United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Butch Thompson Enterprises, Inc., Respondent.	OSHRC Docket No. **08-1273**

Appearances:

Uche N. Egemonye, Esq., and Sharon D. Calhoun, Esq., Office of the Solicitor,
U. S. Department of Labor, Atlanta, Georgia
For Complainant

J. Larry Stine, Esq. And Raymond Perez, II, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, PC,
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Butch Thompson Enterprises, Inc. (BTE), is a site contractor located in Kennesaw, Georgia. On January 30, 2008, one of BTE's crews was relocating part of a storm drainage system for the Barrett Parkway road expansion project in Kennesaw. At approximately 10:00 a.m., Occupational Safety and Health Administration (OSHA) compliance officer Noel Bouyett was driving on Barrett Parkway when he observed BTE's worksite. Believing he saw a safety violation, Bouyett turned off the road, parked his car, and proceeded to conduct an inspection of the worksite. As a result of Bouyett's inspection, the Secretary issued two citations to BTE on July 30, 2008.

Item 1 of citation no. 1 alleges a serious violation of § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions. Item 2 of the citation alleges a serious violation of § 1926.416(a)(1), for permitting employees to work in proximity to energized electric power circuits. Item 1 of citation no. 2 alleges a willful violation of § 1926.652(a)(1), for failing to use an adequate protective system to protect employees from an excavation cave-in.

BTE timely contested the citations. This case went to hearing on April 29 and 30, 2009, in Atlanta, Georgia. BTE stipulated to jurisdiction and coverage (Vol. I, Tr. 11). At the hearing, the Secretary withdrew item 1 of citation no. 1, the alleged safety training violation (Vol. I, Tr. 19).

In its defense to the remaining serious item of citation no.1, BTE argues the Secretary failed to cite the appropriate standard. The Secretary cited § 1926.416(a)(1); BTE contends § 1926.550(a)(15) is more specifically applicable to the conditions present at its worksite. At the hearing the undersigned allowed the Secretary (without objection from BTE) to amend item 2 to allege, in the alternative, a violation of § 1926.550(a)(15) (Vol. I, Tr. 29). Section 1926.550(a)(15) requires the employer to observe a minimum clearance of 10 feet when operating machinery proximate to power lines rated 50 kV. or below. BTE argues it complied with the requirements of § 1926.550(a)(15).

With regard to the alleged willful violation of § 1926.652(a)(1), BTE contends the Secretary failed to establish BTE knew of the violative conduct. BTE contends it established the affirmative defense of supervisory employee misconduct on the part of its foreman Eugene Langston. If a violation is found, BTE argues its classification should be reduced from willful to serious.

For the reasons discussed below, the undersigned vacates item 2 of citation no. 1. She affirms item 1 of citation no. 2 as willful, and assesses a penalty of $10,000.00.

Facts

Joseph C. Butch Thompson founded BTE in 1975. He is the owner and president of the company. BTE works as a site contractor whose duties include clearing and grading sites; installing underground pipes for water, sewer, and storm drainage; installing concrete curbs, gutters, and sidewalks; and paving roads (Vol. I, Tr. 186). BTE performs 90% of its work in Cobb County, Georgia (Vol. I, Tr. 187).

In the fall of 2007, BTE began work on the Barrett Parkway expansion in Kennesaw, Georgia (Vol. I, Tr. 252-253). BTE had several crews working on the project, including a piping crew supervised by foreman Eugene Langston (Vol. I, Tr. 78-79). Langston's crew consisted of Jose Velasquez, Noe Uribe, and Pablo Cicairos (Vol. I, Tr. 52, 61).

BTE was responsible for moving or replacing various underground pipes (Vol. I, Tr. 257-259). The morning of January 30, 2008, Langston's crew began excavating a trench with a Komatsu

excavator PC 270LC-7 (Vol. I, Tr. 135-136). BTE placed the excavator parallel to Barrett Parkway, directly underneath a set of five overhead power lines. Velasquez operated the excavator while Langston, Uribe, and Cicairos acted as spotters, watching so the arm (or "boom") of the excavator did not come into contact with the power lines (Vol. I, Tr. 53-54).

