

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division)	Docket No. 08-00169SH
)	
)	
Plaintiff,)	
)	
vs.)	Citation No.: G0607-26-08
)	
MOORE EXCAVATION, INC.)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to Notice a hearing was held in Portland, Oregon, on August 5, 2010 before Administrative Law Judge Chuck Mundorff. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Sylvia Van Dyke. Defendant, Moore Excavation, Inc., was represented by attorney George Goodman. Roy Moore, President of Moore Excavation, was also present as was OR-OSHA safety compliance officer (SCO) Jeff Weaver. The record closed on August 5, 2010 following recorded closing argument.

Exhibits

At hearing exhibits 1-11, A, 1A & 9A & B were admitted into the record.

Issues

The employer appeals the propriety of Citation #G0607-026-08 for alleged violation of 29 CFR 1926.1053(b)(16)¹ which requires that damaged ladders on a work site must be either withdrawn from service or tagged as defective or do not use. The citation proposed penalties of \$0.00. (Ex. 6).

¹ 29 CFR 192.1053(b)(16) reads: "Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, or corroded components, shall be withdrawn from service until repaired. The requirement to withdraw a defective ladder from service is satisfied if the ladder is (i) immediately tagged with "Do Not Use" or similar language. (ii) Marked in a manner that readily identifies it as defective; (iii) Or blocked (such as with a plywood attachment that spans several rungs).

Finding of Fact

Moore Excavation Inc., is an Oregon employer that provides excavation services in the Pacific Northwest. On January 18, 2008 defendant was engaged in a project in Turner, Oregon repairing a water line. It was a large job with 15,000 lineal feet of pipe and several discreet work areas.

SCO Weaver testified that Moore Excavation was on the Construction 500 list of employers that can be inspected when working and he opened an inspection after identifying the work site in his assigned area. SCO Weaver contacted Andy Coat, the site superintendant in charge of the job, and did a walk through of the site with him.

At that time Weaver identified a 24 foot extension ladder that had been damaged and was leaning up against a fence. He testified that in conversation with Mr. Coat he learned that the ladder had been damaged the week before after being run over by an excavator. He noticed that the ladder was not tagged and stated that he discussed this with Mr. Coat who indicated that the ladder should have been removed after being damaged. SCO Weaver thought that the fenced area was a boundary fence and not a secure area and felt the ladder could have been used by employees at the work site. He testified that he entered the area and looked into the trench without having to unlock any gate. He said the ladder was removed at the time of the inspection but he issued an other than serious citation since the ladder had not been tagged or removed for one week subsequent to being damaged. Video taken at the scene depicts a damaged ladder leaning against a fence and was shot through a fence on the other side indicating an enclosed area.

Weaver further testified that he used the most applicable code that applied in this case per his training and understanding of the regulations, and rated the violation as other than serious and low probability based upon the low likelihood of injury and the lack of exposure to a serious injury.

Site superintendant Coat testified that the ladder had indeed been damaged by an excavator the week before the inspection but that the ladder had been removed from the active work area. He testified that there were approximately 18 people working on the site as a whole but that the ladder was inside an enclosed fenced area that was not a part of the active work zone at the time of the inspection. He stated that he called a foreman to remove the ladder from the area at that time.

Mr. Coat also testified that the ladder was very visibly damaged and that all employees were instructed not to use damaged equipment. He said that the enclosed area where the ladder had been placed was locked – and that the employer required that all inactive work zones be enclosed and locked on a particular job. He said that he asked that the ladder be removed from the work site completely as he was informed of the benefit of immediate abatement by the SCO. He stated that it was his opinion that the ladder had been removed from service as it was in a non-active, enclosed, locked work zone, and that it was visibly damaged so that any employee would be aware not to use it.

He did note that the ladder appeared to be holding up a portion of the fencing which enclosed the area where the ladder was stored and that he was unaware of the regulation that a ladder must only be used for its intended purpose. He felt that in an emergency there was a remote possibility that someone would have attempted to use the ladder but this was extremely unlikely. He did state that some supervisory personnel had keys to the gate and could have accessed the locked area but this was limited to a very few persons.

