

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

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
Ryder Transportation Services,
Respondent.

OSHRC Docket No. **10-0551**

Appearances:

Jeremy Fisher, Esquire, Atlanta, GA
For Complainant

Carla J. Gunnin, Esquire, Atlanta, GA
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Ryder Transportation Services rebuilds starters and alternators for Ryder vehicles at its facility in Doraville, Georgia. On August 27, 2009, an employee working for an electrical contractor at the facility fell from the roof through a skylight, sustaining fatal injuries.

Occupational Safety and Health Administration (OSHA) compliance officer Reinaldo White was assigned to investigate the accident. Based on his inspection, the Secretary issued a one-item citation to Ryder on February 24, 2010. Item 1 of Citation No. 1 alleges Ryder committed a serious violation of 29 C. F. R. § 1910.23(a)(4), by failing to guard its facility's skylights with standard skylight screens or fixed standard railings. The Secretary proposed a penalty of \$ 5,000.00 for this item. She issued the citation under her multi-employer citation policy. (The Secretary also issued a citation to M. C. Dean, the electrical contractor on the site.)

Ryder timely contested the citation. In its answer, Ryder admitted jurisdiction and

coverage. A hearing was held in this matter on September 30 and October 1, 2010, in Decatur, Georgia. The parties have filed post-hearing briefs. Ryder contends (1) the cited standard does not apply to the cited condition; (2) its employees were not exposed to an unsafe condition; (3) M. C. Dean's employees were not exposed to unsafe conditions, in accordance with the Secretary's multi-employer citation policy; and (4) Ryder had no knowledge of the violative condition.

Based on the Secretary's failure to establish Ryder's knowledge of the violative condition, as discussed below, the court vacates Item 1 of Citation No. 1.

Background

Ryder owns and operates a facility on Button Gwinnett Drive in Doraville, Georgia, where it rebuilds, or "remanufactures" starters and alternators for its vehicles. Ryder was not the original owner of the facility; the company moved into the existing structure in 1985. The structure was described at the hearing as a "pretty big warehouse," but no exact dimensions were given (Tr. 27). It was suggested the facility may be as large as a football field, but the only estimate ventured was the building was approximately 100 feet long by 70 feet wide (Tr. 132). Compliance officer Reinaldo White measured the height of the facility's ceiling, and found it to be 25.8 feet high.

At least two fiberglass skylights were installed in the roof. The skylights were approximately 3 feet wide and 10 to 12 feet long. The skylights were clearly visible from the inside of the warehouse. They were more difficult to discern from the roof because they were made in the same corrugated pattern and were of the same color as the roof. The skylights were not guarded with screens or railings.

At the time of the hearing, Ryder employed fourteen full-time and ten part-time employees at the facility. The general manager was John Kaiser. He supervised foreman Brooks Bryan, who in turn supervised leadman Jeffrey Thompson.

Ryder had operated a similar remanufacturing facility in Pennsylvania, which it had closed some time before August 2009. Ryder moved some of the equipment from the Pennsylvania location to the Doraville facility. The company hired M. C. Dean, an electrical

contractor, to perform the necessary electrical work to install the transferred equipment, and to perform other miscellaneous repairs. Ryder and M. C. Dean had a longstanding relationship, and Kaiser regarded M. C. Dean as “a reliable contractor” (Tr. 90).

Three M. C. Dean employees worked at Ryder’s facility in August 2009: supervisor Boyd Young, journeyman electrician Lewis Quinn, and apprentice electrician Sam Ditmore. In order to perform some of the electrical work near the ceiling, M. C. Dean had rented an aerial lift. When M. C. Dean’s employees first arrived in August, Ryder had gone over a list of repairs and installations to be completed by M. C. Dean. At some later point, Ryder asked M. C. Dean to install conduit and a switch for two exhaust fans located in the ceiling of the facility. The exhaust fans had not worked since Ryder took over the facility in 1985. After M. C. Dean installed the conduit and switch, the exhaust fans still did not work. M. C. Dean decided it needed to examine the exhaust fans to determine why they were not working. The exhaust fans extended through the ceiling to the outside of the building. M. C. Dean concluded one of its employees needed to go up on the roof to examine the exhaust fans.

On August 27, 2009, the three M. C. Dean employees arrived at Ryder’s facility at approximately 7:00 a. m. Quinn used the aerial lift to perform some work inside the facility. Around 10:00, Boyd Young and Quinn decided to move the aerial lift outside the facility and use it to lift Quinn to the roof. Quinn was the employee chosen to go up because he already was wearing his safety harness and attached lanyard. After the aerial lift was moved outside, Quinn entered the basket, tied off to the rails, and used the lift’s controls to elevate himself to the roof. Quinn unhooked his lanyard and stepped out onto the roof.

