

Secretary of Labor,

Complainant,

v.

RK Hydro-Vac, Inc.,

Respondent.

OSHRC Docket No. 03-1583

Appearances:

Mary Beth Zamer Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee
For Complainant

Jay St. Clair, Esq., Bradley, Arant, Rose & White, LLP, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

R. K. Hydro-Vac, Inc. (RKH), is a specialty contractor in the commercial roofing industry. As a subcontractor, it vacuums gravel off roofs for reroofing projects undertaken by a general contractor.

On July 23, 2003, Occupational Safety and Health Administration (OSHA) compliance officer Michelle Sotak conducted an inspection of an RKH worksite in Birmingham, Alabama. As a result of Sotak's inspection, the Secretary issued a one-item citation to RKH on August 1, 2003, alleging that RKH committed a serious violation of § 1926.501(b)(1) for failing to require an employee working at the edge of a 30-foot building to use fall protection.

This case was designated as an E-Z proceeding pursuant to Commission Rule 2200.200, *et seq.* A hearing was held in this matter on November 13, 2003, in Birmingham, Alabama. RKH asserts the affirmative defense of unpreventable employee misconduct. The parties have filed post-hearing briefs.

For the reasons discussed below, RKH's employee misconduct defense is rejected and the citation is affirmed, with a substantial reduction in the Secretary's proposed penalty.

Background

On July 23, 2003, compliance officer Michelle Sotak was driving on Valleydale Road in Birmingham, Alabama, on her way to a construction site. As she was driving, she observed a man on the roof of a building at the corner of Valleydale Road and Highway 37. The man did not appear to be using fall protection. Sotak pulled over across the street from the building and took pictures of the man leaning

over the edge of the building's roof (Exhs. C-1, C-2, C-3; Tr. 13-14). A string of flags used as an awareness barrier had been placed 6 feet from the edge of the roof. It had been taken down where the employee was located (Exh. C-2; Tr. 19). After the employee noticed Sotak taking pictures, he stepped away from the edge of the roof and replaced the awareness barrier (Exh. C-4; Tr. 20).

Sotak approached the building and proceeded to the office trailer of the general contractor. She met with the general contractor's site manager, Mr. Faircloth. Faircloth stated that the man on the roof was an employee of subcontractor RKH. Faircloth accompanied Sotak to the roof of the building, but by the time they got there, the employee was gone (Tr. 14-15). The roof was approximately 30 feet high (Tr. 21).

Sotak came back down to the front of the building and met Mike Petrey, who identified himself as an employee for RKH. She then met with the man who had been on the roof, Fernando Acateca, who also identified himself as an employee for RKH (Tr. 15). When asked why Acateca had not been using fall protection, both Petrey and Acateca stated that Acateca had been tied off while on the roof prior to their lunch break. Acateca told Sotak "that he forgot to put [his safety harness] back on when he went up to the roof after lunch" (Tr. 16). It was approximately 2:30 when Sotak interviewed Acateca (Tr. 16). RKH had a safety harness available on site for Acateca and he put it on in Sotak's presence (Tr. 17).

RKH is based in Charlotte, North Carolina, with satellite offices in Florida and Georgia. RKH is owned and operated by partners Richard Girouard and Ron Shafer, and has been in business for approximately 20 years (Tr. 63-65). RKH employs approximately 32 employees, who work in two-man crews (Tr. 56).

The crew members are designated as the keeper and the CDL driver. The crew members use a large tandem vacuum truck to vacuum the gravel. The vacuum truck pulls a supply trailer that carries the hoses and pipes. The keeper drives a pickup that carries various tools and other supplies. The CDL driver sets up the truck on the ground below the area of the roof from which the crew is removing the gravel. After setting up the hoses and pipes, both crew members go on the roof and vacuum the gravel. The average job takes 4 or 5 days to complete (Tr. 63-64). The Birmingham job at issue here was a larger project, on which RKH had worked for 2 weeks at the time of Sotak's inspection. RKH needed 2 or 3 more days to complete the job after Sotak's inspection (Tr. 78).

As a result of the inspection, the Secretary issued the citation that gave rise to the present case.

The Citation

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Secretary alleges that RKH committed a serious violation of § 1926.501(b)(1), which provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

It is undisputed that § 1926.501(b)(1) applies to the roof on which Acateca was working. RKH concedes that Acateca was not tied off and was not using any other form of fall protection, in violation of § 1926.501(b)(1). Exhibits C-1, C-2, and C-3 show that Acateca was leaning over the immediate edge of the building, exposed to a 30-foot fall. The only element of the Secretary's case at issue is whether RKH had actual or constructive knowledge of the violation.

Did RKH Have Actual Knowledge of the Violation?

