
SECRETARY OF LABOR,

Complainant,

v.

CONTINENTAL ROOF SYSTEMS, INC.,

Respondent.

OSHRC Docket No. 95-1716

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

Continental Roof Systems, Inc., (“Continental Roof”) was engaged by the National Park Service (“NPS”) to repair the roof and chimneys of the Franklin D. Roosevelt home in Hyde Park, New York. Following a safety complaint from NPS on May 15, 1995, OSHA inspected the work site on May 16, and subsequently issued three citations alleging sixteen violations of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-687, and proposed a combined penalty of \$139,600.¹ The judge affirmed all the citation items, but downgraded the two willful items to serious, assessing a total penalty of \$32,100.

¹Continental Roof is no longer in business and the judge originally dismissed the citation under *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053, 1993-95 CCH OSHD ¶ 30,539 (No. 94-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997). The Commission reversed and remanded the case for a decision on the merits. *Continental Roof Systems Inc.*, 17 BNA OSHC 2104, 1997 CCH OSHD ¶ 31,351 (No. 95-1716, 1997).

The Secretary of Labor (“Secretary”) petitioned for review, alleging error only with respect to Citation 2, Sub-Items 2(a) and 2(b), which concern a lack of requisite guardrails on a tubular welded frame scaffold and on a pump jack scaffold. The Secretary argues that the judge incorrectly found Sub-Items 2(a) and 2(b) to be not willful. Specifically, the Secretary alleges that the judge erred by disregarding CO Kay Coffey’s testimony that Continental Roof supervisor Eric Baginski admitted that NPS project supervisor Ed Sturm advised Baginski prior to the inspection of the need for scaffold guardrails. The Secretary argues that this testimony constitutes “unrebutted, corroborative evidence” of a pre-inspection warning, which is sufficient to establish that the violation was willful. For the reasons discussed below, we affirm the judge’s decision.

BACKGROUND

Ed Sturm testified that on April 24 he had a conversation with Continental Roof supervisor Chris Michaluk concerning unsafe conditions on the chimney scaffold,² but there is no evidence that they discussed any need for guardrails. When Eric Baginski replaced Michaluk as project supervisor soon thereafter, Sturm discussed with him various safety concerns about the scaffolding, including the need to tie off safety railings, remove the saw horses, and properly tie off the front scaffold, but there is similarly no evidence they discussed guardrails at that time. Sturm did testify, however, that he discussed the need for guardrails with Baginski on “approximately” May 10. As the Secretary notes, CO Coffey provided partially corroborative testimony when he stated that Baginski admitted to him that Sturm had advised Baginski prior to the inspection to install scaffold guardrails.

Sturm was present on the jobsite each day of the relevant period, and kept a contemporaneous daily diary that he testified would contain notes of any serious concerns that he had or discussed with the contractor. Sturm’s diary indicates that the contractor was not on site on May 10, and that it was on site on only five dates prior to the May 16 OSHA inspection. None of the diary entries prior to that of May 15 indicates that Sturm noted or

²The chimney scaffold is not the subject of the citation item at issue on review.

discussed with anyone a need for guardrails on any of the scaffolds. In his notes of May 15, a date when Continental Roof was not on site and just one day prior to the OSHA inspection, Sturm's notes indicate the absence of mid-point guardrails. When confronted with the diary entries on cross-examination, Sturm confirmed that the first specific diary reference to a lack of scaffold guardrails occurred on May 15.

DISCUSSION

It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (consolidated). A finding of willfulness, however, must be predicated upon a showing that the employer possessed a "heightened awareness," rather than simple knowledge of the conduct or conditions constituting a violation. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)("not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation"). Where the requisite state of mind is manifested through the actions of supervisory employees, it is imputed to the employer to the same extent as would be a supervisor's knowledge of violative conditions. *Tampa Shipyards*, 15 BNA OSHC at 1539, 1991-93 CCH OSHD at p. 40,101-102.

The judge's finding that Continental Roof violated the cited standard is not at issue on review. Rather, the sole issue is whether the judge's finding that the violation was not willful was erroneous because he apparently failed to consider the compliance officer's corroborative testimony concerning a pre-inspection warning. This warning might arguably establish the requisite heightened awareness for a willful violation. We conclude that while the judge did not discuss this testimony in his decision, the record evidence, including the omitted testimony, is insufficient to warrant overturning the judge's conclusion that the violation was not willful.

The evidence is contradictory regarding whether Sturm noticed a lack of scaffold guardrails prior to May 15, and whether he discussed a need for guardrails with any Continental Roof personnel prior to the inspection. Although Sturm testified that he advised Michaluk on April 24 that the chimney scaffold was unsafe, there is no evidence that Sturm noted or discussed with Michaluk a need for guardrails. Similarly, although Sturm spoke with Baginski about various safety concerns soon thereafter, there is no evidence that they discussed a need for guardrails at that time. Sturm did testify that later, on approximately May 10, he told Baginski that the scaffold located at the front of the building needed guardrails. That conversation is mentioned in the *post-inspection* daily diary summary Sturm prepared for CO Coffey.³ As the Secretary emphasizes, Coffey partially corroborated this testimony when he stated that Baginski admitted receiving a pre-inspection warning from Sturm about the need for guardrails.

Sturm's contemporaneous daily diary, however, tells a different story. The diary indicates that Continental Roof was not at the worksite at all on May 10. It contains no reference to a need for guardrails until May 15, another day on which the employer was not on site. On cross-examination, Sturm testified that his diary would contain notes of any serious concerns that he had or discussed with Continental Roof, and admitted that the first reference to any deficiency regarding guardrails was contained in the diary entry of May 15.

We find that in view of these discrepancies concerning pre-inspection warnings of the need for scaffold guardrails, Judge Frye did not err in concluding that the Secretary did not establish willfulness. We also note that as neither party has sought review of the penalty, we

find that Judge Frye's assessment is supported by the record. Accordingly, we affirm the judge's decision.

³Sturm summarized the diary entries in an undated memorandum to CO Coffey. That memo, however, also states that the information was taken from the daily notes, and Sturm testified to that effect at the hearing.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel
Commissioner

Dated: October 31, 1997