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COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v. **CASE NO. PUE980898**

THE DRIGGS CORPORATION,
Defendant.

REPORT OF DEBORAH V. ELLENBERG, CHIEF HEARING EXAMINER

June 1, 2001

On July 15, 1999, the State Corporation Commission issued a Rule to Show Cause against the Driggs Corporation ("Driggs" or "Defendant"). Therein the Commission stated that the Division of Energy Regulation (the "Division" or "Staff") had conducted an investigation and alleged that on or about October 19, 1998, while excavating, Defendant damaged a sixteen-inch steel gas main line operated by Virginia Natural Gas, Inc. ("VNG") located at or near the Grove Interchange, also known as the Busch Gardens Interchange, in James City County, Virginia.[1] The Division alleges that Defendant failed to take all reasonable steps to protect the underground utility line, in violation of § 56-265.24 A of the Code of Virginia. The Division also alleges that the Defendant failed to immediately notify VNG, the operator, of damage that occurred as a result of that failure in violation of § 56-265.24 D. The Division recommends the Commission enter an order directing Driggs to take action consistent with its obligations under the Underground Utility Damage Prevention Act (the "Damage Prevention Act")[2] and impose civil penalties pursuant to § 56-265.32 A of the Code of Virginia.

After considering the allegations, the Commission concluded it was appropriate to take evidence to determine if the alleged violations occurred, and if so, whether the enforcement action proposed by the Division was appropriate.

On September 10, 1999, Driggs, by counsel, filed its Answer to the Rule. It denied the allegations relevant to the incident still before the Commission, and further stated that even if the Commission finds that Driggs was the proximate cause of the alleged damage, such damage occurred despite Driggs' exercise of reasonable care. Defendant opined that any damage may have resulted from an isolated occurrence of employee misconduct despite significant training by Driggs. Defendant further asserted that it did not violate the Code for failure to notify the operator because it did not possess knowledge of the incident prior to the investigation by VNG. Defendant therefore moved the Commission to dismiss the case.

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[1]The Rule contained alleged violations associated with other incidents docketed as Case Nos. PUE980407 and PUE980543. Those matters were the subject of Orders of Settlement issued on November 1, 1999, and therefore were dismissed from the Commission's active docket, and are not before the Commission in this case, Case No. PUE980898.
[2]Virginia Code § 56-265.14 et seq.

On September 17, 1999, Staff filed a Response to Motion to Dismiss and opposed Defendant's prayer to dismiss the case. Staff argued that Defendant's admission that the incident occurred was sufficient basis for the Commission to receive evidence on the allegations.

Since the Commission, on November 1, 1999, entered Orders of Settlement addressing several incidents described in the July 15, 1999, Rule to Show Cause but assigned Case Nos. PUE980407 and PUE980543, the Division sought amendment and clarification of the remaining allegations against Driggs. On November 3, 1999, Staff advised that it intended to proceed against Driggs as to the incident described in Paragraph (5) of the July 15, 1999, Rule, and asked the Examiner to dismiss the allegations pertaining to and relief sought for Paragraphs (1) and (3). By Hearing Examiner Ruling dated November 4, 1999, the remaining matter subject to further proceedings was clarified as follows:

(1) On or before October 19, 1998, the Company damaged a sixteen-inch steel gas main line operated by Virginia Natural Gas, Inc., located at or near Grove Interchange (Busch Gardens), James City County, Virginia, while excavating.

(2) With respect to the incident described in Paragraph (1) above, the Company failed to take all reasonable steps to protect the underground utility line, in violation of § 56-265.24 A of the Code of Virginia, and failed to immediately notify the operator of the damage, in violation of § 56-265.24 D of the Code of Virginia.

(3) Based upon its investigation, the Division of Energy Regulation recommends that, consistent with Rule 20 VAC 5-309-50 B of the Commission's Rules for Enforcement of the Underground Utility Damage Prevention Act, the Commission enter a remedial order directing The Driggs Corporation to take action consistent with its obligations under the Underground Utility Damage Prevention Act, Chapter 10.3 (§ 56-265.14 et seq.), of Title 56 of the Code of Virginia, and imposing the civil penalties provided for by § 56-265.32 A of the Code of Virginia.

