

BEFORE THE WORKERS' COMPENSATION BOARD
STATE OF OREGON
HEARINGS DIVISION

Oregon Occupational Safety & Health Division)	Docket No. 08-00149SH
)	
Plaintiff,)	
)	
vs.)	Citation No.: M1454-024-08
)	
CC&L ROOFING CO, INC.)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to notice, a hearing was convened in Portland, Oregon on October 6, 2009. Administrative Law Judge Robert Brazeau presided. OR-OSHA appeared through Carol Parks, Assistant Attorney General, Department of Justice. The employer appeared through George W. Goodman, Attorney at Law.

Exhibits A, Aa, B, 1, 2, 2A, 2AA, 3, 3A, 4, 4A, 5, 6A through 6C, 6BB, 7 through 17, and 21 through 25 were admitted into the evidentiary record at the time of the hearing. The employer objected to the admission of Exhibits 5, 6, and 18 through 21. Exhibit 21 was later admitted during the hearing. The undersigned took the employer's objections to Exhibits 3, 6 and 18 through 20 under advisement pending the outcome of the hearing.

The record was then left open for an additional day of hearing, which occurred on February 17, 2010. On that date, Exhibits 6A, 6AA and 6B were admitted. The record closed on February 17, 2010, at which time recorded oral arguments were completed.

ISSUE

CC&L Roofing appeals OR-OSHA's Citation and Notification of Penalty dated January 8, 2008 and requests that it be set aside in its entirety.

EVIDENTIARY RULINGS

The employer objected to Exhibits 3 and 6 at the outset of the hearing on the ground that they were offered for the substance of what was contained therein. OR-OSHA responded that the exhibits could be properly admitted for the purpose of establishing a pattern of the employer's alleged failure to effectively supervise its employees. After reviewing the exhibits and considering the positions of the parties, I conclude that Exhibits 3 and 6 should be excluded from the record for any purpose other than to establish the existence of prior Citations that became final.

Exhibits 3 and 6 are excerpts from OR-OSHA's inspection files pertaining to Citations issued for violations prior to the one at issue in this case. While they are appropriate to establish the simple existence of those prior final Citations, I do not believe that their contents are admissible to establish an alleged pattern of employer conduct. As the employer pointed out at hearing, to admit the contents of the inspection files as substantive evidence without affording the employer an opportunity to cross examine the authors thereof, or to explore any of the specific circumstances under which the file contents were recorded, would be to effectively deny the employer due process. I, therefore, will not consider the contents of Exhibits 3 or 6 for the substantive purpose of establishing employer knowledge or conduct. The exhibits are hereby admitted, however, for the sole purpose of establishing the existence of prior final Citations.

Exhibits 18, 19 and 20 are transcripts of depositions taken of Evan Byrum, Jeff Carter and Mike Cooper on April 2, 2009. At hearing, the employer objected to their admission on the ground that the depositions were taken only as discovery instruments and should not be admitted as substantive evidence in this proceeding. During the course of the hearing on October 6, 2009, the undersigned advised that the deposition transcripts should be admitted (See Page 77 of the informal transcript provided by counsel), but I now interpret the employer's ongoing opposition to the transcripts as a request for reconsideration of that ruling.

OAR 438-085-0740(4), which is among the Board's rules governing procedures for contested cases under the Oregon Safe Employment Act, provides that depositions and interrogatories are allowed by agreement of the parties or upon motion of a party and an order of the Administrative Law Judge. The rule does not distinguish between substantive and discovery depositions, and I continue to believe that under the Board's rules, the aforementioned deposition transcripts are admissible.

FINDINGS OF FACT

CC & L Roofing Company, Inc., is an Oregon corporation that employs approximately 40 workers. In December of 2007, the company had a contract to work on the roof of the Phoenix Inn, a motel complex in Eugene, Oregon. Two of CC & L's employees, Evan Byrum (Byrum) and Bill Tatum (Tatum), were performing on the roof of the motel on December 13, 2007. While they were there, Mary Anne Minyard, an OR-OSHA Safety Compliance Officer (SCO), was driving by the motel on her way to a non-work related engagement. She observed what she believed to be a fall hazard, *i.e.*, workers more than 10 feet from the ground or other surface without wearing fall protection equipment. She, therefore, drove her vehicle around the block so that she could enter the motel premises.