When the crew members had excavated to a depth of 5 or 6 feet, they determined there was an underground metal pipe not shown on the plans. BTE was to remove this pipe to complete part of its scheduled work. Langston ordered his crew to continue to excavate to a depth of 12 or 13 feet to uncover the pipe. Once the excavation was 13 feet deep, Langston ordered Uribe and Cicairos into the excavation to grade and clean up the pipe in preparation for its removal (Vol. I, Tr. 62-63, 72-74).

Bouyett had been driving eastbound on Barrett Parkway, approaching the intersection with Cobb Place Boulevard. As he was driving, Bouyett noticed BTE's worksite, across the street several hundred feet ahead of him. Bouyett observed BTE's excavator operating in proximity to the overhead power lines. Bouyett saw the arm of the excavator moving up and down (Vol. I, Tr. 40). Bouyett maneuvered his car across three lanes of traffic to the left turn lane, and turned off of Barrett Parkway and parked his car (Vol. I, Tr. 117). By the time Bouyett exited his car and walked to the site, BTE was no longer operating the excavator (Vol. I, Tr. 39). Bouyett observed Uribe and Cicairos in the excavation (Vol. I, Tr. 37-38).

Bouyett interviewed Langston and his crew members. He took measurements of the excavation and photographed the site. As he was leaving the site, he encountered BTE's utility locator, Michael McDaniel, and spoke briefly with him (Vol. I, Tr. 54).

As a result of Bouyett's inspection, the Secretary issued the citations in the instant case.

Citation No. 1

The Secretary has the burden of proving each 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 § 1926.416(a)(1), or, in the Alternative, of § 1926.550(a)(15)

In the citation, the Secretary alleged a serious violation of § 1926.416(a)(1), which provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it effectively by insulation or other means.

The citation provides: "Safeguard measurements were not utilized to protect employees from electrocution when operating a Komatsu excavator in proximity of energized overhead power lines."

BTE contends § 1926.550(a)(15) is a more specific standard than § 1926.416(a)(1) with respect to the cited conditions.[1] Section 1926.550(a)(15) (captioned "Cranes and derricks") is found in "Subpart N–Cranes, Derricks, Hoists, Elevators, and Conveyors" of the construction standards. On its face, § 1926.550 applies to "cranes and derricks," and not excavators. The Commission has held, however, that § 1926.550(a)(15) "expressly was made applicable to non-crane equipment, including backhoes, by a provision in Subpart O, section 1926.600(a)(6)." *Concrete Construction Company, Inc.,* 12 BNA OSHC, 1174, 1175 (No. 82-1210, 1985).

Section 1926.600(a)(6) provides:

> All equipment covered by this subpart [Subpart O] shall comply with the requirements of § 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

Section 1926.602 addresses "Material handling equipment," and § 1926.602(b)(1) specifically applies to "Excavating and other equipment." Thus, BTE's Komatsu excavator is covered by Subpart O, and must comply with the requirements of § 1926.550(a)(15).

Section 1926.550(a)(15)(i) provides:

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[1] Section 1910.5(c)(1) provides: "If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, occupation, or process."

> Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:
>
> (i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet[.]

Section 1926.416(a)(1) applies to employees working in proximity to an electric power circuit. This covers a myriad of situations, including performing electrical wiring inside buildings. On the other hand, § 1926.550(a)(15) applies specifically to situations in which employees operate equipment or machinery in proximity to electrical power lines. In the instant case, BTE was operating an excavator directly beneath overhead power lines. Section 1926.550(a)(15) is more specific to the cited conditions than § 1926.416(a)(1). BTE concedes (indeed, first suggested) § 1926.550(a)(15) applies to its crew's activity at the worksite.

