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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

John B. Lennes, Jr., Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.
G.L. Contracting, Inc.,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on January 20, 1994, at 9:30 a.m. in Courtroom 3, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. The record in this matter closed on January 20, 1994, at the conclusion of the hearing.

Joan D. Humes, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199, appeared on behalf of the Complainant, the Minnesota Department of Labor and Industry (the Department). David Swanson, President of G.L. Contracting, Inc. (G.L. Contracting or Respondent), 4300 Willow Drive, Medina, Minnesota 55340-9701, appeared on behalf of the Respondent.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5, that this decision and Order of the Administrative Law Judge may be appealed by the employer, employee, or their authorized representatives, or any party within 30 days following service by mail of this decision and Order. The Occupational Safety and Health Review Board has the authority to revise, confirm, or reverse the decision and order of the Administrative Law Judge.

STATEMENT OF ISSUE

Whether Respondent failed to require and provide high

visibility personal protective equipment for an employee as required by Minn. Rules pt. 5207.0100 (1991).

Based on the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. G.L. Contracting is a construction contractor engaged in sewer construction. On July 10, 1991, a six-member crew employed by G.L. Contracting was removing and replacing sewer pipe in a trench extending into the street near the intersection of 66th Street and Valleyview Road, in Edina, Minnesota. The work disrupted the normal pattern of traffic at the intersection by forcing automobiles to detour around a backhoe sitting in the intersection. The speed limit on both streets was 35 miles per hour.

2. On July 10, 1991, Ralph Murphy, a superintendent for G.L. Contracting, was traveling past the worksite at 66th and Valleyview on his way to another worksite. Murphy saw that traffic was backed up for a distance of two and one-half blocks on Valleyview and witnessed cars travelling the wrong way on a one-way street to get past the intersection. Many of the motorists were ignoring the Respondent's flagman's directions. Because the flagman was unable to properly control traffic, and believing that a safety hazard existed, Murphy decided to stop and help control the traffic.

3. Murphy stopped his car at the 66th and Valleyview worksite, got out, and took control of automobile traffic at the intersection. He was wearing dark blue pants, a light blue shirt, and an orange hard hat. The road (Valleyview) where Murphy positioned himself was one-way, with two lanes narrowed to one lane by a row of orange traffic cones. The cones extended through the intersection forcing traffic off the street and onto the berm (shoulder) to avoid the backhoe. The intersection is normally controlled by four-way stop signs. The location of the cones precluded any cars from making turns at this intersection.

4. To eliminate the traffic jam, Murphy positioned himself in the roadway on Valleyview to signal cars to proceed or stop and allow other cars travelling on 66th Street to clear the route around the backhoe. Murphy was located just past the point in the road where cars would stop for the stop sign. When the route around the backhoe was clear, Murphy stepped aside and signalled the waiting cars to go through the intersection. When he was performing this function Murphy was not wearing a high-visibility safety vest. Earlier in the day, Murphy had given his safety vest to another employee at a different site who had forgotten his vest. All other employees assigned to the worksite were wearing such vests. Murphy usually carries an extra safety vest in his vehicle. On July 10, however, he did not have one.

5. The traffic approached Murphy's position in the intersection at a slow rate of speed. Visibility was excellent. Murphy stood in the middle of the one open lane to ensure that the cars would stop, and he remained in the lane in front of the

stopped cars until a way was open for those cars to proceed. At that time, Murphy moved aside and allowed the cars to go forward. Murphy spent between five and fifteen minutes directing traffic and then left the roadway.

6. Gary Anderson, an inspector for the Department, was enroute to a different worksite when he saw Murphy in the street without a safety vest. Believing that a safety violation existed, Anderson proceeded to 66th and Valleyview. Anderson stopped his car before reaching the orange cones on Valleyview and took pictures of the site. Only a half-dozen vehicles were in the area when Anderson arrived, and no congestion existed. Because Murphy was not wearing a safety vest, Anderson instructed him to leave the street and undertook a partial inspection of a trench at the worksite. No potential violations were noted except Murphy's failure to wear a safety vest while working in the roadway.