The SCO approached Byrum and Tatum and advised them to come down from the roof. Tatum told her that he was the "lead man" on the job. After conducting her inspection, the SCO concluded that CC & L Roofing had violated a safety standard involving the use of fall protection. She concluded that workers had been exposed to a hazard in that they were working about 34 feet off the ground without fall protection. She further concluded that there was a "medium" probability that the workers would sustain fatal injuries if they fell from the motel's roof. The SCO cited a rule under Division 3 of the standards because she concluded that the workers were performing "construction" work, rather than "maintenance" work, for which a citation under Division 2 might have issued. She also cited the employer for a serious "repeat" violation after reviewing the employer's violation history and noting that it had been cited under the same rule on two prior occasions.

During the course of her inspection, the SCO learned that Byrum and Tatum had removed some roof tiles and put other tiles back on, but she was unsure whether or not the replaced tiles were new. She also observed the workers placing edge cap tiles in place at the edges of the roof line. She was not aware whether or not the workers changed the existing roof line.

The SCO concluded that the employer had knowledge of its employees' alleged violative conduct because Tatum identified himself as a "lead" man. She concluded that both Tatum and Byrum had been adequately trained in the use of fall protection but that Tatum's alleged violation of a safety rule could be imputed to the employer because of his lead man status. She later understood that both Tatum and Byrum had been disciplined by the employer in the form of a one-day suspension from work. She did not know, however, whether either employee had

been previously disciplined for failing to use fall protection. She, therefore, was unable to determine whether or not any disciplinary system used by the employer had been effective in curbing employee's violations of employer rules.

After the SCO had interviewed Tatum and Byrum, she allowed them to return to the roof of the motel with fall protection. She was not aware of the number of roof anchors that were installed on the Phoenix Inn roof, but she knew that it would take a "considerable amount of time" to install one or more, given that roof tile would have to be removed for the installation, and then replaced. The SCO understood that Tatum and Byrum had been on the roof for about an hour before she arrived. She observed that there was scaffolding erected near the roof, but she believed that it was underneath an overhang such that it would not break the workers' fall if they came off the roof.

The SCO believed that the work Tatum and Byrum was performing was extensive enough that installing roof anchors would not have involved a greater hazard than working unprotected for that extensive period of time.

Michael Cooper was the vice-president and co-owner of CC & L Roofing at the time of OR-OSHA's 2007 inspection in Eugene. He advised at hearing that the Phoenix Inn job involved removing the tiles from the "eyebrow" roofs of the motel, remove the existing flashing, wood battens and felt, disposing of the removed materials and installing a new underlayment system and flashing. Then, the old roof tiles would be re-installed. The flashing material had not been present previously; therefore, the installation of that material was new. The purpose of the flashing installation was to minimize the amount of maintenance work that would need to be performed in the future. CC & L's workers also installed a new "bottom course" hurricane flashing to bring the motel's roof up to existing code. They also installed new felt over the motel's carport, along with several other areas of flashing and new tiles.

CC & L's safety program had evolved and increased over the years, partly in response to citations issued by OSHA. Mr. Cooper admitted that changing the "culture" of his workers to improve their attitudes about safety had been a more difficult task than he had once assumed. He indicated, however, that the employer at least verbally disciplines its employees on every occasion in which a violation of company rules is seen. He also indicated that the company has continued to improve its safety program over the past 15 years, including increased emphasis on fall protection during its regular and mandatory safety meetings. In essence, the

company has gradually adopted a “zero tolerance” policy for violations of fall protection rules. If an employee twice violates company fall protection rules, he/she is subject to dismissal.

Byrum and Tatum were directed to attend, and did regularly attend company safety meetings in which the use of fall protection was discussed. Each was advised of company policy on a number of occasions, both with regard to the required use of fall protection and the consequences of an employee’s failure to adhere to company policy.

Jeff Carter was CC & L’s Repair Division manager in December of 2007. The Repair Division of the company works on existing roofs to limit the amount of damage done by the elements. He interpreted the Phoenix Inn job to be an “upgrade” of the roof; the motel was also putting on all new siding because of incorrect installation originally. Carter estimated that it would take about a full work day to take scaffolding down and set it back up in another location. He estimated that he visited the Phoenix Inn worksite about six times during the project. Tatum advised him that scaffolding was up for the first half of the work day on December 13, 2007, but that it had been moved at lunch time. Carter understood that because Tatum and Byrum had only a “couple minutes” of work left to do, they went on the roof without fall protection. Carter advised that once workers have arrived at a location on a roof with all of their safety gear, it takes about 15 minutes to install a temporary roof anchor.

