

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
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 :
 DELTA LINE CONSTRUCTION :
 COMPANY, :
 :
 :
 Respondent. :

OSHRC DOCKET NO. 96-0462

APPEARANCES:

Luis S. Micheli, Esquire
New York, New York
For the Complainant.

Al Smith
Surf City, New Jersey
For the Respondent, *pro se.*

Susan E. Houde
Egg Harbor Township, New Jersey
For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent Delta Line Construction Company (“Delta”) pursuant to an accident on August 29, 1995; the accident involved a Delta employee who was rewiring a traffic signal from the bucket of a utility truck located at the intersection of Route 9 South and Old Mill Road, in Old Bridge Township, New Jersey. As a result of the inspection, Delta was issued a serious citation alleging a violation of 29 C.F.R. 1926.202. Delta contested the citation, and the hearing in this matter was held on October 31, 1996. Both parties have submitted post-hearing briefs.

Background

Delta's work at the subject site was part of a 27-mile traffic signal project pursuant to its contract with the New Jersey Department of Transportation ("NJDOT"). At the time of the accident, Delta's utility truck was parked on the shoulder of Route 9 South just south of Old Mill Road.¹ The truck was facing north with its bucket suspended over the right lane of Route 9 South such that Byron Price, Delta's employee, could perform the rewiring work on the traffic signal, which was not operating at that time. Before Price began his work, Delta blocked off Old Mill Road with orange traffic cones, placed cones around the utility truck, and stationed a flagman about 700 feet north of the intersection; however, none of the lanes of Route 9 South was closed to traffic, and the accident occurred when a tractor/trailer driving in the right lane went under the traffic signal and the top of the trailer struck the bucket, resulting in the bucket separating from the truck's boom and Price sustaining serious head and leg injuries when he fell to the street below.²

The accident occurred about 1:10 p.m., and the Old Bridge Police Department ("OBPD") was at the scene almost immediately. Pursuant to C-7-8, the reports of the OBPD investigation, the tractor/trailer had a registered height of 13.5 feet and the bottom of the bucket had been about 4 inches lower than the top of the trailer. The driver of the tractor/trailer informed the OBPD that he had seen the flagman, the orange traffic cones and the utility truck and bucket but had proceeded south in the right lane because it was not blocked off and because it appeared to him that the bucket was the same height as the traffic signal. Delta's flagman told the OBPD that his job was to direct trucks out of the right lane and into the center lane and that he had so directed the tractor/trailer but it had not complied. Witnesses told the OBPD the right lane had not been closed off and indicated they had seen nothing telling them of the work ahead, leading the OBPD to conclude that the work site had been improperly protected and that motorists were inadequately warned. The OSHA compliance officer ("CO") who inspected the site the following day also concluded that the site was

¹Route 9, a heavily-traveled road with a speed limit of 55 miles per hour, has three lanes going north and three lanes going south and a grassy median in the middle.

²Price was wearing a safety belt and was tied off to the truck's boom, and although he was suspended briefly from the boom after the trailer hit the bucket he then fell to the ground.

improperly protected and that Delta should not have allowed Price to work over the open traffic lane; C-6 is the CO's report of the OSHA inspection.

The Parties' Contentions

The citation in this case alleges that barricades for the protection of the employees at the site did not conform with ANSI D6.1 Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"), in violation of 29 C.F.R. 1926.202. That standard states as follows:

Barricades for protection of employees shall conform to the portions of the American National Standards Institute D6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades.

The Secretary contends that Delta was required to barricade the lane over which Price was working as in C-5, an illustration from the MUTCD showing a short-duration operation on a divided roadway with one lane closed; specifically, C-5 depicts a vehicle in the right lane with channelizing devices around it and the signs to be used to warn of the lane closure. Delta contends that its barricading of the utility truck complied with R-4, another illustration from the MUTCD depicting a vehicle on the shoulder with barricades around it and the signs to be used. Delta also contends that working in a bucket over a "live lane" is a standard practice in traffic signal work, that lane closure in this case would have been infeasible and a greater hazard, and that the accident would not have occurred if Price had not violated the specified procedure for the job.

The Relevant Testimony

Jeffrey Houde, Delta's field supervisor, testified that Price's job involved rewiring the traffic signal and removing the temporary cable that went between the subject signal and the signal on the center median. He further testified the cable removal required working over all three lanes and that closing the road was infeasible, indicating the entire job took only 20 to 30 minutes, that this same job had to be done about 168 times, and that the road could not have been closed each time. Houde noted Price was operating the bucket himself, that he was to have positioned the top of the bucket with the top of the signal, which was 42 inches long, the same length as the bucket, and that if he had he could have done the job safely as he would have been 15.5 feet above the road, the standard height for traffic signals; he also noted that while Delta had a foreman at the site it was up to Price to position the bucket, as the foreman might not have been able to tell its height, and that Price was also to keep an eye on the traffic and stop work if he felt unsafe. Houde said that although the

tractor/trailer ignored the flagman it would have been able to proceed safely if the bucket had been even with the signal, and that while the MUTCD did not address this job the procedure in R-4 was standard practice for signal work and the NJDOT approved of it. (Tr. 67-68; 73-92; 96-100).

