

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building-Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

SECRETARY OF LABOR,

Complainant

v.

PIEDMONT MECHANICAL, INC.,

Respondent.

OSHRC Docket No. 11-2562

(On Remand)

Appearances:

Karen Mock, Esquire
U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

J. Larry Stine, Esquire & Mark A. Waschak, Esquire
Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia
For the Respondent

BEFORE: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER ON REMAND

Background

This proceeding is before the Court on remand from the Occupational Safety and Health Review Commission (“the Commission”).

In 2011, Piedmont Mechanical, Inc. (Piedmont) was a subcontractor on a project to convert landfill gas to energy on the Marine Corps Logistics Base located at 814 Radford Boulevard, Albany, Georgia (Tr. 13-14, 17). Piedmont was subcontracted to install and weld pipe on the project (Tr. 137, 616-617).

On Saturday, March 12, 2011, Piedmont was using a carry deck crane with a 40-foot boom to install pipe in a trench (Tr. 138, 142, Ex. C-12). When the operator swung the boom to bring a pipe over the trench, the boom contacted a power line and an employee in the trench was badly burned (Tr. 174-176).

As a result of the accident, an inspection was conducted by a safety and health compliance officer (the “CO”) for the Occupational Safety and Health Administration (“OSHA”) (Tr. 388). Pursuant to the inspection, Piedmont was issued citations alleging serious and willful violations of the OSHA trenching and crane standards.

Piedmont timely contested the citations. On June 10, 2013, the Court issued a Decision and Order in this matter vacating one item on the grounds that the Secretary failed to establish a violation. All other items were affirmed as serious, including the items in the citation cited as willful. The Secretary filed a Petition for Discretionary Review with the Commission, seeking review of the affirmance of instance (a) of willful Citation 2, Item 1(a)¹ as serious.

Two weeks after the Court’s Decision was issued, the U.S. Court of Appeals for the 11th Circuit issued its decision in *ComTran Group, Inc.*, 722 F.3d 1304 (11th Cir. 2013) holding that where a violation is caused by the actions of a supervisor, the Secretary does not satisfy his burden of establishing employer knowledge solely by imputing the supervisor’s knowledge of his or her own actions to the employer. In so holding, the 11th Circuit joined the 3rd, 4th, 5th, and 10th Circuits in holding that, to impute the violative actions of a supervisor to the employer, the Secretary must present evidence that the supervisor’s actions were foreseeable; for example, where the Secretary demonstrates that the employer had improper training or lax safety standards. 722 F.3d at 1316, 1318. The Circuit Court’s holding did not disturb precedent that where a violation is caused by the actions of a subordinate employee and the supervisor knew or should have known of the violation, the supervisor’s actual or constructive knowledge is imputed to the employer. *e.g. Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986).

The Commission generally applies precedent of the circuit to which the case will likely be appealed “even though it may differ from the Commission’s precedent.” *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Commission precedent imputes a supervisor’s conduct to the employer unless the employer demonstrates, as an affirmative defense, that the supervisor’s violative actions were the result of unforeseeable and idiosyncratic

¹Citation 2, Item 1a alleges a willful violation of 29 C.F.R. §1926.651(k)(2) on the grounds that (a) “[a]t the trenching area-on March 12, 2011, employees were not removed from the 10-foot deep by 100-foot long trench with type-B soil, where there was no cave-in protection, exposing employees to cave-in hazards. The competent person notified the project superintendent the trench was not safe.” and (b) “[a]t the trenching area-on March 12, 2011, employees were not removed from the 10-12 feet deep area with type-B soil with the trench shields 2-4 feet below the top of the trench, exposing employees to cave-in hazards. The competent person notified the project superintendent the trench was not safe.”

behavior. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3rd Cir. 1994).

However, because this case is appealable to the 11th Circuit, the Commission remanded the case for a determination of knowledge for each of the cited items in accord with *ComTram*. Additionally, the Commission directed that, on remand, if instances (a) of Citation 2, Item (a) is affirmed, the willfulness of instance (a) should be reconsidered based on the state of mind of Piedmont's foreman. The Court's Decision that instance (a) of Citation 2, Item 1(a) was not willful was based on the Secretary's failure to establish that the superintendent's knowledge and conduct was imputed to Piedmont.

Discussion Citation 1, Item 1

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. §1926.652(c) on the grounds that "at the trenching area-on or about March 7-11, 2011, employees worked inside the 10-12 foot deep trench where several sections of the trench shields were not connected together with the spreader bars, exposing employees to cave-in hazards."

