SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 96-0593
AVIATION CONSTRUCTORS, INC.,	:	
Respondent.	:	

DECISION

Before: ROGERS, Chairman; VISSCHER, Commissioner.

BY THE COMMISSION:

Respondent, Aviation Constructors, Inc. ("ACI"), specializes in the construction of facilities at airports. ACI contracted with Delta Airlines to construct a baggage conveyor tunnel at Hartsfield International Airport in Atlanta, a project which required that an excavation be opened in the concrete surface. ACI in turn subcontracted with Pressure Concrete, Inc. ("PCI") to install a shoring system in the excavation. While PCI was engaged in this work, the excavation collapsed, seriously injuring one of PCI's employees. The Secretary issued a citation alleging that ACI committed a willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"), by failing to comply with 29 C.F.R. § 1926.652(a)(1), which requires that excavations be adequately protected against cave-ins. Specifically, the Secretary charged that the shoring system PCI installed in

the excavation was not approved by a registered engineer.[1] The only issue before us is whether Administrative Law Judge Ken S. Welsch erred in finding the violation willful in

[1]The cited standard provides, in relevant part, as follows:

§ 1926.652 Requirements for protective systems.

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section . . . .
. . . .
(c) *Design of support systems, shield systems, and other protective systems.* Designs of support systems, shield systems, and other protective systems shall be . . . in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:
(1) *Option (1)—Designs using appendices A, C, and D. . . .*
(2) *Option (2)—Designs Using Manufacturer's Tabulated Data. . . .*
. . . .
(3) *Option (3)—Designs using other tabulated data. . . .*
(4) *Option (4)—Design by a registered professional engineer*. (i) Support systems, shield systems, and other protective systems not utilizing Option 1, Option 2 or Option 3, above, shall be approved by a registered professional engineer.
(ii) Designs shall be in written form and shall include the following:
(A) A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and
(B) The identity of the registered professional engineer approving the design.
(iii) At least one copy of the design shall be maintained at the job site during the construction of the protective system. After that time, the design may be stored off the job site, but a copy of the design shall be made available to the Secretary upon request.

It is undisputed that the shoring system was not derived from established data or other fixed criteria and that therefore Option 4, which requires the approval of a registered engineer, is the provision of the standard applicable here.

nature as alleged.[2] For the reasons that follow, we conclude that the violation was willful, and we assess a penalty of $20,000.

FACTS

At the time ACI contracted for the work, it intended to use plywood sheeting or timber cross-bracing but during the process of designing such a system ACI discovered that those materials would be infeasible due to the restricted space available and hazards created by exposing footings which carried the load of a canopy directly above the work site. For approximately a month afterward, ACI had communications with an engineering company, Starzer & Ritchie, regarding other possible soil retention systems but none of the proposed systems would work within the physical constraints of the job. ACI ultimately decided to use a shotcrete bracing system,[3] similar to the one installed by a subcontractor at an ACI job for Delta Airlines at the Cincinnati, Ohio airport. Since the contractor who had installed that system at Cincinnati was not available, ACI solicited PCI to install the shoring system.[4]

On October 18th, 1995, ACI began demolition work on the sidewalk under the canopy with the opening of the excavation scheduled for 6 days later, October 24th. On either the 18th or 19th, Scott Tate, ACI's project manager, called Gary Humble, PCI's vice-

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[2]At the hearing, ACI's counsel expressly stated that ACI was not raising any issue regarding its responsibility for the exposure of PCI's employees.

[3]"Shotcrete" is a mixture of cement, concrete, and steel fibers. A shotcrete bracing system is a soil retention system made out of shotcrete and rebar, or lagging. The lagging is approximately ten feet long and is wedged into the earth by an air hammer. Next, wire mesh is put over the rebar and secured in place. The shotcrete materials are then blown onto the trench walls by an air compressor. A "soil nailing" system and shotcrete bracing system are the same, and the parties use the terms interchangeably.