Susan Houde, Delta's president, testified the company has been in business for 40 years, that it has never had a fatality, and that it has had very few lost workdays due to injuries. She further testified that Delta's traffic control plans are governed by the specifications for its jobs and safety considerations for its employees and the public. Houde said the work at the site was not part of the original contract but rather part of a "change order" involving temporary wiring for signals. She also said the OBPD had been under contract to provide traffic protection for the project and that when it failed to appear at the site due to being at another intersection Delta's foreman had conferred with NJDOT, which had advised him to proceed as the work was outside the traffic zone. Houde noted the project contract provided for lane closure in some circumstances and that the MUTCD sets out the use of barricades and channeling devices for road work; however, she also noted the situation at the site was not addressed in the MUTCD, that the method Delta used was a standard practice, and that the MUTCD allows for consideration of factors such as duration of the work. (Tr. 102-18).

Francis Glancey, a former senior engineer with the NJDOT, testified that his 25 years with the agency had involved drawing up traffic signal construction specifications and overseeing such construction, including road detours and barricades. He further testified that working in a bucket over a live lane was done often and safely in signal work, and that while there was nothing about this method in the MUTCD his opinion was that R-4 applied to it and that based on his knowledge of the site Delta had complied with the MUTCD. Glancey said the utility truck's boom length would not have allowed Price to work beyond the center lane, that he understood Price was to be working over only the right and center lanes, and that although both could have been closed it takes over 2.5 hours just to shut down a lane; he also said the five workers needed for a closure would be exposed to traffic, while a worker over a live lane above the traffic zone would be at less risk. (Tr. 120-56).

Lee Steiner has a degree in engineering technology and has worked for NJDOT for 16 years. He testified that all of his experience with the agency had involved responsibility for reviewing traffic control plans for construction projects, inspecting construction sites, and adapting traffic control plans to those sites. He further testified that C-10, the project contract, provided for lane closure on Route

9 South on weekdays from 8:00 p.m. to 2:00 p.m. in areas having three lanes and shoulders over 10 feet wide. Steiner noted the accident had occurred around 1:10 p.m. and offered his opinion, based on the MUTCD, that the proper setup would have been to close the lane over which Price was working. He said it takes about an hour to close a lane and another hour to open it back up and that the least expensive means is to utilize traffic cones; he also said that a full setup should be done for any road work lasting over 15 minutes, that R-4 did not apply to the situation at the site because it pertains to work on shoulders, and that the NJDOT standard specifications preclude construction work over live traffic unless it is provided for in the job specifications or an engineer has given written permission for such work to take place. (Tr. 157-67).

Decision

Based on the record, I conclude the Secretary has demonstrated a violation of the cited standard. The language of the standard is mandatory and requires compliance with the MUTCD, and of the two illustrations from the MUTCD presented by the parties, C-5 and R-4, I find that C-5 is more applicable to this case. It is clear from its caption and text that R-4 applies to work occurring on shoulders, while C-5, according to its caption, applies to “daytime maintenance operations of short duration on a 4-lane divided roadway where half of roadway is closed.” It is also clear that Price’s work at the time of the accident was not on the shoulder but rather over the right lane, which was not closed to traffic, and that due to the bucket’s height he was within the traffic zone of the right lane. Moreover, Steiner’s testimony was persuasive evidence that Delta was required to close the lane, and although Glancey testified to the contrary, Steiner’s opinion is credited over that of Glancey due to his particular work experience with the NJDOT, all of which has been in the area of traffic control. Delta was therefore in violation of the standard unless the evidence establishes one of the affirmative defenses indicated in the company’s contentions, *supra*.

Delta contends that lane closure in this case was infeasible. An employer asserting infeasibility of compliance must demonstrate (1) that literal compliance with the standard was infeasible under the circumstances, and (2) that either an alternative means of protection was used or no alternative means was feasible. *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160-61 (Nos. 90-1620 & 90-2894, 1993), and cases cited therein. Delta has not met the first part of its defense for several reasons. First, although Jeffrey Houde indicated otherwise, Glancey testified that the job involved

working only over the right and center lanes and that both could have been closed. Second, Glancey's estimate of over 2.5 hours just to shut down a lane was contradicted by Steiner's testimony that lane closure takes about an hour, and for the reasons noted above, Steiner's opinion is credited over that of Glancey. Third, as Steiner noted, pages 36-37 of C-10, the project contract, provided for lane closure on Route 9, and it is apparent that the makeup of Route 9 South at Old Mill Road (three lanes and a 12-foot shoulder³) as well as the day of the week and the time of the accident (Tuesday at 1:10 p.m.) met C-10's lane closure specifications. Fourth, as Steiner also noted, NJDOT's standard specifications prohibit construction work over traffic unless it is provided for in the job specifications or an engineer has given written permission for such work to take place, and Delta presented nothing to show either of these conditions. Delta also failed to meet the second part of its infeasibility defense, in that the alternative measure of working in a bucket over the right-hand lane, as it was done in this case, afforded inadequate protection. Delta's contention that compliance with the standard was infeasible is therefore rejected.

