



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,

v.

S.K. CONSTRUCTION COMPANY
Respondent.

OSHRC DOCKET
NO. 92-2480

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 September 2, 1993. The decision of the Judge will become a final order of the Commission on October 4, 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 September 22, 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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.

Ray H. Darling, Jr.
Executive Secretary

Date: September 2, 1993

DOCKET NO. 92-2480

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR,

Complainant,

v.

SK CONSTRUCTION,

Respondent.

Docket No. 92-2480

Appearances:

Gary R. Williams, Esq.
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For Complainant

Roger L. Sabo, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

Before: Administrative Law Judge John H Frye, III

DECISION AND ORDER

INTRODUCTION

This matter is before the Commission pursuant to Section 10 (c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) (Act). Respondent is an employer engaged in a business affecting interstate commerce as defined by section 3 (5) of the Act and has employees as defined by Section 3 (6) of the Act and the standards and regulations promulgated thereunder. As the result of a June 16, 1992, inspection by the Occupational Safety and Health Administration (OSHA) at Respondent's Middletown, Ohio, worksite, Respondent was cited for one willful violation

of 29 C.F.R. § 1926.652(a)(1) that requires that each employee in an excavation must be protected by adequate protective systems. Prior to trial, the Secretary amended the complaint to plead, in the alternative, a serious violation of the Act. Trial took place on January 22, 1993, in Cincinnati, Ohio.

OPINION

SK Construction Company (SK), a family-owned business, is a general contractor located in Middletown, Ohio, and is engaged primarily in heavy highway, underground, utility, bridge, and building construction. SK operates in the Southwestern part of Ohio. (Tr. 138, 193.) Howard Richard "Dick" Smith is a founder and President of SK. His three sons serve as vice presidents with the following responsibilities:

Scott Smith is the Safety Director with responsibility for overall company safety policy and compliance with OSHA and other government safety and health regulations;

James E. Smith is in charge of operations; and

Dan Smith runs the office, performs estimates, and is in charge of customer relations.

In 1992, SK received a time and materials contract to repair a sanitary sewer at a branch office of Bank One in Middletown, Ohio. The repair was placed under the direction of Clifford "Terry" King, who had been with SK for approximately three and one-half years and had been hired in as a "top man" on the pipe crew and then promoted to pipelayer who "runs the ditch and calls the shots." King had worked in trenches as deep as forty-two feet and had been certified at a competent person training program in Columbus, Ohio.

This was the first project for King as a crew foreman for SK Construction. King had previously worked for a competitor for approximately eight years and served as a labor foreman for three and one-half years of that time, overseeing up to as many as 22 employees. (Tr. 69-72.) King's prior supervisor at SK, Gayland Proctor, indicated that he had never had occasion to discipline King for safety violations and found him to be very competent in safety matters. Proctor highly recommended King to be a foreman on

construction projects. Vice President of Operations Jim Smith concluded he would be a competent foreman.

Because the sewer repair was to be billed on a time and materials basis, management felt it constituted an appropriate job on which King could break in without the pressure of a fixed price contract. The crew working with Terry included Douglas McQueen, a member of Local 18 Operating Engineers in Dayton, Ohio. McQueen has operated equipment, including backhoes, for SK Construction for twenty-five years. (Tr. 121-22.) There were two laborers, Dave Jones and Darrin Palmer, who had each been with SK some three or four years. (Tr. 75-76.)

When King arrived at the Project on June 15, both Company President Dick Smith and Vice President of Operations Jim Smith were there. President Dick Smith told Terry King that there were five things he wanted from him on the Project. The first three priorities were safety. Smith wanted King to be sure that no one got hurt on that Project. The fourth priority was to have the traffic using the drive-in window come through without hindrance. The fifth priority was quality; Smith wanted to do this only once. Smith told him not to worry about production. The Smiths then proceeded to give technical instructions on what and how to do the job. (Tr. 79, 205, 208-09.)

That day, the crew began to locate the sewer. They removed a tree that could have been in the way, hauled it out, and cut some asphalt. Sewer trench boxes and trench shoring equipment were mobilized. Jim Smith returned to the Project some four or five times that day to assist in getting the Project started as well as to get the trench boxes on the site. (Tr. 78, 145-46.)

