UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. A. L. Grading Contractors, Inc., Respondent.	OSHRC Docket No. **08-0524**

Appearances:

Dane L. Steffenson, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Andrew N. Gross, Esquire, H B Training & Consulting, LLC, Lawrenceville, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

A. L. Grading Contractors, Inc., develops construction sites and installs underground utilities in the Atlanta, Georgia, area. In January 2008, ALG was preparing the site and installing underground utilities for an expansion project of a shopping center, known as the Prado, on Roswell Road in Sandy Springs, Georgia. Occupational Safety and Health Administration (OSHA) compliance officer Freddy King drove by the site on January 24, 2008, and, noting the large scope and numerous pieces of heavy equipment on the project, decided to take a closer look. When King observed what he considered to be violations of the Occupational Safety and Health Act of 1970 (Act), he conducted an inspection of the site. As a result of King's inspection, the Secretary issued two citations to ALG on March 13, 2008.

Item 1 of citation no. 1 alleges a serious violation of 29 C. F. R. § 1926.21(b)(2) for failing to instruct each employee in the recognition and avoidance of unsafe conditions. Item 2 of citation no. 1 alleges a serious violation of 29 C. F. R. § 1926.651(c)(2) for failing to provide a safe means

of egress from an excavation more than 4 feet deep, so as to require no more than 25 feet of lateral travel. The Secretary proposed penalties of $3,500.00 for each of these items.

Item 1 of citation no. 2 alleges a willful violation of 29 C. F. R. § 1926.652(a)(1) for failing to provide an adequate protective system from cave-ins in an excavation more than 5 feet deep. The Secretary proposed a penalty of $ 38,500.00 for this item.

ALG timely contested the citations. The court held a hearing in this matter on July 22, 2008, in Atlanta, Georgia. The parties stipulated jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs. ALG denies it violated the OSHA standards relating to the means of egress from the excavation and the failure to have a protective system from cave-ins in the excavation. ALG argues that if a violation for failure to have a protective system in an excavation is found, the violation is not willful. ALG concedes it violated the terms of the standard relating to employee safety training, but asserts the violation resulted from unpreventable employee misconduct. At the hearing the parties stipulated to a number of facts regarding the conditions on the worksite the day of the inspection (Tr. 4-7).

For the reasons discussed below, the court affirms, as serious, items 1 and 2 of citation no. 1. The court assesses a penalty of $ 3,500.00 for item 1, and a penalty of $ 1,000.00 for item 2. The court affirms item 1 of citation no. 2 as willful, and assesses a penalty of $21,000.00 for that item.

Facts

ALG has been developing worksites and installing underground utilities for construction projects since 1993. ALG also undertakes deep excavations for parking decks, large shopping malls, treatment plants, and reservoirs. The company owns many pieces of heavy equipment, including excavators, scrapers, bulldozers, and loaders (Tr. 19).

In February 2007, ALG began work as a subcontractor to general contractor Balfore-Beatty on the Prado project. The project included the demolition of apartments and office buildings, and the construction of a three-level parking deck and numerous retail stores. A small section of the original Prado shopping center remained (Tr. 20-21).

ALG's job was to grade the site, excavate the area planned for the parking deck, and install the storm sewer and water lines (Tr. 22). In January 2008, ALG had completed over half of its work on the project. At the time of the inspection, ALG was in the process of tying a new sewer line to

an existing sewer line on Lake Placid Drive, the street to the immediate north of the original Prado (Tr. 23).