The Item was vacated by the Court because the Secretary failed to establish that the standard was violated. The issue of knowledge was not reached.

Citation 1, Item 2

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. §1926.652(g)(1)(ii) on the grounds that "at the trenching area-on March 12, 2011, employees worked inside a 10-12 foot deep trench where several sections of the trench shields were not flush against the side walls of the trench, exposing employees to crush-by and 'struck-by hazards.'" The Secretary proposed a penalty of \$3,500.00.

In the Decision issued June 10, 2013, the Court found that the Secretary established that Piedmont failed to comply with the standard. Also, the Court found that with the exercise of reasonable diligence, Piedmont's foreman knew or should have known of the hazardous condition. The foreman was the competent person on the site charged with ensuring that the trench was constructed safely and in accordance with OSHA standards. The gaps between the trench shields and the trench were obvious and in plain view. The foreman's knowledge was imputed to Piedmont.

The evidence establishes that this project represented the first time in approximately five years that Piedmont worked in a trench over five feet deep (Tr. 737-738, 749). The foreman was the designated competent person (Tr. 408, 833, 838). This made it incumbent upon Piedmont to ensure that the foreman was properly trained. However, the foreman testified that he took a course “way back yonder,” (Tr. 162) and could not remember with any certainty whether he received any certification (Tr. 164). Piedmont’s safety director testified that the foreman was designated the competent person based on a trenching course he took in 2003 (Tr. 838).

Piedmont’s own investigative report on the accident highlighted that employees were inadequately trained. Among the conclusions of the report:

Assessment of area incomplete for all hazards.
Insufficient training in recognized hazards in regards to excavation
and trenching confined spaces confined spaces and use of cranes.

Among the recommended corrective actions in the report was “Training for entire crew in regards to excavation and trenching....” (Exhibit C-38, pp. 2-3)

As the competent person, the foreman knew or should have known that the trench shields were improperly installed. The foreman formerly had been a supervisor for Piedmont, but, due to health and other personal problems, had been demoted (Tr. 740-741). Piedmont’s safety director, testified that the reasons for his demotion were his difficulty in completing tasks and his failure to ensure that everything was safe prior to starting jobs (Tr. 745). Based on his improper training, lack of experience and work history, the Secretary established that the failure of the foreman to ensure that the trench shields were properly installed was foreseeable. Under *ComTran*, the foreman’s knowledge is imputed to Piedmont and the violation is established.

For reasons set forth in the Decision, the penalty of \$3,500.00 is appropriate.

Citation 1, Item 3

Citation 1, Item 3 alleges a serious violation of 29 C.F.R. §1926.1402(b) on the grounds that “[a]t the trenching area-on March 12, 2011, employees were using a Broderson telescoping boom crane that was not set up on secure soil to support the crane, exposing employees to struck-by hazards.”

As discussed in the Court’s Decision, the Secretary established that Piedmont failed to comply with the standard. The Secretary also established knowledge based on the crane

operator's testimony that pads were available to secure the crane, but that he and the foreman simply "overlooked that" (Tr. 298). This evidence established that, with the exercise of reasonable diligence, the foreman should have known of the violation and his knowledge was imputed to Piedmont.

It was the crane operator's responsibility to properly set up the crane and to set the pads (Tr. 326, Ex. R-4). At the hearing, the crane operator testified that he made a mistake by not setting the pads (Tr. 326). Therefore, the violation was caused by the actions of the crane operator. The foreman was working with the crane operator and should have known that the crane operator improperly set the crane. Because the violation was caused by the misconduct of the crane operator, *ComTran* is not applicable and the foreman's knowledge is imputed to Piedmont. *Dun-Par Engineered Form Co.*, 12 BNA OSHC *supra* at 1962.

Piedmont raises the affirmative defense of unforeseeable employee misconduct. In the Decision, the affirmative defense was rejected. To establish the "unpreventable employee misconduct" defense, the burden is on the employer to establish: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *e.g.*, *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

Piedmont's own assessment of the violations concluded that its training program was insufficient in recognizing hazards regarding the use of cranes and concluded that the operator was inexperienced in assessing hazards in the set up of cranes (Ex. C-38, p.3). Furthermore, the crane operator testified that Piedmont had no work rules regarding cranes (Tr. 296). Piedmont failed to establish the affirmative defense.

