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.	)	SECOND OPINION AND ORDER ON RECONSIDERATION
Defendant.	)	

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. Also present for OR-OSHA was Jeff Weaver, safety compliance officer. Defendant employer Moore Excavation, Inc. was represented by attorney George Goodman. Also present for employer was Roy Moore, President of Moore Excavation.

Exhibits A, B, and 1-11, including Exhibits 1A, 9A, and 9B, were admitted into evidence. The record closed at the conclusion of the hearing.

PROCEDURAL HISTORY

On October 4, 2010 ALJ Mundorff issued an Opinion and Order, vacating the citation. (Rec.). On November 24, 2010, in response to OR-OSHA's motion for reconsideration, the ALJ issued an order of abatement; and on April 20, 2011 he issued an Opinion and Order on Reconsideration, this time affirming the citation. (Rec.). Employer then moved for abatement and reconsideration, and on June 3, 2001 ALJ Mundorff issued a new order of abatement.

On June 20, 2011 ALJ Mundorff passed away unexpectedly. The pending matter was thereupon transferred to the undersigned for further proceedings. In the meantime the parties had submitted written argument on employer's motion; and

on July 8, 2011 the parties agreed that the record is complete, and the record was considered as closed at that time. Having reviewed the record, including the parties' written arguments, I hereby proceed with reconsideration.

ISSUE

The only issue is propriety of the February 13, 2008 Citation and Notification of Penalty, alleging a single "other than serious" violation with a proposed penalty of $0. (Ex. 6).

FINDINGS OF FACT

The following findings of fact are taken, without substantive modification, from ALJ Mundorff's October 4, 2010 Opinion and Order.

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.

OR-OSHA's safety compliance officer (SCO) Jeff 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 Coate, 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. Coate he learned that the ladder had been damaged the week before, after being run over by an excavator. SCO Weaver noticed that the ladder was not tagged, and stated that he discussed this with Mr. Coate, who indicated that the ladder should have been removed after being damaged. The SCO 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. Weaver 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 Coate 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. Coate 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. Coate 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.

Mr. Coate 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 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. Coate 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. Mr. Weaver 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. 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, site superindant Coate 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. Mr. Ray 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. Ray 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 company's concern for safety was paramount to its work. He stated that they would shut a job down if they identified a hazard. Mr. Moore noted that he was not present at the Turner job site, and was unaware of the damaged ladder.

CONCLUSIONS OF LAW AND OPINION

OR-OSHA conducted an investigation and charged employer with failing to tag and withdraw from service a damaged portable ladder, as required by 29 CFR 1926.1053(b)(16).[1] (Ex. 6-4). The violation was corrected at the time of the inspection, and was considered "other than serious;" and no monetary penalty was proposed. (*Id.*).

[1] 29 C.F.R. § 1926.1053 (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, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired."

Because employer timely appealed the citation under ORS 654.078, OR-OSHA has the burden of proving the denied violation. OAR 438-085-0820(1). To sustain its burden OR-OSHA must prove that the employer had knowledge of the violation. *See Enoch Skirvin & Sons, Inc. v. Accident Prevention Div.*, 32 Or App 109, 111 (1978).

ANALYSIS

Employer concedes that a rule violation occurred here,[2] and does not assert lack of knowledge as a defense. Nonetheless, employer recites the historical development of the "rule of access," which requires the enforcement agency to establish that employees were likely to be exposed to the hazardous condition. Citing *Occupational Safety and Health Law* 80 (Randy S. Rabinowitz ed., 2d ed. 2002), employer contends that the agency is required to prove that "employees of an employer (not necessarily the cited employer) have been or will reasonably predictably be exposed to a violative condition." Arguing that the mere *possibility* of exposure is not enough, employer points out that OR-OSHA's Compliance Officer's Guide instructs its officers to identify and document employee exposure.

As employer undoubtedly knows, the Compliance Officer's Guide does not have the force of law. *See Nygaard Logging Co., Inc. v. OR-OSHA*, 165 Or App 90, 100 (2000) (field compliance manual is internal management directive and does not constitute authoritative interpretation of relevant statutes). For the reasons that follow, however, I agree with employer that OR-OSHA is required to prove that a rule violation is likely to result in employee exposure to risk of injury.

OR-OSHA, citing *OR-OSHA v. Mowat*, 237 Or App 576 (2010), notes that hazardousness is presumed in certain cases, and need not be independently proven. Thus operation of construction equipment within 10 feet of an energized, noninsulated power line is presumed to create a hazard, while the confluence of two venting ducts requires proof under the "common duct rule" that the mixing of vented gases in the case under review actually does create a hazard. *Id.*, 237 Or App at 581-82. According to OR-OSHA the violation at issue here falls into that class of cases where hazardousness is presumed. OR-OSHA argues that, in any event, in the case at bar "employees had access to the violative condition."

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[2] In its brief employer writes: "It is undisputed that the ladder in this case was damaged, and was not tagged and removed from service as required by the cited safety rule." Employer's Motion For Abatement And Reconsideration, p. 10. (Rec.).

