



DEPARTMENT OF THE NAVY  
OFFICE OF THE SECRETARY  
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WASHINGTON, D.C. 20350-1000

2000 AUG 7 August 2000 10:11 AM

Ms. Elaine Kaplan  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Re: OSC File No. DI-98-1483

Dear Ms. Kaplan:

This is in response to your letter of December 2, 1999, to the Department of the Navy, requesting an investigation and report of violation of law, rule, or regulation, and a danger to public health and safety occurring at the Department of the Navy, U.S. Marine Corps, Camp Pendleton, California, alleged by Mr. Jim J. Kent, Pipe fitter.

The Inspector General, Marine Corps received the allegations on December 15, 1999, and further tasked the Commanding General, Marine Corps Base Camp Pendleton to take action. As per the enclosure, four of the five allegations made by Mr. Kent have been substantiated or partially substantiated. The Commanding General concurs with the Inspector General's findings and recommendations and has directed the immediate implementation of actions to address urgent health and safety concerns.

Thank you for bringing this matter to my attention and please be assured that the Department of the Navy is strongly committed to rooting out any health and safety violation. As always if I can be of any further assistance, please let me know.

Sincerely,



Jerry MacArthur Hultin  
Secretary Of the Navy  
(Acting)

Enclosure:  
MC IG Report dated 31 Jul 00

5041  
IGA  
31Jul00

MEMORANDUM FOR THE INSPECTOR GENERAL OF THE MARINE CORPS

From: Director, Assistance and Investigations Division

Subj: INVESTIGATION INTO ALLEGATIONS OF VIOLATION OF LAW,  
RULES, OR REGULATIONS AND A DANGER TO PUBLIC HEALTH AND  
SAFETY AT MARINE CORPS BASE, CAMP PENDLETON FROM  
GENERALLY 1998 TO PRESENT

Ref: (a) Office of Special Counsel Letter of 2 December 1999  
(b) 5 U.S.C. § 1213(d)  
(c) 29 U.S.C. § 651, et seq., Occupational Health and  
Safety Act [OSHA]  
(d) DoDI 6055.1, dtd 19 Aug 1998, DoD Safety and  
Occupational Health Program  
(e) SECNAVINST 5100.10H, dtd 15 Jun 1999, DON Policy for  
Safety, et al  
(f) 29 CFR 1926.652, Excavations  
(g) 29 CFR 1001, Asbestos  
(h) 29 CFR 1960.10, Responsibility of Employee  
(i) FMD Order 5100.1, Excavations & Protective Systems  
(j) MCO P5100.8, MC Occupational Safety & Health  
(k) 29 CFR 1910.134, Respiratory Protection Program  
(l) BO 6260.8B, Occupational Respiratory Protection  
Program  
(m) BO P5100.2f, Base Safety Program  
(n) 29 CFR 1910.1101, Asbestos Standards

1. In response to reference (a), the Inspector General, Marine Corps was tasked to investigate the allegations made by Mr. Kent concerning possible violations of law and regulation pertaining to the health and safety of employees on Marine Corps Base [MCB] Camp Pendleton in 1998 and 1999. The Inspector General, in turn, assigned the conduct of the investigation to MCB Camp Pendleton. Colonel J.E. Switzer, Jr., USMCR, conducted the investigation. This report is submitted under reference (b).

2. The complainant alleged violations of OSHA standards concerning the lack or impropriety of shoring in excavations, and the command's failure to issue him a respirator and even after having reported this, being asked to sign a form verifying that he had received the respirator. The following summary

groups the allegations into excavation issues and asbestos/respirator issues.

### **The Excavation Issues**

*Applicable Law, Rule, or Regulation.* References (c) through (e) apply OSHA standards to all Marine Corps commands. Reference (f) requires shoring, sloping, or benching to protect persons from cave-ins, except when:

- (1) the excavation is entirely in stable rock, or
- (2) the excavation is less than five feet in depth and a competent person, after inspection of the ground, concludes there is no potential for cave-in. A competent person is defined as one who has the expertise to identify predictable hazards and has the authority to take corrective measures to eliminate them.