The crew began their excavation the following morning, June 16. King conducted a soil test and determined that the soil was a type B. The crew put hydraulic shoring, with cylinders, into the trench following excavation. (Tr. 76-84.) President Smith visited the site that morning and observed that the shoring was in place. He assisted in determining the nature of the problem with the sewer. Smith returned to the Project, together with Company Vice President Dan Smith, around 12:30 or 12:45 that same day. He observed the shoring and found that all systems were in place. Smith instructed

Terry King to install a new manhole, repeated the statements he had made earlier about safety, and left the Project. (Tr. 208-12.)

Because a manhole was going to be placed, it was necessary to widen the trench to approximately eight feet. The trench box at the location only had a four foot spreader, so one of the laborers went to get the additional spreaders required. (Tr. 82-83.)

After widening the trench, King decided it was necessary to go into the trench to measure the outside diameter of the existing pipe so that he could order pipe to be installed the following day. He took another soil test, and with two individuals watching, placed a ladder into and entered the trench. The trench was 13 feet deep, roughly 13 feet from end to end, and 15 feet from corner to corner. Although King felt that the trench was safe, he did not want anyone else to go into it. (Tr. 20, 25-26, 85-87, 125-26.) As King was preparing to come out of the trench, he was addressed by CSHO John F. Boylan of OSHA.

Mr. Boylan had observed the trench on the way to review another project and stopped to inspect it on his return. Boylan questioned King and was told that King went in only for a brief period so that he could check the outside diameter of a pipe. Boylan remained at the Project only for a short period of time because he was due back at his office. (Tr. 16-21.) As a result of Boylan's visit, the Secretary cited SK for a willful violation of 29 CFR § 1926.652(a) and proposed a fine of \$12,250.

SK's disciplinary program for safety violations consists of a verbal warning for minor infractions, a written warning for more serious infractions, and termination for repetitive or yet more serious infractions. King was given a written warning and subsequently, after completion of the sewer project, demoted to laborer. (Tr. 90-91, 167-68, 151, 191, 214, 219.)

There is no controversy with respect to the fact that the OSHA compliance officer found King inside the unprotected excavation. Respondent mounted three defenses to the citation at trial: first, that the violation was due to unpreventable employee misconduct; second, that the violation was *de minimis*; and third, there is no basis for a willful violation.

Unpreventable Employee Misconduct

The Commission and courts have recognized a so-called “unpreventable employee misconduct” defense under which the employer must demonstrate the existence of a thorough safety program which addresses the standard in question, is adequately communicated to employees, and is uniformly and effectively enforced. *Brock v. L.E. Myers Co., High Voltage Division*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S.Ct. 479 (1987); *Floyd S. Pike Electrical Contractor, Inc.*, 6 BNA OSHC 1675, 1677-1678 (1978).

Respondent argues that it has met this test. It points out that King had compiled an outstanding work and safety record in his three years with SK, had not been disciplined for safety violations, and was highly recommended for the position of foreman. He had received competent person training and had tested the trench both that morning and prior to entering it. Prior to his coming to SK, he had been a superintendent for a competitor and oversaw as many as twenty-two people.

Company President Dick Smith visited the site on both the first and second day of the project to check on King’s progress and emphasize safety. It appears that King was following SK and OSHA safety requirements up to the time he entered the unprotected excavation on the second day.

SK argues that clearly, King’s action was not foreseeable and was inconsistent with his conduct of the project to that point. His dispatch of an employee to get wider shoring for the trench box clearly indicates that he recognized that protection against trench collapse was necessary. SK urges that it had no indication that King would choose to ignore safety requirements and enter the excavation.

Further, SK points out, King was disciplined for this activity with a written, rather than a verbal warning. SK also states in its brief that King was demoted from a laborer-foreman at the end of this Project to a regular laborer, a position he continued to hold through the time of the hearing. It is, however, unclear precisely when this may

have occurred. SK notes that King was not the only individual who had been disciplined by SK for violation of safety rules.¹

SK argues that, while the Secretary may criticize its overall safety policy as not sufficiently broad, it must be noted that King had attended the competent person training program² and had the competent person manual,³ which sets out in detail the OSHA Subpart P Regulations for excavations. SK points out that an objective of that program is to equip participants with an “extensive knowledge of 29 C.F.R. 1926 -- Subpart B -- Excavations.”⁴ The various types of protective systems are discussed in detail⁵ and students are taught how to test soil.

SK maintains that Mr. Boylan recognized all of this. It relies on a worksheet which Mr. Boylan prepared for his personal use.⁶ That worksheet identifies six broad categories, each with a number of specific items, which Mr. Boylan checks in the course of an inspection. The six broad categories are:

- A. Management Commitment and Leadership;
- B. Assignment of Responsibility;
- C. Identification and Control of Hazards;
- D. Training and Education;
- E. Recordkeeping and Hazard Analysis; and
- F. First Aid and Medical Assistance.