Employer responds by noting that the issue in *Mowat* was whether the enforcement agency had to prove the *existence* of a hazard as part of its *prima facie* case. Conceding that the broken ladder here created a *potentially* hazardous condition, employer argues that OR-OSHA still must (and failed to) prove that employees were likely to be *exposed* to the hazard. Employer quotes from *Mad Creek Logging*, 123 Or App 453, 455 (1993), *rev den*, 318 Or 381 (1994), where the court wrote:

> "The parties agree that, in order to establish a violation, OR-OSHA must show that an employee was exposed to an unsafe condition as a result of a failure to comply with the standard."

I do not find *Mad Creek Logging* helpful here. The court in *Mowat*, noting that its earlier decision in *Mad Creek Logging* was not inconsistent with its holding (in *Mowat*) that hazardousness did not need to be proven in every case, wrote:

> "Because of the parties' agreement [in *Mad Creek Logging*] about what OR-OSHA had to prove to sustain its citation against the employer, we did not consider whether the rule was one that made hazardousness an element of it. In all events, *Mad Creek Logging* does not establish a principle that applies to the interpretation or enforcement of all OR-OSHA safety rules."

OR-OSHA v. Mowat, *supra*, 237 Or App at 583. [Bracketed material added]. The *Mowat* court did not elaborate further, and neither endorsed nor disavowed the stipulated burden of proof in *Mad Creek Logging*. All *Mowat* really tells us here is that OR-OSHA does not have to prove that a broken ladder is hazardous to use, a proposition that employer does not challenge.

For its part, OR-OSHA quotes *dictum* from *Mad Creek Logging*, as follows:

> "Certainly, a 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*."

Id., at 455-56. (Emphasis added by OR-OSHA.)

Again, however, I find *Mad Creek Logging* to be of little use here, in light of the *Mowat* court's comment about the lack of a broad principle stemming from that earlier case. In any event, even the language quoted by OR-OSHA implies that the agency must prove at least a *potential risk of injury*, which suggests some degree of employee exposure to the violative condition.

Citing *R. Williams Const. Co. v. OSHA*, 464 F3d 1060, 1064 (9th Cir 2006) (violation of a safety rule is established where employees have access to the violative condition) OR-OSHA argues that the site superintendant's admission that the defective ladder here *could have* been put back into use in an emergency meets its burden of proof. I disagree.

In *Williams* the court distinguished between being in a "zone of danger" and being exposed to the actual danger. At issue was a safety rule requiring all work areas inside a trench to be within 25 feet of a point of egress. Finding it "reasonably predictable" that a worker might venture more than 25 feet from the only point of egress in a 45-foot trench, the court concluded that the worker then

> "will become exposed to the danger itself. Thus, we hold that this regulation applies regardless of whether the employees were exposed to the actual danger at the time of the collapse. A violation is established so long as employees have *access* to a dangerous area more than 25 feet from a means of egress."

R. Williams Const. Co. v. OSHA, *supra*, 464 F3d at 1064. (Emphasis in original).

Thus *Williams* seems to stand for the proposition that a violation is established when evidence shows that it is reasonably predictable that a worker *will become exposed* to the actual danger or risk of injury created by the hazard. This is virtually identical to the "rule of access" standard advocated by employer – *i.e.*, that a violation is established where it is shown that "employees * * * have been or will reasonably predictably be exposed to a violative condition."

Employer, in fact, does not insist that *actual* exposure is part of OR-OSHA's burden. Quoting from *Sec'y of Labor v. Gilles & Cotting, Inc.*, 3 O.S.H. Cas. (BNA) 2002 (1976), employer asserts that reasonable predictability of exposure, or "access," is established when

> "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, *will be*, are, or have been in a zone of danger."

(Emphasis added). Nonetheless, employer contends that there is no proof of even *likely* exposure here; and argues that the citation must be vacated. Again, I agree with employer.

First, it is obvious that the "zone of danger" here is restricted to use of the damaged ladder itself. Employees will not be exposed to the risk of injury unless they actually attempt to use the ladder. Applying the standard (of likely exposure to a hazard) here, a violation would be established if it were reasonably predictable that, as a result of employer's failure to tag and/or withdraw from service the defective ladder, an employee would attempt to use the damaged ladder. Although there was conflicting testimony regarding whether the gate to the fenced work site here was locked, there is no persuasive evidence that the work site itself was an active site during the time the defective ladder was stored there. The SCO, in fact, testified that the (other than serious) severity rating of the violation was low, because "there was no one in that immediate area working."

Further, the SCO also determined that the *probability* of an accident was low. According to OAR 437-001-0135(3)(a), this means that "it would be unlikely that an accident could occur" due to the violation. In light of the SCO's own evaluation, I find that it was not reasonably predictable that, as a result of the violative condition found here, a worker would become exposed to the actual risk of injury by attempting to use the defective ladder. Accordingly, I find that OR-OSHA has not established the violation.

ORDER

IT IS HEREBY ORDERED that the Citation and Notification of Penalty dated February 13, 2008 is vacated.

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 Medford, Oregon on July 28, 2011

Workers' Compensation Board

Bruce D. Smith
Administrative Law Judge