A hearing to receive evidence on the alleged violations began on April 18, 2000, and concluded on April 20, 2000. Transcripts of the hearing are filed with this Report. Counsel appearing were Sherry Bridewell, Esquire, and Allison Held, Esquire, for the Division; and Richard F. Ensor, Esquire, and Gerald I. Katz, Esquire, for Driggs. Staff and Driggs filed post-hearing briefs on June 1, 2000.

SUMMARY OF THE RECORD

The facts relevant to this case are largely undisputed. On October 7, 1998, Kenny Weaver, a Driggs foreman, directed Jason Sharpe, also an employee of Driggs, to operate a bulldozer in the vicinity of the pipeline to blend grades in the area.[3] During that excavation Mr. Sharpe hit and

[3]Transcript 225-226, 229.

damaged VNG's pipeline.[4] Mr. Sharpe testified that he notified his supervisor, Kenny Weaver.[5] Neither Kenny Weaver nor Jason Sharpe informed Driggs' management of the damage to the pipeline until Friday, October 16, 1998.[6] VNG was advised that the pipeline had been hit on Monday, October 19, 1998.[7]

Jason Sharpe testified that after the incident, the top of the pipeline was left exposed; however, the line was covered with 8 to 12 inches of dirt when the VNG employees visited the area on October 12th and 16th.[8] Mr. Sharpe testified that he did not backfill over the damaged pipeline.[9] Mr. Weaver was not called to testify. Driggs infers that once Jason Sharpe left the area, Kenny Weaver placed several inches of dirt on the pipeline to cover up the damage.[10]

The evidence supports a finding that Jason Sharpe damaged the pipeline while excavating with a bulldozer on October 7, 1998; that Kenny Weaver and Jason Sharpe had knowledge of the damage to the pipeline on October 7, 1998; that they failed to report the incident to their employer until October 16, 1998; and that VNG was not notified until October 19, 1998.

The record is also clear that the VNG underground natural gas main was clearly marked with paint and flags. Donald Tate, a locator for NOCUTS, Inc. marked the line on September 16, 1998.[11] Jeffrey T. Anthony, a supervisor and locator for NOCUTS, marked the facility with paint and flags on October 4, 1998.[12] Mr. Saffoori, a consultant with VDOT, testified that he spent 75% of his time in the field and had observed that the line was marked with paint and flags.[13] The pipeline was also marked with high visibility yellow permanent pipeline markers that stood at least five feet high, with one located about ten feet from where the incident occurred. It was located directly over the pipeline.[14] Moreover, the Driggs supervisor incident report acknowledges that the area was clearly marked.[15]

Driggs does not deny that the natural gas main was cut by one of its employees, that notice was not provided to VNG at the time the line was hit, or that the pipeline was covered up after the incident. However, Driggs asserts that it exercised reasonable care and took all reasonable steps necessary to protect the VNG pipeline.

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[4]Transcript 225-227; 229; Staff Exhibit 23.
[5]Transcript 227.
[6]Transcript 266-67, 311, 195; Exhibits 20 and 24.
[7]Transcript 105, 228; Staff Exhibits 1 and 6.
[8]Transcript 171, 228, 235.
[9]Transcript 228, 235.
[10]Driggs Brief at 15.
[11]Transcript 30-46.
[12]Transcript 68-81.
[13]Transcript 215-216.
[14]Transcript 90.
[15]Staff Exhibit 20.