7. G.L. Contracting maintains a company policy expressly requiring safety vests for employees working in roadways. Exhibit C. The Respondent's safety rule uses the same language used in the Department's rule. Ex. A at 6, 24. It provides vests free of charge to all employees. Employees are expected to wear them whenever they are working within a right-of-way. Supervisors attend annual training seminars on safety issues which are provided at no charge by Respondent. Exhibit B. In addition, weekly "tool box" talks on safety issues are held with all employees. The subjects change from week to week as scheduled by Respondent's safety director. Supervisors are responsible for ensuring that all employees follow the company's safety policy. The Respondent requires employees to abide by its safety rules. Employees can be and have been fired for noncompliance. Although none have been fired for failing to wear a safety vest, they have been reprimanded for failing to wear a vest when required and are not permitted to work within a right-of-way without a proper vest. When the Respondent's president learned of the violation, he verbally warned Murphy to abide by the rules at all times.

8. Based on the inspection held on July 10, 1991, a Citation and Notice of Penalty was issued on August 6, 1991. The citation was for a serious violation of Minn. Rule 5207.0100. G.L. Contracting contested the citation but not the penalty, by letter dated August 8, 1991. The Department issued a Summons and Complaint on September 20, 1991. G.L. Contracting answered the Complaint on September 27, 1991. The Notice and Order for Hearing in this matter was issued on September 8, 1993.

9. Murphy realized that he was violating safety rules when he began directing traffic at the intersection of 66th and Valleyview. He believed that the traffic jam created a greater risk of injury to employees than the risk created by his failure to wear a proper vest. However, compliance with the rule was not impossible. Nothing precluded Murphy from obtaining a vest from another employee at the site and having the employee leave the right-of-way for a short time while he took care of the traffic problem.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. 182.661, subd. 3, and 14.50.
2. The Notice of Hearing was proper in all respects and all procedural and substantive requirements of law and rule have been fulfilled.
3. G.L. Contracting is an employer within the meaning of Minn. Stat. 182.651, subd. 7.
4. The Department has the burden of proving, by a preponderance of the evidence, that G.L. Contracting violated Minn. Rule 5207.0100 when its employee stood in the roadway directing traffic without wearing a safety vest.
5. G.L. Contracting violated Minn. Rule 5207.0100 (1991) when one of its supervisors stood in the roadway to direct traffic without wearing a safety vest.
6. G.L. Contracting's violation of Minn. Rule 5207.0100 was a serious violation for purposes of Minn. Stat. 182.651, subd. 12 (1990).
7. The Respondent established that the violation which occurred resulted from an isolated instance of employee misconduct and the citation and penalty should, therefore, be vacated.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

The Citation charging Respondent with a violation of Minn. Rule 5207.0100 issued by Complainant on August 6, 1991 and the penalty of \$209.00 imposed for the Citation is VACATED.

Dated this of February, 1994

JON L. LUNDE
Administrative Law Judge

Reported: Taped (No. 20573)
No Transcript

MEMORANDUM

Respondent is charged with a violation of Minn. Rules pt. 5207.0100. The Rule states in part:

Employees exposed to vehicular traffic when the work area is on the driving lanes or on the shoulders or berms, or on the median adjacent to streets, highways, or roadways shall be provided with and required to wear warning vests or other high visibility garments. . . .

Respondent admitted that Murphy violated the cited rule by directing traffic in a roadway without wearing a warning vest or high visibility garments. It argued, however, that the citation and penalty should be dismissed because the department did not schedule a hearing in a timely, fashion, an emergency existed, and Murphy's acts were an isolated instance of employee misconduct.

Under Minn. Stat. 182.66, subd. 1 (1990), the Commissioner must, not later than six months following an inspection, issue a written citation to the employer by certified mail. If a protest is filed, a complaint must be served within 90 days after receipt of the Notice of Contest pursuant to Minn. Stat. 182.661, subd. 6 (1991). The citation and complaint in this case were issued promptly and in full compliance with statutory provisions. Although more than two years elapsed before the Department scheduled this matter for hearing, Respondent failed to show that that delay violated any legal limitation period or that the Respondent was prejudiced by the delay. Consequently, Respondent's request for a dismissal on the grounds that the hearing was not scheduled in a timely manner must be dismissed.