Mr. Carter advised that he did not discipline every worker’s infraction through a written warning. Rather, he would verbally discipline the worker and then ensure that the worker had improved his adherence to the company’s rules.

Byrum recalled that there was scaffolding surrounding the entire Phoenix Inn building at the time he arrived at work on December 13, 2007. He recalled that it was still there at about 11:30 a.m., but the portion under which he and Tatum were working was dismantled by the time SCO Minyard arrived around noon. He and Tatum were on the roof without fall protection at that time. Later in his testimony, however, Byrum recalled that there was, in fact, scaffolding beneath where he and Tatum worked at the time the SCO arrived. He recalled that after SCO Minyard allowed Byrum and Tatum to go back on the roof with fall protection, they each installed a temporary roof anchor into an existing two-by-four and that it took about 30 minutes for them to do so. It then took an additional 30 minutes to dismantle the anchors and replace the roof tiles when they completed

their work. He was disciplined after OR-OSHA issued the Citation for the December 13th alleged violation. He received fall protection instruction at the time he was hired and on an ongoing basis thereafter.

Tatum advised that he was the foreman for CC & L's Repair Division on December 13, 2007. As such, he supervised Byrum and served as the "lead man" for his crew. He recalled that after he and Byrum were allowed to return to the roof by the SCO, they worked the rest of the day and still had additional work to perform at the end of the day. He also recalled that when he and Byrum were on the roof, the scaffolding that had once been in place at the end of the building where they worked had been moved down to the middle of the motel building. He acknowledged that even when the scaffolding was in place, it might not have protected both workers from falling to the ground.

Marilyn Schuster is OR-OSHA's policy manager. As such, she provides official interpretations of OR-OSHA's rules. One such interpretation involved the difference between "construction" work subject to Division 3 rules and "maintenance" work subject to Division 2. In a letter to an employer, Schuster advised OR-OSHA's policy of requiring fall protection whenever workers worked 10 feet or more above a surface, whether or not the work involves construction or maintenance. She also advised that "short-term" work not requiring fall protection was that which required less time to perform than it would take to install fall protection. With regard to the Phoenix Inn job, Ms. Schuster advised that she considered the work performed by CC & L to be of the "construction" variety given that the work involved replacing things that had been removed and installing new things that had not been there before. She did not believe that the Phoenix Inn job being performed by Tatum and Byrum was "short-duration" work because it had been going on for some time and was scheduled to continue after OR-OSHA's inspection was performed.

Steve Korbas was the site superintendent for the general contractor on the Phoenix Inn in December of 2007. It was his recollection from reviewing photos in evidence that Tatum and Byrum worked on the roof without fall protection or scaffolding on December 12, 2007, as well as for a period on the 13th.

CONCLUSIONS OF LAW AND OPINION

OR-OSHA's January 8, 2008 Citation alleges that the employer violated OAR 437-0043-1501 by not ensuring that fall protection systems were provided, installed and implemented when employees were exposed to a hazard of falling 10

feet or more to a lower level. In order for its Citation to be affirmed, OR-OSHA must prove a number of things: 1) that the employer was subject to the Act; 2) that the cited standard is applicable to the factual situation; 3) that there was employee exposure to a hazard; and 4) that the employer had actual or constructive knowledge of the conduct or condition constituting the violation. In order to prove that a repeat violation occurred, OR-OSHA must also prove that other violations of the same standard occurred within the three years prior to the current Citation.

The employer does not contest, and I find, that the employer was subject to the Oregon Safe Employment Act. The employer is incorporated in Oregon and employed approximately 40 workers at the time the Citation issued. Neither does the employer contest that it was twice cited for a violation of OAR 437-003-1501 during the three years preceding the present Citation. The employer does, however, assert that the current Citation should not stand as the third repeat of the cited standard because the cited rule was not applicable to this set of facts. In that regard, the employer argues that if any rule should have been cited, it should have been one arising out of Division 2, the General Occupational Safety and Health Rules.

