

BEFORE THE WORKERS' COMPENSATION BOARD  
STATE OF OREGON  
HEARINGS DIVISION

Oregon Occupational Safety & Health Division	)	Docket No. 09-00130SH
	)	
Plaintiff,	)	
	)	
vs.	)	Citation No.: S0023-088-09
	)	
MOORE EXCAVATION, INC.,	)	
	)	OPINION AND ORDER
Defendant.	)	ON RECONSIDERATION

On December 10, 2010, plaintiff moved for reconsideration of an October 12, 2010 Opinion and Order that vacated a May 29, 2009 citation issued for alleged violations with proposed fines of \$1,925.00. More specifically, plaintiff asked that I impute a foreman’s knowledge of the violations alleged to the defendant, and affirm the citation. The aforementioned Opinion and Order was abated on December 13, 2010 to consider plaintiff’s motion and to allow defendant time to respond. Having received defendant’s response, I proceed with reconsideration.

As noted in the October 12, 2010 Opinion and Order, the primary dispute between the parties is whether Travis Moore’s (onsite foreman) knowledge of the violations alleged is imputed to the defendant. OR-OSHA argues that Moore’s knowledge is imputed to the defendant and thus reasons that its citation should be affirmed. The defendant argues that because Moore’s actions were not reasonably foreseeable, his knowledge is not imputed, and thus reasons that the citation should be vacated.

Proof that a supervisor personally committed a safety violation establishes employer knowledge that may be attributed to the employer. *See Oregon Occupational Safety and Health Division v. Don Whitaker Logging*, 329 Or. 256, 264 (1999). In determining whether to attribute Travis Moore’s knowledge to the defendant, I examine whether: (1) a work rule was in place to prevent the violation; (2) the work rule was adequately communicated to employees; (3) reasonable methods of discovering noncompliance were employed; and (4) the work rule was effectively and uniformly enforced. *See Mountain States Tel. and Tele. Co. v. Occupational Safety and Health Review Comm’n*, 623 F2d 155, 157 (10<sup>th</sup> Cir 1980)(cited by *Occupational Safety and Health Division v. Tom O’Brian Construction Co., Inc.*, 239 Or 348, 350 (1999)).

The hearing record established that at the time of the conduct giving rise to the citation, the defendant had safety rules in place designed to prevent the violations alleged. Additionally, the record established that Moore and Buck (the employees whose conduct lead to the citation) were aware of the employer's safety rules, and that proper shoring materials were on site and available for their use, but that Moore and Buck chose to ignore the employer's rules and not use the readily available shoring. The record further established that very shortly after the employer learned of the actions of Moore and Buck, their employment was terminated. The hearing record also established that: (1) Mr. Ray (defendant's safety coordinator) held weekly safety meetings (many of which were attended by Moore and Buck) and performed unannounced work site inspections offering safety instruction, and meeting out discipline as necessary; and (2) unannounced on site safety inspections were made by the defendant's president approximately three days per week.

Applying the factors enumerated in *Mountain States* to the whole of the hearing record, I concluded, and still conclude, that Travis Moore's knowledge should not be imputed to the defendant. I reach this conclusion regardless of which party has the burden of proof on that issue.

Accordingly, as supplemented herein, I adhere to and republish my October 12, 2010 Opinion and Order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Notice to all parties: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, 1163 State St., Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Portland, Oregon, **January 31, 2011** , with copies mailed to:

Workers' Compensation Board

/s/ Emerson G. Fisher

Emerson G. Fisher

Administrative Law Judge