[4]PCI has extensive experience using shotcrete to stabilize and rehabilitate existing structures such as sewers and piers, lining manholes and wet wells, and constructing walls at treatment plants. Although PCI primarily renovates sewers it has also constructed protective systems utilizing shotcrete for its own employees on numerous jobs in excavation work.

president and general manager, to discuss the project, including job conditions and requirements for design drawings. Humble informed Tate that PCI had previously worked with an engineer who could supply the required drawings but that would take "a few days." Pending the results of a soil test, Humble was told to assume a "worst case scenario condition for your calculations for your stamped engineered shop drawings," specifically Type C soil, which, under the definitions set forth in the Secretary's excavation standards, is the least cohesive type of soil. Humble did not raise any question regarding what Type C meant or what the conditions were that he should assume for his design.

On October 20, PCI faxed its proposal to ACI, which was the first document received from PCI relating to the possibility of PCI doing the work. PCI's proposal was accompanied by a sketch drawn by Humble showing the placement of rebar and shotcrete. ACI's General Manager of Field Services, Steve Schlundt, testified that he understood this was not an engineer stamped plan and that ACI would have to have an engineer approved plan on site before starting the excavation work. PCI's proposal did not otherwise contain or mention any drawings.

On receipt of PCI's proposal ACI faxed its acceptance to PCI authorizing PCI to "begin work on shop drawings and other required submittal data." According to Tate, this phrase referred to shop drawings stamped by a registered professional engineer and could not be interpreted to mean anything else. After the exchange of correspondence that day Tate and Humble spoke on the phone, and Tate specifically reminded Humble that stamped engineered drawings were required.

Between October 20 and November 4, when the accident occurred, ACI telephoned PCI from three to six times regarding the absence of the engineer drawings but sent no further written requests. According to Schlundt, ACI was "relying on . . . our good faith with them that they would provide . . . what they told us they would provide" and "[w]e were led to believe that the plans would be in our hands prior to starting." On October 24, the day the excavation began, Schlundt met with PCI, at which time the two companies discussed the

absence of an engineer-approved drawing. Schlundt told Humble that getting the drawings done "was of the utmost essence and importance." Humble in turn said he knew of the requirement and that the drawings were being worked on and would be "forthcoming in the near future." At this time, Schlundt knew that PCI's employees would have to enter the excavation within the next day or two. Schlundt said that it would not be unreasonable from a design standpoint to expect PCI to develop the necessary engineering plan in a short period of time.[5]

PCI started work in the excavation on October 26. At that time, ACI had not received a engineer's drawing, and PCI continued to inform ACI that the plan was being "worked on." On October 31, Tate sent the results of a soil test to PCI with a letter stating "this will allow [PCI] to complete the stamped set of shop drawings for the soil retention system." Tate testified that he used the word "allow" as a "gentle prod" to PCI to complete its drawings. "I had repeatedly asked him [Humble] over the phone for this information. He knew it was required of him and he just hadn't received it. So, I wanted to put it in writing." Tate and Schlundt were also of the view that although PCI's initial work description and accompanying sketch did not constitute an engineer's drawing, any design approved by an engineer would be likely to incorporate PCI's original proposal. As Tate put it, since PCI had demonstrated what it proposed to do and PCI was "comfortable" with that proposal, he felt that ACI could allow the work to continue even though PCI had not yet furnished an engineer's stamped drawing.

A post-accident report prepared by an engineer came to essentially the same conclusion as Tate and Schlundt regarding the adequacy of PCI's original proposal.

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[5]ACI's expert Carroll Crowther similarly testified that once PCI had the plans for the project and made a site visit, it would take a competent engineer no more than a day to design a shotcrete system, and it would not take more than one day just to review the plans and walk the site. Crowther also testified that it is not unusual to hire the subcontractor installing a bracing system until just days before the excavation is opened.

