

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.
SSA Cooper, LLC,
Respondent.

OSHRC Docket No. **09-1946**

Appearances:

Lydia Jones, Esquire, Atlanta, Georgia
For Complainant

Edward M. Hughes, Esquire, Savannah, Georgia
For Respondent

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

DECISION AND ORDER

SSA Cooper, LLC., is engaged in work at marine terminals. On August 18, 2009, the Occupational Safety and Health Administration (OSHA) conducted an inspection at the Respondent's worksite at GPA Garden City Terminal, Garden City, Georgia. As a result of this inspection, OSHA issued a citation to SSA Cooper, LLC., on October 23, 2009. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to Simplified Proceedings, in Savannah, Georgia, on January 29, 2010.

At issue is the alleged violation of 29 C.F.R. § 1917.93(a) as alleged in citation No. 1, Item 1. For the following reasons, the alleged serious violation of 29 C.F.R. § 1917.93(a) is vacated and no penalty is assessed.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law (Tr. 189-196) are included in this decision in accordance with 29 C.F.R. § 2200.209(f) as follows:

JUDGE SIMKO: We're back on the record. We've been off the record for a while to give me a chance to review the record and the testimony, the written evidence, all documentary evidence and witness submissions, and the case law cited.

First, let me state, once again, the Standard's requirements. The Respondent was cited for a violation of 29 C.F.R. 1917.93(a), which states that "The employer did not ensure that employees exposed to falling objects wore protective helmets in a specific area, the apron area.

"On or about August 18th, 2009, two employees were observed walking and working around a vessel being unloaded by a crane without wearing a protective helmet, exposing the employees to head injuries from falling objects."

The standard allegedly violated provides as follows: "The employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects."

It appears that there is no dispute as to the applicability of this standard, this being a marine terminal and these standards apply to marine terminals.

There also appears to be no dispute as to whether the terms of the standard were violated in that no hard hats were worn by two employees.

The employee exposure has been shown to falling objects. Employees Covington and Bonds were in the area of the cranes and the unloading and loading of the vessels, which is

considered a hard hat area, without wearing hard hats.

It appears to be, with regard to the case in chief, the initial area of dispute that was still at issue was the knowledge of the Respondent here. The test here is whether the Respondent had actual or constructive knowledge of the alleged violations.

Now, Respondent's superintendent was in the area approximately 100 feet from employees Covington and Bonds. Mr. McDermott, the superintendent for the Respondent, testified he did not see Bonds in the area and when he saw Covington, he told Covington to get back in his vehicle. Earlier he had seen Covington with a green hard hat, when he was outside of his vehicle.

The testimony establishes that both employees could do their job from inside their vehicle, that Bonds could do his job 99 percent of the time inside the vehicle and that Covington checks the loads from his vehicle.

Both employees had hard hats with them and there was no reason for McDermott to believe they would not wear them when outside the vehicle.

Now, the knowledge test is not -- the knowledge standard is not an absolute standard imposed on an employer. It's a reasonable person standard. There's a violation unless the Respondent did not know or could not have known, with the exercise of reasonable diligence, of the existence of the hazards.

So the constructive part is that he could not have known if he exercised reasonable diligence. That is also the reasonable person standard. And if an employer actually knows something, that is another element of knowledge.

Mr. McDermott, while in the area, did not see Bonds without a hard hat. Covington was told to get back in his vehicle when he saw that he was out without a hard hat, by McDermott.

Work sites are dynamic places and a superintendent cannot absolutely prevent idiosyncratic or unforeseeable events at all times. This is not a situation where an employer hides his head in the sand or ignores what he should be watching, turns his back on an operation and someone gets hurt.

It's a situation where Mr. McDermott had multiple duties. He didn't expect Mr. Bonds to be outside of his vehicle. He knew he was going to go check on a truck, but he could have done this from within the vehicle.

His exposure was one time, for approximately five minutes. Mr. Covington, however, had two exposures, each of them for about two minutes at a time.

The first time, Mr. McDermott discovered Mr. Covington was outside of his vehicle, he gave him a verbal warning, in that he told him to get back in his vehicle. The second time, Mr. Covington having been told to get back in his vehicle, bounced out of his vehicle and came up to the compliance officer concerned that the company was going to be cited or he was going to be cited for not having long pants on. His hard hat was still in the vehicle.

Now, Mr. Covington and Mr. Bonds neither one testified in this matter today, so we don't know what was going on in their heads. All we know is the evidence that I have before me.