The Secretary contends BTE violated § 1926.550(a)(15) because the arm of the crane entered the 10-foot minimum clearance required by the standard. BTE argues it did not. Altogether, there were five overhead lines at the site. At the beginning of the hearing, the parties stipulated to several facts regarding these five lines (Vol. I, Tr. 11-13):

(1) The line closest to the ground is a fiber-optic communication line. It is 21 feet, 7 inches high.

(2) The second lowest line is a Marietta Power System TPX service line. It is 24 feet, 6 inches high. Its voltage is 240 volts, and rated for a maximum of 110 amps. It services streetlights and traffic signals.

(3) The middle line is a Marietta Power System neutral line that carries stray voltage. It is 27 feet, 3 inches high.

(4) The second line from the top is a Marietta Power System primary conductor. Its voltage is 7,200 volts. It is 39 feet high.

(5) The highest line is managed by Georgia Power. Its height and voltage are unknown.

(6) BTE did not deenergize, or arrange to have deenergized, any of the lines.

The Secretary and BTE agree that it is the second lowest line, the TPX service line, that is at issue here. The lowest line is a communications line and does not carry voltage. The middle line is neutral and does not present a threat of electrical shock. The two highest lines are out of range for contact with the excavator.

The second lowest line is 24 feet, 6 inches high. At 240 volts (and assuming no insulating barriers), the minimum clearance between the line and any part of the excavator is 10 feet.[2] Therefore, to maintain a minimum clearance of 10 feet, no part of the excavator could reach above 14 feet, 6 inches.

According to Komatsu's specifications, the height of the excavator cab is 3 meters, or 9 feet, 10 inches. The arm of the excavator has a maximum digging height of 32 feet, 10 inches, and a maximum dumping height of 23 feet, 1 inch (Exh. C-7).

Bouyett testified he observed the arm of the excavator come within 5 feet of the line. He stated he first observed the arm of the excavator operating "in very close proximity to the power lines" (Vol. I, Tr. 36). Bouyett elaborated (Vol. I, Tr. 39-40, emphasis added):

> I noticed that [the excavator] was moving soil. It was swinging around and placing something–I mean, *it was very difficult to see it as I was approaching it* but, I mean, basically what I saw was, basically, the arm was–actually it was going down. I saw the movement of the arm going up, getting close to the line, and then swinging to the left side of the excavator. I imagine it was just moving some soil.

When asked how close the arm of the excavator came to the lines, Bouyett replied, "I estimate it was definitely less than five feet. It was very close" (Vol. I, Tr. 40). He stated he was estimating the arm's distance from the lowest line, which is not the TPX line at issue here (Vol. I, Tr. 112). By the time Bouyett parked his car and walked to the site, the excavator was no longer operating.

Bouyett interviewed Jose Velasquez, the operator of the excavator (Vol. I, Tr. 52). Velasquez told Bouyett he had asked for BTE to bring a smaller excavator to the site because he was concerned about the power lines, but Langston told him BTE had none available. Langston, Uribe and Cicairos acted as spotters, checking the clearance between the wires and the arm while Velasquez operated

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[2] Section 1926.550(a)(15)(i) provides the minimum clearance for lines rated 50 kV. or below "shall be 10 feet." One kV. is a thousand volts, thus 50kV. = 50,000 volts.

the excavator. Despite Velasquez's concern, he did not tell Bouyett the arm of the excavator actually entered the minimum clearance space. Indeed, Bouyett testified Velasquez, as operator of the excavator, was not in a good position to judge the arm's distance from the power lines (Vol. I, Tr. 53, 126).

Andrew Jenkins is BTE's general superintendent over all field work (Vol. I, Tr. 247). He testified the arm of the excavator did not need to enter the minimum clearance space in order to complete the excavation (Vol. I, Tr. 279):

> [W]hen you're setting flat and you're digging the arm is bent back as you come up, so there's no reason to raise high. I mean, I think it says the arm is like – the top of the boom is ten foot something so, actually, you're not coming much higher than the boom. If it was folded back sitting on the ground it wouldn't come up and swing, so that's why. I estimated it 14, 15 feet, maybe [.]

