



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR  
Complainant,

v.

UTILITY SYSTEMS, INC.  
Respondent.

OSHRC DOCKET  
NO. 93-1945

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 2, 1995. The decision of the Judge will become a final order of the Commission on April 3, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before March 22, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
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Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: March 2, 1995

DOCKET NO. 93-1945

NOTICE IS GIVEN TO THE FOLLOWING:

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Respondent is a corporation which was engaged in excavation and related activities. Between March 18, 1993 - May 28, 1993, the worksite at 12 North Second Avenue, Kenil, New Jersey was inspected by an OSHA compliance officer. Subsequently, on June 10, 1993, the company received two citations resulting from this inspection. Respondent filed a timely notice of contest but is now only contesting citation #1, item 1 and the proposed penalties. A hearing was held on January 26 and June 2, 1994, in New York, New York. Both parties were represented at the hearing and both parties have filed post-hearing responses. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

#### SECRETARY'S CASE

At the hearing, the compliance officer, Gary Jensen, testified that he had come to this particular jobsite on March 17, 1993, because of a report of a serious accident which had occurred at the location the day before. The accident involved an explosion and fire, which had been caused by a contractor striking a gas line. Mr. Jensen noted that when he arrived at the accident site that nothing remained of the one family dwelling except the foundation. Finding no representative there from Respondent's company, Utility Systems, Inc., The compliance officer took a videotape of the damage. He then returned to the accident scene on March 18, 1993. On that day, Mr. Jensen conducted an opening conference with Respondent's superintendent, Manny Casais, who explained to him what had happened on the day of the accident.

Mr. Jensen also conducted interviews with Mr. Pinho III, Utility System's president and Mr. Farinhas, the operator of the backhoe. During the course of his inspection, Mr. Jensen

also interviewed Mr. Sparnon, an inspector from Purcell & Associates, Mr. Burbridge, distribution foreman from New Jersey Natural Gas, Mr. Tarleton, general supervisor of gas operations, and Ms. DeCapitani, the homeowner of house No. 12.

From the interviews Mr. Jensen ascertained that Utility Systems had been hired to install a water main and service lines in the jobsite area that was already hooked up for gas. Before beginning the job, Respondent called Garden State Markout, which is a toll-free utility markout service for the state of New Jersey to which all utilities belong. Contractors are required to call this service to request markouts, which involves the utility company coming to a site and physically indicating where gas main and service lines are located on the ground and on roads. This is done using indicators such as yellow painted lines and stakes or flags. Utility Systems also sent a certified letter to New Jersey Natural Gas requesting a markout of the affected streets in the jobsite area. Both requests were made on January 29, 1993. According to New Jersey Natural Gas records, the requested markouts were done on February 1, 1993.

The homeowner of 12 North Second Avenue, Ms. DeCapitani, testified that there were extensive markouts on and around her property that indicated her gas service. She noted that there was a yellow gas flag on her front lawn, a large pipe beside the front door that had a two inch yellow cap marked "Gas", and a two to three foot long yellow line painted perpendicularly in the street over her gas service line, and that across the street from the yellow line was a big capital "G".

On or about February 5, 1993, the Respondent began excavation of the streets in the jobsite area in order to install the water main lines. In excavating North Second Avenue in order to dig a trench for the water main pipe, Utility Systems

necessarily tore up the pavement upon which the gas markings were painted. Ms. Decapitani, the home owner, specifically testified that the excavation work destroyed the markouts for the gas service in front of her home. After Respondent installed the water main line, it backfilled the trench with dirt and gravel but did not repaint or remark the gas markings or obtain a remark.

On March 13, 1993, the Saturday before the Monday when Respondent was scheduled to begin water service line excavation work on North Second Avenue, there was a large snowfall. According to weather bureau reports approximately one foot of snow fell on that Saturday. By Monday, March 15, 1993, there were snow drifts in front of 12 North Second Avenue which were three to four feet high. The weather was so poor on Monday, March 15, 1993, that Utility Systems was unable to begin its excavation work. In fact the entire day was spent clearing the snow from the street. Because of the blizzard, any gas markings for house No. 12 were no longer visible. The flag on the front lawn was covered by snow. The excavation for the water main line had destroyed the yellow line in the street. In addition, the blanket of snow had covered any gas markings in front of house No. 12.