Whether Division 2 or 3 applies here depends on whether the work being performed by CC & L at the Phoenix Inn was “maintenance” work, which would be covered by Division 2, or “construction” work, which is covered by Division 3. Although the question is clearly subject to interpretation, I conclude that the work performed on the subject occasion was “construction.” As noted by Mr. Cooper’s testimony, CC & L’s contract involved extensive installation of a number of new items, including tile, felt, flashing, wood batten and other miscellaneous items. This, in my opinion, constitutes more than the “maintaining” of an existing structure. The overall purpose of the work might have been to assist the Phoenix Inn in maintaining a workable physical plant, but CC & L was required to perform extensive repair and new installation in order for that to occur. Division 3, therefore, was applicable.

Whether or not the employer violated the cited rule also depends on whether or not its workers were, in fact, more than 10 feet from the ground or a platform during the work being performed. The testimony of Tatum and Byrum, although sometimes inconsistent, was essentially that there was scaffolding in place fewer than 10 feet below them on December 13, 2007 until sometime before lunch time, when they noted that the scaffolding had been removed. It was clearly gone by the time the SCO arrived, as born out by the photos in Exhibit 9, but the employees insist that the scaffolding was there until shortly before she came to the site.

Having reviewed the photos and heard all the evidence, I conclude that even if the scaffolding was in place for most of the morning of December 13, 2007, it was positioned such that it could not have stopped either Byrum or Tatum from falling to the ground if they accidentally left the roof. The preponderance of evidence indicates that scaffolding was either not in place on December 13th, or that it was tucked under a ridge below where Byrum and Tatum worked. It, therefore, would have been completely ineffective in breaking their fall. The workers admit that they were not using fall protection, and I find that the circumstances constituted a violative condition. I further conclude that Byrum and Tatum were exposed to a significant hazard as a result of there being no adequate fall protection in use. Had one or both fallen from the roof, he/they would have fallen 34 feet to the ground.

As previously noted, because OR-OSHA has cited the employer for an alleged “serious” violation, it must prove that the employer had actual or constructive knowledge of the alleged violation. If, on the other hand, the employer “did not, and could not with the exercise of reasonable diligence, know of the presence of a violation, the knowledge element is not established. ORS 654.086(2); *OR-OSHA v. Don Whitaker Logging*, 329 Or 256 (1999). The parties agree on that notion. They disagree, however, as to whether or not a defense of alleged employee misconduct is an “affirmative” one, *i.e.*, a defense that must be proved by the Defendant.

Having reviewed the arguments of the parties, I conclude that an employer’s assertion of employee misconduct is but a response to the Plaintiff’s case in chief, rather than an “affirmative” defense. An “affirmative” defense requires its proponent to bear the burden of both production and persuasion regarding the assertion made. *See Meachem v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). That is, the proponent must establish the elements of the defense *and* then bear the ultimate burden of persuading the trier of fact that the defense should overcome the other party’s *prima facie* case. In the present case, however, OR-OSHA clearly has the burden of both production and persuasion regarding the underlying element of employer knowledge. That is part of OR-OSHA’s case in chief and if it fails to establish each element of a sustainable Citation, that case fails. Here, OR-OSHA has not asserted that the employer had *actual* knowledge of a violation. Rather, it asserts that the employer had *constructive* knowledge through the imputing of the knowledge of a lead man to the employer. OR-OSHA must prove that the employer had that imputed knowledge before the employer must respond with an affirmative defense.

Whether the knowledge of Tatum can be imputed to the employer in this case requires a review of the previous case law, as well as the specific facts surrounding the present matter. The lead Oregon case on the issue is *Don Whitaker Logging, supra*. Therein, the Supreme Court reversed the holding of the Court of Appeals and found as a matter of law that if OR-OSHA proves that the supervisory employee personally committed a serious violation while acting within the scope of his authorized duties, the supervisor's knowledge is attributable to employer because of their agency relationship. The Court further held, however, that an employer is not responsible for a safety violation if it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. Thus, if OR-OSHA presents evidence demonstrating employer's knowledge, the employer still may offer relevant evidence that, in the particular circumstances, it should not be held responsible. *Id.* at 263.