Section 1926.550(a)(15) requires BTE to maintain a minimum clearance of 10 feet between the TPX line and the excavator. Where, as here, the language of the standard states a specific dimension, it is crucial to the Secretary's case that she establish an accurate measurement. Bouyett observed the excavator in operation from across seven lanes of traffic while he was driving in a car (Exh. ALJ-1; Vol. I, Tr. 108, 111). He testified it was difficult to differentiate the five lines from one another from his vantage point (Vol. I, Tr. 121). Once he was at the site, Bouyett took no measurements of the excavator and power lines, although he had measuring equipment with him and took measurements of the excavation (Vol. I, Tr. 134, 142).

Bouyett's estimate of the distance between the power lines and the arm of the excavator while it was operating is speculative. Although the arm may have entered the minimum clearance space for the TPX line, the record does not establish it was more likely than not that this happened. Bouyett is a credible witness, and there is no doubt he believes the arm of the excavator entered the minimum clearance space (and it may have), but the undersigned cannot find BTE failed to comply with the standard based solely on Bouyett's eyeball estimate performed while driving a car in heavy traffic. Absent corroborating evidence, the Secretary's case fails.

Item 2 of citation no. 1 is vacated.

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.652(a)(1)

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

It is undisputed BTE's employees Uribe and Cicairos were in the excavation when Bouyett arrived at the site. The excavation was 13 feet deep, had nearly vertical walls, and was dug in previously disturbed soil. BTE did not slope, shore, or otherwise provide protective measures against a cave-in. Bouyett photographed the employees in the excavation (Exhs. C-8 and C-9). There is no question that § 1926.652(a)(1) applies, that BTE violated the terms of the standard, and that BTE exposed two of its employees to the hazard of being injured or (most likely) killed in the event of a cave-in.[3] BTE concedes this much in its brief (BTE's brief, p. 38): the company "readily admits that Complainant established the violative conditions of 29 CFR § 1926.652(a)(1) . . . when its crew foreman Mr. Langston permitted employees to work in an unprotected 13-foot deep trench[.]"

The only element of proof at issue is that of knowledge. Langston was the crew foreman, and thus a supervisory employee. He knew the excavation was unsafe, yet ordered two employees to

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[3] Bouyett took Langston's statement at the site. Langston read it over, made one correction (marked in brackets below), and signed the statement. It reads (Exh. C-16):

> I am the foreman and trench "competent person" for the storm drain project at Barrett Parkway & Cobb Place Blvd. The project started on 1/30/08 at 8:00 a. m. I was replacing a 10.8 feet deep storm drain catch basin because of the road expansion project. I determined to be type "B" soil, but I knew I was dealing with pre-disturbed soil. Once I determined that I was dealing with type "C" soil I did not test the soil. I have 24 years of experience and I've taken several trench and excavation safety courses. I did not get a trench box because I was going to have the crew go in the trench and grade the soil real quick and then I was going to use a concrete [or brick] manhole structure for protection. I could not slope or bench the trench because of the road on one side and utility lines on the other.

enter it, and observed them while they were working in it. Despite this rather straightforward case of actual knowledge, BTE argues the Secretary failed to prove the company had either actual or constructive knowledge of the hazardous condition. In support of its contention, BTE cites *W. G. Yates & Sons Construction Co., Inc., Hvy. Div. v. OSHRC,* 459 F.3d 604, 608-609 (5th Cir. 2006), in which the court concludes:

> [A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable.