At the hearing, the Secretary proceeded on the theory that Petrey was Acateca's supervisor and that his knowledge of Acateca's failure to tie off could be imputed to RKH. Sotak testified, "I asked Mr. Petrey, I asked who was in charge. He stated that he was" (Tr. 22). Sotak stated the Acateca's failure to use fall protection was in plain view and that she observed him from the road as she was driving by (Tr. 22). She believed that Petrey was aware of Acateca's failure to tie off for two reasons: "One, I believe [Petrey] was on the ground tying the pieces to the rope where Mr. Acateca could pull them up; and, two, when I asked why Mr. Acateca wasn't wearing fall protection, he stated he probably forgot" (Tr. 23).

The testimony of RKH witnesses Michael Corigliano and Richard Girouard, however, undercut the Secretary's position that Petrey had supervisory control over Acateca.

Michael Corigliano is a firefighter with the City of Charlotte Fire Department. For the past 9 years, he has worked part-time as RKH's safety directory and CDL driving trainer (Tr. 31-32). Corigliano testified that RKH's two crew members were equal in terms of safety training and job responsibility

(Tr. 56). When asked if he knew what Petrey meant when he told Sotak that he was in charge, Corigliano responded (Tr. 57):

No, I don't. They are all equal as far as that goes, except he drives a bigger truck which that could cause him to be in charge, but he does have the CDL driver's license. Let's put it that way.

...

[T]here's two different types of trucks. The CDL driver for the big truck and then there are the regular drivers that hold the regular driver's license to run the smaller trucks.

...

In my training, they're all trained equally as far as the rules go of OSHA. They're all aware of it, they're all trained in CPR, they're all trained by OSHA standards, and they all know the operations except for, of course, some of the new people.

Girouard corroborated Corigliano's testimony that one crew member did not have supervisory authority over the other (Tr. 64):

They just team it, both ways. One guy gets on the ground, and one guy goes on the roof, setting it up, and then when they're vacuuming, they are both on the roof and they just take turns. Essentially, every day, they do the exact same job. They will just take turns doing it.

Girouard stated that Acateca's only supervisors were himself and his partner Ron Shafer (Tr. 65).

When asked if Petrey was a supervisor, Girouard stated (Tr. 70-71):

Girouard: Well, we like to call them two-man teams because they are basically two people that do the same thing. There's nobody saying, "Hey, you do this, you do that."

Q.: Does he have the authority to hire and fire people?

Girouard: No, he doesn't.

Q.: Does he have the authority to order people around?

Girouard: They don't have the authority to order people around, but mainly it's a two-man team. You have to work together just like when I said when they get to the job, they go up and figure out how they're going to do it and they go to work from there. They do the exact same job.

Q.: Now, one person that may be designated as in charge, there was some discussion about CDL. Does that play into how somebody may think they're in charge?

Girouard: Well, they're in charge when they're driving the big trucks, and they're the ones that's going to have to be the lead person because they have to drive the big truck and pull the trailer, and, then, one of them will have the contact sheet, and who they're going to contact at the job, and one of them will do the paperwork and fax in their time sheet every night.

RKH has clarified that it is only in driving the vehicles that the CDL driver is designated as the lead crew member. Once they are at the job site, the two crew members are equals, with no supervisory authority over each other. Both Petrey and Acateca were called into the office after the event because RKH considered the violation to be a team failure. In her post-hearing brief, the Secretary does not argue that Petrey was Acateca's supervisor. She does not argue that RKH had actual knowledge of the violative conduct, but rather contends that RKH could have known of it with the exercise of reasonable diligence. This is the showing necessary to prove constructive knowledge.

The record does not establish that RKH had actual knowledge of Acateca's failure to tie off.

Did RKH Have Constructive Knowledge of the Violation?

An employer is assumed to have constructive knowledge of a violative condition if the condition could have been discovered or disclosed with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of violations. *Pride Oil Well Services*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Adequate Work Rules

RKH has an extensive written safety program, copies of which are given to all employees (Exh. R-1; Tr. 34-35). The written program sets out the requirements for fall protection. The program states (Exh. R-1, p. 3-52):

Each employee engaged in roofing activities on low-slope roofs with unprotected sides and edges 6 feet (1.8 meters) above lower levels shall be protected from falling by guardrail system or a combination of a warning line system, warning line system and personal fall arrest system, or warning line system and safety monitoring system.

The safety program's section on fall arrest systems is illustrated showing how to configure the fall arrest system and includes a page on how to calculate fall distances. The program states (Exh. R-1, p. 3-49):

FALL ARREST SYSTEM

When guardrails or other safeguards are not in place, rely on fall arrest.