On January 24, 2008, OSHA compliance officer Freddy King was driving north on Roswell Road, the street to the immediate east of the project. King saw the large construction project to his left at the Prado. He turned left and entered the upper parking lot for the Prado and observed the work underway at the south end of the project for 10 or 15 minutes. Satisfied there were no obvious OSHA violations, King started to drive away from the site. As he exited, King noticed an excavation at the north end of the site, between the Prado and Lake Placid Drive. King parked his car in the lower parking lot where he could overlook the excavation. He observed two employees in the excavation, and an employee positioned as a flagger for the traffic on Lake Placid Drive (Tr. 39-40). King did not see a protective system in the excavation, despite the walls extending above the heads of the employees in the excavation. King saw a ladder in the excavation. He videotaped the excavation from his location in the lower parking lot. King then walked from the parking lot to an access road, and followed the access road to the excavation, arriving 2 or 3 minutes later (Exh. C-1; Tr. 41). By this time, the ladder was no longer in the excavation, but lying on the ground to the right of the excavation (Tr. 46).

King motioned to the two employees to exit the excavation. The employees climbed a mound of dirt and pulverized rock in the middle of the excavation to exit it (Tr. 48). King also motioned to ALG site superintendent Michael Berry, who was sitting in his truck, to come over. King held an opening conference with Berry (Tr. 50).

King measured the excavation and interviewed Humberto Cortez and Mario Trujillo, the two employees in the excavation. Cortez could speak some English, and he translated for Trujillo. The employees stated they had been trained in excavation safety (Tr. 54). Cortez accompanied King to speak with Melquiades Alvarez, the flagger. Alvarez told King he had not been trained in traffic control safety (Tr. 55-56).

King measured the excavation and found it to be 32 feet long, 9.2 feet deep, and over 8 feet wide. King took the depth measurement where he had seen Cortez and Trujillo working, just south of an existing gas line that bisected the excavation. A manhole was at one end of the excavation.

An existing telephone line and other utility line were at the other end of the excavation (Exhs. C-3, C-5; Tr. 55, 104).

Because it was cold that day, King and Berry sat in Berry's truck to finish discussing the inspection. Berry presented King with his competent person training certificate (Tr. 58). Berry told King he had classified the soil as Type C. King took a written statement from Berry. King would write down a question, read it to Berry, and then write down Berry's response. After King finished questioning Berry, he gave the two pages to Berry to review and make any changes he thought were warranted. Berry signed the bottom of the second page without making any changes (Exh. C-6; Tr. 75).

As a result of King's inspection, the Secretary issued the two citations that gave rise to this case.

Citation No. 1

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

> 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The Secretary alleges ALG committed a serious violation of § 1926.21(b)(2), which provides:

> 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 citation alleges the flagger "had not been trained or certified in safe temporary traffic control practices." ALG's flagger caught King's attention as soon as he drove by that end of the worksite. King stated (Tr. 116):

> Mr. Alvarez was controlling traffic at the job site at that time. He didn't see me coming. He didn't know I was there. If I would not have stopped, I could have driven right past him, and he would not have known I was even there. I went past him, turned around and came back, and Mr. Alvarez just kind of motioned me through with just a glance over his shoulder to see if any other traffic was coming.

ALG does not dispute the applicability of § 1926.21(b)(2) to Alvarez working as a flagger at the Prado worksite. ALG was performing construction work and its activities are covered by the construction standards found in part 1926 (Tr. 7). Neither does ALG dispute its noncompliance with the terms of § 1926.21(b). At the hearing (Tr. 5-6) and in its post-hearing brief, ALG stipulated (ALG's brief, p. 4): "Melquiades Alvarez, an A. L. Grading employee, was directing traffic. He was not trained as a traffic controller or as a flagger."

The Secretary established employee exposure to a hazardous condition. King testified, "Alvarez was exposed to being struck by vehicular traffic," risking a concussion, multiple fractures, and possibly death (Tr. 78). ALG also stipulated it knew Alvarez was working as a flagger despite not being trained in traffic control safety (ALG's brief, p.4): "The Employer knew that the two employees were in the trench, and that Mr. Alvarez was controlling traffic. . . . A. L. Grading has trained certain employees on traffic control, including at least two employees who were working at the Prado on the day of the inspection."

The Secretary has established ALG violated § 1926.21(b)(2). Despite ALG's many concessions and stipulations regarding this item, the company argues the violation of the cited standard resulted from unpreventable employee misconduct.

