

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division)	Docket No. 09-00126SH
)	
Plaintiff,)	
)	
vs.)	Citation No.: M5681-050-09
)	
CBI SERVICES, INC)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to Notice a hearing was held in Eugene, Oregon, on June 10, 2010 before Administrative Law Judge Chuck Mundorff. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Carol Parks. Also present was OR-OSHA Safety Compliance Officer Craig Brink. Defendant, CBI Services Inc., was represented by attorneys Carl B. Carruth and Win Calkins. With them was employer representative Randy Hynek. Testimony was taken and the matter was continued for the submission of written closing argument. The record closed on September 23, 2010 with the receipt of final Reply argument from OR-OSHA.

Exhibits

At hearing, exhibits 1-20, A, 2A, 2B & 4A were admitted into the record.

Issues

Defendant appeals the propriety of Citation #M5681-050-09 which listed two items for violation of OAR 437-003-0073(2) and OAR 437-003-1501 pertaining to fall protection in the workplace. Proposed penalties of \$475.00 were assessed for the two violations. (Ex. 12).

Findings of Fact

On February 2, 2009, the employer, a contractor, was performing work on a water tank located at 34276 E. Cloverdale Road in Creswell, Oregon. On that day Safety Compliance Officer (SCO) Craig Brink was traveling in his vehicle down Cloverdale Road when he saw a worker up at the top of the tank and proceeded to the work site. SCO Brink has been a compliance officer for OR-OSHA for 3 ½ years. He has a 26 year prior employment history in construction and logging. OR-OSHA has a program directive creating a local emphasis program in Oregon to focus inspections on fall protection issues. (Ex. 1).

As he approached the water tank he observed the worker sitting on the top edge of the water tower welding who did not appear to be using fall protection. Brink testified that he took several pictures prior to opening the inspection. He then approached the work site and engaged in a discussion with the supervisor of the project, Roy Vorhof. Brink stated that Vorhof told him he was the site superintendant overseeing the work and that he was on site every day. Brink testified that he and Vorhof were approximately 60 feet from the entrance to the tank and that the worker was visible from where they stood. He said that Vorhof instructed the worker on the edge of the tank to step down.

At that time Brink said he also observed a second worker operating a lift who was wearing a harness with a lanyard but that the lanyard was not attached to the lift. Brink took photographs of the second employee while talking with Vorhof. Brink took measurements of the tank which showed that the top of the tank to the interior floor measured approximately 130 feet. The tank had a painters railing on the inside of the tank that would break a workers' fall but there was no such railing on the outside of the tank. Brink measured that a fall to the outside of the tank at 32 feet to the ground. (Exs. 7, 8). He then issued the citation listing the two items being 1) that an employee was not using fall protection while welding on the top of the tank, and 2) a second employee was not tied off while operating a manlift. (Ex. 12).

Randy Hynek, CBI's area safety manager testified at the hearing. He stated that he was not on site but that the company has safety rules in place and they insist that work rules are complied with. He noted that all employees are trained in fall protection and that the supervisor onsite is responsible to ensure that the rules are enforced. He stated that in this case the employees cited were

disciplined by the company. He noted that they were long term well valued employees with a good safety record and that he audits the work crews approximately once per quarter.

Jeremy Crawford, the employee who was welding on the top of the water tank testified as well. He stated that he is a union boilermaker that erects and welds storage tanks for CBI Services. He was working on the top of the scaffold on the top of the tank welding earthquake bars to the top. He stated that he was not sitting on the top of the tank rail but was crouched down with his feet on a railing leaning with his back against the tank. He said the distance from the painters railing to the top of the tank was 26 inches. He said he stepped up on the railing because he was getting hot sparks down his shirt while welding. He said that he was not tied off because he was not exposed to a fall. He said he never had his rear end on top of the tank and the top of the tank was at his waist or above. He acknowledged that he was disciplined by the employer as a result of the citation.

John Bryan, the employee operating the manlift, testified at hearing. He said that he was repositioning himself and was only 5 to 6 feet off the ground. He said he was wearing his harness but he forgot to reconnect the lanyard in this instance. He said that he normally was very conscientious about fall protection as he had been injured after a fall off a scaffold. He said it was his custom and practice to tie off but he just forgot in this instance. He also acknowledged that he was disciplined by the company as a result of the citation.