Driggs had entered into a contract with VDOT to remove approximately one million yards of earth over a 2-3 year period at and around the Busch Gardens Interchange in James City County, Virginia.[16] Driggs held meetings with VNG, other utility companies, VDOT, and local government officials to coordinate the project.[17] Driggs and VNG established a reasonable procedure for excavation near the sixteen-inch steel gas main pipeline owned and operated by VNG and located in the project area. Driggs agreed that VNG would be contacted several days prior to any excavation near the pipeline and test pits would be hand dug to determine the location and depth of the pipeline.[18] Moreover, it was agreed that any such excavation would be performed only with VNG present.[19] Mike Knox, an employee of VNG with 20 years of experience in the field, testified that VNG requests that all contractors call VNG prior to working above a pipeline. When it receives such a call, VNG routinely sends a representative out to observe construction. Mr. Knox reported that a contractor must dig two feet away from a pipeline. Laborers can use shovels but are not allowed to use "mechanized equipment on top of the pipeline."[20] Mr. Costello, a former Driggs foreman and Mr. Weaver's supervisor at the time of the incident, acknowledged that Driggs was not supposed to go anywhere near the pipeline unless it contacted VNG.[21] He reported that it was Driggs' practice to contact VNG three or four days before any such work, to schedule meetings to dig test pits.[22] Neal Emerson, also employed by Driggs at the time of the incident, testified it was Driggs' normal practice to call VNG, and to dig test pits to determine the depth and location of the pipeline.[23] Terry Ingham, a Driggs employee, added that, pursuant to the agreement, Driggs and VNG had dug over forty test pits.[24]

Driggs also offered evidence on the training provided to its management team, equipment operators, and laborers. At the beginning of the project and every year thereafter, a number of employees traveled to the corporate office in Maryland for a training seminar on the Damage Prevention Act.[25] No evidence was offered to support a finding that either Mr. Sharpe or Mr. Weaver were part of that group.[26] The Company also conducted weekly "toolbox meetings," which covered a number of safety issues.[27] Several meetings addressed the requirement that utility lines be located by digging test pits prior to excavation, the necessity of hand digging around utility lines, the improper use of mechanized equipment within 2-3 feet of such lines, and the procedures to follow in the event of an accident.[28] However, there is no evidence that pipeline safety procedures were covered in toolbox meetings attended by Mr. Sharpe or Mr. Weaver.[29]

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[16]Transcript 334.
[17]Transcript 292.
[18]Transcript 262.
[19]Transcript 262-263.
[20]Transcript 155.
[21]Transcript 262.
[22]Id.
[23]Transcript 205.
[24]Transcript 306.
[25]Transcript 339.
[26]Transcript 224-225, 340.
[27]Transcript 233, 206, 261, 292.
[28]Transcript 298-306; Driggs Exhibit Nos. 27-30.
[29]Driggs Exhibits 27-31.

The Company offered evidence that its corporate safety department had also issued a written directive on June 1, 1998, stating in pertinent part:

> Once the utility markings/flags are in place, the exact location of the utility MUST be determined by test pitting. Test pitting is only done with a shovel – a shovel – only a shovel. A machine is not to be used.[30]

Terry Ingham, Driggs' project manager, testified that he provided a copy of that directive to all superintendents and foremen.[31]

Finally, Driggs asserts that it maintained adequate supervision over its employees.[32] Mr. Costello, Kenny Weaver's immediate supervisor, testified that on numerous occasions he specifically instructed Mr. Weaver to stay away from the VNG pipeline.[33] Mr. Costello testified that on the day of the incident he had again instructed Kenny Weaver not to excavate within 20 feet of the pipeline.[34]

DISCUSSION

With undisputed evidence that an employee of Driggs damaged the pipeline, and VNG was not notified until twelve days later, the unresolved question becomes whether Driggs exercised reasonable care as required by the Code of Virginia.[35]

Staff asserts that Driggs failed to take all necessary steps to protect the pipeline, and therefore failed to exercise reasonable care. Staff contends that Driggs did not follow its own procedures on October 7, 1998, when an employee of Driggs damaged the VNG pipeline, and VNG was not timely notified. Staff also contends that Driggs did not properly train its equipment operator, Jason Sharpe, or the operator's foreman, Kenny Weaver, on underground utility damage prevention procedures.[36] Staff further contends that if either Sharpe or Weaver had been properly trained, one of them would have known the proper safety procedures to use when working around a clearly marked gas pipeline. Staff asserts that Driggs' failure to provide any damage prevention training to Jason Sharpe and Kenny Weaver contributed to its violation of Virginia Code § 56-265.24 A and demonstrates its failure to exercise reasonable care with regard to the incident. Staff argues that putting an untrained supervisor in the field to look out for an untrained employee is particularly negligent.[37]

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[30]Transcript 290; Driggs Exhibit 26.
[31]Transcript 290, 330.
[32]Transcript 314.
[33]Transcript 263, 273, 209, 212; Staff Exhibits 20 and 24.
[34]Transcript 263.
[35]Transcript 310.
[36]Staff Brief at 9.
[37]Staff Brief at 10.