Each specific item listed under the above categories on Mr. Boylan’s form is to be checked off as either “yes” or “no.”

¹Respondent cites its Ex 10, which documents some five instances of employee discipline.

²R. Ex. 5

³R. Ex. 13

⁴*Id.*, p.2.

⁵*Id.*, pp.17 - 23.

⁶R. Ex.1.

In the course of his evaluation, Mr. Boylan marked each specific item favorably to SK except for those that directly pertained to King's excursion into the excavation.⁷

In view of the foregoing, SK professes to fail to understand why the Secretary pursued this particular Citation. SK notes that Secretary is left with such things as attacking SK's safety program, questioning the severity of the discipline administered to King, and alleging that insufficient numbers of other employee have been disciplined. SK asserts that the record demonstrates that, when discipline is necessary, it is meted out.

SK believes that, in this case, the Secretary has neither proven foreseeability nor rebutted the defense of employee misconduct. It relies on *Austin Building Co. v. OSHRC*, 647 F. 2d 1063 (10th Cir. 1991) where the court held:

The secretary has the burden of showing that the employer knew, or with the exercise of reasonable diligence, could have known of the likelihood of the non-complying condition or practice. The employer may defend by showing that the violation was an unforeseeable occurrence. Evidence that the employer effectively communicated and enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not foreseeable or preventable.

647 F. 2d at 1067-68 (emphasis added). As the Commission noted in *Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133, 2135 (1984), "an employer is not liable for failure to foresee every incident before it occurs and can take extraordinary cautions to prevent."

The Secretary maintains that Respondent has failed to prove facts sufficient to support the affirmative defense of "unpreventable employee misconduct." First, the Secretary maintains that Respondent failed to take all reasonable steps to prevent a

⁷See Tr.51-53. The following specific items on R. Ex. 1 were checked "no:"

- Management observes safety rules;
- Safety designee on site knowledgeable and accountable;
- Supervisors (including foremen) safety and health responsibilities understood; and
- Employees adhere to safety rules.

violation of the applicable standard, including providing adequate instruction to its employees. The Secretary points out that in *Daniel Construction Co., 10 OSHC 1549, 1552* (Rev. Com. 1982), the Commission noted that "... where a supervisory employee is involved in the violation, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish...," and constitutes strong evidence that the employer's safety program is not effectively enforced. He also points out that "... the employer must establish that it took all feasible steps to prevent the [violation], including adequate instruction and supervision of its supervisory employee." *L.E. Myers Company, 16 BNA OSHC 1037, 1041* (Rev. Com. 1993), citing *Daniel Construction Co., supra*.

The Secretary points out that SK places great weight on its President's speech to King in which he told him to follow three rules: "safety, safety, safety."⁸ However, he notes that this admonition gives no instruction relative to reasonably foreseeable safety problems on the project, i.e., an employee working in an unprotected trench, and that King was not instructed to follow specific OSHA standards or those procedures he had learned some months earlier at the competent person class. He believes that the mere recitation of "safety, safety, safety" was clearly too vague to rise to the level of an adequate instruction, and argues that King's act of entering the unprotected trench was not in violation of these instructions because King believed that the trench was safe.

Second, the Secretary argues that SK's safety program did not serve to clarify the situation, pointing out that, although the great part of SK's work deals with trenching, no

⁸See Findings 13 and 16; Tr. 79, 123, 208 and 212.

trench safety issues are listed in its nine point safety rules.⁹ He notes that, while the company rules make passing reference to a generic safety booklet printed by the Ohio Construction Contractor's Association,¹⁰ that pamphlet contains over three hundred safety tips covering all phases of construction work only one of which relates unprotected trenches. By virtue of its breadth of scope, the pamphlet can not be said to be directed to any hazards reasonably to be anticipated by employees such as King who have a limited scope of work.¹¹

The Secretary relies on *Danco Construction Co. v. Secretary*, 6 BNA OSHC 2039 (8th Cir. 1978) and on a recent decision in *Secretary v. Abbott Contractors, Inc.*, OSHRC Docket No. 91-177 (January 8, 1993). In *Danco*, the court faced the question of whether the instructions given to the employees were specific enough to protect employees against reasonably foreseeable dangers. There, oral safety instructions were given to employees concerning the avoidance of overhead power lines while using a crane. They were warned, in general, to stay away from those lines, but were not instructed to maintain the OSHA-required ten foot clearance between the crane and the lines. The Court found this to be insufficient.

In *Abbott*, Judge Barkley held that the affirmative defense of unpreventable employee misconduct must fail when, among other things, an employer's work rules are

⁹See R. Ex. 2 and Tr. 114, 184-185.

¹⁰R. Ex. 8

¹¹The Secretary asserts that record reveals that these employees spend ninety percent of their time working in trenches, citing Tr. 143.

too vague to provide guidance to supervisory personnel. Judge Barkley found the Respondent guilty of a willful violation in spite of the fact that supervisor in question had received ten hours of competent person training.

The Secretary is correct that SK's safety rules and its communication of specific safety requirements to King were both very general and not directly related to the hazards which King faced in performing the work assigned to him. However, the Secretary overlooks the fact that King had detailed instructions concerning trenching safety in the form of the competent person manual which he received as a part of his training. Because SK is a small company,¹² it is not surprising to find that it placed reliance on outside sources for both training and safety rules rather than conducting in-house training and generating its own safety rules.

More importantly, in this case there is no indication that SK had a history of failing to observe proper practices.¹³ In contrast to the situation in *Abbott* where there was evidence that the company had not followed proper practices for some three years because a particular employee refused to use a trench box,¹⁴ the project in question appears to have been conducted in accord with all applicable safety rules except for King's entry of the excavation. Indeed, as SK points out, the fact that King was awaiting

¹²At a time of peak activity, SK might have about 100 employees. See Tr. 44.

¹³The Secretary seeks to bolster his argument in this regard by pointing to the fact that SK's president could not deny that SK reported twelve "lost work days" resulting from injuries for the most recent year for which figures were available, 1991. In point of fact, SK's president specifically indicated that he could neither confirm or deny that fact without checking his records, and pointed out that the Company had experienced only one serious accident. See Tr. 222-25.

¹⁴The decision reveals that the employee not only refused to use the box, but was not disciplined for this refusal.

the return of a laborer dispatched to retrieve the equipment necessary to use the trench box at the time he entered the excavation indicates his awareness of and intent to follow proper procedures.

Rather than *Abbott*, this case more closely parallels *Secretary v. Dover Elevator Co.*, 16 BNA OSHC 1281 (Rev. Com. 1993), in which a foreman left an extension cord plugged into an unprotected circuit and available for use while going to some lengths to obtain a working electrical receptacle which was protected by a GFCI device so as to permit the use of a power drill. There, the Commission stated:

The Act does not mandate that an employer necessarily eliminate all instances of employee noncompliance with its work rules. Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required.¹⁵

This case also presents a sharp contrast with the situation in *Danco*. In the latter case, a relatively inexperienced crew was given the job of unloading steel pipe by using a crane in the vicinity of overhead power lines. Although the company often was engaged in this activity, it did not train its crews in safe practices. The crew involved in the accident which gave rise to the *Danco* decision had not been given specific instructions regarding the required clearance to be maintained. Moreover, it was sent out to work without supervision. The cab of the crane which it was using contained an outdated warning placard which mandated a clearance of six rather than ten feet from power lines.

In contrast, SK trained King through the competent person course and provided specific safety instructions through the manual provided with that course. SK also closely

¹⁵16 BNA OSHC at 1287.

supervised King's progress on this job. SK has been inspected by OSHA in past years but had not been previously cited. And the Compliance Officer found that, with the exception of King's lapse, SK's safety program was satisfactory.

However, the Secretary also argues that, even given the existence of adequate safety rules, SK failed to demonstrate that they were uniformly and effectively enforced. Although SK has been in business for more than twenty-five years, SK produced evidence of only five disciplinary actions taken against employees which related to safety violations. Of these five, only one occurred prior to King's infraction.¹⁶

The Secretary relies on the testimony of Mr. McQueen, an equipment operator with SK for some 25 years, for the proposition that employees did not consider disciplinary action could result from violating an OSHA regulation. He cites Mr. McQueen's apparent lack of concern over the violation of OSHA rules and apparent absence of fear of punishment as illustrative of the fact that actions such as King's were not uniformly or effectively punished. However, the Secretary reads too much into Mr. McQueen's testimony.

First of all, given the fact that SK is a small company which does a substantial amount of trenching and that Mr. McQueen operates equipment used to open trenches, it is likely that Mr. McQueen would be aware of violations of the applicable OSHA standards had they occurred. He testified that, although he had heard of others entering unprotected excavations, he was not aware of that happening at SK.¹⁷ In the absence

¹⁶The Secretary points out that it is well settled that proof of post violation enforcement is insufficient to sustain a defense of unpreventable employee misconduct.

¹⁷See Tr. pp.131-32.

of such violations, it is not surprising that the question of discipline did not come to his mind. Moreover, Mr. McQueen clearly felt that his personal responsibility related to safe practices, rather than administrative requirements and discipline. He testified that, when King entered the excavation, his sole concern was King's safety, not the possibility of discipline. As he put it, "... that's not my job, to tell him he might be fired."¹⁸

Finally, the Secretary cites SK's response to King's action in the case at bar. He argues that despite King's voluntary, knowing, and willful violation, an act which might have cost him his life, SK meted out the lightest possible sanction: a simple reprimand. He believes that the credible evidence fails to support SK's position that it enforces OSHA safety standards.

On its face, the treatment of King's lapse does not illustrate a tough attitude toward enforcement. While the punishment given King may not have been the minimum available as the Secretary suggests, it was not as severe as the offense might have warranted. An immediate demotion and suspension without pay for a period of time would not be inappropriate if, as SK's management believed, termination was too severe a punishment.¹⁹ However, while the punishment may have been light given the offense, it is clear that SK did not treat the offense in a casual or matter-of-fact manner.

¹⁸See Tr. pp.132-35.

¹⁹While the record indicates that King was demoted, it is unclear when this took place. The testimony of President Dick Smith and of Vice-Presidents James and Scott Smith may differ on this point. King himself did not say precisely when he was demoted. All witnesses agree that the Bank One project was the last one in which he had a supervisory role.

Counsel for the Secretary has moved to reopen the record to admit SK's answers to two interrogatories which did not indicate any punishment other than a written reprimand in order to impeach the testimony that King was demoted. Counsel for SK opposes on the ground that admission of these answers, which were available to the Secretary to use at trial, would be unfair in that SK would not have an opportunity to respond. The motion is denied.

President Dick Smith explained SK's reaction to the incident as follows.

Q [By Mr. Sabo] Did you have any further discussions with him on this?

* * *

A I brought [King] into the office that night and I was going to let him go because it was, in my opinion, inexcusable. But Dan and Jim and Scott and I talked about it, probably for about two hours that evening, and we determined that had he sent another man in there, we would have dismissed him. But since it was himself, we declared it an error in judgement and we didn't think we should condemn him for that.

Q Did you have any discussions with Mr. King yourself about it or did you let the others do it?

A Yes, I did. I had a long discussion with Terry and the next morning I brought him in the office and I preached to him for an hour. And he cried and he said he would pay the fine himself and all that sort of thing. He's truly repentant and so based on all that evidence we decided we'd at least keep him in a job.²⁰

It is clear from the above that SK did not take King's lapse lightly. It is also clear that SK decided to temper its punishment in light of the peculiar facts surrounding this violation. In view of the obvious seriousness of the incident in the eyes of SK's President, the decision to temper the punishment in this instance should not be taken as indicative of an overall unwillingness to enforce safety rules. The lack of evidence of a tough enforcement policy must be considered together with the lack of evidence of a systemic

²⁰See Tr. pp.213-14. Scott Smith explained his rationale for not dismissing King as follows.

His infractions, I do not think, was serious [enough] for dismissal. Terry's been with us for, I think, five years. This is the first problem we had with him. It was not the normal minor violation. But looking at his work record or past performance, talking to him about the incident, how, you know, he did it on the spur of the moment, not really thinking about it, I did not warrant that he should be let go. He was a very good production worker. We have removed him from being a foreman or crew leader, whatever you want to call it. But he's still a good worker and I think he still has potential. But I could not see firing him for this.

Tr. p.191.

safety problem inherent in SK's operations and Mr. Boylan's failure to find a problem with SK's administrative controls. *See Secretary v. Dover Elevator Co., supra.*

In light of these circumstances, I find that SK has demonstrated that it adequately established, communicated, and enforced safety rules. In reaching this conclusion, I am heavily influenced by the facts that first, there is no evidence of either a general laxness toward safety on SK's part or the presence of systemic safety problems at SK; second, that, in general, the compliance officer was satisfied with SK's safety program; and third, that there is no evidence that King's lapse was part of a pattern of departures from applicable safety rules at the job in question. Were any of the above three factors absent, it would be difficult if not impossible to conclude that SK's approach of relying on general admonitions regarding safety from management, outside training, and outside materials to establish and communicate its safety rules was adequate.

I conclude that SK has established that the violation in question was the result of unpreventable employee misconduct. In light of this conclusion, it is unnecessary to consider SK's other defenses.

FINDINGS OF FACT

1. Howard Richard "Dick" Smith is a founder and President of Respondent S.K. Construction Co. Vice President Scott Smith is the Safety Director, Vice President James E. Smith is in charge of operations, and Vice President Dan Smith runs the office, performs estimates, and is in charge of customer relations. (Tr. 137-39, 159, 193.)

2. SK has weekly safety meetings at its construction projects which are given by the crew leader and last fifteen to thirty minutes. SK also has safety pamphlets at the office and at the project sites where employees report to work. Company Superintendents and lead people attend seminars. (Tr. 74, 161-62.)

3. SK's safety program is certified by the Ohio Contractors Association (OCA) on a yearly basis. In order to be certified, a twenty-point safety program must be met by SK. (Tr. 162-63.)

4. SK has a disciplinary program which includes administering discipline for violations of safety regulations. (Tr. 167-68.)

5. SK has sent all of its supervisors and crew leaders to participate in competent person training under the OSHA trenching regulations and participates in OCA seminars. (Tr. 149, 162.)

6. SK has been inspected by OSHA in the past, but has not been cited previously. (Tr. 198.)

7. In 1992, SK received a time and materials contract to repair a sanitary sewer at a branch office of Bank One in Middletown, Ohio. (Tr. 143, 203-04.)

8. The 1992 repair was placed under the direction of Clifford "Terry" King. (Tr. 27, 66-67, 72, 117-19.)

9. This was the first project for King as a crew foreman for SK Construction. (Tr. 69-72.)

10. When King arrived at the Project on June 15, 1992 to commence construction activities, he received safety and operational instructions from President

Dick Smith and Vice President James Smith. President Smith told King that his first three priorities were safety, his fourth priority was to avoid impeding traffic using the drive-in window, and his fifth priority was quality. (Tr. 79, 205, 208-09.)

11. That day, sewer trench boxes and trench shoring equipment were mobilized. Vice President James Smith returned to the Project some four or five times that day to assist in start-up and to get the trench boxes on the site. (Tr. 78, 145-46.)

12. Excavation began the following morning, June 16. King conducted a soil test and determined that the soil was type B. The crew put hydraulic shoring, with cylinders, into the trench following excavation. (Tr. 76-84.)

13. Company President Smith visited the site that morning and returned with Vice President Dan Smith around 12:30 or 12:45 that afternoon. On both visits, he observed the shoring and found that all systems were in place. On the second visit, President Smith instructed King to install a new manhole, repeated his safety instructions, and left the Project. (Tr. 208-12.)

14. In order to accommodate the manhole, the trench was widened. The trench box at the location only had a four foot spreader, so a laborer was sent for the additional spreaders required. (Tr. 82-83.)

15. After widening the trench, King took another soil test, and with two individuals watching, placed a ladder into and entered the trench. The trench was 13 feet deep, roughly 13 feet from end to end, and 15 feet from corner to corner. (Tr. 20, 25-26, 85-87, 125-26.) As King was preparing to come out of the trench, he was addressed by CSHO John F. Boylan of OSHA.

16. SK's disciplinary program for safety violations consists of a verbal warning for minor infractions, a written warning for more serious infractions, and termination for repetitive or yet more serious infractions. The Smiths determined not to fire King. King was given a written warning and subsequently, after completion of the sewer project, demoted to laborer. (Tr. 90-91, 167-68, 151, 191, 214, 219.)

CONCLUSIONS OF LAW

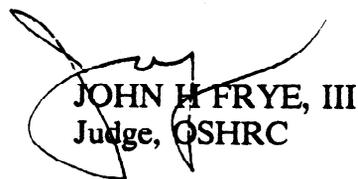
1. Respondent SK Construction Company was at all times pertinent hereto an employer within the meaning of Section 3(5) of the Occupational Safety & Health Act of 1970, 29 U.S.C. Section 651-678 (1970).

2. The Occupational Safety & Health Review Commission has jurisdiction of the parties and the subject matter.

3. Respondent SK Construction Company was not in violation of the standard set forth at 29 C.F.R. 1926.652(a)(1) as charged in Citation 1, Item 1.

ORDER

Citation 1, Item 1, is vacated.


JOHN H. FRYE, III
Judge, OSHRC

Dated: ~~SEP 02 1993~~
Washington, D.C.