On cross-examination SCO Weaver testified that he did not recognize the ladder as a support for the fence and that he was not aware that the fencing was a four cornered enclosure. He felt that the area where the ladder was placed could have become an active work zone at any time and that he did not believe that the area was locked nor did he remember anyone unlocking a gate. He stated that he felt that the ladder had not been “removed from service” as it could have been grabbed and used by an employee in an emergency situation and that it should have been taken off site so that it was not accessible. He was asked about the propriety of issuing a citation in this situation as opposed to a “Hazard Letter” which is a less serious sanction. SCO Weaver stated that he felt the code he cited was directly implicated by the presence of the damaged ladder and that he was not trained to issue a “Hazard Letter” in that circumstance.

On rebuttal, Mr. Coat testified that the enclosed fences are required to be locked on all inactive work zones and that to the best of his knowledge the fence was signed that it was off-limits with “Do Not Enter” or other similar verbiage.

Scott Ray testified on behalf of Moore Excavation. He is the safety officer for the company and conducted safety trainings and work site audits. He stated that he had 25 years in construction safety experience. He was not with the company at the time of the OR-OSHA inspection but reviewed the materials

resulting from the citation and subsequent litigation. He stated that it was his opinion that the ladder in question had effectively been removed from the work site as it had been placed in an inactive locked work zone. He stated that in his training the ladder need not have been externally tagged as it was readily identified as damaged – it had a cracked support system – and that as long it was not available for use, no tagging was required.

Roy Moore, the owner and President of Moore Excavation Services Inc., testified that his companies concern for safety was paramount to its work. He stated that they would shut a job down if they identified a hazard. He noted that he was not present at the Turner job site and was unaware of the damaged ladder.

Conclusions of Law and Opinion

As the employer timely appealed the citation pursuant to ORS 654.078, it is OR-OSHA's burden of proof to establish a violation. OR-OSHA argues that it is undisputed that the ladder was not immediately tagged after it was damaged and the rule requires the ladder to be marked and removed – not just withdrawn from service – in order to comply with its mandate. It also notes that the hazard does not have to be an actual hazard but it may, in fact, be a potential hazard. In this case OR-OSHA notes that there was no testimony as to what the signs on the fence indicated and more than one employee had keys to the area if it was in fact locked. OR-OSHA argues that the on-site supervisor was aware of the hazard and that knowledge was imputed to the employer. It also argued that the proposed penalty was reasonably calculated in accordance with its standards.

The employer argues that there is no documented exposure, either actual or potential, and that the employer did in fact, take the ladder out of service when it locked it in an enclosure where there was no active work taking place. Moore Excavation argues that the exposure must be “reasonably likely” and there was no evidence provided that a hazard was proven in this instance. Defendant urges that the safety codes are not “building codes” and a mere technical violation of an OSHA rule should not result in a citation where there was neither a current nor potential “hazard” to which employees could have been exposed even if a violation occurred.

The court has held that “failure to comply with a safety rule that gives rise to a potential risk of injury to an employee is a violation, even in the absence of evidence that the employee was actually in the zone of danger.” *Oregon Occupational Safety and Health Division v. Mad Creek Logging*, 123 Or.App. 453

(Or.App. 1993). The question in this case is whether the mere possibility of exposure as opposed to a reasonable likelihood of exposure is enough to support the citation in this instance. Based upon the evidence and testimony presented I find that it does not.

First, the SCO confirmed in his testimony that at the time he issued the citation he was unaware that the ladder was in a fenced enclosure. The employer clearly attempted to remove the ladder from service by placing it in an area that was a non-active work zone. The testimony of the SCO indicated that the area was open to access but this was contradicted by both Mr. Coats and Mr. Ray. Both testified that areas taken out of active status were always fenced and locked for employee safety. While there may have been some employees with keys to the area – there was no testimony or documentary evidence that they were working in proximity to the inactive site where the damaged ladder was stored. In fact, the testimony was that there were 3 miles of pipe on that job and that no one had been at that particular zone for a week.

While the safety laws account for potential exposure to hazards in order to provide protection to employees, on this record I am not convinced that even in an emergency an employee would have had access to the damaged ladder. Having reached that conclusion I further conclude that OR-OSHA has not met its burden to show exposure to a hazard and OR-OSHA's citation is vacated.

ORDER

The January 18, 2008 Citation issued to Defendant Moore Excavation, Inc., is vacated.

Entered at Eugene, Oregon on **October 4, 2010**, copies mailed to:

Workers' Compensation Board

Chuck Mundorff
Administrative Law Judge