Driggs argues that despite its reasonable efforts, its employee, Kenny Weaver, in direct contradiction to the VNG agreement and Driggs' procedures and training, directed Jason Sharpe to excavate in the area of the pipeline.

Driggs argues that the Damage Prevention Act imposes liability for failure to exercise "reasonable care" and not strict liability.[38] Driggs asserts that the events which gave rise to the damage did not result from Driggs' failure to exercise reasonable care. Driggs argues that the unpreventable employee misconduct doctrine developed in federal law for application of the Occupational Safety and Health Act ("OSHA") should be applied here, and provides that an employer's duty to comply with the law does not extend to the abatement of dangers created by unforeseeable or unpreventable employee misconduct.[39] Driggs argues that strict liability should not be imposed on an employer for the acts of an employee that are in direct contradiction to the training, rules, or supervision provided by the employer.[40] Rather, Driggs asserts that it acted reasonably when it established a company policy, developed a course of action with VNG to provide for excavation around the pipeline, and provided regular training.

The analysis in this case begins with the applicable statutory language. Virginia Code § 56-265.24 A clearly outlines the duties of an excavator and provides that:

> Any person excavating within two feet of either side of the staked or marked location of an operator's underground utility line or demolishing in such proximity to the underground utility line that the utility line may be destroyed, damaged, dislocated or disturbed, <u>shall take all reasonable steps necessary to properly protect, support and backfill underground utility lines</u>. This protection shall include but may not be limited to <u>hand</u> digging, within the limits of the planned excavation or demolition, starting two feet of either side of the extremities of the underground utility line for other than parallel type excavations and at reasonable distances along the line of excavation for parallel type excavations. (emphasis added).

The Code does not impose strict liability for any damage, but required Driggs to take reasonable care to protect the pipeline while excavating around it. The Commission has addressed "reasonable care," finding that:

> '[r]easonable care' is a relative term, and varies with the nature and character of the situation to which it is applied. The amount or degree of diligence and caution necessary to constitute reasonable care depends upon the circumstances and the particular factual context of each case. *Perlin v. Chappell*, 198 Va. 861, 864 (1957). While the custom of a business may provide evidence of the exercise of

[38] Driggs Brief at 2.
[39] *Pennsylvania Power and Light Co. v. OSHRC*, 737 F.2d 350 (3rd Cir. 1984).
[40] *Brennan v. OSHRC*, 511 F.2d 1139, 1144-45 (9th Cir. 1975).

> reasonable care, it is not necessarily conclusive of what reasonable care would demand in a particular case.[41]

In the NOCUTS case cited, the Commission found that inadequate staffing and failure to take timely measures to mitigate staffing problems were evidence of a failure to exercise reasonable care under the Damage Prevention Act.[42]

The Virginia Supreme Court has also stated that reasonable care can be viewed as "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another."[43] (citing *Griffin v. Shiveley*, 227 Va. 317 (1984)).

I agree with Staff that Driggs failed to exercise reasonable care in this instance. Although Driggs outlined a reasonable procedure for excavating around the pipeline that should have assured compliance with the Damage Prevention Act, the Company failed to properly train and supervise Jason Sharpe and Kenny Weaver to assure compliance with that procedure. Mr. Sharpe was employed by Driggs in August or September 1998, and testified that he could not recall receiving any training about damage prevention.[44] The Company asserts that weekly toolbox meetings were held to instruct employees on various safety issues.[45] Those meetings, however, were held to comply with OSHA requirements, not to train employees on the requirements of the Damage Prevention Act. Moreover, the evidence is clear that neither Mr. Weaver nor Mr. Sharpe attended the few meetings that even mentioned the subject of pipeline safety.[46] Although there is evidence that Mr. Weaver was told to stay away from the pipeline, there is no evidence that he received any training on the Damage Prevention Act, the importance of the requirements of that Act, the procedures outlined in the agreement with VNG, the absolute prohibition of the use of mechanical equipment anywhere around the pipeline, or even how to determine the location of the pipeline. Similarly, and equally troubling, is the failure to provide reasonable supervision of the field work on the day of the incident. Driggs asserted it provided proper oversight, but offered no evidence to support its claim. To the contrary, failure of anyone to even notice the operation of a bulldozer in the area indicates failure to provide reasonable care. Driggs clearly did not exercise reasonable care to protect the pipeline from damage by its employees and therefore violated Virginia Code § 56-265.24 A.