The Secretary has met his burden of establishing Piedmont's knowledge of the violation and the Item is affirmed. For reasons discussed in the Decision, the penalty of \$3,500.00 is appropriate.

Citation 1, Item 4(a) and 4(b)

Citation 1, Item 4(a) alleges a violation of 29 C.F.R. §1926.1412(d)(1) on the grounds that "[a]t the trenching area-on March 12, 2011, the Broderson telescoping boom crane was not inspected before operating the crane that day, exposing employees to struck-by hazards."

The standard proceeds to list items to be inspected such as, electrical apparatus, control mechanisms, fluid levels, hooks and latches, ropes, and cab windows. The facts in this case establish that the crane operator did not conduct a proper daily inspection before placing the crane into service. Also, Piedmont did not communicate any work rules to the crane operator setting forth the requirements and necessity of a daily inspection (Tr. 296). Had Piedmont exercised reasonable diligence it would have known of the violation.

ComTran does not compel a different result. As the crane operator, he was responsible for conducting the daily inspection (Tr. 167, 727). He did not have a checklist for the inspection (Tr. 294). The foreman was at the site and was aware that the crane was being used (Tr. 298). He should have known that the crane operator did not conduct the requisite daily inspection. As noted, *ComTran* does not apply when the violative conduct is that of a subordinate employee and the supervisor knew, or with the exercise of reasonable diligence should have known of the violation. Therefore, the foreman's constructive knowledge is imputed to Piedmont.

Piedmont also failed to demonstrate that the failure to conduct the daily inspections was the result of unpreventable employee misconduct. The crane operator testified that Piedmont had no work rules regarding cranes (Tr. 296). He also testified that his usual daily inspection consisted of merely checking for oil leaks and flat tires (Tr. 324). Such inspections fall far below the checks required by the standard. The safety director testified that daily inspection sheets were supposed to be filled out by the operator. She asked for, but never received them (Tr. 804). The crane operator testified that he was not required to put his daily inspection into writing and was not provided with any checklist of the items that needed to be inspected (Tr. 294). Piedmont's investigation of the accident found that its training "in regards to daily inspection of equipment being used" was insufficient (Ex. C-38, p.3). Clearly, Piedmont had no formal method of ensuring that its crane operators conducted a proper daily inspection.

Citation 1, Item 4(b) alleges a serious violation of 29 C.F.R. §1926.1412(e)(1) on the grounds that "[a]t the trenching area-on March 12, 2011, the Broderson telescoping boom crane had been operated at the site since January 2011 and had not been inspected on a monthly basis, exposing employees to struck-by hazards."

The Secretary established that monthly inspections of the crane were not conducted as required by the terms of the standard. Piedmont asserted that the crane rental company was responsible for conducting monthly inspections. In the Decision, the Court found that Piedmont

knew or should have known of the violation because it was not reasonably diligent in assuring that crane was properly inspected.

The Secretary also met his burden of establishing knowledge under *ComTran*. Piedmont's superintendent was responsible for ensuring that the rental company conducted the inspection, but he never received or asked for inspection reports (Tr. 167, 296, 647-648). The superintendent could not identify anyone at Piedmont who was responsible for ensuring that the rental company conducted the inspections (Tr. 647). The superintendent clearly failed to fulfill his safety obligation. The Secretary has adduced sufficient evidence to impute the superintendent's failure to meet his burden to Piedmont. Piedmont's safety director testified that she asked the superintendent for the monthly inspection reports, but never received them. She concluded that the superintendent was improperly trained to understand his pretask responsibilities (Tr. 805). The safety director admitted that she was responsible for that training (Tr. 806). This training failure was recognized in Piedmont's analysis of the accident (Ex. C-38, pp. 2-3) and made it foreseeable that nobody was ensuring that the crane was inspected monthly.

For reasons set forth in the Decision, a combined penalty of \$2,800.00 for Citation 1, Items 4(a) and 4(b) is assessed.

Citation 2, Item 1a and 1b

Citation 2, Item 1a alleges a willful violation of 29 C.F.R. §1926.651(k)(2) on the grounds that (a) “[a]t the trenching area-on March 12, 2011, employees were not removed from the 10-foot deep by 100-foot long trench with type-B soil, where there was no cave-in protection, exposing employees to cave-in hazards. The competent person notified the project superintendent the trench was not safe.” and (b) “[a]t the trenching area-on March 12, 2011, employees were not removed from the 10-12 feet deep area with type-B soil with the trench shields 2-4 feet below the top of the trench, exposing employees to cave-in hazards. The competent person notified the project superintendent the trench was not safe.”