The supervisor, Roy Vorhof, also testified. He said he has 35 years in the construction trades and he is one of 5 superintendents for CBI. He said that he was standing inside the tank when he was approached by Brink who pointing at Crawford told him "that man is not tied off." He said that he could not tell if Crawford was leaning against the side of the tank or not. He felt that Crawford's work site was fully enclosed as there was 26 inches from the top of the tank to the painters' rail. He testified that this particular crew was very good and safety conscious. He said they hold weekly safety meetings with site specific fall protection plans. He was also disciplined as a result of the citation.

SCO Brink testified that considering the potential injuries from the falls and the limited time of the exposures that the citation was determined to be serious with low probability. He noted that the site supervisor had access to the employees and knew or should have known of the violations and that knowledge was imputed to the employer. After utilizing all applicable reductions the base penalties of \$1,800.00 were reduced to \$475.00.

Conclusions of Law and Opinion

Motion to Dismiss

Prior to taking testimony, and again at the conclusion of plaintiff's case in chief, defendant moved to dismiss the citation alleging that OR-OSHA had not proven that the employer had actual knowledge of the violations.

Specifically, defendant argues that there is no evidence to support a finding that the on site supervisor, Roy Vorhof, knew that Crawford was sitting or was above the railing, or that Bryan had not hooked his harness to the lift after repositioning it. Defendant argues that the evidence and testimony was that Vorhof was diligent in monitoring employees and enforcing safety rules and employer knowledge cannot be imputed on a claim that the supervisor could have seen the violation.

OR-OSHA responds that "actual knowledge" is proven under Oregon law in two ways, first, the employer knew, or second, with the exercise of reasonable diligence could have known of the hazardous condition, then that constructive knowledge meets its burden of proof. It argues that Vorhof was in the work area where the employees were working without fall protection and that due to his close proximity he could have known of the violations with the exercise of reasonable diligence.

In the context of a serious violation, OR-OSHA has the burden of proving employer knowledge. (OAR 437-001-0015(61)(a)(A)). Additionally, OAR 437-001-0760(3)(c) provides:

"Any supervisors or persons in charge of work are held to be the agents of the employer in the discharge of their authorized duties, and are at all times responsible for:

- (A) The execution in a safe manner of the work under their supervision; and
- (B) The safe conduct of their crew while under their supervision; and
- (C) The safety of all workers under their supervision."

As noted above, in the instant case OR-OSHA asserts that the employer had "constructive knowledge" of the violations due to the presence of supervisor Vorhof within 65 feet of the violative conditions with reasonable time

to discover the violations. The employer responds that mere proximity of the supervisor to a violation is insufficient to establish employer knowledge – relying on the court’s holding in *Enoch Skrivin and Sons, Inc. v. Accident Prevention Division*, 32 Or App 109 (1978). In that case, the Court of Appeals held that because none of petitioner's officers or agents saw or were informed of the violation incident as it occurred, nor could have due to the timing of the nature of the violation, that constructive knowledge could not be imputed to the employer.

The testimony of SCO Brink established that he observed Crawford at or near the top of the tank while driving down the road. After pulling over, he approached the work site while taking pictures of the alleged violation. Once inside the tank he contacted Vorhof and informed him of his observation of Crawford, who remained in the position where Brink first observed him. At that same time, he identified that Bryan was on the manlift without his harness being tethered to the lift. While there was conflicting testimony on how long Bryan was in the lift unhooked, the contemporaneous field notes taken by SCO Brink note that he was in the lift unhooked for approximately 10 minutes. (Ex. 14-1).

Employer argues that continuous observation of employees is neither required or possible and that the conditions existed in such a short window of time such that Vorhof did use reasonable diligence in supervising his crew. However, as noted in the preceding paragraph, I find that there was sufficient time for Vorhof to observe either or both of the workers subject to the citations and that constructive knowledge was established by OR-OSHA. As such, the Motion to Dismiss is denied.

CITATION ONE ITEM ONE

Serious Violation of OAR 437-003-0073(2) – Personal Fall

Protection.

To sustain its burden of proof, OR-OSHA must prove that a violation of an applicable rule occurred, that there was a hazard present, that the employer had knowledge of a violation and that the penalty assessed for the violation was not excessive. *See Enoch Skirvin & Sons, Inc. v. Accident Prevention Div.*, 32 Or App 109 (1978).

This item alleged a violation due to Bryan working in an elevated boom platform without using fall protection. At hearing, Bryan testified that he was in the manlift and was working but that he had forgotten to attach his lanyard to the lift after repositioning it.