Unpreventable Employee Misconduct

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997). ALG failed to prove each of these elements of its defense.

Established Work Rule

ALG superintendent Michael Berry claimed ALG had a work rule requiring the company to use only trained flaggers, but his testimony on this point was less than convincing. Berry's testimony tends to support the theory ALG established a work rule after King's inspection took place (Tr. 150-152):

> Q. You said there is a rule that flaggers have to be trained. What rule are you referring to?
>
> Berry: That's a Department of Transportation rule, and then A. L. Grading has a rule.
>
> Q. And, do you know where it appears as far as A. L. Grading having this rule? Is it in their policies and procedures that we looked out every day?
>
> Berry: I couldn't tell you particularly whether it was there in the handbook or whatever, but I think it is a written rule of A. L. Grading.
>
> Q. Do you know whether it's a written rule of A. L. Grading?
>
> Berry: Do I know for a fact? I have seen a new pamphlet that it's a written rule in A. L. Grading. I don't remember which pamphlet it is.
>
> Q. A new pamphlet since the OSHA inspection?
>
> Berry: I guess. I don't know. I mean, I don't know the date on it.
>
> Q. Do you know whether A. L. Grading had such a rule prior to the OSHA inspection?
>
> Berry: I couldn't say that they had a written rule or not, sir. I know I knew about it.

The employee misconduct defense does not require the established work rule to be written, but it is helpful to adduce a copy of the written rule if it exists. Although Berry referred to a handbook and a "new pamphlet," in which he read the rule, ALG did not introduce into evidence a safety manual or any other documentation in which such a rule appears.

Communicated to Employees

Even if Berry's testimony had proven that ALG had an established work rule requiring flaggers to be trained, the company failed to communicate it to its employees. Jose Israel Velez was

not only an employee of ALG's at the time of the hearing, he was a pipe foreman–a supervisory employee (Tr. 169). It was Velez who assigned Alvarez to work as a flagger (Tr. 170). At the hearing, Velez contended (through an interpreter) he was aware ALG had a work rule requiring flaggers to be trained in traffic safety. This contradicted his testimony given in a deposition the previous week (Tr. 170):

> Q. Do you remember our deposition last week?
>
> Velez: Yes.
>
> Q. Do you recall me asking you, were you aware prior to January 24th that to be a flagger to control traffic that you had to be trained to do that?
>
> Velez: Yes, I remember you asked me.
>
> Q. And, you answered, "No, I did not know."
>
> Velez: I don't remember answering that.

Velez did not know whether Alvarez had been trained in traffic control safety. Velez testified he assigned Alvarez the flagging position because, "I just thought of putting him there" (Tr. 171). Velez first said he learned of the training rule from "[f]riends and other people that work in construction" (Tr. 171). When asked if he had been trained to assign only flaggers who had received traffic control training, Velez responded that, a couple of years ago, a supervisor named Jose had told Velez about the rule "[d]uring a chat outside of work" (Tr. 172). Velez also stated the day after the inspection, "Mr. Mike Berry told me in a comment that we had done something wrong by putting [Alvarez] in that position" (Tr. 172).

The court is left with the strong impression that Berry's post-inspection comment to Velez was the first time anyone from AGL had mentioned the flagger safety training rule to him. AGL has failed to establish it had a work rule addressing this issue that was communicated to its employees, including its supervisory personnel.

Discovery of Violations

ALG made no real attempt to prove it takes steps to discover violations of its supposed rule. Velez did not know whether Alvarez had been trained when he assigned him to be the flagger. Berry admitted he did not know who was and was not trained in traffic control safety among his

employees, so he had no way of knowing whether a given flagger was in compliance with the rule or not. Berry also stated he had no process for discovering whether the rule was being violated: "I personally didn't know the name of every trained flagger we have, no, sir, I didn't. I did not personally ask Mr. Alvarez that day if he had flaggers training, no" (Tr.154).