On Tuesday, March 16, 1993, the Utility Systems excavation crew with superintendent Manny Casais arrived at North Second Avenue at about 8:00 a.m. to begin the installation of water service lines. Before beginning the work, Mr. Casais surveyed the block of houses looking for gas markings. At approximately 8:30 a.m., Mr. Casais called New Jersey Natural Gas and requested a remark of the street because he had "missed a couple of markers" which evidently he had noticed previously. When Mr. Casais requested a remark, the operator at New Jersey

Natural Gas told him to call the Garden State Markout Service directly. The operator also indicated to him that she did not know if a crew could be sent out that day because of the large snowfall. Mr. Casais indicated to the operator that he could not wait for the Garden State Markout Service as it could take them two or three days to send out a crew. The audiotape of this telephone call reveals that Mr. Casais became very agitated. He finally told the operator ``if you wanna do, fine, if you no wanna do, then I break the line and you come out to fix'', and then hung up on her. Mr. Casais apparently commenced the excavation work at approximately 8:45 a.m. on March 16, 1993. He directed that the work start at the east end of North Second Avenue where he was more certain of the markouts and worked westerly. By about 11:00 a.m., Mr. Casais and his crew had worked their way down the block to the house at 12 North Second Avenue. Mr. Casais demonstrated his uncertainty regarding this house by walking around the house looking for an outside gas meter and also ringing the doorbell to ask the homeowner if any gas service was used. Since no one was at home, and Mr. Casais did not notice any gas markings, he decided to go ahead with the excavation. He told his backhoe operator, Mr. Farinhas, to proceed ``slowly''. Almost immediately the backhoe struck a live gas service line. There was a loud ``hissing'' sound. The backhoe operator called to Mr. Casais. Approximately ten minutes later the house exploded and a large fire ensued.

Emergency crews from the fire department, police department, and gas company arrived soon thereafter. Gas service was turned off for the entire block. New Jersey Natural Gas then discovered a yellow gas flag in the front yard of house No 12, buried under about a foot of snow. In the end, nothing was left of the house except the cinder block foundation.

From his interviews and observations, the compliance officer was able to reconstruct Respondent's conduct which led to the explosion at the worksite. The compliance officer recommended the issuance of a citation for a violation of 29 C.F.R. section 1926.651(b)(1) as Respondent's superintendent proceeded to open an underground excavation without knowing the estimated location of the underground utility that reasonably could have been expected to be encountered. Mr. Casais had instructed the backhoe operator to dig although he was not sure whether or not house No. 12 used gas utilities. In addition, both Mr. Casais and Mr. Pinho, the company president, knew of the requirement to determine the location of underground utility installations before proceeding. Also, both men should have known that the absence of visible markers at house No. 12 was not reliable proof that gas was not in use there. This was especially true since the original street markings had been destroyed by subsequent excavation work in that area and further obscured by the blizzard. See Secretary's brief, p. 5-11, 14-20. The Secretary's case was also supported by exhibits C-1- C-11.

#### RESPONDENT'S CASE

During the hearing, the Respondent's attorney, Mr. Cosma crossexamined Mr. Jensen, Ms. DeCapitani, Mr. Burbridge, and Mr. Tarleton. Mr. Cosma also questioned Mr. Hiller, an engineer from Purcell & Associates, Mr. Sparnon, an inspector from Purcell & Associates, Mr. Pinho III, president of Utility Systems, Mr. Pinho II, vice-president of Utility Systems, as witnesses to present Respondent's position.

Respondent argues that the case arose after an explosion at 12 North Second Avenue, Kenil, New Jersey on March 16, 1993, when an unmarked natural gas pipe was ruptured during excavation for a water main and service. Prior to commencement



of the project, representatives of Utility Systems attended a preconstruction meeting at which New Jersey Natural Gas disseminated a handout outlining recommended procedures to follow when obtaining markouts of gas service prior to excavation in conformance with OSHA and New Jersey state law.

In conformance with these recommended procedures, Respondent on January 29, 1993, called the 800 number, to the Garden State Markout Service. In this request, Respondent requested that all markouts in the applicable area involved be completed by February 5, 1993. Utility Systems also sent a certified letter to New Jersey Natural Gas on January 29, 1993 requesting the markouts. New Jersey Natural Gas records indicate that Mr. Robert Burbridge marked out North Second Avenue on February 1, 1993.