Testimony of Bryan at hearing was that he was only up in the lift for a minute or two and that the lift was only 5-6 feet off the ground when he did clip his lanyard. SCO Brink also testified that the lift did not reach 10 feet in height. Employer argues (among other things) that in order to sustain a violation under this rule a worker must be exposed to a fall of 10 feet or more citing to OAR 437-003-1501. That rule contains the General Fall Protection guidelines and is specifically cited under the specific rules pertaining to boom lifts. It states:

“Except as otherwise provided in paragraphs (1)-(4) of this section, when employees are exposed to a hazard of 10 feet or more to a lower level, the employer shall ensure that fall protection systems are provided, installed and implemented according to the criteria in 1926.502.”

Paragraphs (1)-(4) of that rule provides:

“(1) Holes.

(a) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, personal fall restraint systems, safety net systems, guardrail systems, or covers erected around such holes.

(b) Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

(c) Each employee on a walking/working surface shall be protected from objects falling through holes (including skylights) by covers.

(d) Smoke domes or skylight fixtures are not considered covers for the purpose of this section unless they meet the strength requirements of 29 CFR 1926.502(i).

(2) Wall openings. Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of personal fall arrest systems, personal fall restraint systems, safety net systems, or guardrail systems.

(3) Established floors, mezzanines, balconies and walkways. Each employee on established floors, mezzanines, balconies and walkways, with an unprotected side or edge 6 feet (1.8 m) or more above a lower level, shall be protected from falling by the use of personal fall arrest systems, personal fall restraint systems, safety net systems, or guardrail systems.

(4) Excavations.

(a) Each employee at the edge of an excavation 6 feet (1.8 m) or more in depth shall be protected from falling by guardrail systems, fences, or barricades when the excavations are not readily seen because of plant growth or other visual barrier;

(b) Each employee at the edge of a well, pit, shaft, and similar excavation 6 feet (1.8 m) or more in depth shall be protected from falling by guardrail systems, fences, barricades, or covers.

(5) Dangerous Equipment. Each employee shall be protected from falls into or onto dangerous equipment by personal fall arrest systems, personal fall restraint systems, safety net systems, guardrail systems or equipment guards.”

Defendant argues that none of the exceptions pertaining to 6 foot falls contained in paragraphs (1) – (4) apply to boom lifts and that for a violation to attach it must be shown that the employee was exposed to a fall of 10 feet or more. OR-OSHA, while not specifically addressing the issue, argues that it has established a fall hazard of six feet based upon the testimony of Bryan and therefore, the rule regarding personal fall protection applies to him. In addition OR-OSHA asserts that the company acknowledged the violation by disciplining Bryan following the citation.

Bryan’s testimony was not conclusive on the height issue. At hearing he testified that he was 5 to 6 feet off the ground when advised to clip off. SCO Bryan did not testify as to how high the lift was in the air – but did acknowledge that it was less than 10 feet. There were no measurements taken.

At best, an employee would have to be exposed to a fall of at least 6 feet in order for a violation to occur assuming that the one of the exceptions of paragraphs (1)-(4) of OAR 437-003-1501 apply to this case. I find that OR-OSHA

failed in its burden of proof to show that Bryan was exposed to a hazard of 6 feet or more as there was no specific evidence provided to indicate how high the lift was at the time of the alleged violation. The lift may have been at 6 feet or it may have been at 5 feet, on this record there is no way to know. Additionally, whether or not an employee is disciplined has no bearing on OR-OSHA's burden of proof in this forum. Employee's may be disciplined or not by a company despite the determination of this forum. For those reasons, Citation One, Item one is vacated.

CITATION ONE ITEM TWO
Serious Violation of OAR 437-003-1501

Again, to sustain its burden of proof, OR-OSHA must prove that a violation of an applicable rule occurred, that there was a hazard present, that the employer had knowledge of a violation and that the penalty assessed for the violation was not excessive. *See Enoch Skirvin & Sons, Inc. v. Accident Prevention Div.*, 32 Or App 109 (1978).

Here, OR-OSHA alleges that Crawford was exposed to a fall hazard of 32 feet from the top of the tank to the ground at the outside of the tank as he was sitting on the top of the edge of the tank and that personal fall protection was required.