Covington admitted to Mr. Vos, the compliance officer for the government, that he forgot his hard hat, he wasn't thinking, and that Superintendent McDermott had told him to get back into his vehicle due to no hard hat.

The Respondent reported a great number of violations back in 2006. But since 2006, which was approximately three years before these alleged violations occurred, there have been very few hard hat violations reported by the Respondent. I believe there were two in 2007 and one in 2008 and the two in 2009 occurred during this inspection.

Multiple inferences could be drawn from that, one of which is that Respondent has been watching for violations of hard hats and has made sure that his employees were wearing hard hats.

Mr. McDermott testified that there was an obstructed view of the area shown in Exhibit J-3 and J-4. There is some conflicting evidence as to whether that could be seen. However since the burden is on the government, to prove that element, I find that they did not show that aspect as to clear visibility of the area.

There was some testimony that Mr. Covington was at Mr. McDermott's truck and Mr. McDermott told him to get back in his vehicle and that this would have been before the investigator, Mr. Vos, arrived on the scene at ten a.m.

As stated earlier, Mr. Covington told the compliance officer, Mr. Vos, that he forgot to put his hard hat on, when he was seen by the compliance officer the second time and he came up to the crane without his hard hat on, to talk about some other issue.

And when Mr. Covington came up to the compliance officer to talk to him, without his hard hat on, Mr. McDermott was on the phone talking with his offices in a remote location.

Mr. Bonds told Mr. Vos that he had his hat -- his hard hat in the vehicle across the traffic lanes. He didn't think that Mr. McDermott saw him. He told Mr.

Vos that he would have been yelled at about not wearing a hard hat, had Mr. McDermott seen him. Mr. Covington also told Mr. Vos that he had a hard hat in his vehicle.

While there was no delineation of the exact area that hard hats should have been worn, it does not seem to be any dispute that the area where these employees were working was an area that had overhead hazards.

Mr. McDermott also testified that the employees were required to wear hard hats everywhere in this area and that the work going on was loading and unloading of vessels. He was the supervisor of this gang. This gang had between 19 and 23 employees. Approximately 60 employees work on a vessel, at a time.

Mr. McDermott also testified that he did not see Mr. Covington without a hat before Mr. Vos arrived. Now, there – this is somewhat in conflict with the fact that Mr. McDermott did tell Mr. Covington to get back in his car. That time frame has not been established as to when that was, whether that was before or after Mr. Vos had arrived on the scene. There is some conflicting evidence with regard to the timing of that.

It appears that later in his testimony, Mr. McDermott did say that he saw Covington without a hat on before the inspection, outside of his car. So it's a little confusing. Once again, Mr. Covington and Mr. Bonds, neither one were called to testify by either side.

Mr. McDermott testified that he did not see Bonds without his hard hat on before the photo or the inspection. That is consistent with Mr. Bonds' testimony that he did not believe that Mr. McDermott even saw him.

Mr. Bonds could have informed the truck driver concerning the replacement of the truck cab from inside of his vehicle as well as outside the vehicle. There was no expectation on the part of the Respondent that Mr. Bonds would be outside of his vehicle doing that work.

Also there is no inference that there was an expectation that Mr. Covington would have been outside his vehicle doing his work. Mr. McDermott, in fact, told Mr. Covington to stay in his car.

He was concerned about his short pants, I believe. When Mr. Covington jumped out of the car to go up and talk to compliance officer and didn't bother to put his hard hat on, and Mr. McDermott, at that time, was otherwise involved in the conversation with his remote office.

Now, there was testimony by Mr. McDermott that Mr. Bonds was in his truck that morning, but that the witness, Mr. McDermott, did not see Mr. Bonds until after he was told that Bonds had had no hard hat and was out of his vehicle.

I, therefore, find there was no actual or constructive knowledge on the part of the Respondent of the employee exposure and the violation of this standard.

I find that it was impossible for the superintendent to see these two events and when he did see the one event, when Mr. Covington came up to his car, he took appropriate action by having him get back into his car.

So having found that these events were basically idiosyncratic, isolated events, not foreseeable by the company I find that there was no knowledge, on the part of the Respondent, of these violations.

Having found there was no knowledge, there's no need to talk about the employer's safety and health program or the defense of employee -- un-preventable employee misconduct.

(Tr. 189-196)

FINDING OF FACTS AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 1917.93(a) is vacated and no penalty is assessed.

/s/

JUDGE STEPHEN J. SIMKO, JR.

Date: March 3, 2010