Respondent contends that, according to Mr. Sparnon and its own employees Mr. Casais and Mr. Farinhas, there was no markout for gas service ever done at No. 12 North Second Avenue. The Respondent began installing water service prior to the week of March 15, 1993. On March 15, 1993, Utility Systems was to begin installing service lines on North Second Avenue. However, over the weekend there was a blizzard in that area. Because of the large snowfall, all day on March 15, 1993 was spent clearing snow from North Second Avenue. Excavation work actually started on Tuesday, March 16, 1993, and proceeded in accordance with the markouts established by New Jersey Natural Gas Company. The property in question, 12 North Second Avenue, was not marked out by New Jersey Natural Gas as showing gas service. Further, there was no exterior gas meter or other evidence of gas service to the house and no one was home on the morning of March 16, 1993, when excavation in front of the house commenced.

Respondent asserts that it had a right to rely upon the accuracy of the records and the accuracy of the markouts made by New Jersey Natural Gas Company in determining what underground installations it may reasonably expect to encounter during the excavation work. Respondent notes that it is beyond dispute that only some houses on North Second Avenue had gas service. In fact exhibit C-1 reflects that 8 out of 17 houses (excluding house No. 12) showed no gas service. Thus, there were no gas service markouts showing gas lines from the gas main to those homes.

On the morning of March 16, 1993, Respondent had a crew of seven, including Manny Casais, the supervisor and John Farinhas, the backhoe operator. The facts indicate that prior to beginning the excavation work that morning, Mr. Casais called New Jersey Natural Gas and asked for a remark of the street. The Secretary has seized upon this telephone conversation as justification for this citation. However, it is clear that Mr. Casais was instructed by the company's president, Mr. Pinho III, to call the utilities on a regular basis and tell them whatever he had to tell them to get a utility representative to come out to the jobsite. The intent was obviously to be extra cautious by having a utility representative present as often as possible and not because of a failure by Respondent to have the site premarked.

Utility Systems argues that this whole case turns on whether the worksite at 12 North Second Avenue was in fact marked out by New Jersey Natural Gas on February 1, 1993. The statements made by Respondent's supervisor, Mr. Casais, to the compliance officer, Mr. Jensen, are consistent with the testimony of Mr. Sparnon, the independent witness who was an inspector from Purcell & Associates on March 16, 1993, as well as the testimony of Frank Pinho III that the jobsite was not marked out.

The Secretary tries to make a case that the site was marked out by the testimony of Mr. Robert Burbridge, New Jersey Natural Gas's distribution foreman. However, a careful review of Mr. Burbridge's testimony reflects his confusion and lack of credibility regarding the marking of this worksite. In fact, the evidence reflects that the records of New Jersey Natural Gas with respect to the markouts on North Second Avenue are just not reliable. Further, they are contradicted by the actual eyewitness observations on March 16, 1993, and thereafter by almost all observers at the site, including an observer disinterested to these proceedings.

Utility Systems asserts that it did not violate 29 C.F.R. section 1926.651(b)(1). Respondent took precautionary measures with respect to the markouts before proceeding. Respondent's supervisor, Manny Casais, after getting an unsatisfactory response from the gas company to his request that they send someone out the morning of March 16, 1993, to recheck the gas company's marks, checked around the area to be excavated himself. He checked around the perimeter of the house to determine if any outside gas meter was present and even knocked on the door of the house No. 12 but found no one at home that morning. Indeed, it is also significant that house No. 12 appeared to be unique in this particular neighborhood as its gas meter was located inside the house.

Further, Respondent acted prudently to give the gas company sufficient time to get someone to the site that morning, by Mr. Casais' decision to start work on the east end of North Second Avenue, where Mr. Casais was sure that several houses in a row did not have gas service. Utility Systems reached the house at 12 North Second Avenue at approximately 11:00 a.m. on the morning of March 16, 1993. Since there were no visible

markings whatsoever on the exterior of this house, and no records indicated gas service to this residence, Mr. Casais instructed Mr. Farinhas to commence water line excavation in the street in front of the house. Shortly thereafter, Mr. Farinhas heard a "hissing" sound, observed that the backhoe had caught an active gas line servicing the house and stopped digging. Several minutes later there was an explosion from inside the house.