Generally, when OSHA approved commercial shoring is not used, a registered professional engineer must approve or design the shoring system used. Any sloping in class C soil, which is predominant at Camp Pendleton, must be at 1 ½ to 1 (34 degrees).

All supervisors and individual employees are responsible for compliance with OSHA rules. See reference (h).

- Allegation 1. The complainant alleged that in February 1998, his immediate supervisor, the Pipe Services Section supervisor, ordered the complainant, over his protest, to dig a tunnel, without proper shoring, under a road in the 23 Area of the air station.

*Finding.* **Partially Substantiated.**

That the complainant dug a hole over five feet deep without proper shoring, and both the complainant and his co-pipe fitter worked in that hole in April 1998 is **substantiated**; that the complainant's supervisor ordered the unsafe hole, directed a tunnel under a road, and that the complainant protested digging the unsafe hole is **unfounded**.

*Facts.* The complainant and a co-worker were tasked to work on an underground water leak at the 23 Area air station. The leak caused in the 23 Area air station hole to open up, undermining the road and the two workers called in heavy equipment to remove additional soil to expose the broken

pieces to allow repair. An attempt was made to slope the sides of the hole, but appropriate sloping was not feasible. The "on hand" shoring available at Camp Pendleton on 15 April 1998 was not usable or easily transportable. The metal shoring's hydraulics had deteriorated, the shoring trailer had flat tires, and the trailer hitch was not compatible with most pipe fitter trucks. The hole was at least six feet deep and the soil was wet. There was no plan, need, or intent by anyone involved to "tunnel" under the road. The complainant's co-worker testified that he did not feel that the hole was unsafe, that he would not have got into the hole if he felt it was unsafe, and that he was not ordered by anyone to get into the hole. He further stated that he is comfortable in refusing an order to enter an unsafe work environment and has done so in the past. The co-worker and the complainant's supervisor both attested that the supervisor did not order anyone to enter the hole; indeed, the supervisor assigns pipe fitters to fix leaks, but does not direct the manner in which they should dig their hole or otherwise accomplish their tasks. The supervisor routinely left work at the job site unsupervised. Complainant, moreover, was the senior pipe fitter at the site and directed all digging of the site. As such, his position description required him to be responsible for performing work in a safe manner and adhering to all safety regulations, and also to determine the necessary assistance from other trades, make arrangements for them, and direct the operator of the excavation equipment as to where to dig. A senior investigator at the base Joint Safety Center came upon the hole and photographed it with the complainant and his co-worker in the hole, ordered them out of the hole, and reported the safety violation to the complainant's supervisor, and also raised the incident at the next Facilities Maintenance Department (FMD) safety meeting.

During this timeframe pipe fitters at the emergency pipe maintenance shop routinely dug holes over five feet deep without shoring because the shoring before 1999 was obsolete. Adequate shoring was not available at Camp Pendleton. Normally, the pipe fitters would attempt to slope their holes, but sloping was occasionally prevented by roads, buildings, and light poles and like obstacles, in which case, they did their work in the unsafe holes. Time pressure, peer pressure, job security, lack of training, as

well as their personal beliefs that the holes were not really dangerous were factors affecting their decisions.

Further, there is no evidence that a competent person ever inspected this job site as required by 29 CFR 1926.652, Excavations. In addition, persons with "competent person" training did not appear to be readily available in the shop during this time period.

- Allegation 2. The complainant alleged that on April 30, 1998, his immediate supervisor ordered the complainant to dig a hole in the 17 Area officers housing to repair a ruptured water pipe, that the complainant protested because the hole was over five feet deep and without shoring, but was told by the supervisor to continue digging; the southeast wall of the hole collapsed on the complainant.

*Finding.* **Substantiated.**

The complainant was initially responsible for having dug this very dangerous hole. However, his supervisor's arrival at the site in the afternoon and his observation of the six foot deep, unshored, wet, vertical walled hole put him on notice that this hole was noncompliant and unsafe. He should not have allowed the complainant and his co-pipe fitter to continue to work in it without shoring, especially after having been informed of a previous unsafe hole in his shop two weeks before. Moreover, he should never have instructed two pipe fitters to enter this same hole after having been informed that portions of the vertical wall had already collapsed.