Quinn was carrying a voltage tester with him, and a two-way radio with which he communicated with Young. Quinn walked to the first exhaust fan and discovered it had no motor in it. Quinn radioed this information to Young. Quinn then walked over to the second exhaust fan, and discovered it too was missing its motor. Quinn started to return to the aerial lift. After analysis of all evidence, it is reasonable to infer that, instead of retracing his steps and passing back by the first exhaust fan he had checked, Quinn set off in a direct path from the second exhaust fan to the aerial lift. A skylight lay in his path. Quinn stepped on the skylight and it broke under his weight. Quinn fell 25.8 feet to the concrete floor below, suffering

grievous injuries. Ryder and M. C. Dean employees rushed to his aid. Someone called 911, and an ambulance eventually arrived and took Quinn to Atlanta Medical Center. Quinn died there 13 days later.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1910.23(a)(4)

The citation states:

29 CFR 1910.23(a)(4): Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.

On or about 9/11/09¹ an employee was performing electrical voltage testing on some exhaust fans at Ryder. The employee stepped on a skylight on the roof and fell through to approximately 25.8 feet and was fatally injured. Ryder Transportation did not have any skylight screen or standard railing on all exposed sides to protect the employee.

The standard at 29 C. F. R. § 1910.23(a)(4) provides:

Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.

(1) Does the Cited Standard Apply?

The Secretary chose to cite Ryder under 29 C. F. R. § 1910.23(a)(4), a general industry standard. That standard applies when employees are engaged in maintenance activities. In the

¹ This date is in error. It is undisputed Quinn fell through the skylight on August 27, 2009. September 11, 2009, is the date White began his inspection at Ryder's facility. Both parties referred to the correct date throughout the proceeding. The erroneous date in the citation caused no prejudice toward Ryder. The citation is amended to reflect the correct date

present case, Ryder contends, M. C. Dean's employees were engaged in construction activities.² Therefore, it argues, the cited general industry standard does not apply to the construction work in which the employees were engaged.

The standard at 29 C. F. R. § 1910.12 defines "construction work" as work for "construction, alteration, and/or repair, including painting and decoration." "Maintenance" is not defined in the standards. The *American Heritage Dictionary* (Second Coll. Ed.) defines "maintenance" as "The work of keeping something in proper condition."

Ryder leadman, Jeffrey Thompson, testified M. C. Dean's work included: repairing security lights by the back door by replacing the bulbs, repairing fixtures in the paint booth, installing a new 100-amp load center, adding five new circuits, re-securing loose receptacles in the shop walls, repairing a damaged conduit in the shipping area, installing three new 30-amp circuits for test equipment, installing a circuit for a spot welder and an oven, relocating power for the existing oven, installing a new switch in the main gear box, troubleshooting problems with the air conditioning, and installing a plug over the office door. The "demolition" work M. C. Dean performed consisted of removing a fan using a screwdriver and some wirecutters. M. C. Dean did not transport or install the equipment transferred from the Pennsylvania facility. Thompson stated that Ryder "had the equipment sitting where we wanted it, and then we let them run the power to it" (Tr. 160).

Boyd Young had worked as a foreman for M. C. Dean for three years at the time of the hearing. Although M. C. Dean has a construction division for its electrical work, Young and his crew worked in the service division. He characterized M. C. Dean's job with Ryder as "[m]iscellaneous electrical repairs and additions" (Tr. 176). The parties did not enter into a written contract for the job, but reduced it to a purchase order for "electrical repairs" (Exh. C-4).

The record establishes M. C. Dean's employees were engaged in maintenance, and not construction, activities. Ryder hired M. C. Dean to keep the existing electrical system and the

² There is a construction standard addressing fall hazards created by working around skylights. The standard at 29 C. F. R. § 1926.501(b)(4) provides:

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, covers, or guardrail systems erected around such holes.

transferred equipment in proper condition. The cited general industry standard applies.

(2) Did Ryder Fail to Comply with the Terms of the Cited Standard?

It is undisputed Ryder did not guard the skylights in the roof of its facility with screens or standard railings.

(3) Did Employees Have Access to the Violative Condition?

No Ryder employees were exposed to the unguarded skylights. The last time a Ryder employee had been on the roof was in 2006, when Thompson had used two ladders (one to access a mezzanine, and a second to climb to the main roof) to reach the roof in order to change a belt on an exhaust fan on one of the lavatories. At that time, Thompson noted there were no screens or railings guarding the skylights. He stated at the hearing that the skylights “look like they’re corrugated because they match the tin on the roof” (Tr. 33).³

Ryder later classified the roof as a restricted area, forbidding its employees to access it. Ryder safety manager Bill Stewart instructed employees not to go up on the facility roof or trailer roofs. No one from Ryder informed M. C. Dean of this directive.