Utility Systems contends that a preponderance of the evidence indicates that at the time of the explosion that the gas service line had not been marked out by the gas company. A contractor has a right to rely upon the completeness and accuracy of the gas company's records. The actions of the Respondent in all regards in this case were prudent and in keeping with its obligations under applicable Federal law and New Jersey state law. See Respondent's brief, p. 37-45, 48-51. The Respondent's case was also supported by exhibits R-1, R-8- R-15.

#### DISCUSSION

##### Alleged willful and serious violation of 29 C.F.R. section 1926.651(b)(1)

Willful and Serious Citation 1, item 1 alleges:

The estimated location of underground utility installations, such as sewer, telephone, fuel, electric, water lines, or any other underground installations that reasonably may be expected to be encountered during excavation work, were not determined prior to opening an excavation.

The estimated location of a natural gas line that reasonably could have been expected to be encountered during excavation work, was not determined prior to opening of the excavation. This resulted in an explosion and fire which occurred after a backhoe struck and damaged a natural gas line, exposing employee(s) working at the site to fire and explosion hazards.

A.

The primary question to consider here is whether the Respondent was in violation of the standard as cited. In this instance Utility Systems was cited for failing to determine the location of an underground gas line prior to commencing excavation work.

In this case it is quite evident from a review of all the record evidence that Respondent, through both its superintendent in charge of the worksite, Mr. Casais, and its president, Mr. Pinho III, who visited the worksite on a weekly basis, knew the requirements of the standard. The compliance officer testified that he had provided copies of the OSHA excavation standard to both Mr. Pinho and Mr. Casais during a prior inspection and advised them both to take a course on the excavation standard in order to qualify as ``competent persons``. During the current inspection, both Mr. Casais and Mr. Pinho produced cards to show that they had completed the recommended course.

Besides knowledge of the particular standard at issue, Respondent also knew of the violative condition. Both Mr. Pinho III and Mr. Casais were aware that a number of houses on North Second Avenue used gas. However, they both were unsure which ones since some gas markings could not be accounted for. Specifically, Mr. Casais' actions on the morning of March 16, 1993, demonstrate Respondent's uncertainty regarding the gas markings on the block. Mr. Casais initially on that morning called the gas company for a remark and noted that he was missing some markings that he previously had noticed on the street. He then started work on the east end of the street where the gas markings were more clear. When the crew got to No. 12 North Second Avenue, Mr. Casais did not see any markings so he held up

the work while he personally inspected all around the outside of the house and attempted to talk to the homeowner.

Utility Systems also was cognizant that the blizzard over the weekend had blanketed the street with snow, further obscuring any previous gas markings which had been made. Despite this knowledge and uncertainty, Respondent's superintendent, Mr. Casais, consciously made the decision not to wait for the gas company to respond to his own request for the street to be remarked. With potentially life-threatening consequences, Mr. Casais instructed his backhoe operator, Mr. Farinhas, to proceed to excavate. Both Mr. Casais and Mr. Farinhas were in the immediate area when the gas line was severed, causing the explosion. Both employees of Respondent were exposed to the hazard presented by violation of the standard.

It is also quite clear that Respondent's superintendent, Manny Casais, was in complete charge of the jobsite for Respondent at the time of the accident. The totality of his actions indicates an intentional disregard for the hazardous conditions at the jobsite and a plain indifference to the safety of his employees. Further, Mr. Casais, in his conversation with the gas company operator on March 16, 1993, indicated an almost urgent desire to get the work done that day regardless of the risk to himself or his employees. Under Commission precedent, a foreman's or supervisor's knowledge and voluntary violation of the Act are properly imputed to the employer. See Secretary of Labor v. Tampa Shipyards, Inc., 15 BNA OSHC 1533 (No. 86-360 and 86-469, 1992).

Accordingly, taking into consideration all the record evidence and credible testimony presented regarding this citation item, I find that the Secretary has established a violation of

the standard by a preponderance of the evidence presented. The evidence further reflects that the Respondent knew or should have known of the hazards to its employees. Respondent through its supervisor made a conscious decision to disregard the known requirements of the standard. Only through fortuitous circumstances were Respondent's employees not killed or badly injured.

