STATE OF MINNESOTA

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Steve Sviggum, Commissioner,
Department of Labor and Industry,

Complainant-Appellant,

v.

Michels Pipeline, Inc.,

Respondent.

DECISION

OAH No. 8-1901-20212-2
MN OSH Docket Nos. 8389 and 8640

FACTS AND PROCEDURAL HISTORY

Michels Pipeline, Inc. ("Respondent"), is a Wisconsin-based business engaged primarily in the construction of petroleum and natural gas pipelines.

Citation J8947

In October of 2005, Respondent's employees were relocating a high pressure natural gas pipeline at a site located near Golden Oak Road and Oak Grove Circle in Golden Valley, Minnesota ("Worksite 1").

On October 17, 2005, the Minnesota Occupational Safety and Health Administration ("MN OSHA") Senior Safety Investigator Larry Sperling ("Sperling") conducted an inspection of the worksite. Sperling determined that Respondent had excavated portions of a trench to almost five feet deep in Type C soil without an adequate slope, and without a trench box or a ladder. When Sperling instructed one of Respondent's employees to exit the trench, he was unable to do so. Sperling discussed proposed citations with the site foreman, Rick Halfmann, and a mutually agreeable abatement date was set.

The employee who was working in the trench at the time of the inspection was issued written discipline by Respondent, as was the site foreman, Rick Halfmann.

On November 3, 2005, the Commissioner of Labor and Industry issued a Citation and Notification of Penalty relative to the above described incident, identifying serious violations of 29 C.F.R. § 1926.651(c)(2) and (k)(2), and 29 C.F.R. § 1926.652(a)(1), and proposing a penalty of $8,400.00 for the violations.

Citation U7336

In June of 2006, Respondent's employees were repairing a pipeline near East Columbia Parkway and Northeast Architect Street in Minneapolis, Minnesota ("Worksite 2").

On June 13, 2006, Senior Safety Inspector Gary Anderson ("Anderson") conducted an inspection of the work site. While Anderson was at the site, he observed Corey Stenson, Respondent's employee, entering a trench he had been filling with a backhoe to secure a wire. Anderson measured the trench as six feet deep, and six feet, six inches wide, with vertical walls. The trench was dug in Type C soil, and was not supported by a trench box. On June 16, Anderson conducted a closing conference with the site foreman, Wyatt Laxdal, and Respondent's Safety Director, George Witt. At the conference, Anderson discussed the proposed citations, and a mutually agreeable abatement date was set.

Corey Stenson, the employee who entered the unsupported trench, and Laxdal, the site foreman, were issued written discipline by Respondent, and required to attend an eight-hour trench safety training session as a condition of continued employment.

On July 14, 2006, the Commissioner of Labor and Industry issued a Citation and Notification of Penalty relative to the above described incident, identifying serious violations of 29 C.F.R. § 1926.651(c)(2) and (k)(2), and 29 C.F.R. § 1926.652(a)(1), and proposing a penalty of $4,200.00 for the violations.

Contested Case Hearing

Respondent contested the Citations and Notifications of Penalty, and a contested case hearing relative to both citations was held before Administrative Law Judge ("ALJ") Eric L. Lipman on May 21, May 22, and June 3, 2009, at the Office of Administrative Hearings in St. Paul, Minnesota. Rory H. Foley, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry ("Commissioner"). Aaron Dean, Fabyanske, Westra, Hart & Thompson, P.A., appeared on behalf of Respondent.

On July 21, 2009, the ALJ issued Findings of Fact, Conclusions, and Order ("ALJ's Report"), entering judgment in favor of Respondent and dismissing the citations. While the ALJ found that violations had occurred at the two worksites, the ALJ also found that Respondent:

- established a work rule to prevent reckless behavior and unsafe trench practice from occurring;
- adequately communicated the rule to its employees through a pyramiding series of written and oral training materials;
- took steps to discover incidents of noncompliance through unannounced investigations; and
- effectively enforced the rule through progressive discipline whenever employees transgressed it.

Based on these findings, the ALJ found that the misconduct leading to the citations could not have been controlled through the exercise of reasonable diligence, entitling Respondent to the "employee misconduct" defense, and dismissal of the citations.

The ALJ's Report was served on the parties on July 21, 2009. The Commissioner appealed the ALJ's Report to the Minnesota Occupational Safety and Health Review Board ("Review Board") on August 17, 2009. In the appeal, the Commissioner argues the following:

1. That the ALJ erred in finding and concluding that Respondent proved the affirmative defense of unpreventable employee misconduct regarding the trench violations.

2. That the ALJ erred in failing to impute the supervisors and/or competent persons' knowledge of the violations to the Respondent.

3. That the ALJ erred in finding that the MN OSHA Field Compliance Manual required that the case file contain documentation of the evidence that refutes an employee misconduct defense.

4. That, for these reasons, the Review Board should reinstate the citations and penalties in MN OSH Docket Number 8389 and Docket Number 8640.

On April 12, 2010, the Review Board heard oral argument at 443 Lafayette Road North, Dakota Room, St. Paul, MN 55155. Rory H. Foley appeared and presented oral argument on behalf of the Commissioner. Aaron Dean appeared and presented oral argument on behalf of Respondent. Both parties submitted written argument. Geoffrey S. Karls, Assistant Attorney General, was present as legal advisor to the Board.