Enforcement of Rule

Similarly, Berry stated he had no method for enforcing the rule (Tr. 154). Velez testified that, even though Berry told him he had done something wrong in assigning Alvarez as flagger, he was not reprimanded or otherwise disciplined for this safety infraction (Tr. 172-173).

ALG has failed to establish employee misconduct at every level. Item 1 is affirmed as serious.

Item 2: Alleged Serious Violation of § 1926.651(c)(2)

Section 1926.651(c)(2) provides:

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

It is undisputed that three of the four elements of the Secretary's burden of proof are established by the record:

Applicability: The excavation was 32 feet long and more than 4 feet deep (Tr. 55). The cited standard applies to the excavation.

Employee Exposure: Two employees were in the excavation. If a violation is found, they were exposed to the hazard of being seriously injured or killed in a cave-in.

Knowledge: A ladder was in the excavation when King first observed it from the upper parking lot (Exhs. C-1, C-4; Tr. 43). For some unknown reason, by the time King arrived at the excavation 2 or 3 minutes later, the ladder was laying on the pavement on the east side of the trench (Tr. 110). The employees exited the excavation by walking up a mound of dirt and pulverized rock in the middle of the excavation. Berry and Velez knew the employees were exiting in this manner,

and Berry himself walked "[u]p and down the slope" to exit and enter the excavation (Tr. 143).[1] If a violation is found, Berry had actual knowledge of the violation. "[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co., Inc*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). As supervisor, Berry's knowledge is imputed to ALG.

The only remaining issue is whether the mound of dirt and pulverized rock the employees used to exit the excavation was a safe means of egress.

The morning of the inspection, ALG's crew had laid the first piece of sewer pipe in the excavation. It then poured a mixture of dirt and pulverized rock on top of the pipe as backfill (Tr. 124). The resulting mound was located between the manhole at one end of the excavation and an existing gas line that cut across the excavation. In a typical ramp designed for exiting an excavation, the ramp rises from the bottom to one end of the excavation, where it flattens out as it reaches ground level. Here, the mound rose up in the middle of the excavation, ending in a peaked top that fell short of ground level. King estimated the distance between the top of the mound to the pavement to be 18 inches to 2 feet (Tr. 82). Velez estimated the distance to be 10 to 12 inches (Tr. 177). The photographs of the excavation show a significant gap between the top of the mound and the pavement. Loose rocks are visible on the mound (Exhs. C-2, C-3, C-4, C-5).

---

[1] Velez stated the day of the inspection was the first day in his seven years with ALG that his crew had used a ramp to exit the excavation; they had always used a ladder before (Tr. 178). A ladder was in the excavation minutes before King arrived on the scene. The only reason the ladder was on the site was for entering and exiting the excavation (Tr. 176):

Q. What do your employees use a ladder for in the trench?

Velez: To get in and out of the excavation.

Q. Anything else?

Velez: Just to get in and out of the excavation.

A reasonable interpretation of the record is that ALG never intended the mound of backfill to be used as a ramp to exit the excavation. Because the ladder had been removed from the excavation for unknown reasons just prior to King's arrival, the only means the employees had for exiting the excavation when King motioned to them was to climb up the mound. This interpretation does no explain, however, the claims by Berry and Velez that they were aware the employees were exiting the excavation by walking up the mound of backfill.

When King arrived at the excavation, he motioned the employees to get out. King turned to look at Berry as he approached him from his truck. King stated (Tr. 48):

> I noticed a motion out of the corner of my eye, and it was the employees climbing up this mound of dirt to exit the excavation. . . I was not able to observe them climbing up the mound of dirt, as I was trying to bring my video camera and turn it on to get it to activate and take a picture of them exiting the trench by what I considered to be an unsafe means.