According to this report, the cave-in was due to the development of fissures and filling with water and could not have been anticipated. The report further stated, "With the information available prior to the failure it appeared that even without a bracing system the slope should have remained stable." ACI's expert witness, Carroll Crowther, agreed with the conclusion that the cave-in was caused by unforeseeable developments, not defective shoring. During the hearing, the Secretary's counsel stated that he did not dispute that the shotcrete system devised by PCI was a satisfactory method of supporting the excavation. In other words, the gravamen of the Secretary's case is not that a registered engineer would have found PCI's proposal to be deficient in any material respect but rather simply that the system was not approved in advance as required by the standard.[6]

DISCUSSION AND ANALYSIS

On these facts Judge Welsch concluded that the violation was shown to be willful in nature. He found that ACI's two supervisors, Schlundt and Tate, allowed the work to continue even though they were aware that ACI had not received the engineer's drawing and certification. He therefore held that during the approximately 10-day period from October 26, when PCI's employees first entered the excavation, until November 4, the date of the accident, ACI had acted with an "intentional, knowing, and voluntary disregard for the requirements of the Act." The judge also rejected ACI's argument that it had made a good faith attempt at compliance by contracting for a protective system and reasonably relying on PCI's promises that the plan would be forthcoming. The judge noted that ACI remained in control of the site but did not exercise its authority to instruct PCI to keep employees out of the excavation until PCI furnished the engineer's plan and certification. Instead, the judge found the repeated requests for the required drawings by ACI's supervisors to be evidence

[6]The specific description of the alleged violation in the citation is that "*[t]here was no data available to show* that the concrete (shotcrete) had the capacity to resist without failure all loads that were imposed upon the walls of the trench" (emphasis added).

of a "heightened awareness" that it was in violation of the Act for not having the drawing. Relying on *Mobile Premix Concrete, Inc.*, 18 BNA OSHC 1010, 1995-97 CCH OSHD ¶ 31,416 (No. 95-1192, 1997), the judge concluded that "ACI did not have a good faith belief that its failure to have an engineer-approved plan somehow conformed to the requirements of the Act."

In its petition for review before us, ACI acknowledged that a willful violation may be found where the employer acted with intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. While agreeing that the judge applied the appropriate legal test for determining willfulness, ACI contended that the judge erred because he failed to give proper weight to the efforts ACI made to comply with the cited standard. We granted review and directed the parties to file briefs on this question.

As Judge Welsch correctly observed in his decision, whether a willful violation exists depends upon the employer's state of mind with respect to the requirements imposed by a standard. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987). The facts here demonstrate that ACI was aware of the requirement that the shoring design be approved and certified as approved by a qualified engineer. Nevertheless it knowingly allowed the work to commence and to continue over some period of time without the required approval. On these facts, the Secretary has made a prima facie showing that the violation was willful in nature. As the Commission held in *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992), an employer who has notice of the requirements of a standard and is aware of a condition which violates that standard but fails to correct or eliminate employee exposure to the violation demonstrates knowing disregard for purposes of establishing willfulness. *Accord A. Schonbek & Co. v. Donovan*, 9 BNA OSHC 1189, 1981 CCH OSHD ¶ 25,081, p. 30,984 (No. 76-3980, 1980), *aff'd*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, pp. 40,103-04 (No. 86-360, 1992) (consolidated) (failure to institute

procedures known to be required constitutes willful violation). ACI does not assert to the contrary but contends that its efforts to comply with the standard by repeatedly reminding PCI of the need for an engineer's drawing and requesting on numerous occasions that PCI provide the required drawing demonstrate that its state of mind was not one of disregard of or indifference to the requirements of the standard. We agree that ACI's efforts are relevant for the purpose ACI argues. However, we find on the facts here that those efforts are not sufficient to negate a showing of willfulness.

Under well-established Commission precedent, an employer may defend against an initial showing that its state of mind was one of willfulness by adducing evidence tending to show that in fact it acted in good faith with respect to the requirements of the standard in issue.[7] Such evidence may take one of two forms: the employer may seek to establish that

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[7]The Secretary contends that the Commission should not recognize any good-faith defense to willfulness, citing *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir. 1994), which arises in the same circuit as this case, and *United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998). In view of our disposition finding a lack of good faith, Chairman Rogers sees no need to address the Secretary's argument. Commissioner Visscher, on the other hand, would observe that neither of the cases the Secretary cites supports the proposition that good faith cannot rebut willfulness.

The employer in *Trinity* failed to institute an audiometric testing program as required by the Secretary's hearing conservation standard. Instead the employer supplied its employees with hearing protection devices on the belief that such devices would protect against hearing loss as effectively as a testing program under the standard. The court concluded that regardless of whether this belief was held in good faith, the employer willfully violated the standard by substituting its own judgment for what the law required. Unlike the employer in *Trinity*, ACI's actions, while inadequate, were intended to implement the means of protection required by the cited standard. ACI has not contended that in good faith it could choose some safety precaution other than a shoring system approved by a registered engineer.