DISCUSSION

The Review Board has authority to revise, confirm or reverse an ALJ's decision if it is made in violation of constitutional provisions; in excess of the statutory authority or jurisdiction of the agency; made upon unlawful procedure; affected by other error of law; unsupported by substantial evidence in view of the entire record as submitted; or arbitrary or capricious. Minn. R. 5215.5210. The Commissioner contends that the ALJ's Report misinterprets the law regarding the "employee misconduct" defense, and is not supported by substantial evidence.

The employee misconduct defense shields an employer from liability for workplace safety violations when it: 1) had an established work rule designed to prevent the violation; 2) adequately communicated the rule to its employees; 3) took steps to discover violations, and 4) effectively enforced the rule when violations have been discovered. *See Horne Plumbing and & Heating Co. v. O.S.H.R.C.*, 528 F.2d 564, 568-571 (5th Cir. 1976).

The Commissioner first argues that, pursuant to Review Board precedent, the defense of employee misconduct is not available when supervisory personnel are involved in or aware of the violation. The Review Board is unconvinced by this argument. The cases cited by the Commissioner do not appear to establish any bright-line rule that the employee misconduct defense is automatically invalidated when supervisory personnel are involved with or aware of the violation. Rather, those cases largely involve fact-specific determinations of whether the employee misconduct defense is appropriate in each situation. Accordingly, the Review Board will not disturb the ALJ's Report on this point.

The Commissioner next argues that Federal case law in this area mandates a more demanding analysis of the employee misconduct defense when supervisory personnel are involved in the violation, and that the ALJ did not analyze the employee misconduct defense under this higher level of scrutiny. To support this contention, the Commissioner essentially argues that the ALJ's finding that this higher level of scrutiny was met is not supported by substantial evidence. A review of the record affirms that the Review Board's satisfaction that the ALJ's findings were, in fact, supported by substantial evidence. The record indicates that:

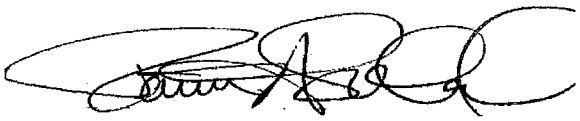
- All of Respondent's employees are issued a safety manual and a pocket-sized safety handbook, both of which include Respondent's written work rule that its employees not enter an unprotected trench that is 60 or more inches deep, unless the trench is properly sloped or braced.
- Respondent provided its employees with safety training regarding proper trench safety during annual safety seminars and "tool box talks" at work sites before the beginning of excavation.
- Respondent's supervisory employees periodically conduct unannounced site visits to ensure compliance with relevant worksite safety rules. Employees found violating work safety rules are subject to discipline or dismissal.
- All of Respondent's employees involved in the violations who testified at the hearing indicated that they had been provided appropriate safety training, including the supervisory personnel.

The Commissioner's central argument on this point appears to be that the fact that these infractions occurred at all is proof that Respondent was not properly training its employees. While the violations might not reflect positively on Respondent's training of its employees, the Review Board cannot view them as determinative in and of themselves. Given the substantial evidence listed by the ALJ supporting his finding that Respondent did all it reasonably could be expected to do to enforce safe worksite practices, the Review Board declines to disturb the ALJ's Report on this point.

ORDER

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions and Order issued in this matter by Judge Eric Lipman on July 21, 2009, is **AFFIRMED**.

Dated: 10/18/10



Patricia Solheid
Board Chair

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
443 Lafayette Road
St. Paul, MN 55155

Michael's Pipeline, Inc.
Federal Inspection No. 309530806

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Kathy Hagen, being first duly sworn upon oath, hereby deposes and says:

That in the City of St. Paul, County of Ramsey and State of Minnesota on the 18th day of October, 2010, she served the attached Decision by depositing in the United States mail, a true and correct copy thereof, properly enveloped, with postage prepaid, and addressed to:

Aaron Dean
Attorney at Law
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402

Rory H. Foley
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127

Kathy Hagen

Subscribed and sworn to before me
this 18th day of October, 2010.

Annette M. Trnka
Notary Public

ANNETTE M. TRNKA
Notary Public-Minnesota
My Commission Expires Jan 31, 2015

443 Lafayette Road N.
St. Paul, Minnesota 55155
www.doli.state.mn.us

MINNESOTA DEPARTMENT OF
LABOR & INDUSTRY

(651) 284-5005
1-800-DIAL-DLI
TTY: (651) 297-4198

October 18, 2010

Aaron Dean
Attorney at Law
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402

Rory H. Foley
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127

Re: Commissioner, et al. v. Michels Pipeline Construction
OAH Docket No. 8-1901-20212-2
MN OSH Docket Nos. 8389 and 8640

Dear Mr, Dean and Mr. Foley:

Enclosed please find served upon you the decision of the Occupational Safety and Health Review Board in the above-named matter.

Sincerely,

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Kathy Hagen

Kathy Hagen
Executive Secretary

cc: Geoffrey Karls
OSH Review Board

This information can be provided to you in alternative formats (Braille, large print or audio tape).