Velez testified that after the backfill had been poured on top of the pipe, his crew had hit it with the bucket of a an excavator and graded it (Tr. 178). Berry testified the mound was at a "walkable slope" (Tr. 127). Velez stated it was no problem for employees to step up out of the excavation "without using their hands" (Tr. 177). King disagreed with their assessments. He estimated the angle of the slope to be from 40 to 45 degrees (Tr. 114). He stated that, in an emergency situation, employees could potentially attempt to exit the excavation in a panicked state, exacerbating the already unsafe condition (Tr. 79-80): "If the employees needed to exit the trench excavation in a hurry, due to the looseness of the mound of dirt and the angle of that mound of dirt, they could not egress the trench quickly in a safe manner. That would lead to either being struck by a collapsing trench or engulfment by the soil."

The court determines the mound of backfill did not serve as a safe means of egress from the excavation. The mound was at a steep angle and covered with loose rocks. It ended in a peak, not a flat surface. From the peak, employees had to step up at least 10 inches to the pavement. In the event of an emergency, it is likely employees would have difficulty keeping their footing and emerging from the excavation quickly. Item 2 is affirmed.

Citation No. 2
Item 1: Alleged Willful Violation of § 1926.652(a)(1)

The Secretary alleges ALG committed a willful violation of § 1926.652(a)(1), which provides:

> 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) Excavation are made entirely in stable rock; or
>
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

ALG stipulated the excavation was more than 5 feet deep and no trench box was in it at the time of the excavation (Tr. 5). ALG argues it was in compliance with the standard because the excavation falls within exception (i) of § 1926.652(a)(1): it was made entirely in stable rock. It is ALG's burden, as respondent, to prove the excavation was made entirely in stable rock. As an exception, the burden of proof is on the party claiming its benefit. *Kasper Wire Works, Inc.,* 18 BNA OSHC 2178, 2194(No. 90-2775, 2000 *aff'd* 268 F3d 1123 (D. C. Cir. 2001)

Section 1926.650(b) defines stable rock as:

> natural solid mineral material that can be excavated with vertical sides and will remain intact while exposed. Unstable rock is considered to be stable when the rock material on the side or sides of the excavation is secured against caving-in or movement by rock bolts or another protective system that has been designed by a registered professional engineer.

Based on his visual inspection of the excavation, King initially classified the soil as Type B because he observed mineral deposits, striations, layering of rock, soil around stones in the walls, and an unsupported undercut in one of the walls (Exh. C-5; Tr. 66). King described the soil in the walls of the excavation as "mineral deposits, . . . granular in nature, not the composition of a clay and not the composition of a sand, somewhere in between, maybe a loam" (Tr. 112-113). King later changed his classification of the soil to Type C, based on the "disturbance of the soil during the installation of the preexisting utility lines" (Tr. 112).

At the hearing, Berry testified ALG did not need to use a trench box in the excavation because it was in "solid rock" (Tr. 124). Berry based his opinion on his field experience (Tr. 163). Berry's testimony contradicts the written statement taken down by King and signed by Berry during the inspection. In that statement, Berry conceded, in pertinent part, the following (Exh. C-6):

3. Did you type the soil prior to or at the start of work?

A. Yes test drilled the whole road. Typed as type C due to the fractured rock.

4. For a trench of this depth, 9 foot plus, is protection required from cave-in hazards?

A. Yes

5. What kind of protection could have been used?

A. Trench Box Could not slope it due to the situation and location.

6. Is there a trench box available for use at this site?

A. Yes it's a 20-foot box but we couldn't use it because its too long to be installed in the areas we had to work in between the existing utilities.

7. **Does the company have additional short trench boxes?**

A. Yes

8. Why did you have employees enter the trench without protection from cave-in?

A. Trying to expedite re-opening the public road, Lake Placid Drive.

. . .

12. Did you consider this trench safe for employees to work in?

A. No

Confronted with this damaging statement at the hearing, Barry admitted he had read it and signed it without making any changes, and without telling King he disagreed with any of the answers King had written down (Tr. 131). Barry explained that he regarded the inspection as a "traffic stop," where you tell the officer, "'Yes, sir,' 'No, sir,' tell them what they want to hear" (Tr. 131-132).