The Court previously found that the Secretary established that Piedmont violated the standard as alleged. Also, considering instance (a), the evidence established that the foreman, who was the competent person at the site, informed the superintendent that the trench was unsafe for employee entry. The foreman's knowledge that employees were working in the unprotected trench was imputed to Piedmont.

Under *ComTran*, knowledge of the violation is also imputable to Piedmont. The foreman noted that the banks of the trench were not sloped back, there were cracks in the trench walls and mud at the bottom (Tr. 148). Also, Piedmont was under pressure from the construction manager to get the pipes into the trench (Tr. 153). Although the superintendent instructed the foreman that the pipes had to be placed into the trench, he never told the foreman to place employees in the trench. Rather, he instructed the foreman to throw cross ties into the trench and drop the pipes into the trench with the lull onto the cross ties so they would not lie on the ground (Tr. 227-228). The superintendent testified that he explained the process in detail in front of other employees (Tr. 624, 684). The superintendent then left the site to run errands, leaving the foreman to carry out his instruction.

Around lunchtime, after the superintendent returned from an errand, some members of the crew informed him that the foreman told them that they couldn't get in the trench to install the pipe. He replied "No, you can't get in the trench, but we are going to install the pipe" (Tr. 629). He repeated his explanation on how to place the pipes inside the trench with the lull (Tr. 630). He told the employees to explain the method to the foreman and to tell him that "we're not getting in the trench" (Tr. 683). The superintendent then went to his office to do some paperwork (Tr. 629).

The foreman concluded that placing the pipes in the trench required employee entry. He testified that he was concerned that just throwing the pipes into the trench on top of the ties would void the warranty on the pipes (Tr. 203, 235). Also, using the lull was dangerous because it lacked outriggers and using it to put the pipes in the trench required that the lull be fully extended (Tr. 200). He also did not believe that there was any way to remove the choker from the pipes after they were placed in the trench (Tr. 203). This was confirmed by the crane operator who testified that it was necessary for employees to get into the trench to unstrap the pipes (Tr. 329). Underscoring the confusion, the superintendent instructed the crew that they should leave the straps in the trench (Tr. 629).

Piedmont argues that the foreman's actions should not be imputed to it because the foreman was acting in direct contravention of the superintendent's orders not to allow employees in the trench. I do not agree. Piedmont's own investigation of the incident concluded that the "[t]ask assignment not explained in regards to how the task was to be completed with full understanding," and recommended "[t]raining for entire crew in regards to excavation and

trenching....” (Exhibit C-38, pp. 2-3). The superintendent’s discussions with the foreman and crew should have made it clear to him that his foreman did not fully comprehend his instructions. Indeed, the foreman’s history of not following safety instructions should have put the superintendent on notice that, rather than retreating to his office, he should have remained at the trench to observe that his instructions were carried out, or if they couldn’t be resolved, to devise an alternative solution. When, after lunch, the crew came to him indicating that the foreman did not understand the technique, the superintendent should have personally reinstructed the foreman rather than leave that task up to the crew. The foreman’s history of difficulty following safety instructions, together with the superintendent’s failure to adequately explain his instructions to the foreman made it foreseeable that the foreman would order employees into the unprotected portion of the trench.

Regarding the second instance of Item 1(a), as the competent person, the foreman should have known that the trench boxes were improperly installed. However, the foreman’s designation as the competent person was based simply on a course he took in 2003. Moreover, this project was the first time in at least five years that a Piedmont crew worked in trench boxes (Tr. 749). The foreman’s lack of experience in using trench boxes and the insufficient training of employees regarding trenching hazards made it foreseeable that the foreman would fail to realize that the trench boxes were not properly installed. Under *ComTran*, the foreman’s knowledge is imputed to Piedmont.

The Decision also found that, though serious, both instances of Citation 2, Item 1(a) were not willful. A violation is “willful” if it was committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983); *Georgia Electric Co.*, 595 F.2d 309, 318-19 (5th Cir. 1979); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff’d* 73 F.3d 1146 (8th Cir. 1996). The employer’s state of mind is a key issue. *AJP Construction, Inc.*, 357 F.3d 70, 74 (D.C. Cir. 2004).