The employer in *Ladish* was charged with a criminal willful violation for knowingly failing to replace an unsafe fire escape, which resulted in the death of an employee. The issue before the court was whether the trial judge erred in not granting an acquittal based on good

(continued...)

it had a good-faith belief that as a factual matter the conditions in its workplace conformed to OSHA requirements, *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993), or the employer may introduce evidence to show that it took steps or made efforts to comply with those requirements, *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997).[8] In either case, the test of whether the employer demonstrated good faith is an objective one, *Morrison-Knudsen, Caterpillar*. Where the employer, as here, argues that it demonstrated good faith by attempting to comply with the standard, the question is whether the employer's efforts were objectively reasonable even though they were not totally effective in protecting

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[7](...continued)
faith. The court stated as a general proposition that "there is no generic 'good faith' defense in the federal criminal law in general . . . or for violations of the Occupational Safety and Health Act in particular." The court, however, conceded that an employer's "efforts to make its workplace safe may show that an offense was not willful."135 F.3d at 491. Moreover, Commissioner Visscher notes that there is other appellate authority recognizing that good faith efforts to protect employees are relevant on the issue of willfulness. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 165 (1st Cir. 1987); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 848-49 (8th Cir. 1981).

[8]ACI's position is that the judge erred by analyzing the case from the perspective of whether ACI had a reasonable belief that it had complied with the standard rather than addressing whether ACI had made reasonable but unsuccessful efforts to comply. We construe the judge's decision as discussing both elements of rebuttal to a showing of willfulness, although ACI had not argued to the judge that it had a good faith belief that its conduct was in compliance with the standard.

In rejecting ACI's contention that its efforts to compel PCI to provide the necessary engineer's drawing were reasonable, the judge concluded that, on the contrary, those efforts were evidence of an *increased* awareness of ACI's violative conduct. In the circumstances here, it is not necessary to decide whether ACI's requests to PCI constitute *additional* evidence to support a finding of willfulness. We therefore do not adopt this finding of the judge.

employees from the hazard. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *Tampa Shipyards*, 15 BNA OSHC at 1541, 1991-93 CCH OSHD at p. 40,104.[9]

There is no dispute that ACI failed to obtain a design approved by a registered professional engineer prior to commencement of the excavation. ACI's efforts consisted of nothing more than repeated requests, predominately oral, that PCI provide the required engineer-approved drawing. When PCI disregarded those requests, ACI took no action to provide for the safety of the excavation as required by the provision of the standard at issue. The purpose of that provision is to ensure that during the course of the work the employer is proceeding with knowledge and assurance that it has a shoring design adequate for the conditions in question. As the Secretary stated when she promulgated section 1926.652, the requirement for a written design approved by an engineer is "intended to increase the

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[9]In *Caterpillar* the court affirmed the Commission's holding that warning tape and signs were not objectively reasonable measures to reduce the likelihood of injury from broken fragments of metal being expelled from a press at a high rate of speed because they would offer no protection to employees working within the danger zone. *See Woolston Constr. Co.*, 15 BNA OSHC 1114, 1119, 1991-93 CCH OSHD ¶ 29,394, p. 39,570 (No. 88-1877, 1991), *aff'd without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992) (1992 WL 117669) (violation found willful where employer failed to make good faith attempts either to comply with the standard or otherwise eliminate the hazard to employees). *Compare Mobil Oil Corp.*, 11 BNA OSHC 1700, 1701, 1983-84 CCH OSHD ¶ 26,699 (No. 79-4802, 1983) (while guarding a six-foot area around a wax pit with a rope was not as effective or complete as completing the wall which surrounded most of the pit, it was sufficient to counter a willful charge); *Wright & Lopez, Inc.*, 8 BNA OSHC 1261, 1262, 1266, 1980 CCH OSHD ¶ 24,419, pp. 29,774, 29,777 (No. 76-3743, 1980) (where employer had installed partial shoring which did not extend to the bottom of the trench and was in the process of installing additional shoring when the trench collapsed, a violation for inadequately shored trench found not willful although the employer had actual knowledge of the requirements of the standard and was aware that the trench was not properly shored); *Williams Enterp., Inc.*, 4 BNA OSHC 1663, 1668, 1976-77 CCH OSHD ¶ 21,071, 25,362 (No. 4533, 1976) (violation of the Act for failure to secure a crane counterweight against toppling or falling on an unstable street surface not willful where employer placed the counterweight on a wooden base which partially but not entirely compensated for the grade of the street).