Barry elaborated (Tr. 164-165):

> I was trying to be as polite and professional with Mr. King as I could and agreed with anything he said, more or less, and was probably pretty gullible because I wouldn't have signed the statement if I had to do it over again today. But, I wouldn't have gotten confrontational with him either because he was a man of authority. I view him just like a trooper.

In his 35 years working in construction, Barry had been involved in at least ten OSHA inspections (Tr. 144). Barry was the superintendent over the Prado project and three other project sites at the time of the inspection (Tr. 122). He was an experienced supervisor entrusted with overseeing large project sites. It is reasonable to expect Barry would be able to interact with an

OSHA compliance officer and correct mistaken impressions the compliance officer may have expressed without becoming "confrontational." While his claim he was attempting to appease King may be understandable, it does not explain away his answers in his written statement. Barry does not claim King dictated his answers to him or otherwise coached him. Barry specifically states in his answers that he did not use the trench box on site because it was too long, and he was trying to expedite the job so he compromised on excavation safety. He stated he did not consider the excavation safe to work in. At no time during the inspection did Barry inform King he believed the excavation was in stable rock. To the contrary, Barry told King he classified the soil as Type C "due to the fractured rock" (Tr. 59).

No weight is given to Barry's testimony at the hearing regarding his belief the excavation was in solid rock. The written statement taken down by King and signed by Barry, contemporaneous with the inspection, is credited as reliable.

ALG attempted to bolster its argument at the hearing with the testimony of John Clark. Clark is the project manager in testing for Contour Engineering (Tr. 180). Contour Engineering performed a boring test the parties stipulated was "further up the access road" from the excavation located at the corner of the access road and Lake Placid Drive (Tr. 188). Clark testified the boring sample indicated "auger refusal at three feet below" (Tr. 187). Auger refusal typically indicates the auger has reached solid rock, but, Clark stated, it could also occur with layered rock or boulders mixed with sand or other minerals (Tr. 183-184).

Even if the results for the boring sample are assumed to be the same for the excavation, ALG's case is not proven. The boring sample showed auger refusal at three feet. Exception (i) of Section 1926.652(a)(1) requires the excavation to be "made *entirely* in stable rock." A 9.2 foot deep excavation made in the location of the boring sample would be made only in ⅔ stable rock.

The court finds not only did AGL fail to establish the excavation was in stable rock, the Secretary established the excavation was not in stable rock. The court credits King's testimony that the excavation was dug in Type C soil.

Employees Trujillo and Cortez were exposed to the risk of serious injury or death by a cave-in. Supervisor Barry and pipe foreman Velez knew the employees were in the excavation without

adequate protection. Their knowledge is imputed to ALG. The Secretary has established ALG committed a violation of § 1926.652(a)(1).

Willful Classification

The Secretary classifies this violation as willful.

> 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." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.,* 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.,* conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.,* 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd on other grounds,* 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.,* 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC,* 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.,* 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

ALG contends Berry was a well qualified project supervisor with 35 years of experience in construction. The court agrees with this assessment. Berry received training as a competent person

(Tr. 141). Berry also took OSHA's 30-hour class and a soil erosion class administered by the State of Georgia (Tr. 141). King stated, "[I]t was my determination that he was, in fact, a competent person and had a good general working knowledge of the OSHA requirement for safe excavation and trenching work" (Tr. 58).

ALG uses Berry's expertise to argue, "The reasonable and objective good faith determination by Superintendent Berry that his excavation was in stable rock and therefore conformed to OSHA requirements negate the willful classification" (ALG's brief, p. 12). This argument cannot be squared with Berry's written statement.

Berry did not determine the excavation was in stable rock. He determined the excavation was in Type C soil. Berry admitted he knew the excavation was not safe to work in. He could not use the 20-foot trench box on site because it would not fit into the excavation with the existing gas line cutting across it. Although the company has shorter trench boxes Berry could have had brought to the site, he chose not do so. Berry deliberately sent two employees into the excavation without cave-in protection because he was trying to expedite the re-opening of Lake Placid Drive (Exh. C-6). Berry sacrificed safety for expedience.