Based on the continued need to repeat his instructions, it should have been clear to the superintendent that the foreman had difficulty understanding his instructions. On that basis, the Court found that the superintendent should have made extra efforts to ensure that his orders were understood. However, his failure to undertake those extra efforts did not rise to the level of willfulness. In its Order of Remand, the Commission has instructed that the issue of willfulness

of instance (a) of Citation 2, Item 1(a) be reconsidered on the basis of the state of mind of the foreman.

The foreman had substantial and progressive medical and personal problems² that led to his removal as a supervisor and caused him difficulty in following safety orders (Tr. 740, 745). Moreover, the foreman was confused over the superintendent's instructions. The foreman's words and actions were contradictory and confused. Earlier, a representative of the construction manager offered to buy the crew a steak dinner if Piedmont got pipes into the trench, "no matter what" (Tr. 226). The foreman turned down the offer, stating to the superintendent "I didn't care if he offered a steak supper or not, I wouldn't be in there because it was dangerous" (Tr. 153). After strongly asserting to the superintendent that he would not place employees into the unprotected area of the trench, he decided to do so when he believed that the superintendent's instructions were unworkable. Piedmont's safety director testified that the violation was caused, in part, because of unclear communication (Tr. 763). Given the foreman's serious medical condition, this confusion, while not exculpatory, is understandable. Under these circumstances, the violation was committed out of a lack of communication coupled with the foreman's confusion and medical impairments, not with an intentional, knowing or voluntary disregard for the requirements of the Act or with "plain indifference" to employee safety (Tr. 631).

Also the second instance of Citation 2, Item 1(a) was not willful based on the state of mind of the foreman³. At least for the past five years before this project, Piedmont never worked in trenches greater than five feet in depth (Tr. 737). The safety director also testified that 95% of Piedmont's work is process piping, pipe racks and ceilings. Only 5% of their work is in trenches, at most four feet deep (Tr. 748). As noted, the foreman was designated the competent person at the site based on a trenching course taken in 2003. Besides his personal problems, the foreman's knowledge of the trenching requirements in both education and practice was stale. Additionally, the trench was inspected by safety officials from both the construction manager and military base

² The evidence establishes that the foreman's personal and medical problems were extreme. According to the safety director, his wife was hit by a car while riding a horse and suffered brain damage. Eight months after that incident, his daughter was killed in a car wreck. Soon after, he began to have tremors and was diagnosed with Alzheimer's and Parkinson's (Tr. 187, 236, 745).

³ In his brief, the Secretary raises several arguments why the violation was willful. For example, he argues that the safety director's failure to visit the site to make sure that the trench was properly constructed was the result of a reckless disregard of employee safety. The Secretary raises issues beyond the Commission's Remand Order which specifically instructed that willfulness be determined based on the state of mind of the foreman.

safety who never expressed any concerns about the trench boxes (Tr. 50, 93-95). Therefore, the foreman was not sufficiently trained or experienced to determine that the trench boxes were improperly installed and that the violation was not the result of a reckless disregard of employee safety.

Citation 2, Item 1b alleges a violation of 29 C.F.R. §1926.652(a)(1) on the grounds that (a) “at the job site-on March 12, 2011, employees worked inside the 10-foot deep by 100-foot long trench with type-B soil, where there was no cave-in protection, exposing employees to cave-in hazards,” and (b) “at the job site-on March 12, 2011, employees worked inside the 10-12 feet deep trench with type-B soil, with the top of the trench shields 2-4 feet below the top of the trench, exposing employees to cave-in hazards.”

Citation 2, Item 1(b) is similar to instance (a) of Citation 2, Item 1(a), except that it cites Piedmont because employees worked in the trench, rather than for Piedmont’s failure to remove those employees. As to instance (a) of Citation 2, Item 1(b), the Court finds the same evidence regarding knowledge and willfulness of both items in Citation 2, Item 1(a) is identical and need not be repeated. For the reasons set forth in instance (a) of Citation 2, Item 1(a), the Court concludes that the foreman knew or should have known of the violation. Piedmont failed to properly train or instruct the foreman and that, under *ComTran*, the foreman’s knowledge is imputed to Piedmont. Also, for reasons set forth in instance (a) of Citation 2, Item 1(a), the Secretary failed to establish that the violation was the result of the foreman’s reckless disregard or indifference to employee safety.

Similarly, instance (b) of Citation 2, Item 1b, the Secretary asserts that the trench box was two to four feet below the top of the trench. The Court finds that the Secretary established the violation and that, as the competent person, the foreman knew or should have known that the trench was not in compliance. For reasons set forth in instance (b) of Citation 2, Item 1(a), the Secretary established that it was reasonably foreseeable that the foreman would not be able to properly recognize that the trench was noncompliant. Accordingly, under *ComTran* the foreman’s constructive knowledge is imputed to Piedmont.