likelihood that the protective systems designed under this option will be adequate to protect employees." 54 Fed. Reg. 45,959 (1989). There is no indication, and ACI does not contend, that it had taken any of the steps necessary to effectuate this purpose. For instance, ACI did not even attempt to arrange for a registered engineer to observe the worksite prior to the collapse.

Indeed, ACI's attempts to achieve compliance with the standard are even less substantial than those in other cases holding that employers had not made sufficient efforts to negate willfulness. In *V.I.P. Structures Inc.*, 16 BNA OSHC 1873, 1875-76, 1993-95 CCH OSHD ¶ 30,485, p. 42,110 (No. 91-1167, 1994), the employer was found in willful violation of a standard requiring safety nets for fall protection even though the employer had nets available at the site but was unable to set them in place because deep mud at the worksite prevented the employer from moving its lift equipment. Although the employer tried unsuccessfully each day to position the nets, the Commission held that "these efforts to advance the nets do not rise to the level of good faith sufficient to negate willfulness." In *Calang Corp.*, 14 BNA OSHC 1789, 1792-93, 1987-90 CCH OSHD ¶ 29,080, p. 38,872 (No. 85-0319, 1990), the employer's attempt to reduce the possibility of a cave-in by lowering the water table was held insufficient to preclude finding of willfulness where it failed to slope the trench in accordance with the applicable standard. In these cases, the employers actually implemented, at least to some minimal degree, some measure directed at reducing the hazard to employees. In the circumstances here, however, where the standard is concerned with the information available to the employer during the course of the work, ACI allowed work to be performed without assurance from a registered professional engineer that the protective system was adequate and without even initiating the mechanism by which it would obtain that assurance. As the Commission stated in *Kehm Constr. Co.*, 7 BNA OSHC 1976, 1979, 1979 CCH OSHD ¶ 24,098, p. 29,279 (No. 76-2154, 1979), where an employer has actual knowledge of the requirements of a standard and is aware that the conditions at the site do not meet those requirements, "failure to take *positive steps* to

comply . . . constitutes a least a careless disregard of the mandate of the Act" (emphasis added). We therefore agree with the judge that ACI's efforts were inadequate.

Having concluded that the violation was willful in nature, we turn now to the assessment of an appropriate penalty. The Commission has discretion to assess an appropriate penalty based on the facts, and in so doing the Commission may conduct a *de novo* review of the judge's assessment. *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1993-95 CCH OSHD ¶ 30,516 (No. 91-414, 1994). Although ACI does not address the propriety of the judge's assessment of $55,000 for a willful violation, we find that assessment to be excessive in the circumstances here.

Under section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission considers four factors when determining an appropriate penalty: the employer's size, good faith, and prior history of compliance with the Act as well as the gravity of the violation. These factors are not accorded equal weight, and gravity normally is the most significant consideration. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006, 1993-95 CCH OSHD ¶ 30,635, p. 42,444 (No. 92-424, 1994). In assessing the penalty of $55,000 proposed by the Secretary, the judge determined that the violation was of high gravity because designs approved by an engineer under Option 4 of section 1926.652(c) are necessary to ensure that the shoring system is safe.

For the reasons we have stated, we agree with the judge with regard to the purpose of the provision of the standard at issue here, and we are not unmindful that an employee was seriously injured at ACI's worksite. However, the record does not support the judge's finding that the violation in this case is of high gravity. While we do not dispute that analysis and approval of a shoring design by a registered engineer serves an important safety function because it provides assurance that the design of the shoring will be adequate to protect employees, we cannot find a violation of this requirement to be of high gravity since the record establishes, and the Secretary concedes, that the hazard of inadequate shoring was due to factors which an engineer could not have anticipated and taken into consideration.