"The hallmark of a willful violation is the employer's state of mind at the time of the violation–an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.'" *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd* 268 F.3d 1123 (D.C. Cir. 2001). The record makes clear Berry's state of mind at the time Trujillo and Cortez were working in the excavation. Berry knew the excavation was not safe, yet he sat in his truck next to the excavation as they labored in the trench. Berry knew ALG should place a trench box in the excavation, but he knowingly disregarded this requirement.

The Secretary has established ALG's violation of § 1926.652(a)(1) is willful.

Penalty Determination

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.

ALG employed approximately 85 employees at the time of King's inspection (Tr. 7). OSHA had previously inspected an ALG worksite and had issued citations to the company, including a citation for failing to provide cave-in protection in an excavation (Tr. 77, 118). ALG demonstrated good faith during the inspection. The remaining factor to be considered is the gravity of the violations.

Item 1 of citation no. 1–§ 1926.21(b)(2): The gravity of this violation is high. ALG assigned Alvarez as a flagger despite his not having been trained in traffic control safety. Alvarez was exposed to being struck by passing vehicles. It was Alvarez's inattentiveness that first drew King's attention (Tr. 116). The gravity of Velez's assignment of Alvarez as flagger is exacerbated by the fact ALG had at least two employees on site who had been trained in traffic control safety (Tr. 8). The assignment of Alvarez demonstrates a cavalier attitude toward the requirements of § 1926.21(b)(2). The court agrees with the Secretary that the proposed penalty of $ 3,500.00 is appropriate.

Item 2 of citation no. 1–§ 1926.651(c)(2): The gravity of this violation is high. The only means of egress the employees had out of the excavation was a steep backfill mound that fell short of the pavement. The gravity is mitigated somewhat by the peculiar circumstances surrounding the ladder that disappeared from the excavation. The stills from King's videotape show the ladder was in the excavation when he arrived at the worksite. Velez stated that, in his experience, ALG always used a ladder, rather than a ramp, for employees to exit and enter an excavation. For some reason (perhaps so the employees could maneuver more easily as they worked?), someone removed the ladder and placed it next to the excavation by the time King walked to the immediate worksite. When King motioned to the employees to exit the excavation, the only means available to them was to climb the backfill mound. King saw the ladder lying next to the excavation. It is unclear why he did not instruct another ALG employee to replace the ladder in the excavation for the employees to make a safe exit as they obeyed his order. Due to the fleeting nature of the exposure (no more than 3 minutes), the court determines an appropriate penalty for this violation is $ 1,000.00.

Item 1 of citation no. 2–§ 1926.652(a)(1): The gravity of employees working in a 9.2 foot deep excavation without any form of fall protection is high. Had a cave-in occurred Trujillo and Cortez most likely would have been crushed by the weight of the rock and soil mixture that made

up the walls. An excavator was running adjacent to the excavation, creating vibrations that could contribute to the occurrence of a cave-in (Tr. 36). It is determined, however, the Secretary's proposed penalty of $ 38,500.00 is too high. Berry testified ALG had used a hydraulic hammer to excavate the trench (Tr. 137). In two days, ALG had excavated approximately 32 feet. Usually Berry would expect his crew to excavate 200 feet a day (Tr. 133-134). Although Berry knew the excavation was in fractured rock, he took a calculated risk the excavation walls would not collapse. Pressured to finish the sewer tie-in quickly, Berry made a snap judgment. While misguided, his judgment was influenced by the difficulty the crew had in excavating the trench. The court determines a penalty of $21,000.00 is appropriate.

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:

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.21(b)(2), is affirmed and a penalty of $ 3,500.00 is assessed;

2. Item 2 of citation no. 1, alleging a serious violation of § 1926.61(c)(2), is affirmed and a penalty of $ 1,000.00 is assessed; and

3. Item 1 of citation no. 2, alleging a willful violation of § 1926.652(a)(1), is affirmed and a penalty of $21,000.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: December 15, 2008