As with instance (b) of Citation 2, Item 1(a), the Secretary failed to establish that the foreman’s failure to comply with the standard was the result of a reckless disregard of employee safety. As noted, *supra*, despite being designated the competent person, the foreman’s experience and training were lacking. Moreover, the construction manager and base safety

officials who reviewed the trench never expressed any problem with the trench. Therefore, the Secretary failed to establish that the violation was willful.

For reasons set forth in the Decision, a combined penalty of \$4,400.00 is appropriate for Citation 2, Items 1(a) and 1(b).

Citation 2, Item 2

Citation 2, Item 2 alleges a willful violation of 29 C.F.R. §1926.1408(a)(2) on the grounds that “[a]t the trenching area and below the overhead power lines-on March 12, 2011, the employer did not determine if any part of the Broderson crane, load line, or load could get closer that [sic] 20 feet to the overhead energized 12.4 kV power line, exposing employees to an electrical shock hazard.”

The evidence established that the standard was violated as alleged. The foreman was acting as flagman and directed the crane operator into the power lines. Both the foreman and the crane operator were aware of the power lines. However, before using the crane, they never discussed the danger posed by the overhead lines (Tr. 177). According to the foreman, the operator did not see the lines because the sun was in his eyes (Tr. 172). Despite being blinded by the sun, neither the foreman/flagman nor the operator stopped to assess the situation (Tr. 754). They knew the crane would be operating in proximity of the overhead line, yet failed to properly plan the operation or anticipate the presence of the overhead line.

Under *ComTran*, the foreman’s knowledge is imputed to Piedmont. The superintendent testified that he saw that the crane was moved to the trench and that employees were trying to set the pipes (Tr. 630). Indeed, he instructed the foreman to set the pipes, yet said nothing about the power lines. Therefore, he had actual knowledge that the crane was being operated in proximity to the power lines, yet took no measures to assess the situation (Ex. C-36; Tr. 755-756). In its investigation, Piedmont recognized that the entire crew was insufficiently trained in the use of cranes. In her accident report, the safety director identified the following factors as contributing to the accident:

- Operator inexperience of assessing hazards in regards to lifts and set up of cranes;
- Flagger inexperience of assessing hazards in regards to lifts and set up of cranes;

Insufficient training of crane operator;
Insufficient training of flagger.
(Ex. C-38, p.3).

The failure of training and supervision made the violation foreseeable.

As stated in the Decision, the violation was classified as serious, but not willful. Additionally, for reasons set forth in Citation 2, Item 1, the foreman was suffering from problems that resulted in his being demoted from superintendent. The Secretary introduced no evidence that Piedmont was aware of the scope of the medical conditions that impaired his judgment. In any event, when the sun blinded the crane operator, he should have stopped the crane and assessed the situation. His failure to do so was the result of improper training. It was not, however, the result of a reckless disregard or plain indifference to employee safety.

For reasons set forth in the Decision, a penalty of \$5,100.00 is appropriate.

Findings of Fact and Conclusions of Law

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

Order

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. §1926.652(c) is vacated.
2. Citation 1, Item 2 alleging a serious violation of 29 C.F.R. §1926.652(g)(1)(ii) is affirmed and a penalty of \$3,500.00 is assessed.
3. Citation 1, Item 3 alleging a serious violation of 29 C.F.R. §1926.1402(b) is affirmed and a penalty of \$3,500.00 is assessed.
4. Citation 1, Item 4(a) alleging a serious violation of 29 C.F.R. §1926.1412(d)(1) and Citation 1 and Item 4(b) alleging a serious violation of 29 C.F.R. §1926.1412(e)(1) are affirmed and a combined penalty of \$2,800.00 is assessed.
5. Citation 2, Item 1a alleging a willful violation of 29 C.F.R. §1926.651(k)(2) and Citation 2, Item 1b alleging a willful violation of 29 C.F.R. §1926.652(a)(1) are affirmed as serious violations and a combined penalty of \$4,400.00 is assessed.

6. Citation 2, Item 2 alleging willful violation of 29 C.F.R. §1926.1408(a)(2) is affirmed as a serious violation and a penalty of \$5,100.00 is assessed.

/s/

KEN S. WELSCH
Administrative Law Judge

Dated: January 13, 2014