Commission precedent also holds that good faith can be considered in assessing a penalty for a willful violation. *S. Zara & Sons Contr. Co.*, 10 BNA OSHC 1334, 1340, 1982 CCH OSHD ¶ 25,892, p. 32,400 (No. 78-2125, 1982), *aff'd without published opinion*, 697 F.2d 297 (2d Cir. 1982); *Kent Nowlin Constr., Inc.*, 5 BNA OSHC 1051, 1055, 1977-78 CCH OSHD ¶ 21,550, p. 25,863 (No. 9483, 1977) (consolidated), *aff'd*, 593 F.2d 368 (10th Cir. 1979). ACI clearly intended that employees be protected by shoring, just as ACI had provided such protection on its previous jobs. It investigated various shoring alternatives before commencing work and eventually selected a system configured for the particular worksite in accordance with one of the options permitted under the standard. While we find that ACI did not make good faith efforts to comply with respect to the particular provision of the standard at issue here, we nevertheless conclude that these overall circumstances should be taken into consideration in assessment of an appropriate penalty. For instance, in *V.I.P. Structures*, 16 BNA OSHC at 1876, 1993-95 CCH OSHD at p. 42,110, the Commission regarded the employer's attempts to move safety nets into position as an indicator of good faith for penalty purposes. *See Kent Nowlin Constr. Co.*, 648 F.2d 1248, 1281 (10th Cir. 1981) ("relative degrees of dereliction within the willful violation category"); *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1894, 1995-97 CCH OSHD ¶ 31,228, p. 43,791 (No. 92-3684, 1997), *aff'd per curiam*, 131 F.3d 1254 (8th Cir. 1997) (fact that employer demonstrated good faith during the inspection taken into account in assessing penalty for a willful violation); *S. G. Loewendick & Sons Inc.*, 16 BNA OSHC 1954, 1959, 1991-93 CCH OSHD ¶ 30,558 (No. 91-2487, 1994) (not inconsistent to find a violation willful and also find that the employer exhibited some good faith), *rev'd on other grounds*, 70 F.3d 1291 (D.C. Cir. 1995); *C.N. Flagg & Co.*, 2 BNA OSHC 1195, 1974-75 CCH OSHD ¶ 18,686 (No. 1734, 1974), *aff'd without published opinion*, 538 F.2d 308 (2d Cir. 1976) (distinguishing the general good faith of an employer from the willful actions of particular supervisors at the work site in question).

For these reasons, we conclude that a penalty of $20,000 is appropriate. Accordingly, the judge's decision finding a willful violation of section 1926.652(a)(1) is affirmed and a penalty of $20,000 is assessed therefor.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: September 28, 1999

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 96-593
AVIATION CONSTRUCTORS, INC., Respondent.	:	

APPEARANCES:

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

Ira J. Smotherman, Esquire
Shapiro, Fussell, Wedge, Smotherman & Martin
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

On April 16, 1996, the Secretary issued two citations to Aviation Constructors, Inc. (ACI), for alleged trenching violations. The Secretary withdrew item 3 of Citation No. 1, which alleged a serious violation of § 1926.651(g)(1)(i). Prior to the hearing, the parties reached a settlement agreement regarding items 1 and 2 of Citation No. 1, alleging serious violations of §§ 1926.651(c)(2) and 1926.652(e)(1)(ii), respectively. A partial settlement agreement was filed with the court and is approved by this Decision and Order. The only item remaining at issue is item 1 of Citation No. 2, which alleges a willful violation of § 1926.652(a)(1), for failure to use an adequate protective system to protect employees in an excavation from cave-ins. At the hearing, ACI admitted that it violated § 1926.652(a)(1) (Tr. 11-13, 36). ACI disputes only the classification of the violation as willful and the Secretary's proposed penalty of $55,000.

Background

In August 1995, ACI entered into a contract with Delta Airlines to build a baggage conveyor tunnel at the south terminal of Hartsfield International Airport in Atlanta, Georgia. The contract required ACI to perform demolition work on the existing roadway and sidewalk, remove the debris from the demolition, and excavate an opening for the tunnel that led to the lower level of the terminal (Tr. 17-18, 95). After construction of the tunnel, ACI would backfill earth over the top of the tunnel and pour a new concrete roadway where the excavation had been dug (Tr. 99).