BTE's reliance on *Yates* is misplaced. The instant case does not present a *Yates* situation, which occurs when a supervisor has knowledge *of his own misconduct*. The court in *Yates* emphasizes it requires a foreseeability analysis for "only the situation in which it is the supervisor himself who engages in unsafe conduct . . . Thus, a supervisor's knowledge *of his own rogue conduct* cannot be imputed to the employer." *Id.,* footnote 8 (emphasis added). Here, the cited conduct is not Langston's instruction to his employees to enter the excavation; the cited conduct is the presence of the employees in the excavation. Their physical entry into the excavation triggered the violation.

Langston, in his capacity as a supervisory employee, knew Uribe and Cicairos were in the unsafe excavation. "[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). The Secretary has satisfied her burden of proof for the knowledge element. She established BTE violated § 1926.652(a)(1).

Supervisory Misconduct Defense

BTE argues any violation of § 1926.652(a)(1) was the result of unpreventable employee misconduct on the part of Langston. 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).

BTE established the first element of its affirmative defense; it has a comprehensive safety program, including work rules designed to prevent the violation of § 1926.652(a)(1). Newly-hired employees must complete a safety orientation, available in both English and Spanish (Exhs. R-5 through R-8). BTE's "Excavation & Trenching" policy provides in pertinent part (Exh. R-7):

> For any and all trenches more than (5') five feet deep, slope sides of trench 1.5 feet horizontal to 1.0 feet vertical, unless a COMPETENT PERSON classifies the soil and determines that this is not necessary. Other alternatives are to use shoring and/or trench boxes.
> . . .
> A COMPETENT PERSON is one who has been trained and is capable of identifying existing and predictable hazards in the surrounding work areas, and/or working conditions that are unsanitary, hazardous, or dangerous and who has the authority to take prompt corrective measures to eliminate the hazard. Also, the competent person must have the authority to stop work if a hazard exists.
>
> A competent person must inspect/check all trenches, adjacent areas, and any protective systems for possible cave-ins, failure of protective systems, hazardous conditions, etc. Inspections MUST be performed DAILY before work begins and/or any worker enters the area. Inspections must be performed after any rainstorm, any hazard-increasing occurrence and/or any other change in conditions.

The training programs BTE describes in the record show it intended to communicate the substance of the workrule. The circumstances surrounding the violation demonstrate, however, BTE failed effectively to communicate that the workrule had to be followed. Enforcement of the workrule is shown to be lax when everyone at the site felt free to violate it. Where, as here, the purported employee misconduct relates to a supervisory employee, the employer faces a higher standard of proof. "[W]here 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 supervisor's 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." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

A supervisor's participation in the violation does not by itself establish that a safety program is inadequate. Yet, safety infractions by supervisors are evidence of poor communication and

implementation of a safety program. BTE had a total of seven employees on the Barrett Parkway site at some point during January 30: the operator Velasquez, laborers Uribe, and Cicairos; the utility locator McDaniel; the foreman Langston; and superintendents Andrew Jenkins and Marshall Hollis. The latter three were supervisors on site.[4] BTE provided all but Velasquez and McDaniel with "competent person training," which is a specialized 10-hour training course in trenching and excavation safety requirements. McDaniel was a competent person but may have received the training from another employer (Tr. Vol, I, 169, 238-239, 244). Velasquez would have been trained on BTE's workrule and the requirements for cave-in protection. Five of these individuals directly participated in or observed the violation. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (Nos. 89-2883 -3444, 1993) (seven employees not wearing safety belts, not merely one; "cumulative effect" of seven belies that conduct was isolated).

BTE's Excavation and Trenching policy states a competent person has the authority to stop work if a hazard exists. Velasquez, Uribe, and Cicairos had the authority to stop the work and report the unsafe conditions to a safety representative (Tr. 103, 238). No one countermanded Langston's order to Uribe and Cicairos to enter the unsafe excavation. McDaniel, who is highly experienced in judging the depth of an excavation, observed Uribe and Cicairos working inside the 13-foot excavation. McDaniel testified he did not think the excavation was deep enough to merit cave-in protection. Bouyett interviewed Uribe and Cicairos, who separately reported they knew the excavation needed some type of protective system but entered without it.

