

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW**

Some personal identifiers have been redacted for privacy purposes



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

THE HOME DEPOT #6512, and its successors,

Respondent.

OSHRC DOCKET NO. 07-0359

APPEARANCES:

For the Complainant:

Michael D. Schoen, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Matthew T. Deffenback, Esq., Haynes and Boone, LLP, Houston, Texas

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Home Depot #6512 (Home Depot), operated a retail establishment at 21530 Tomball Parkway, Houston, Texas. Respondent Home Depot admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On August 17, 2006, a Home Depot lot attendant, (*redacted*), was discovered lying under the side of a truck in Home Depot's Tomball parking lot. (*redacted*) was transported, by ambulance, to a hospital. (*redacted*) died on August 19, 2006, of "blunt head trauma and subdural hematoma and brain contusions," complicated by "hepatic cirrhosis due to chronic alcoholism and hepatitis C infection." Though aware of (*redacted*) death, Home Depot failed to report the death to OSHA (Joint Stipulations, Exh. C-9). After learning of the incident, the Occupational Safety and Health Administration (OSHA) initiated an investigation, and at its completion, Home Depot was issued a citation alleging violation of 29 CFR §1904.39(a).

By filing a timely notice of contest Home Depot brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Houston, Texas on June 19, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §1904.39(a)

Other than serious citation 1, item 1 alleges:

29 CFR 1904.39(a): Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, the employer must orally report the fatality/multiple hospitalization by telephone (sic) or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. The OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742) may also be used:

On or about August 19, 2006, a death of an employee was not reported to the Occupational Safety and Health Administration.

OSHA regulation 29 CFR 1904.5 instructs employers:

You must consider an injury or illness work-related if an event of exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in §1904.5(b)(2) specifically applies.

Discussion

Home Depot recognizes that the regulations create a “geographic presumption” of work relatedness where an injury or illness resulted from an event or exposure in the workplace. Home Depot maintains, however, there was no credible evidence of a specific event causing (*redacted*) condition. The record does not support Respondent’s contention. To the contrary, the evidence suggests that (*redacted*) fell in the Home Depot parking lot, sustaining the head injuries to which he eventually succumbed. That the cause of his fall cannot be established is not relevant. In the preamble to the cited standard the Secretary stated:

In applying [the presumption of work-relatedness], the question employers must answer is whether there is an identifiable event or exposure which occurred in the work environment and resulted in the injury or illness. “Thus if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event - the tripping accident - occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur.”

(Exh. C-4). It is clear that, under the Secretary’s interpretation, a fall at the workplace must be treated as if it were “work related” even though the cause of the fall is undetermined, and may not be attributed to any workplace hazard. The geographic presumption would, therefore, apply in this case unless an exception can be established.

Home Depot argues that *(redacted)* may have sustained head trauma prior to August 17, 2006. If so the exception set forth in §1904.5(b)(2)(ii) would apply. That exception exempts injuries or illnesses involving “signs or symptoms that surface at work, but result solely from a non-work-related event or exposure that occurs outside the work environment.” When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). Exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980). *(redacted)* brother, *(redacted)*, testified that he was with his brother the evening prior to *(redacted)* collapse at the Tomball store, and that he did not then, and had not at any time prior to that date experienced any kind of head injury while he was with *(redacted)* (Tr. 20-21). According to *(redacted)*, his brother was fine on the morning of August 17, 2006. Pat Kuntz, the Tomball store manager, also testified that *(redacted)* appeared fine, “just like he was every other morning” at 7:30 a.m. on August 17, 2006 (Tr. 45). Nothing in the record supports Home Depot’s contention that *(redacted)* head injuries predated his August 17, 2006 fall in the Tomball parking lot. The exemption has not been established.

Though the record does not establish that *(redacted)* fall was due to any occupational hazard present in Home Depot’s work place, his injury was “work-related” for purposes of the cited regulation, solely because it took place in the work place. The cited violation has been established.

Penalty

The parties stipulate that the proposed penalty of \$1,000.00 is appropriate for the cited violation in the event it is affirmed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1904.39(a) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: September 7, 2007