Terry Ingham also testified that Driggs experienced problems with the location and depth of the pipeline.[47] However, as Staff observed, there is no required depth for gas pipelines and the contractor's obligation under the Damage Prevention Act is not mitigated by variable depth.[48] The Damage Prevention Act, however, does make clear that reasonable care must be exercised to protect the line when excavating within two feet of the marked or staked horizontal locators. Driggs knew or should have known where the pipeline was located and exercised reasonable care to keep its employees from operating equipment within two feet of the underground line. It knew only hand

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[41] *SCC v. NOCUTS, Inc.*, Case No. PUE980621, 1999 S.C.C. Ann. Rep. 435, 436.
[42] Id. at 438.
[43] *Gossett v. Jackson*, 249 Va. 549, 554 (1995).
[44] Transcript 223.
[45] Transcript 296-297.
[46] Transcript 325.
[47] Transcript 284.
[48] Staff Brief at 11; Virginia Code §§ 56-265.14 et seq.

digging was allowed. Problems locating the depth of the pipeline are not relevant to the violations alleged here.

Staff also alleges violation of § 56-265.24 D of the Code which requires the person responsible for excavation that causes damage to an underground utility line to notify the operator of the line immediately, and prohibits any backfilling around the line until the operator has repaired the damage and given clearance to backfill. Staff asserts that Driggs failed to notify VNG immediately of the damage to the pipeline, as prescribed by law.

Driggs asserts that it was neither informed nor aware of the incident on the day it occurred, that VNG was aware of the "potential damage" prior to Driggs' discovery, and that Driggs' efforts to notify VNG after Driggs learned of the incident satisfied the requirements of the Damage Prevention Act.[49]

Virginia Code § 56-265.24 D provides that:

> [i]n the event of any damage to, or dislocation, or disturbance of any underground utility line including its appurtenances, covering, and coating, in connection with any excavation or demolition, the person responsible for the excavation or demolition operations shall immediately notify the operator of the underground utility line and shall not backfill around the underground utility line until the operator has repaired the damage or has given clearance to backfill.

The VNG pipeline was damaged on October 7, 1998.[50] On Monday, October 12, Robert Hornsby, an employee of VNG, advised Mike Knox, also with VNG, that he noticed some grading work had been done in the vicinity of the pipeline, and that Driggs' equipment may have come into contact with the line.[51] They, however, did not have affirmative knowledge that the line had been hit, and no gas was leaking from the pipeline. Therefore neither Mike Knox nor Robert Hornsby considered an immediate investigation necessary or an emergency to exist. They determined they could further investigate at a meeting with Driggs already scheduled for the end of that week.[52] Driggs was advised of VNG's observation at the scheduled meeting. Driggs began its investigation. Upon questioning, Jason Sharpe informed the project management team, that he had hit the line on October 7, that he had informed his supervisor, and that he had not backfilled over the line. Driggs followed its standard procedure and documented the incident.[53] Driggs did not complete its investigation of the incident until late Friday afternoon, October 16, 1998. Mr. Ingham testified he called VNG but was unable to reach anyone because it was after 5 on Friday. He did not contact Mr. Knox who testified that he was on standby all weekend and that his pager number and cell phone number were readily available to Driggs. Mr. Ingham did not contact the emergency number for VNG which is answered 24 hours a day, seven days a week. Mr. Ingham instructed Neil Emerson to advise VNG on Monday morning, October 19, 1998, that Driggs may have hit the line.

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[49]Driggs Brief at 15.
[50]Staff Exhibit 20.
[51]Staff Exhibit 7.
[52]Transcript 164.
[53]Transcript 318-328.