Field superintendent Hollis stated he was at the site that morning between 7:30 and 8:00 a.m., then left with the understanding the excavation would be dug between 5 and 8 feet deep (Vol. II, Tr. 57). Hollis stated he learned the excavation was 13 feet deep when he returned to the site at approximately 11:30 a.m. and found Bouyett there (Vol. II, Tr. 58). Superintendent Jenkins stated he was present at the site early on the morning of January 30 and left before 9:00 a.m. (Vol. I, Tr. 253). Jenkins testified that the original plan was to slope the excavation if it exceeded 5 feet in

[4] The Secretary contends McDaniel was also a supervisory employee, which BTE disputes. McDaniel is a salaried employee who considers himself to be a supervisor and in management. The record does not establish McDaniel acted as a supervisor at the site. As stated, he was a competent person and was well informed on trenching regulations. He directly observed the employees in the trench without commenting or protesting the obvious violation (Tr. Vol. 1, 167-169).

depth. He stated, "We should have been able to slope it back with no trouble at the depth it was going to be" (Vol. I, Tr. 252). Jenkins testified he did not know the excavation had been dug deeper than 5 or 6 feet until he received a phone call from supervisor Hollis at approximately 11:00 a.m. (Vol. I, Tr. 254).

Even if the trench had been between 5 to 8 feet, BTE needed to implement cave-in protection. Langston did not believe he could properly slope the trench walls because the power lines obstructed one side and the street obstructed the other (Exh. C-16). To be properly sloped for Type C soil, even if only 5 feet deep, the nearly vertical walls should have shown a far greater degree of sloping than Bouyett observed. It does not appear the crew actually intended to slope the trench walls as a means of cave-in protection. No trench box was on site.

Although Hollis and Jenkins were not on the site as the excavation approached 13 feet, they were carrying their cell phones. Thompson explained all supervisors have a cell number as well as a Nextel number where they can be reached (Vol. I, Tr. 195): "[A]s you know, in some cases the cell number can't be reached. Nextels are more available, but most of our people – I think everybody that's in a foreman or supervisory position has a Nextel so, you know, we're available by one or the other all the time." Langston testified he consulted his two immediate supervisors regarding protection for the excavation. The two supervisors deny this, but Langston did have the means to contact them.

Langston was a credible witness who acknowledged his mistake without excuses or rationalizations. He freely admitted he knew the excavation was unsafe and that he ordered two employees to enter it anyway (Vol. I, Tr. 155). He recognized a cave-in could have occurred while the employees were in the excavation, and he admits he was lucky (as were Uribe and Cicairos) that one did not (Vol. I, Tr. 156). When questioned by the undersigned, the following exchange occurred (Vol. I, Tr. 163, emphasis added):

Q. And why no trench box?

Langston: *We* just made the wrong decision that morning, you know. *We* made a–

Q. Was it yours alone or were you talking to other people?

Langston: I *was talking to my two immediate supervisors*.

Q. And you just decided to go with–

Langston: *We* felt the trench was safe.

Langston's testimony establishes he had contacted Hollis and Jenkins about the excavation at some point prior to OSHA's inspection.[5] There is no apparent reason for Langston to state his immediate supervisors knew of the decision to perform the work without providing cave-in protection. Langston accepted responsibility for his decision. BTE reprimanded Langston. On his January 30 disciplinary sheet BTE wrote "Andy Jenkins and Marshall Hollis accept limited responsibility for the safety violation"(Exh. R-39, p.3). It remains unclear why Langston's two immediate supervisors were reprimanded if they had no contemporary knowledge of the workrule violation. The rationale of a shared supervisory responsibility appears lacking. BTE points to no part of its safety program or to no other instance where the supervisors up-the-line were disciplined because of an infraction by a subordinate. BTE did not reprimand the down-the-line employees Uribe or Cicairos, although they participated in the violation.