*Facts.* The complainant's supervisor assigned the complainant and a temporary co-worker, both pipe fitters, to perform an emergency repair on a water leak in the 17 Area Officers' housing. A third worker was assigned to assist with his backhoe. As the senior pipe fitter at the site, the complainant supervised both the co-pipe fitter and the backhoe operator in all digging at the site. The complainant and his co-pipe fitter worked mostly unsupervised at their job assignments.

Soon after her water was cut off, a resident had a heated exchange with the complainant regarding the lack of prior notice of the outage.

The leak was coming from a center island in the middle of a cul-de-sac with a light pole in the middle of the island. The "as-built" drawings clearly depicted a gas line running through the island near the water line. No dig alert or base utility locators were summoned, although the complainant and the co-pipe fitter testified that they requested the complainant's supervisor to do so. The supervisor testified that, if requested, he would have ordered the locators. They continued with the assignment. Eventually, the gas, telephone, and cable lines were cut by the backhoe, further unsettling the residents and necessitating emergency calls to the affected utilities. The complainant and his co-pipe fitter testified that while they were off site seeking barricades the backhoe operator dug on his own and hit the gas line. The backhoe operator denied this. The other utilities were cut while the complainant and the co-pipe fitter were directing the backhoe operation.

Subsequently, the complainant and the other pipe fitter got into the hole and continued to dig to expose the waterline by hand. The hole at that point was between five and seven feet deep, and the south wall was so unstable that the back-hoe operator lay his back-hoe bucket against it to try to prevent clumps of soil from sloughing off into the hole. The west and north walls were sloped enough for the two pipe fitters to walk up them; the west wall had steps cut into it.

The complainant's supervisor received a call generated by distraught tenants at about 1330 and, for the first time, visited the site. The depth of the hole upon his arrival exceeded six feet. He conversed with the complainant, gave advice on how to find the leak, retrieved some parts from a maintenance worker's truck, gave them to the complainant, and instructed him to get the leak fixed. The complainant and his co-pipe fitter testified that the complainant told his supervisor that the complainant planned to slope the south wall of the hole into the roadway, but the complainant's supervisor refused and directed the two pipe fitters to get in the hole and fix the leak. The complainant's supervisor and the backhoe operator refuted this statement. The supervisor stated that he never orders any pipe fitter into a hole, but only asks them to make the repair, leaving the manner of repair to them.

After the complainant's supervisor departed, the complainant and the co-pipe fitter did re-enter the hole. Thereafter, about two cubic feet of wet soil fell off the south wall and splashed against the complainant's feet and legs to the top of his boots. Contrary to his earlier statements, the complainant was not buried to his waist in mud, and his co-pipe fitter did not have to dig him out with a shovel. He had been squatting down and the soil created a wave in the muddy water at the bottom of the hole, splashing him and muddying his underwear. His co-pipe fitter was not affected by the collapse. The co-pipe fitter testified that he and the complainant discussed that the hole should probably be shored or sloped, and the backhoe operator recalls overhearing that discussion.

The complainant decided to leave the job site; it was at about the same time he normally quit work. He and the co-pipe fitter returned to the shop. There the complainant's supervisor asked them if the repair had been made, and was informed that it had not. He then asked them whether they were going to return to finish the repairs. The complainant refused, informed his supervisor that part of the wall had collapsed on him and that he was going home. The co-pipe fitter volunteered to return. The complainant's supervisor assigned the co-pipe fitter and another individual to complete the repairs on overtime. The complainant's supervisor accompanied them, noted that only a small amount of earth had collapsed and told the pipe fitters to proceed with the repairs. They did so.

A senior investigator from Base Safety visited the hole on April 30<sup>th</sup> and directed that it be shored before anyone else entered it. Homemade 3/8" plywood shoring was placed in the hole the next day so that the utility companies could make permanent repairs to their severed lines. This shoring was inadequate, and had not been approved by a registered professional engineer.

It was common practice at the emergency pipe maintenance shop during this timeframe to dig holes over five feet deep without shoring. Normally, the pipe fitters would attempt to slope their holes, but sloping was occasionally prevented by roads, buildings, light poles and like obstacles, in which case, they did their work in the unsafe holes. Time pressure, peer pressure, job security, lack of training, as well as their personal beliefs that the holes

were not really dangerous were factors affecting their decisions.