I know of no court case subsequent to *Whitaker* that has attempted to determine what "particular circumstances" might relieve an employer from a finding of imputable knowledge. However, I believe that the *Whitaker* Court's phrase, "with the exercise of reasonable diligence" is key to determining employer knowledge in a particular case. I believe that the phrase, which was taken from former OAR 437-001-0015(54)(a)(A), and which remains in the Division's rules, contemplates that the reasonableness of the employer's efforts in promoting safety and employee adherence to OR-OSHA rules must be considered in determining whether "knowledge" should be imputed. In doing so, the *Whitaker* Court's holding that an employer's duty does not rise to the level of "strict liability" must be adhered to.

After carefully considering the record in this matter, I conclude that the employer could not have known, with the exercise of reasonable diligence, that Tatum and Byrum would violate OR-OSHA's fall protection rule. The evidence is clear that the employer repeatedly trained and advised its employees, including Tatum and Byrum, on OR-OSHA's requirements that adequate fall protection be used. There were numerous safety and team meetings in which the rules were emphasized. The employer spent tens of thousands of dollars on fall protection equipment and supplied each of its workers with not only that equipment, but with specific directives that the equipment must be used. When SCO Minyard performed her inspection at the Phoenix Inn site, Tatum and Byrum were each equipped with all of the fall protection equipment that each needed to be in compliance. They chose not to use it, however, despite the employer's specific directive that they do so. Minyard noted from her interview of the two employees that they were "well-trained" and "apologetic" for not using the equipment, supporting the notion that they knew the use of the equipment was required.

If the employer supplied Tatum and Byrum with all the equipment they needed to be in compliance, and provided each worker all of the training he needed to be in compliance, and warned each of them of the consequences of not being in compliance, one wonders what more the employer could have done to ensure that compliance. Clearly, an employer might hire someone to be a 24/7 monitor of a job site in order to ensure compliance, but I do not believe that “reasonable diligence” requires that such an extraordinary measure be taken. Rather, I believe that if the evidence shows that an employer did everything an employer could do in the exercise of reasonable diligence to ensure its workers’ adherence to company and OR-OSHA rules, the willful misconduct by a supervisory employee should not be imputed to the employer unless the employer actually knew of the conduct and did not take action to stop it.

I am mindful that my colleagues have held differently than I on cases similar to the present one. For example, my distinguished colleague, Administrative Law Judge John Mark Mills, held in *Mountain Power Construction Company, Inc.*, Dkt. No. Sh-04205 (July 2005), and *Trees, Inc.*, Dkt. No. SH-04281 (September 2006) that the acts of a supervisor could be imputed to his employer. In fact, I have also so held, most recently in *Northwest Delivery Systems*, Dkt. No. SH-0800147 (September 2009), and *Cascade Heating Specialties*, Dkt. No. SH-080499 (October 2009). Yet, each of those cases was fact specific. In his cases, Judge Mills determined that the employers failed to adequately train their employees and/or adequately enforce company rules. Similarly, in the cases before me, I found that the employers’ training and enforcement efforts were inadequate under the facts specific to those matters. Here, by contrast, I find that the employer did everything it reasonably could to supply, train, and prepare its employees to work in compliance with OR-OSHA’s rules. It also took reasonable means to enforce OR-OSHA’s rules, as well as the policies and safety meeting minutes reflect. Remembering that “reasonable” means are not the same as “extraordinary” means, I find that to hold the employer responsible for its employee’s actions under the circumstances of this case would be tantamount to the imposition of “strict liability.” The *Whitaker* Court has specifically advised us that the principles of strict liability do not apply.

Having found that OR-OSHA has failed to establish the required “knowledge” element of a case for a serious violation, I conclude that OR-OSHA’s Citation cannot stand. I do not so conclude lightly, for I am quite aware of the significant dangers inherent in the roofing and other trades, having presided over these cases for nearly 20 years. Employers must adequately train their employees to follow OR-OSHA’s rules, and they must be seen to have imposed discipline

when employees fail to follow them. It is not possible, however, for employers to prevent each and every transgression of its workers, and the law does not require them to. Rather, the employer's actions must be "reasonable," and I find that in the present case, CC & L's actions were reasonable under the circumstances.

ORDER

The Citation and Notification of Penalty dated January 8, 2008 is disapproved and set aside.

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, 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 on February 23, 2010, with copies mailed to:

Workers' Compensation Board

Robert Brazeau
Administrative Law Judge