Langston's demeanor during his testimony was consistent with someone giving his honest assessment of the decision to send the employees into the excavation without a trench box. He was calm and controlled, and did not hesitate or stumble in giving his answers. His answers were direct and to the point, without the evasiveness often seen in witnesses attempting to avoid or shift responsibility. Langston's testimony is assessed as credible.

The excavation was more than twice the depth of one which required a protective system and was dug in previously disturbed soil next to a heavily traversed road. Neither the foreman nor McDaniel, each a competent person, or the three trained employees, two of whom were also competent persons, questioned the decision to work in the excavation. The undersigned cannot overlook the shared knowledge of the hazardous condition. The fact that no one voiced any objection to sending employees into the excavation (including the employees who entered it)

[5] Prior to asking the question set out above, this judge noted Langston carefully answered only the specific question asked. When this judge's questions elicited the answer set out above, she did not wish to continue questioning in the area which directly impacted the parties' primarily contested issue. Somewhat surprisingly, the Secretary did not inquire further. Counsel for BTE chose not to follow up on Langston's unequivocal statement that Jenkins and Hollis knew of the violative condition of the excavation (Tr. Vol. I, 164). Thus, the details of the exchanges between Langston and his supervisors are unknown.

demonstrates a cumulative laxness towards excavation safety. BTE has the burden of proving its affirmative defense of supervisory misconduct, and BTE has failed to meet that burden.

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).

Langston, Jenkins, and Hollis knew the excavation was dug in Type C soil next to a busy roadway. They were experienced in excavation work. BTE is a site contractor whose work routinely requires its crews to excavate. Langston admitted he knew the excavation was unsafe, yet he instructed Uribe and Cicairos to enter it and prepare the pipe for removal. He made no other provision for protecting his crew members from a cave-in. He knew the risks to which he was exposing the men in his charge and the prevalence of cave-ins in Cobb County (Tr. Vol. I, 187).

"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 Langston's state of mind at the time he instructed Uribe and Cicairos to work in the excavation. Langston knew the excavation was not safe. Langston knew BTE should place a trench box in the excavation, but he knowingly disregarded this requirement. The willful state of mind of a supervisor can be imputed to his or her employer. *E.g. Tampa Shipyards, Inc*., 15 BNA OSHC 1533, 1539 (Docket No. 86-360-469, 1992).

The Secretary has established BTE'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.

The gravity of employees working in a 13 foot deep excavation dug in Type C soil without any form of fall protection is high. Had a cave-in occurred Uribe and Cicairos most likely would have been crushed by the weight of the soil from the trench walls. An excavator and a busy roadway ran adjacent to the excavation, creating vibrations that could contribute to the occurrence of a cave-in.

BTE employed approximately 140 employees at the time of Bouyett's inspection and is considered a medium-sized employer. Since its inception in 1975, BTE has never received an OSHA citation (Vol. I, Tr. 93). BTE demonstrated good faith during the inspection. The Secretary's proposed penalty of $56,000.00 is too high. Although its employees did not follow its workrule, BTE designed a safety program with an emphasis on safety training beyond that required by OSHA. BTE's owner, Joseph "Butch" Thompson, appears personally involved in the company's safety equipment and training decisions, and he has invested the company's resources towards both. BTE disciplined Langston, and to some extent, Jenkins and Hollis. Langston, the person most at fault for

the instant violation, accepted responsibility for his action. It is determined a penalty of $10,000.00 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) and withdrawn by the Secretary, is vacated and no penalty is assessed;
2. Item 2 of citation no. 1, alleging a serious violation of § 1926.416(a)(1), is vacated and no penalty is assessed; and
3. Item 1 of citation no. 2, alleging a willful violation of § 1926.652(a)(1), is affirmed as willful, and a penalty of $10,000.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: October 27, 2009
Atlanta, Georgia