B.

The next question to consider is whether or not the violation is properly classified as serious and willful. In this matter, Utility Systems was charged with a serious and willful violation of the standard at 29 C.F.R. section 1926.651(b)(1).

The compliance officer testified that he characterized the violation as ``serious`` as Respondent's foreman and backhoe operator were exposed to potential substantial injury from being struck by debris, impalement hazards, and internal injuries. The compliance officer also noted that the employees could have been killed if they had been closer to the explosion or if the debris had flown in a different direction. A review of this case record reveals that the citation was quite properly classified as a ``serious`` violation.

The compliance officer also characterized the violation as ``willful``. Under Commission precedent, 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. See Secretary of Labor v. Williams Enterprises, Inc., 13 BNA OSHC 1249 (No. 85-355, 1987). Willful conduct by an employee in a supervisory capacity constitutes a prima facie case of willfulness against the employer unless the supervisory employee's misconduct was

unpreventable. See Secretary of Labor v. V.I.P. Structures, Inc., 16 BNA OSHC 1873 (No. 91-1167, 1994).

The record here is quite clear that Utility Systems through both its superintendent and its president specifically knew the requirements of the standard it has been charged with willfully violating. It is also eminently clear that Respondent's superintendent, Mr. Casais, on the morning of March 16, 1993, despite the severe weather conditions and prior excavation work which had destroyed the gas markings on North Second Avenue, made the conscious and deliberate decision to proceed with excavation work knowing full well that he was uncertain of which houses on the street had gas service. Mr. Casais, evidently because of his zeal to get the work completed, made the conscious decision to not even wait for the gas company to respond to the telephone call for remarking the street, which he himself had made earlier that morning of the accident. Mr. Casais, as the company's superintendent, knew the potentially dire consequences of the company's violation of its safety obligations under the Act but intentionally disregarded them. Respondent made no good faith effort to comply with the OSHA standard and its actions were not reasonable under the circumstances which existed in this case. Only through fortuitous circumstances were Respondent's employees not killed or badly injured. Consequently, despite Respondent's protestations to the contrary, it is quite evident here that the record reflects that the citation was quite properly classified as a "willful" violation.

C.

A final question to consider is the reasonableness of the penalty proposed by the Secretary in this case. Under section 17(j) of the Act, 29 U.S.C. section 666(j), the Commission considers four factors in determining an appropriate



penalty: the gravity of the violation, size of the employer, previous history of violations, and the good faith of the employer. Gravity is normally the most important factor. See Secretary of Labor v. Nacirema Operating Company, 1 BNA OSHC 1001 (No. 4, 1972). In determining the gravity of a violation, the Commission takes into account such facts as (1) the number of employees exposed, (2) the duration of exposure, (3) the precautions taken against injury, and (4) the degree of probability that any injury would occur. See Secretary of Labor v. Quality Stamping Products Company, 16 BNA OSHC 1927 (No. 91-414, 1994).

In this matter the compliance officer proposed an unadjusted proposed penalty of \$35,000. At the hearing the compliance officer noted that despite the high gravity of the violation and the potential for severe injury or death, he reduced the penalty amount by 40 percent based on the relatively small size of this company. No further adjustment was made for prior history as the company has been previously cited. Also no further adjustment was made for good faith because of the serious, high gravity, willful type of violation.

Accordingly, the totality of the evidence and testimony in this matter substantiate that the Respondent was in violation of the standard on the date of the inspection. The Secretary has proposed a penalty of \$21,000 for this citation item. Under all the existing facts and circumstances herein, a penalty of \$21,000 for said serious and willful violation of the standard is consistent with the criteria set forth in section 17(j) of the Act. See Secretary of Labor v. A.P. O'Horo Company, 14 BNA OSHC 2004 (No. 85-369, 1991).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. Citation 1, item 1, alleging a serious and willful violation of 29 C.F.R. section 1926.651(b)(1) is affirmed and a penalty of \$21,000 is assessed.



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IRVING SOMMER  
Chief Judge, OSHRC

DATED: **FEB 28** 1995  
Washington, D.C.