Adequate shoring was unavailable at Camp Pendleton during this time period. Further, there is no evidence that a competent person ever inspected this job site as required by 29 CFR 1926.652, Excavations. In addition, persons with "competent person" training did not appear to be readily available in the shop during this time period.

OSHA completed an investigation of the 17 Area incidents in August 1998, and on 2 March 1999, cited MCB Camp Pendleton for three serious violations and one willful violation of law and regulation on excavation. The serious violations were for failing to use utility locator services; using homemade plywood shoring not approved by a professional engineer; and failing to designate a competent person. The willful violation was for failing to provide proper shoring for the 17 Area hole after a supervisor saw it and commented that it needed shoring.

The Facilities Maintenance Officer responded to the OSHA citations on 10 May 1999. He stated that MCB Camp Pendleton had ensured that the specific employees involved in the 17 Area hole had received refresher training in locator service procedures; that 10 supervisors had attended the Navy construction course addressing shoring issues; that 25 employees, including supervisors and select journeymen, had attended competent person training; that copies of 29 CFR 1926 had been distributed to each FMD branch; and that 29 employees had received excavation issue training. The complainant's supervisor concedes that the purchase of the new shoring equipment at Camp Pendleton was precipitated by the OSHA investigation into the 17 Area hole.

Further, the Facilities Maintenance Officer sent a letter dated 9 June 1999 to all employees and supervisors reminding them of their safety responsibilities; and on 22 June 1999, he issued an FMD order on excavations clarifying the requirements and procedures for shoring and sloping holes.

- Allegation 3. The complainant alleged that he reported both the February 1998 and the April 30, 1998, incidents to the Facilities Maintenance Service supervisor, who supervised

complainant's immediate supervisor, but to the date of his complaint, no shoring material had been ordered.

*Finding.*     **Not Substantiated.**

*Facts.* On 3 September 1998 and 21 January 1999, FMD, through the complainant's supervisor, ordered a combined amount exceeding \$11,000 of new shoring equipment to replace the unusable equipment previously on hand at Camp Pendleton. The impetus appears to have been the OSHA investigation, not the complainant's letter.

- Allegation 4. The complainant alleged that on August 11, 1999, he personally observed a hole over eight feet deep that was dug to repair a sewage line in the 31220 Area of the lift station with no shoring, and that the complainant's supervisor oversaw the August trenching operation.

*Finding.*     **Partially Substantiated.**

That on 11 August 1999, the complainant saw a hole at the 31220 sewage lift station, and the hole was about eight feet deep with no shoring is **substantiated**; that the complainant's supervisor supervised that hole is **unfounded**, as he was on a training assignment in the FMD planning and estimating section on that date.

*Facts.* Based on his evaluation of two photographs, a senior investigator, Base Safety, testified that the 31220 Area lift station was "not that bad a hole." He criticized the lack of safety devices at the top. A registered professional engineer at the Navy Resident Officer In Charge of Construction [ROICC], however, examined the same photographs and opined that considering the depth, the moist soil, the large unsloped portions of the walls, and the lack of shoring, the hole does not meet OSHA standards and was unsafe. Even had a trench box been used, the walls near where employees moved during egress and ingress had to be protected.

The complainant's supervisor was not supervising the 36 pipe shop during this period, having been assigned for training in the planning and estimating section. Although records revealed that this job was assigned to the "80's" shop on 11 August 1999, the normal second level supervisor of the 80's shop related that he may have been on leave

during this period and did not at the time of his testimony know who had had direct supervision of this job.

### **The Asbestos/Respirator Issues**

*Applicable Law, Rule, or Regulation.* References (c) through (e) apply OSHA standards to all Marine Corps commands.

Reference (j) requires all persons who work with asbestos to be identified by the installation safety office and to be properly monitored by the base industrial hygienist. Reference (k) provides that if engineering methods are not available to protect personnel from asbestos, respirators must be used.

Per references (k) and (l), if identified by the Base Industrial Hygienist as requiring a respirator, the steps to receive a respirator are:

- (1) medical certificate (annual);
- (2) respirator training (annual);
- (3) fit testing (semi-annual);
- (4) issuance of respirator.