Under the contract, ACI was responsible for providing vertical shoring for the excavations on the project (Tr. 118). At the time of its bid, ACI planned on using plywood sheeting or timber cross-bracing. ACI learned after beginning the design of this protective system, however, that it was infeasible due to the restricted space available and hazards created by exposing footings which carried the load of a canopy directly above the worksite (Tr. 19-20, 30, 95-96).

ACI contacted Pressure Concrete, Inc. (PCI), a construction company based in Florence, Alabama, that primarily performs sewer renovation work (Exh. C-17, pp. 13-14; Tr. 9-10). ACI wanted PCI to install a protection system using shotcrete and rebar (Exh. C-1). PCI had worked on one job previously for ACI. That job did not involve the creation of a protective system (Tr. 99-100).

ACI began demolition work on the sidewalk under the canopy on October 18, 1995. The excavation was scheduled to begin on October 24 (Tr. 21). On October 20, Gary Humble, the vice-president and general manager of PCI, faxed a proposal to ACI's project manager, Scott Tate, regarding the installation of a protective system (Exh. C-1; Tr. 22). Transmitted with the proposal was a sketch of the proposed system drawn by Humble (Exh. C-2; Tr. 24-25). On October 20, Tate faxed a letter of intent to enter into an agreement with PCI to perform shotcrete shoring on the project (Exh. C-3). Humble faxed an executed copy of the letter of intent to Tate. He wrote in the margin of the letter "not familiar with this add," referring to a document referenced in the letter of intent (Exh. C-4). Tate faxed a copy of the referenced document, addendum no. 1, to Humble on October 24, 1995 (Exh. C-14; Tr. 104).

ACI opened the excavation on October 24. On October 26, after the excavation had been opened to a depth of 5 feet, ACI instructed PCI to begin installing the protective system in the excavation. Seven Schlundt, ACI's general manager of field services, knew at the time that PCI had not provided ACI with an engineer-approved written plan of the proposed protective system, as required by § 1926.652. PCI employees worked in the excavation on October 26 (Tr. 35-37).

PCI employees continued to work in the excavation as ACI dug deeper and deeper. On October 30, the excavation was 10 feet deep with vertical walls (Tr. 148-149). Schlundt was aware that PCI's employees were continuing to work in the excavation and that ACI still did not have the engineer-approved plan that PCI had said it would provide. Schlundt did not instruct anyone that the employees should not work in the excavation until the plan was on-site (Tr. 39).

On October 30, ACI received soil test results for the soil in the excavation. Tate sent a copy of the soil test results and a letter to Humble by regular mail on October 31 (Exh. C-5, p. 115). In the letter Tate states, "This will allow you to complete the stamped set of shop drawings for the soil retention system your firm is installing" (Exh. C-5). PCI's employees continued to work in the excavation on November 2, 3 and 4, 1995 (Exh. C-11). Schlundt and Tate knew that PCI had not provided ACI with an engineer-approved plan (Tr. 40-41).

On November 4, the north wall of the excavation collapsed, severely injuring the PCI employee who was working in the excavation (Tr. 46). The excavation was 10 feet deep at one end and 13 feet deep at the other end at the time of the collapse (Tr. 154-155). At the time of the cave-in, ACI did not have an engineer-approved plan on the site. PCI's employees had been working in the excavation for ten days (Tr. 117).

The Violated Standard

ACI stipulated that it violated § 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

ACI concedes that its excavation, which was in Type C soil and was deeper than 5 feet, is governed by paragraph (c), option 4, of § 1926.652, which provides:

> Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraphs (c)(1); or, in the alternative, paragraph (c)(2); or in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:
> . . . .
> (4) Option (4) - *Design by a registered professional engineer.*
> (i) Support systems, shield systems, and other protective systems not utilizing Option 1, Option 2, or Option 3, above shall be approved by a registered professional engineer.
> (ii) Designs shall be in written form and shall include the following:
> (A) A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and
> (B) The identity of the registered professional engineer approving the design.
> (iii) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Secretary upon request.

