



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

PIPELINE DISTRIBUTION CONTRACTORS
Respondent.

OSHRC DOCKET
NO. 91-3312

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 April 8, 1993. The decision of the Judge will become a final order of the Commission on May 10, 1993 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 April 28, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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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) 634-7950.

FOR THE COMMISSION

A handwritten signature in cursive script, appearing to read "Ray H. Darling, Jr.", written over a horizontal line.

Ray H. Darling, Jr.
Executive Secretary

Date: April 8, 1993

DOCKET NO. 91-3312

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, :
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Complainant, :
 :
v. : OSHRC Docket No. 91-3312
 :
PDC, INC., :
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Respondent. :
:

Appearances:

Channah S. Broyde, Esquire
Larry A. Auerbach, Esquire
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U. S. Department of Labor
Atlanta, Georgia
For Complainant

Jerold A. Mueller, Esquire
Milwaukee, Wisconsin
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

PDC, Inc. (PDC), contests a two-item citation alleging serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 of the citation alleges a violation of § 1926.651(c)(2), for failure to provide a ladder or other safe means of egress in a trench that was more than 4 feet deep. Item 2 alleges a violation of § 1926.652(a)(1), for failure to adequately shore or slope a trench in which employees were working. PDC denies that

it failed to provide a safe means of egress from the trench. PDC admits that the trench was not sloped or shored in compliance with § 1926.652(a)(1), but contends that the violation was the result of unpreventable employee misconduct.

PDC works in the underground gas distribution industry (Tr. 109). The company was installing a gas line along Highway 20 near Cumming, Georgia, on November 20, 1991, when William Harrington, a compliance officer for the Occupational Safety and Health Administration (OSHA), drove by (Tr. 7-8, 24-25). Harrington could see the hard hats of two men who were working in the trench (Tr. 8). Harrington stopped and conducted an inspection of the site. As a result of his inspection, the citation which is the subject of this proceeding was issued by the Secretary on November 27, 1991.

Item 1: Alleged Violation of § 1926.651(c)(2)

The Secretary charged PDC with violating § 1926.651(c)(2), which provides:

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

The trench was 27 feet long and 14 feet wide. At its shallowest end, the trench measured 4 feet 6 inches deep. At its deepest point, where the employees had been working, the trench was 8 feet 6 inches deep (Tr. 9). Since the trench was beside the highway and subject to vibrations, Harrington's main concern was the possibility that the walls of the trench would collapse (Tr. 9). There was no ladder in the trench, but there was one available on the site (Tr. 17).

When Harrington arrived at the site, two employees were working in the trench. He observed both employees exit the trench. In order to exit, the employees went to the shallow end of the trench (*See* Exh. C-2) and placed their hands on the ground above the trench for support. They then jumped out of the trench (Tr. 40-41). Harrington observed that there was no incline at the place where they exited. The trench ended in a wall, not a ramp (Tr. 41).

Clinton Odom, a laborer for PDC, was one of the men that Harrington saw in the trench. Odom testified that a ladder was not needed in the trench because the employees

could “just walk right up the thing” (Tr. 48). Odom stated that he had no trouble exiting the trench (Tr. 49).

Harrington’s opinion regarding the need for a ladder in the trench is credited above that of Odom’s. Harrington measured the trench and determined that there was no incline at the end of the trench where the employees exited. He observed the employees put their hands on the ground above the trench for support when exiting the trench. The photographs of the trench introduced at the hearing bear out Harrington’s testimony (Exhs. C-1 through C-6). The Secretary has established that PDC was in violation of § 1926.651(c)(2).

The hazard created by PDC’s failure to have a ladder in the trench is that employees working in the trench would be unable to exit the trench quickly in the event of a cave-in (Tr.18). The risk of a cave-in was very real because, as will be discussed *infra*, the trench, which was dug in previously disturbed Type C soil, was neither sloped nor shored. The risk was further exacerbated by the fact that the trench was dug alongside a highway subject to vibrations caused by the highway’s traffic. Trench cave-ins present a high risk of death to employees who are unfortunate enough to be in the trench at the time. Serious injuries are also a common result of cave-ins. PDC’s violation of § 1926.651(c)(2) was serious.