The Respondent also argued that an emergency existed which justified Murphy's actions on July 10, 1991. That argument must be rejected because nothing precluded Murphy from obtaining a vest from another employee before he began directing traffic. Admittedly, the other employee might be required to leave the worksite for a short period of time. Nonetheless, Murphy's violation of the standard when that alternative was available to him was unjustified.

Finally, the Respondent argued that the citation and penalty should be vacated because the violation was an isolated instance of employee misconduct. In order to establish that defense an employer must show that it has established work rules designed to prevent the violation, has adequately communicated the work rule to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. As is discussed below, the Administrative Law Judge is persuaded that the Respondent has established all four elements in this case and the citation and penalty should, therefore, be vacated. Jensen Construction Co., 1979 CCH OSHD 23,664 (1979).

The defense of unpreventable employee misconduct was discussed in Daniel Construction Co., 1982 CCH OSHD 26,027 (Review Commission 1982). In that case the Review Commission noted that an employer asserting the defense of unpreventable employee misconduct must prove that the employee's noncompliance with a

standard departed from a uniformly and effectively enforced workrule." It also noted that when a supervisor is involved in the misconduct, there is strong evidence that the employer's safety program was lax, and that an employer's burden of proof is more rigorous when a supervisor commits a violation because it is the supervisor's duty to protect the safety of employees under his supervision. Id., at 32,672. In Greer Architectural Products, Inc., 1989 CCH OSHD 28,601, a citation charging an employer with a safety violation for allowing employees to work outside guardrails without being tied off or otherwise protected from an accidental fall was vacated on the grounds of unpreventable employee misconduct. The foreman who was charged with the violation testified that he always wore his safety belt and always hooked up to the guardrail except on the occasion when he was observed by the compliance officer. In that case, the foreman had given his safety belt to an employee earlier in the inspection in order to abate a violation. Later he stepped over a wire guardrail to check a measurement without using a belt. The general superintendent ordered him back inside the cable. The Judge in that case concluded that the employer effectively communicated and enforced its work rule and had never had to warn the foreman about not wearing a safety belt and had no reason to believe that he would violate the company's rules.

In this case the Respondent had a written work rule requiring all employees to wear their safety vests when working inside the right-of-way of a road. This safety policy was communicated to all employees in a written safety booklet. The booklet is revised annually and each employee had to verify that he read the policy on an annual basis. Furthermore, supervisors attended annual safety programs and foremen held weekly safety programs with all employees. The subject of those weekly meetings varied from week to week as determined by the Respondent's safety director. The Respondent uniformly enforced the rule regarding safety vests and prohibited employees from working within the right-of-way without a vest. The employer provided vests to all employees and routinely repurchased additional vests. Usually, the foreman on a job site had extra vests available and Murphy himself usually had an extra vest in his vehicle. On the day in question, Murphy did not have an extra vest and had given his vest to an employee at another site who had forgotten his vest at home. The Administrative Law Judge is persuaded, under the circumstances, that the employer had a work rule prohibiting employees from working on streets and roads without a safety vest, that the rule was effectively communicated to employees and enforced by the Respondent's supervisor and job foremen. It is concluded, therefore, that the Respondent has established the elements of unpreventable employee misconduct and that the citation and penalty should be vacated. Although Murphy was a superintendent he testified that he always wears a vest when within a right-of-way. His testimony was credible and persuasive.

Although the Respondent has never discharged an employee for failing to wear a vest, it had discharged employees for other safety violations and routinely reprimanded employees who violated the rule and required that they not work in a

right-of-way without a vest. The record shows that all employees at the worksite prior to Murphy's arrival were wearing proper vests and the fact that Murphy himself had given his vest to another employee who forgot his, shows that the Respondent did enforce its work rule requiring employees wear safety vests. The Respondent had no reason to believe Murphy would violate company rules and warned Murphy about his violation. Based on all these circumstances, and the fact that Murphy's violation was an isolated instance of short term occurring under potentially dangerous circumstances dismissal is appropriate.

JLL