

## Seventh Circuit Holds that General Safety Rules Alone are Not Enough for a Good Faith Defense to a Willful Classification

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In *Stark Excavating, Inc. v. Perez*, the Seventh Circuit Court of Appeals shed some light on the applicability of the good faith defense to a willful classification and the type of evidence upon which employers must rely in order to prevail on the defense. In *Stark Excavating*, Stark was cited at two different worksites for willful excavation cave-in protection violations under 29 CFR § 1926.652(a) (1), among others.

At the worksite in question, Stark's crew was replacing a fire hydrant waterline. The Stark foreman arrived at the site, took a soil sample from the excavation site, and analyzed it to determine its soil type – Type B – and the type of cave-in protection to be utilized – 45 degree sloping. With this information, the foreman completed the top half of a Daily Report form, but left the bottom half of the form blank, which had boxes for selecting the method of protection actually used. The foreman testified at the hearing on the matter that he “did not pay attention really how the hole looked.” He stated, “I looked at it. I knew it was – I just wanted to get in there and get the hydrant on is really the bottom line.” OSHA arrived on site and cited Stark Excavating for a violation of the cave-in protection standard, which required that the soil be sloped 45 degrees. (It was sloped to only 60, 70, 76, and 80 degrees at different points of the excavation according to the Compliance Safety and Health Officer.)

The employer asserted a good faith defense to the willful classification based on its efforts to comply with the regulations through safety rules, training, and inspections. However, OSHRC and the Seventh Circuit emphasized that Stark failed to effectively enforce its own rules and policies when violations were discovered, as evidenced by (i) a progressive discipline policy that did not allow verbal warnings, and (ii) supervisor testimony that they seldom issued written safety tickets and preferred to give verbal warnings. Moreover, the Court of Appeals found that Stark provided no evidence of any actions at the specific worksite to ensure cave-in protection. The ALJ, according to the Seventh Circuit, had held an erroneous belief that the employer took reasonable steps to slope the excavation site when in fact, the foreman admitted that he chose expediency over safety when he deliberately decided not to adequately slope the excavation.

From this decision, it is clear that according to the Seventh Circuit, general safety rules alone do not establish a good faith defense. Evidence of good faith efforts at the specific site at issue is, however, relevant to the willful classification determination.