The employer argues that the evidence is not persuasive that Crawford was sitting on the edge of the tank, that he was within an enclosure, and that fall protection was not needed in this instance. It also argues that if Crawford was exposed to a hazard it was an act of employee misconduct that was unpreventable by the employer.

SCO Brink testified that he observed Crawford at the top of the tank while driving down the road and continued to observe him while approaching the work site. He took photos that show Crawford's feet up on the painter's railing while he is hunched over welding on the top of the tank. Crawford testified that he was not sitting on the top of the side of the tank but rather was leaning against it – saying that the top of the tank was never above waist height. He stated that he stepped up on the rail in order to keep sparks from coming down his shirt while welding the earthquake bars to the top of the tank. His testimony that he was leaning against the side of the tank is directly refuted by the photo evidence showing the top of the tank at his thigh level. (Ex. 8 at 1, 2). There was no evidence that there was a platform or rail on the outside part of the tank and while Crawford is clearly leaning in, lessening the likelihood of a fall, the evidence is clearly persuasive that he was exposed to a fall of 32 feet had he gone over the back side of the tank.

Nonetheless, as noted above, the employer asserts that Crawford's act was unavoidable employee misconduct. To establish an unpreventable employee misconduct defense, the employer must prove (1) it established work rules designed to prevent the violation; (2) the work rule was adequately communicated to its employees; (3) it took steps to discover the violation; and (4) it effectively enforced the rule when violations have been discovered. *Jensen Construction Co.*, 7 OSHC 1477 (1979).

Here, even assuming that Defendant met its burden regarding the work rules elements, it failed to establish that it took reasonable steps to discover the violation. I have previously determined that element of employer knowledge, the determination that Defendant did not exercise reasonable diligence to detect the violation and established constructive knowledge of the violation. *See Oregon Occupational Safety and Health Div. V. Don Whitaker Logging, Inc.*, 329 Or 256 (1999). Constructive knowledge of a violation is that of which an employer could have known with the exercise of reasonable diligence. SCO Brink testified that Vorhof acknowledged that Crawford required fall protection once the matter was brought to his attention. Vorhof testified that he yelled at Crawford to get down or tie off and the violation was abated immediately. Had he made reasonable efforts to survey the work site he would have discovered the violation.

Based on the foregoing, OR-OSHA has met its burden of proof to establish a subject employer, a violated standard, employee exposure and employer knowledge. Accordingly, in the absence of a viable defense, OR-OSHA has established the propriety of Citation One Item Two.

Here, the citation item was designated as low probability with a serious severity rating. OAR 437-001-0135(1) requires that the probability of an accident which could result in an injury from a violation be determined by the Compliance Officer and be expressed as a "probability" rating. A "low" probability rating is appropriate if the factors considered indicate it would be "unlikely" that an accident could occur. A "medium" probability rating is appropriate if the factors considered indicate it would be "likely" that an accident could occur. A "high" probability rating is appropriate if the factors considered indicate it would be "very likely" that an accident could occur. SCO Brink indicated that the probability rating was low as the worker was leaning into the tank and did not have a long period of time of exposure. Accordingly, I am persuaded that the "low" probability rating is appropriate.

OAR 437-001-015(62)(a)(A) provides that a “serious violation” is a violation in which there is a substantial probability that death or serious physical harm could result from a condition which exists in the place of employment. Serious physical harm includes injuries that could shorten life or significantly reduce physical or mental efficiency by inhibiting, either temporarily or permanently, the normal function of a part of the body. SCO Brink testified that a fall from 32 feet would likely result in death. As such, a “serious” severity rating is appropriate.

Penalties are addressed by OAR 437-001-0135 through OAR 437-001-0203. OAR 437-001-0145(1) provides that a penalty shall be assessed by considering the penalty established by the intersection of the probability and severity ratings in Table 1 of the rule. As the penalty assessed is within the range allowed under the applicable rule, my ability to modify the penalty amount is limited to circumstances where OR-OSHA has abused its discretion in assessing the penalties. *See Brennan v. OSHRC (Interstate Glass Co.)* 487 F.2d 438 (8th Cir. 1973). Therefore, Citation One Item Two and the penalty assessed is affirmed.

ORDER

The Citation and Notification of Penalty dated February 18, 2009 is affirmed in part. Citation One Item One is vacated. Citation One Item Two is affirmed.

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 Eugene, Oregon on **November 29, 2010**

Workers' Compensation Board

Chuck Mundorff
Administrative Law Judge