The employer has the duty to provide a respirator to an employee if necessary for his health. References (g) and (k).

The first line supervisor has the duty to ensure that his subordinates are issued a respirator, if exposure to asbestos is identified. Reference (m).

Each employee has a duty to ensure he has and uses his required personal protective equipment. References (h), (m), and (n).

Each supervisor and all individual employees are responsible for compliance with all OSHA rules. Reference (h).

#### • Allegation 5.

(a) The complainant alleged that after more than ten years of using friction saws to cut friable asbestos pipe, he has not been issued a respirator or been given equipment to determine the extent of his exposure to asbestos; that he has reported the problem to his first and second-line supervisors, but has not received the proper equipment; and that his first and second-line supervisors (the Pipe Maintenance Services Section supervisor and the Facilities Maintenance Services supervisor) asked the complainant to sign a form verifying that he had

received safety equipment that was never provided, but declined to sign.

*Finding.* **Partially Substantiated.**

That the complainant was not issued a respirator while employed at Camp Pendleton is **substantiated**; that the complainant was not given equipment to determine his exposure to asbestos is **unfounded**. Personal Air Monitoring is not required or conducted for individuals, but is instead focused on the asbestos related task the employee is required to perform. Cutting transite (asbestos cement) pipe is the only permitted asbestos task that the complainant's shop may perform, and that task has been tested. Exposures for this task, if using a friction saw, are above OSHA standards. Respirators are thus required.

*Facts.* The complainant's position description specified that he be required to work with asbestos cement [AC] pipe, and requires him to be respirator certified. It also requires him to perform all work in a safe manner and adhere to all safety regulations.

Pipe fitters such as the complainant are required to cut AC pipe 50 to 90 per cent of the time, as a large percentage of water pipes on MCB Camp Pendleton are of this composition. Two methods for cutting AC pipe are recognized: 1) friction (high-speed abrasive) saw; and 2) snap cut method.

The Base Industrial Hygienist [IH] has recommended since 1995 the snap cut method or the "wet method" (wetting the cutting surface of the pipe while using a friction saw), noting that it will lower the exposure levels below the OSHA standards, but still require respirators for the task. The IH also advised the discontinuance of the use of high-speed abrasive saws unless they had a HEPA vacuum attached. In 1997, use of the high-speed abrasive saws attached was prohibited unless they had the HEPA vacuum. No saws with HEPA vacuums are available to the complainant's shop.

The complainant testified that he uses the "wet method" with his own water bottle when cutting AC pipe. He said he doesn't use the snap cutters, as they are worn out and he therefore uses a friction saw.

To obtain a respirator at MCB Camp Pendleton, FMD, the employee must do four things:

- (1) get a respirator physical annually from the Occupational Health Department, Navy Hospital;
- (2) attend a respirator users class at base safety center annually;
- (3) get fit tested for the respirator semi-annually;
- (4) show fit test card to Supply and receive a respirator.

The FMD second line supervisor's secretary arranges medical appointments based on the pipe fitter's birthday. Upon completion of the appointment, she schedules the respirator class. The pipe fitter gets fit tested immediately after the class and is issued the fit test card. The employee then takes the card back to Supply and draws his respirator.

The complainant received his physical every year except 1999, when he missed his appointment. He attended the respirator class at Base Safety several times. He was apparently never fit tested or issued a fit test card. Thus, he was never permitted to pick up a respirator. The complainant surmised that it was because his supervisor did not want him to have one.

Apparently, the complainant didn't retain the medical certificate from his physical that is required to be produced at the conclusion of the respirator class to get fit tested and receive the fit test card.

All other pipe fitters questioned, except the new hires that were not yet scheduled for physicals, took their medical certificates with them to the class and received their fit test cards. The complainant claimed that he gave his medical certificate to his supervisor after completion of the physical, and that the supervisor only gave him back a blank form to take to the class. Base Safety therefore has refused to give him a fit test, as he has no physical. The complainant admits that he didn't discuss this problem with his supervisor.

