In a decision which rejects a long-standing disputed interpretation of the OSHA law by the Secretary of Labor, the Fifth Circuit U.S. Court of Appeals has ruled that a contractor was not liable for an unforeseeable act in violation of OSHA committed by the contractor’s job foreman and another employee.

Horne Plumbing and Heating Company, a subcontractor, had been cited and fined as a result of a fatal cave-in of an unshored trench in May, 1972. Horne had proven that adequate instructions had been given to its foreman and employees, and adequate materials had been provided at the job site with which to build and install proper trench shoring. Nevertheless, the shoring had not been installed in the part of the trench which eventually collapsed, and the foreman had taunted one employee who mentioned the dangerous situation, “If you’re right with God, you have nothing to worry about.”

The Occupational Safety and Health Review Commission, applying principles of civil law applicable to negligence cases, ruled that the foreman was part of the management of the company, and therefore, the company was automatically responsible for all of his actions, regardless of whether or not his actions were in conflict with established company policies and the foreman’s own personal experience (which in this case included over 20 years experience as a journeyman plumber).

Despite the fact that the violation had been committed by a foreman, the court ruled that “it would be inconsistent with the purposes and policies of the Act and contrary to the express language of section 17 (k) [of the Act] to penalize Horne for violations of which he had no knowledge, which he could not have foreseen, and which he had taken such elaborate measures to prevent.”

ASA’s General Counsel, McNeill Stokes, whose law firm handled the case, stated that “this decision should settle once and for all that an employer cannot be held liable for its employees’ OSHA violations, where the employer has adequately instructed the employees in the proper way to do their work without committing violations, and the employees’ past experience does not give the employer any reason to believe they will intentionally disregard their instructions and commit unsafe acts.” Stokes added, “This decision is in line with previous decisions of the courts and the Review commission, but the Secretary of Labor has disputed whether an employer could defend an OSHA citation on this basis where it was a foreman who committed the violation. This decision puts to rest any doubt on that interpretation.”

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