Accordingly, VNG was notified of the incident upon VNG's arrival at the construction site on October 19, 1998.[54] Driggs contends that it was reasonable to wait until Monday rather than call the emergency number because VNG was already aware that the pipeline might have been hit.

Staff asserts that since both Jason Sharpe and Kenny Weaver were employees and agents of the Defendant, their knowledge of the damage is imputed to Driggs.[55] Jason Sharpe knew on October 7, 1998, that he had hit and damaged the VNG pipeline.[56] Mr. Sharpe also informed his foreman, Kenny Weaver.[57] Yet, VNG was not notified until close to two weeks after the incident. Staff argues that although VNG suspected prior to October 19, 1998, that there might be damage to the pipeline, Driggs was not absolved of its obligation under the Act to report it.[58] Staff argues that the Code provides no exception to the notification requirement even if the operator of the utility suspects damage to the pipeline.

Driggs admits that "as a general rule, the knowledge of an agent is imputed to his principal."[59] Driggs asserts that despite its efforts to exercise reasonable care, the VNG pipeline was damaged as a result of a single employee's intentional and knowing disregard of the safety procedures established by Driggs, and that the same individual, Kenny Weaver, intentionally failed to inform management of the incident when it occurred. Driggs argues that the factual circumstances in this case differ from the more typical situation in which an excavator damages a utility line and fails to contact the utility operator. It argues that not only was the damage to the pipeline purposefully concealed from Driggs, but Driggs was not even aware that any excavation had occurred near the pipeline, until questioned by VNG on October 16. Driggs contends that the facts support its contention that Kenny Weaver's failure to inform Driggs was motivated by his personal interest in remaining employed and not receiving sanctions for an incident that was not in his employer's interest, but rather, was in direct conflict with Driggs' procedures. Driggs therefore asserts that Kenny Weaver's knowledge of the incident cannot be imputed to Driggs and the penalty for failing to notify VNG of the damage cannot be imposed.[60]

Again, I agree with Staff. If an act is done in the course of employment, an employer may be liable for the acts of the employee.[61]

> An act is within the scope of the employment if (1) it be something fairly and naturally incident to the business, and (2) if it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did

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[54]Transcript 204.
[55]*Fulwiler v. Peters*, 179 Va. 769 (1942).
[56]Transcript 225.
[57]Transcript 227.
[58]Staff Brief at 15.
[59]Driggs Brief at 13.
[60]Id. at 15-16.
[61]*Davis v. Merrill*, 133 Va. 69 (1922) and *Tri-State Coach Corp. v. Walsh*, 188 Va. 299 (1948).

> not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.[62]

There are exceptions to this general rule. The agent's knowledge will not be imputed to the principal if the agent's conduct raises a presumption that he would not have reported the information to the principal, or where the agent is in reality acting in his own personal interest and adversely to the principal's interest, or has a motive in concealing the facts from the principal.[63]

The employees here were clearly performing excavation work within the scope of their employment.[64] Mr. Sharpe was working grade as he had been instructed by Mr. Weaver. Mr. Weaver was performing duties as a supervisor of that fieldwork regardless of how ill-advised it was to direct work in the area of the pipeline. There is no evidence that he had sufficient training to fully appreciate why it was critical that only hand digging be done around the pipeline. On cross-examination by Staff, Mr. Ingham testified that Mr. Weaver had never before disregarded Driggs' procedures.[65] Further, there is no evidence that Jason Sharpe or Kenny Weaver received any training on the proper procedure to follow after a pipeline has been hit. The facts of this case do not support an exception to the general rule of law. Driggs should be held responsible for the failure to notify VNG.

Moreover, Driggs failed to take readily available means to contact VNG when it completed its investigation of the incident on October 16. Twenty-four hour VNG contacts were available and well known by Driggs. Although VNG had reason to believe excavation over the pipeline may have occurred, Driggs confirmed on October 16 that the pipeline had been hit. The law requires immediate notification to the operator who can better judge the risk involved and take appropriate action. Mr. Knox stated that had he been notified on Friday that the pipeline was damaged, he would have had a crew out Saturday morning to dig it up and repair it.[66] It is well settled that a principle is liable for the negligent acts of his agent who is acting within the scope of employment although the principle did not know or authorize the conduct.[67]

The facts support findings that Driggs violated Virginia Code §§ 56-265.24 A and D. Virginia Code § 56-265.32 provides that "[t]he Commission may. . .impose a civil penalty not exceeding $2,500 for each violation, if it is proved that the person violated any of the provisions of this chapter, except § 56-265.16:1, as a result of a failure to exercise reasonable care."