The complainant's supervisor testified that he has never had a conversation with the complainant about his not having a respirator. The complainant admitted "fighting" his supervisor for over a year to get issued a ladder,

saying to his supervisor, "Hey, asshole, I need my ladder" and he got it. Similarly, the complainant admitted that he fought his supervisor for quite a while before his supervisor got him a hammer drill that the complainant had been requesting. Yet other pipe fitters were fully able to go through the four steps to get respirators that were arranged for them by the secretary, not by the complainant's supervisor.

The complainant's supervisor admitted that he became aware of the complainant's claim that he was never issued a respirator last year, but claimed that he had no conversation with the complainant about respirators.

The complainant's supervisor has no list of pipe fitters who have had respirators issued, and admitted that he did not know who had one issued and who didn't. He nevertheless assigned them to duties that involved cutting asbestos pipe. He continued to send the complainant to job sites that involved cutting AC pipe even after becoming aware that the complainant has not been fit tested or had a respirator issued.

The complainant continued to, and was allowed to, function fully as a pipe fitter even though by law, regulation, and position description he had to be respirator certified and required to use a respirator when cutting AC pipe. As an employee, the complainant also had a responsibility to obey safety laws and regulations.

No one at FMD, including the complainant's supervisor's secretary, had a list of those to whom respirators had been issued. Nor did Base Safety maintain a list of respirator certified individuals.

Only one of nine pipe fitters interviewed testified to regular use of a respirator when cutting AC pipe, notwithstanding that most had a respirator issued and available to them, and even though their fit tests may be out of date.

(b) The complainant alleged that he reported the problem to his first and second line supervisors, but did not receive the proper equipment.

*Finding. Partially Substantiated.*

That the complainant was not issued a respirator is **substantiated**; that the complainant reported the problem to his second line supervisor is **not substantiated**. Both the complainant's supervisors have recently become aware of it through other sources.

*Facts.* The complainant testified that he never talked to his second line supervisor about the complainant's lack of a respirator. The complainant's supervisor denied that the complainant ever discussed his lack of a respirator, but admitted learning late last year that he didn't have one. The complainant's second line supervisor heard from other sources recently that the complainant didn't have a respirator.

(c) The complaint alleged that in July 1999, his first and second line supervisors asked the complainant to sign a form verifying that he had received safety equipment that was never issued to him, but that the complainant declined to sign the form.

*Finding.* **Not Substantiated.**

*Facts.* The other pipe fitters did not recognize the document the complainant proffers as the offending form, although one pipe fitter said it looked familiar. Both the complainant's first and second line supervisors claimed never to have seen the form, and that they had never asked the complainant to sign any equipment form in general, or the specific form to which the complainant refers. The complainant's supervisor testified that he once did a survey of his pipe fitters' personal equipment. That form, however, did not survey possession of respirators.

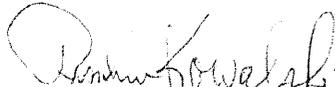
The form does not have a signature block. The questions about possession of safety equipment include yes or no blocks and appear innocuous. The complainant testified that he answered "no" in all of the blocks. Thus, it does not appear that he could have been prejudiced even if he had been asked to sign the form.

3. The Commanding General, MCB Camp Pendleton has directed immediate implementation of five actions that have urgent health and safety concerns, specifically,

- that present regulations requiring written records/descriptions of all excavations be enforced;
- that FMD maintain a current list of all employees with respirators issued;
- that the complainant [and all employees, as necessary] be directed to get a respirator and use it when cutting AC pipe. He [they] should be escorted through the issuing procedure, if necessary. He [they] must be restricted from assignments cutting AC pipe until his [their] respirator[s] is [are] issued;
- that any supervisor sending employees who do not have a current fit test and a respirator issued to jobs that involve cutting AC pipe be disciplined; and
- that FMD immediately inspect and, if necessary, repair or replace the "snap cutters" for use of the pipe fitters.

4. Additionally, the Commanding General has directed that in situations where shoring is more than likely to be required on a job site that the supervisor directing and overseeing the work ensure that shoring materials are present or readily available at the job site.

5. The Commanding General has deferred disciplinary action until resolution of related issues. This investigation constitutes the final response to reference (a).

  
ANDREW KOWALSKI