendents screaming at employees. According to Mr. Shaffer, when he asked for a trench box a couple days later, Mr. DeWitt told him not to worry because OSHA does not work on Saturday (Exh. C-6; Tr. 73, 271). Other employees on site including the trackhoe operator and a laborer knew the excavation was noncompliant, but they said nothing.

When he arrived on the site, Mr. DeWitt did not say anything or do anything about the employees re-entering the excavation (Tr. 241). Although backfill was placed in the excavation and the slope of the south wall was lowered, the other walls including the north wall remained practically vertical. DeWitt estimated the excavation’s depth was still in excess of 5 feet which would require protection along the north wall. The excavation’s depth was not re-measured. If Mr. DeWitt’s estimated depth was correct, a shield or trench box should have been installed before the work continued (Tr. 222, 242-243).

DEI has been cited a number of times (the exact number not provided) for trenching violations. DEI has a history with OSHA dating back to 1981 (Tr. 69). Most recently, DEI received

a serious citation for the similar violation of § 1926.652(a)(1) which became a final order on June 12, 2009. It was informally settled without change other than a reduction in the proposed penalty (Exh. C-5). Mr. DeWitt knew of DEI's trenching violations from OSHA in 2007 and 2009 (Tr. 232-233).

DEI has a safety manual which requires shoring or sloping of all excavations more than 5 feet deep (Exh. R-2, Tab 3, p. 35). The rule also requires that daily inspections of excavations be made by a competent person. A checklist which details a list of things to check in order to ensure the safety of the excavation was included in the manual (Exh. R-2, Tab 4, p. 17).

Despite these rules, no inspections were done throughout the day and no safety checklist was completed. Mr. DeWitt could not explain why it was not done (Tr. 237-238). Superintendent Scowden even testified that he has never seen a checklist (Tr. 191). DEI failed to show that such checklists are part of the routine practice and failed to provide any documentation showing that such checklists or any inspections were completed in the past. Also, the record indicates that DEI's safety manual was not even known by employees. Foreman Shaffer, who was responsible for ensuring the safety of his crew, testified he was not aware of a safety manual. Other than the 10 minute tool box talks read on Friday afternoon before receiving paychecks, there is no showing of other employees' training.

The excavation was in plain view and was open and obvious to anyone traveling on Colonial Drive. CO Freeman noted the excavation while driving on Colonial Drive. It was so obvious that two employees who claimed they received no excavation training from DEI, knew working in an 8-foot excavation was unsafe (Tr. 43, 266). Three walls were nearly vertical (Tr. 25). It is unclear how long the employees were working in the excavation before CO Freeman's arrival. According to his photograph, the employees were in the excavation for less than 12 minutes before exiting. Even a brief exposure to a hazardous condition such as cave-ins does not negate the violation or its seriousness. *Flint Engineering & Construction, Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992).

DEI's willful violation of § 1926.652(a)(1) is established.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

DEI has 162 employees and no credit is given for size (Tr. 206). DEI is also not entitled to credit for history and good faith. DEI has received a number of previous OSHA citations for excavation violations including within the past three years (Exh. C-5). Its safety program was not shown to be effective and enforced.

A penalty of \$ 25,000.00, is reasonable for DEI's willful violation of §1926.652(a)(1). Three employees were exposed to an inadequately protected excavation. The employees started working in the excavation around 7:30 A.M., and were working in the unprotected trench at the time OSHA came on site at 2:50 P.M. The foreman in charge knew the excavation was unsafe but allowed the employees to work in an unprotected excavation (Tr. 125).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation no. 1, item 1, willful violation of § 1926.652(a)(1), is affirmed and a penalty of \$ 25,000.00, is assessed.

Date: June 1, 2011

/s/ Ken S. Welsch

KEN S. WELSCH
Judge