Item 2: Alleged Violation of § 1926.652(a)(1)

PDC was charged with violating § 1926.652(a)(1), which provides in pertinent part:

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

The trench was neither sloped nor shored (Tr. 11). The soil in which the trench was dug had been previously disturbed. Three previously installed pipelines were uncovered in the course of digging PDC’s trench (Tr. 10, 37). Harrington took a soil sample and used it to conduct a sedimentation test which, in his opinion, established that the soil was Type C, the most unstable soil classification (Tr. 15, 26, 37). The trench was dug parallel to Highway 20 where vibrations from the traffic could affect the soil’s stability. Harrington

observed some loose clods of soil falling into the trench when a truck passed by on the highway (Tr. 27).

PDC admits that the trench was not shored or sloped and that it should have been (Tr. 105, 140). PDC contends, however, that the violation of § 1926.652(a)(1) is the result of unpreventable employee misconduct on the part of its foreman, Randy Collins.

“In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule.” *H. B. Zachry Company*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980). In claiming that Collins, a foreman, was the employee who engaged in the unpreventable misconduct, PDC sets itself a formidable goal:

Because the behavior of supervisory personnel sets an example at the workplace, an employer has--if anything--a heightened duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.

Floyd S. Pike Elec. Contractor, Inc. v. OSAHRC, 576 F.2d 72, 77 (5th Cir. 1978) (quoting *National Realty and Constr. Co. v. OSAHRC*, 489 F.2d 1257, 1268 n. 38 (D.C. Cir. 1973)).

For a number of years, PDC has engaged the services of MRM, Inc., a safety services contractor (Tr. 81). MRM helped PDC to develop and implement its safety program and policy (Tr. 65). The safety program includes yearly eight-hour seminars (Tr. 76). The 1989 safety seminar included a lecture on trench safety given by James Kurth, who is employed by MRM as a safety manager for PDC (Exh. R-10; Tr. 63, 82). Randy Collins attended the 1989 seminar, as evidenced by his signature on the attendance sheet (Exh. R-10; Tr. 78). Kurth also lectured PDC's foremen on the changes in the excavation standard on April 21, 1990. Collins attended the lecture (Exh. R-4; Tr. 69). The *Excavation Safety Guide*, which was issued to the foremen at the lecture, includes a section entitled “SLOPING AND SHORING: Competent person's guide to the proper method for each type of soil (A, B, or C)” (Exh. R-4). Collins also attended PDC's 1991 Trench Safety Workshop, which included instruction in soil classification, sloping and shoring (Exh. R-6; Tr. 73-75). PDC's crews attend weekly tool box talks where safety is discussed (Exh. R-3; Tr. 67).

PDC has a written procedure for progressive disciplinary actions (Exh R-15, p. 3). PDC established a board of review to investigate alleged safety infractions and to decide on any disciplinary action to be taken (Tr. 92). The company also gives out awards based on safety performance and equipment maintenance; no awards are given based on production (Tr. 92). On May 29, 1990, Delaine Nelson, president of MRM, and James McIntyre, president of PDC, jointly issued a strongly worded memo to all managers and foremen at PDC. The memo referred to several safety infractions discovered during a safety inspection conducted by one of the company's safety inspectors. The memo concludes (Exh. R-15, p. 2):

We're not playing games. Who's fooling who?

It costs more to contest a citation than to stop and take precautionary measures in these situations. And . . .

IT IS THE LAW!!

Our company policy is as follows:

“If any employee must enter an excavation 5' or over, it will be sloped or shored, have a ladder in it and the spoil will be moved back 2' from the edge of the ditch.”

There are no short cuts.....

Measures will be taken!!!!

The copy of the memo entered as Exhibit R-15 is dated June 11, 1990, and is signed by Randy Collins.

PDC has established that it has a well-developed, comprehensive safety program in place. Joseph Camp, a capable and highly respected former area director for OSHA, examined PDC's safety program and talked with its president. Camp praised the program as “very good and very effective” (Tr. 115). He was of the opinion that PDC had adequate work rules covering sloping and shoring.

The evidence establishes that the work rules were repeatedly communicated to Randy Collins. As to enforcement of the work rules, following the OSHA inspection, Collins was

brought up before PDC's board of review. PDC's president McIntyre explained the disciplinary action taken against Collins (Tr. 138-139):

The result was that we felt that Randy was negligent and we made a decision that Randy needed three days off without pay and that we'd come up with some other things that he was going to need to do. He needed to research to know why he was wrong. He needed to stand up in front of our foremen's meeting--in front of our foreman at the foremen's meeting and explain this whole situation and go over it and go over it with them what he could have done so that this wouldn't have happened.