Willfulness

The Secretary contends that ACI's violation of § 1926.652(a)(1) was willful.

A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 ("the Act"), is one committed with an "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41,123, 41,132 (*quoting Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). "It is differentiated from other types of violations by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference."

> *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is an objective one, that is, "whether the employer's belief concerning the factual matters in question was reasonable under all of the circumstances." *Morrison-Knudsen Co.\Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, pp. 41,261, 41,281 (No. 88-572, 1993).

Mobil Premix Concrete, Inc., (No. 95-192, 1997) (slip opinion, pp. 6-7).

Schlundt and Tate knew that under option 4 of § 1926.652, ACI was required to have an engineer-approved plan on the site during work in the excavation. Beginning on October 26, 1995, ACI instructed PCI to place its employees in an excavation that was at least 5 feet deep despite ACI's awareness PCI had not provided it with the required plan. On October 30, the excavation was 10 feet deep; ACI knew it did not have the plan; and it allowed PCI to continue to work in the excavation. On November 4, the excavation ranged from 10 to 13 feet deep; ACI knew that it still did not have the mandatory plan; and ACI knew that PCI's employees were still working in the excavation. ACI acted throughout this ten-day period with an intentional, knowing, and voluntary disregard for the requirements of the Act.

ACI argues that it made a good faith attempt at compliance, which merely fell short of the requirements of the standard. ACI contends that it spent $76,125 to hire PCI to install a protective system (Exh. C-6). It points out that PCI had sufficient time to complete the required plan, and questions the credibility of Humble's testimony regarding PCI's actions. ACI argues that when the plan promised by PCI was not forthcoming, ACI began making daily requests for it.

While ACI attempts to shift the responsibility for the violation of § 1926.652(a) to PCI, it misses the crucial point that ACI had the authority to prevent PCI's employees from entering the excavation until PCI provided the required plan. ACI claims in its brief that it "had little choice but to allow PCI to commence work installing the shotcrete, because of the danger to the public if the excavation caved in" (ACI's Brief, p. 19). There is no support in the record for this statement, and it does not explain why ACI continued excavating deeper as the days went on without receiving a plan from PCI.

It was within ACI's power to stop PCI's employees from entering the excavation until it had the engineer-approved plan. ACI chose not to do so. Its awareness of its violative conduct was heightened, as evidenced by Schlundt and Tate's continuing requests to PCI for the plan. ACI did not have a good faith belief that its failure to have an engineer-approved plan somehow conformed to the requirements of the Act.

The Secretary has established that ACI committed a willful violation of § 1926.652(a)(1). ACI demonstrated a knowing disregard for the requirements of the Act.

Penalty Determination

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

The record does not reflect how many employees ACI has. When asked if ACI was given an adjustment in the proposed penalty for size, Compliance Officer Patricia Morris responded that it had not "[b]ecause, Aviation is part of the Cleveland Group, and that puts them over the size credit" (Tr. 77). The classification of the violation as willful mitigates against a finding of good faith. ACI has a history of previous violations. ACI argues that it has no previous history because a 1993 citation was settled (Exh. J-D). However, ACI agreed to abate the violation, withdraw its notice of contest, and pay a penalty of $1,125 for item 1 of the 1993 citation. This constitutes a prior history for purposes of the penalty determination.

The gravity of the violation is high. Engineer-approved plans are required under option 4 to ensure that a safely designed support system will be utilized.

Upon due consideration of these factors, it is determined that a penalty of $55,000 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

CITATION NO. 1

Item 1, in violation of § 1926.651(c)(2), is affirmed pursuant to settlement agreement as a serious violation and a penalty of $2,000 is assessed.

Item 2, in violation of § 1926.652(e)(1)(ii), is affirmed pursuant to settlement agreement as a serious violation and a penalty of $2,000 is assessed.

Item 3, in violation of § 1926.651(g)(1)(i), was withdrawn at hearing by the Secretary.

CITATION NO. 2

Item 1, in violation of § 1926.652(a)(1), is affirmed and a penalty of $55,000 is assessed.

KEN S. WELSCH
Judge

Date: November 10, 1997