Staff urges the Commission to impose the maximum penalties permitted by Code § 56-265.32 A, a penalty of $2,500 for each violation of the Act or a total of $5,000. Staff also seeks an injunction against Driggs from committing further violations of the Act. Staff witness Tahamtani

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[62] *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 300 (1948).
[63] *Fulwiler v. Peters*, 179 Va. 769 (1942) (quoting *Federal Reserve Bank v. Duffy*, 210 N.C. 598, 188 S.E. 82 (1936)); *Martin Marietta Corp. v. Gould, Inc.*, 70 Fd. 3d 768 (4th Cir. 1995).
[64] Transcript 225.
[65] Transcript 312.
[66] Transcript 348.
[67] *Jefferson Standard Life Insurance v. Hedrick*, 181 Va. 824 (1943).

testified Driggs has been subject to a number of incidents that have been investigated by Staff.[68] All but this incident have been the subject of settlements.[69]

Certain factors have been set forth by the Commission to determine the level of penalty warranted when settlement of alleged violations is reached. The Commission has also considered those factors in imposing penalties in litigated cases.[70] Those factors include the nature, circumstances, and gravity of the violation, the degree of the respondent's culpability, and the respondent's history of prior offenses. In this case, Staff urges the Commission to apply the maximum penalty because Driggs failed to exercise reasonable care while excavating around a pipeline pressurized with approximately 1,000 pounds per square inch of natural gas. VNG safety representative, Robert Long, testified that had the damage to the pipeline not been discovered and repaired, the pipeline would have eventually ruptured due to the pressure inside.[71] Further, Driggs' careless excavation caused approximately $11,000 in damage to the transmission line.[72] Driggs did not advise VNG until after VNG suspected damage and alerted Driggs that VNG intended to expose the pipeline to make its own assessment. Thus, the nature and gravity of the violations are severe. Moreover, Driggs has been investigated for a number of previous alleged violations which were the subject of settlement orders. I find the maximum penalty is warranted for both violations here.

Finally, counsel for the Staff has advised that the Defendant has filed a voluntary bankruptcy petition for liquidation. (11 U.S.C. §§ 701 through 766). The federal bankruptcy laws, however, do not affect the Commission's determination of this case.[73]

Section 362(b)(4) of the Bankruptcy Code[74] provides that "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is not subject to the Bankruptcy Code's automatic stay provision. The case presently before the Commission to enforce the Damage Prevention Act falls within this exception. The Bankruptcy Code further provides that a discharge pursuant to Chapter 7 or Chapter 11 does not discharge the debtor from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . ."[75] Thus the Commission's decision here on whether or not to impose a civil penalty for Defendant's violations of the Damage Prevention Act should not be affected.

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[68]Transcript 243.
[69]Transcript 246.
[70]*SCC v. T. K. Vann Services, Inc.*, Case No. PUE970395 et al., 1999 S.C.C. Ann. Rep. 379, 380.
[71]Transcript 127.
[72]Transcript 23.
[73]20 VAC 5-309-10.
[74]11 U.S.C. § 362(b)(4).
[75]11 U.S.C. § 523(a)(7).

Based upon the record herein, I find that:

1. Driggs violated §§ 56-265.24 A and D of the Act;

2. Driggs should be penalized for its failure to exercise reasonable care according to § 56-265.32 A of the Act; and

3. Driggs should be enjoined from further violation of the Act.

Therefore **I RECOMMEND** that the Commission:

1. ***ENTER*** an order consistent with these findings;

2. ***IMPOSE*** a penalty of $5,000 for two violations of the Act; and

3. ***ENJOIN*** Defendant from further violations.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

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Deborah V. Ellenberg
Chief Hearing Examiner