...

And we made a decision that we needed to remove him from our field operations and take him out of that decision-making process so that he's not out there and so that this doesn't happen, so that we don't have an accident.

The Secretary contends that PDC was on notice that Collins should not have been entrusted with the safety of its employees. McIntyre testified that Collins had failed to follow PDC's work rules before, and that there was "a chain of events" that indicated that Collins may have had some problems performing his duties (Tr. 139). Collins had been verbally reprimanded before the OSHA inspection for failing to place the spoil pile at least two feet away from a trench. Collins underwent some personal problems that apparently affected his judgment on the job (Tr. 141).

The resolution of this issue is not easy. PDC has established that it is a company with an exemplary safety program and that it is committed to safety. PDC had developed extensive safety rules and sought to communicate them to its employees through numerous seminars, workshops, tool box talks, safety guides and memos. Collins was the recipient of much of this safety instruction. PDC had a formal disciplinary procedure that was workable and took disciplinary action following the OSHA inspection.

The Secretary challenges whether PDC took appropriate and expedited disciplinary action against Collins. He argues that PDC had reason to believe that Collins was not following the safety procedures in which he had been trained. Collins had been previously reprimanded for failing to comply with PDC's safety rules.

Camp's evaluation was based on his examination of the written materials and discussion with company officials (Tr. 115-117, 121). He did not examine any trenches or conduct any inspections. Camp had no personal knowledge of the condition of any of the trenches (Tr. 120-121). He did not observe how employees were actually disciplined for violations of safety. His review of the safety program and conversations with management of PDC convinced him that the company had a commitment toward safety of its employees. This Judge concurs in that assessment of the safety program.

The Secretary does not challenge the quality of the written safety materials or doubt the personal sincerity of McIntyre or any other top company official. The Secretary challenges the manner in which the written policies were actually implemented and enforced at the worksite on a day-to-day basis. He notes that a company can have a good program on paper and still be in violation of OSHA's safety standards (Tr. 121).

The Secretary makes much of the fact that Collins had been reprimanded in the past for failing to comply with PDC's safety rules. He argues that because of this fact, PDC should have been on notice that Collins may have had some difficulty in performing his duties. Prior to the current violation, it was unreasonable for the Secretary to take the position that PDC must assume that Collins would violate safety rules. Collins violated one rule and was disciplined. There is no convincing evidence that PDC should have assumed Collins would continue to violate safety rules. Appropriate disciplinary action had been taken when the first violation was discovered. While past history is important on this question, reliance cannot be made totally on this fact. Collins was appropriately disciplined for the violation discovered with respect to soil being within 2 feet of the bank. PDC took appropriate disciplinary action. If there is an assumption that a person is guilty of continuing violations after he is determined to have committed the first violation, there is no way an employer can absolve himself of responsibility.

Collins' past conduct was explained very appropriately by McIntyre. He was deemed a valuable employee and, when McIntyre realized that he had personal problems, PDC no longer relied on his judgment in supervising employees. He was moved to the front office. PDC took this action rather than firing Collins because he had been a good employee for fifteen years and was important to the operation of the business. McIntyre recognized the

fact that he was having personal problems that might interfere with his supervision and authority. In view of the chain of events concerning Collins, reasonable action was taken by the company.

The facts of this case are peculiar and call for a different conclusion than that proposed by the Secretary. The Secretary's argument assumes that an employee who violates a safety rule and is disciplined is going to continue to violate safety rules. This assumption is not supported by the evidence. PDC's reliance on Collins to do his job was reasonable under the circumstances.

The alleged violation and penalty are vacated.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 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.

PDC employs approximately 120 people (Tr. 22). The company has no history of previous violations (Tr. 24). PDC demonstrated considerable good faith in its aggressive approach to safety. The gravity of the violation of § 1926.651(c)(2) is extremely high, as the likely result of not having a means of safe egress in the event of a cave-in is death.

Based upon the foregoing considerations, it is determined that the appropriate penalty for item 1 is \$675.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is

ORDERED: (1) That item 1, alleging a violation of § 1926.651(c)(2), is affirmed and a penalty of \$675 is assessed; and

(2) That item 2, alleging a violation of § 1926.652(a)(1), is vacated and no penalty is assessed.

/s/ James D. Burroughs

JAMES D. BURROUGHS

Judge

Date: March 31, 1993