Delta also contends compliance was a greater hazard. To demonstrate this affirmative defense, an employer must show (1) that the hazards of compliance were greater than those presented by not complying, (2) that alternative protective means were used or were not available, and (3) that applying for a variance would have been inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159 (Nos. 90-1620 & 90-2894, 1993). As set out above, Glancey indicated that the five workers who would have been needed to effectuate a lane closure would have been exposed to a greater hazard than the one employee who was working over a live lane of traffic in a bucket. However, in view of the circumstances under which Price was working, which clearly exposed him to the hazard of being struck by vehicular traffic, Glancey's testimony does not establish the first part of Delta's defense. These circumstances also preclude Delta from establishing the second part of its defense, making it unnecessary to address whether application for a variance from the standard was inappropriate. Delta's greater hazard defense is accordingly rejected.

Delta's final contention is, in essence, that the accident was the result of unpreventable employee misconduct. To prove this affirmative defense, an employer must show (1) that it had work

³Susan Houde testified the width of the shoulder in the subject area was 12 feet. (Tr. 117).

rules designed to prevent the violation, (2) that it had adequately communicated the rules to its employees, (3) that it had taken steps to detect violations, and (4) that it effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). As noted *supra*, Jeffrey Houde testified Price was to have positioned the bucket even with the signal, both of which were 42 inches long; that doing so would have enabled him to perform the job safely as he would have been 15.5 feet above traffic; that it was up to Price to position the bucket, as the foreman might not have been able to tell its height; and that Price was also to keep an eye on traffic and stop work if he felt unsafe.⁴ (Tr. 75-85; 90; 97-98). However, Houde also testified that Price was working on the face of the signal and had just opened its center section to do the rewiring and that the foreman, who had been watching him, turned away right before the accident occurred. (Tr. 73-74; 79-82). This testimony defeats Delta's employee misconduct defense and explains why the accident happened. The bucket and signal were both 42 inches long, and Price, whose upper body had to have been at least 2 feet above the top of the bucket, could not have worked on the signal's center section unless the bucket was lower than the signal, and in this case it was over 2 feet lower. Further, if the foreman was watching Price he had to have been aware the bucket was lower than the signal, and that Delta knew the height at which Price was going to be working is supported by its having stationed a flagman north of the area to wave trucks out of the right lane. Finally, Houde's testimony that Price was to watch out for traffic does not follow in light of his other testimony that Price was working on the signal's face, which meant that he would have been facing the signal and had his back to the traffic. It is clear that the accident was not caused by unpreventable employee misconduct and that Delta was in violation of the standard.

Turning to the assessment of an appropriate penalty, the Commission considers the employer's size, history and good faith, as well as the gravity of the condition, when assessing penalties, with the gravity of the violation being given the most weight. The record shows that Delta is a small employer with no history of prior OSHA violations. (Tr. 27-28; 36-37). However, the record also clearly shows a high-gravity condition, in that Price was working within the traffic zone of a live lane of traffic, which in my view precludes any reduction in penalty for good faith. In

⁴Houde indicated that Price had been told a number of times that the height of tractor/trailers in New Jersey was 13.5 feet. (Tr. 81).

addition, the hazard of the condition was compounded by the fact that Delta's flagman had been with the company for only about two weeks and that August 29 was his first day to work as a flagman. (Tr. 55-56). The hazard was further compounded by the fact that while Delta had evidently posted a construction sign north of the site there was insufficient notice to motorists of the work ahead. (Tr. 57; 63-64; C-6, pp. 3-5; C-7, p. 2; C-8). The problem in this case appears to have been, as indicated by the testimony of Susan Houde, that the OBPD was unable to provide traffic control protection at the site that day due to being at another intersection. Regardless, this does not excuse Delta's failure to provide adequate protection for its employees at the site, and it is my conclusion, after considering the record as a whole and all of the factors noted above, that a penalty of \$5,000.00 is appropriate in this case.

Conclusions of Law

1. Respondent Delta Line Construction Company is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.
2. Respondent was in serious violation of 29 C.F.R. 1926.202.

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 is AFFIRMED as a serious violation, and a penalty of \$5,000.00 is assessed.

Irving Sommer
Chief Judge

Date: