Is a Company Liable for a Supervisor's Deliberate Safety Violation?



Complying with OSHA regulations is often a burdensome process. So it might be tempting for supervisors to cut corners, especially when they're under pressure to get a job done fast and efficiently. Hopefully, none of your supervisors are inclined to feel, let alone give in to such temptation. Unfortunately, however, there are supervisors who are willing to deliberately violate an OSHA rule in the interest of expediency, even if it jeopardizes the safety of their workers. Suppose a supervisor takes such a chance and it results in an accident. Clearly, the supervisor has committed a deliberate violation. But OSHA doesn't apply to supervisors-only to their employers. Should the supervisor's employer be held liable for committing a willful violation?

A case from Florida sheds light on how courts and administrative tribunals like the Occupational Safety and Health Review Commission (OSHRC) answer this question. Here's what happened.

THE CASE

What Happened: A contractor was hired to install a sewer line under a public roadway in Jacksonville. At one location, the line would have to be installed 12 feet under an existing gas line that ran perpendicular to the sewer line. The trenching used to install the sewer line before the point of intersection complied with OSHA standards. But when the trenching reached the gas line, the supervisor deliberately decided not to slope it. As he would later testify, "we only had one jointed pipe to put in and we thought we could get it done in 15 minutes" before a cave-in could occur.

Sadly, the gamble didn't pay off. While two workers were installing the pipe in the unshored trench, a large ball of clay became dislodged and fell on top of them. One of the workers was killed.

The Issue: OSHA cited the contractor for two violations, including willful failure to protect workers in an excavation against cave-ins under Section 1926.652(a)(1) of the OSHA excavation standard. The contractor blamed the accident on the supervisor and denied liability for the violation.

What OSHRC Decided: OSHRC rejected the contractor's defense, found it liable for a willful violation of the excavation standard and upheld a $50,000 fine [Secretary v. John Carlo, Inc., OSHRC Docket No. 04-1405, May 22, 2006].

ANALYSIS

The contractor tried unsuccessfully to use two defenses to separate itself from the supervisor's actions.

Attribution: Persons are guilty of a willful violation if they act intentionally, knowingly or in voluntary disregard for the requirements of the law. These are states of mind. How can an entity, as opposed to an individual, have such a state of mind? Answer: Courts look at what was on the minds of the company's agents, that is, the individuals representing the company. In this case, it was easy for OSHRC to "attribute" a willful state of mind to the contractor. The supervisor who ordered the work done in the unsloped trench was the contractor's agent. He knew full well that he was violating the OSHA standard. In other words, he showed intentional disregard for the trenching standard. In addition, OSHRC noted that corporate officials at the contractor company knew what the supervisor was up to and approved his actions.

Unpreventable Employee Misconduct: An employer can also avoid liability for an OSHA violation by proving that it was the result of unpreventable misconduct by an employee, in this case, the supervisor. There are four things an employer must prove to establish this defense. The contractor in this case failed to make out even one of the requirements:

- **Established Work Rules:** First, the employer must show that it had established work rules to prevent the violation. The contractor in this case did in fact have trenching rules but they were filled with errors.
- **Adequate Communication of Rules to Employees:** Although the contractor passed out its safety manual and held occasional tool talks, it made no effort to verify that the training was understood and failed to document who had received training.
- **Taking Steps to Discover Violations:** This requirement includes not just sniffing out violations but fixing them once you find them. Officials of the contractor company knew that the supervisor was planning not to slope trenches upon reaching the gas line but didn't order him to correct the violation.
- **Effective Enforcement of Rules against Violators:** The contractor didn't manage to clear this hurdle, either. Although the supervisor was fired after the incident, misconduct wasn't listed as the official reason. On the contrary, the contractor gave the supervisor high final performance ratings and indicated in the separation notice that it would be prepared to rehire him.