The Secretary contends that, under her multi-employer citation policy, Ryder exposed Quinn to the unguarded skylight. The Commission has recently reversed its previous position, holding the Secretary may cite a non-exposing, controlling employer under this policy. In *Summit Contractors Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the Commission holds:

“[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees, but those of other employees engaged in the common undertaking.” *McDevitt Street Bovis*, 19 BNA OSHC at 1109, 2000, CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability, ‘an employer may be held responsible for the violations of other employers ‘where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.’ *Id.* (citation omitted); *Grossman Steel*, 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 24,791.

The violation at issue here is the lack of guarding on the skylights. Only Ryder could

³M.C. Dean foreman Young went up on the roof after the accident with Ryder’s safety director. He stated the skylights were not as obvious from the roof as they were from the ground: “They were the same pattern as the roof metal and they were actually the same color as the roof metal” (Tr. 193).

take steps to abate this violation. John Kaiser, Ryder's general manager, testified he was in charge of maintenance at the facility, and that Ryder was responsible for the condition of the facility's roof. The Secretary has established Ryder was the controlling employer, and thus liable under the multi-employer citation policy.

Quinn was on the roof pursuant to his assigned duty of testing the exhaust fans. Quinn's tragic death is proof of his exposure to the unguarded skylight.

(4) Did Ryder Have Actual or Constructive Knowledge of the Violative Condition?

The Secretary contends Ryder had actual knowledge of the violative condition. Thompson was aware someone from M. C. Dean was going to go on the roof to check out the exhaust fans. Foreman Brooks Bryan was not at Ryder's facility on August 27, 2009. When Bryan was away, Thompson, as leadman, had supervisory authority over the site. "[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Ryder argues that neither of its employees who testified at the hearing, Kaiser and Thompson, knew Quinn was going to go up on the roof. This assertion is not supported by the evidence presented during the hearing. At several different points during his testimony, Thompson acknowledged he knew someone from M. C. Dean was going to go up on the roof:

Q. Did [M. C. Dean] tell you that they were definitely going to go up on the roof?

Thompson: I knew they had to, but I didn't know when, you know.

(Tr. 151).

Q. Did [M. C. Dean] talk to you about using an aerial lift to work on those fans at that time?

Thompson: Well, when we talked about doing the electrical on them, we said if they didn't work, we had a ladder that we could access the roof if they needed it. And he said if they had to access the roof, they'd use the airlift.

(Tr. 165-166).

Q. Did you talk to anybody with Ryder in management about that conversation?

Thompson: No.

Q. So you're the only one that knew about it?

Thompson: Right.

Q. You didn't tell them about the policy not to go up on the roof?

Thompson: No. We just stated that Ryder employees couldn't do it.

Q. Okay. So you just figured that somebody else might do it?

Thompson: Right.

(Tr. 166-167).

Thompson had actual knowledge an M. C. Dean employee was going to go on the roof, but he did not have actual knowledge the employee would walk within 6 feet of the skylights. The Secretary equates knowing an M. C. Dean employee was going to go on the roof with actual knowledge of a violative condition. Accessing the roof, however, is not tantamount to exposure to the violative condition of unguarded skylights. As White conceded, not all skylights need to be guarded. Guarding is only required when it is anticipated an employee is going to be exposed to the hazard of falling through the skylight. "At that point in time, if there's any type of activity *going on right around the skylight*, then it should be guarded" (Tr. 75, emphasis added).

Thompson testified it was possible to walk on the roof without coming within 6 feet of the skylights or the edge of the roof. Although the exact dimensions of the roof are lacking in the record, it is undisputed an employee could walk on the roof while avoiding exposure to fall hazards existing at the edge of the roof as well as around the skylight. Only two skylights, measuring 3 feet by 10 to 12 feet are mentioned in the record. Thompson testified it was possible to access the exhaust fans without coming within 6 feet of the skylights or the edge of the roof.

Undoubtedly, someone should have reminded Quinn that there were skylights in the roof, and informed him that the skylights were more difficult to see from the roof than from the ground. Ryder was required, however, to guard the skylights only when it reasonably anticipated an employee would be within 6 feet of them. Ryder had neither actual nor constructive knowledge that an employee would be exposed to the unguarded skylights that were remote from

his work area. The Secretary has failed to establish knowledge of the violative condition. The item is vacated.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that Item 1 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1910.23(a)(4), is vacated, and no penalty is assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: February 28, 2011