A fall arrest system typically consists of:

- full body harness
- lanyard (with locking snap hooks or D-clips)
- rope grab
- lifeline
- lifeline anchor

You must use a fall arrest system if you are in danger of falling:

- more than 6 feet

RKH's work rules regarding the use of fall protection are consistent with the requirements of § 1926.501(b)(1). The work rules are determined to be adequate.

Training Program

The record establishes that RKH has an exemplary training program. Corigliano testified that when an employee is hired, he is given a safety manual and safety bag, and attends mandatory safety and driver training (Tr. 33-34). The safety bag contains a hard hat, gloves, two pairs of safety glasses, a lanyard, a safety harness, 50 feet of safety rope, and a personal fall lanyard (Tr. 43-44). The initial safety training lasts 11 hours (Tr. 54).

Twice a year at 6-month intervals, all RKH employees attend a mandatory 3-day training seminar (Tr. 33). Both Petrey and Acateca attended these seminars (Exhs. R-2, R-3; Tr. 37-38, 145-149). RKH's safety training program is determined to be more than adequate.

Supervision

The two-man crews work on their assigned projects without on-site supervision. RKH contends that it provides adequate supervision for its employees in three ways: (1) random site visits by safety director Corigliano, (2) random site visits by owner Girouard, and (3) random site visits by RKH's insurance carrier. RKH contends, "Since employees do not know when a surprise visit will occur, they must assume that every day is an inspection day" (RKH's brief, p. 3).

Corigliano testified (Tr. 50):

I go to a random site and look at the operation and make sure the perimeter warning is up, and make sure that the men are abiding by our safety rules and they're being followed. They are just usually random because my days in the fire department are different. So, they never know when I will be there.

He stated that he averaged two or three on-site visits a month. “We work throughout the Southeast, and there is not always a local job site that I can visit because of my work schedule. I have to work my other job the next day, so I can’t leave for an overnight visit” (Tr. 53). Corigliano conceded that his on-site visits are limited to North Carolina and that he would be unable to visit a worksite in Alabama (Tr. 53).

Girouard testified that he makes unannounced visits to worksites six to ten times a month (Tr. 66). He stated that RKH had approximately ten jobs in Alabama in the past year, and that he had visited none of them (Tr. 74).

Girouard also testified regarding on-site visits by RKH’s insurance carrier (Tr. 67):

[W]e’re in a self insurance fund through our Workman’s Comp, and also our insurance company makes a request probably six to eight times a year that they want to visit a job site when they’re going to be in the Charlotte area or wherever they’re going to be. They have a safety director, and they’ll call me up and say, “Hey, we want to see a job site. Can you give me an address?”

There was no evidence that the insurance carrier ever ventured as far as Alabama to inspect an RKH site. Based upon the record, RKH has established that, while it may adequately supervise its employees in North Carolina, it does not provide adequate supervision of its employees on its Alabama worksites.

No one from RKH or its insurance carrier had been to Alabama in the past year. RKH employees on the Alabama worksites were aware that it was unlikely that a surprise inspection would take place. This lack of supervisory oversight is evidence of failure to exercise reasonable diligence to discover violative conditions. Employees who know there is only a remote chance that a supervisor will show up on a site are more likely to take shortcuts. In the instant case, not only did Acateca violate RKH’s work rule requiring him to tie off, he did so in the presence of Petrey, who failed to remind Acateca to tie off. Despite all their training, neither employee followed the safety rules when they believed they could get away with not doing so. RKH’s failure to provide adequate supervision over its Alabama worksite establishes its constructive knowledge of the § 1926.501(b)(1) violation.

Enforcement Policy

RKH’s constructive knowledge of the § 1926.501(b)(1) violation is also established by its lack of an enforcement policy. Despite being RKH’s safety director, Corigliano testified that his safety training does not include any discussion of a disciplinary system, stating, “That’s not my job” (Tr. 52). He took no part in disciplining Petrey and Acateca following the OSHA inspection (Tr. 54).

Girouard testified that RKH does not have a graduated disciplinary scale. Enforcement is not part of the safety program (Tr. 75). Girouard and Shafer called Acateca and Petrey into their office and talked to them. RKH gave all of its employees a refresher course in safety training as a result of the OSHA citation (Tr. 72-73). Girouard stated that he and Shafer handled safety violations on an individual basis and did not have a formal policy for enforcing RKH's safety rules.

Without knowing there will be repercussions, employees may more readily ignore safety rules. Failure to implement an enforcement policy or disciplinary policy for employees who fail to follow company rules is evidence of lack of reasonable diligence. *Revoli Construction Co., Inc.*, 19 BNA OSHC 1682 (No. 00-0315, 2001).

Unpreventable Employee Misconduct Defense

RKH asserts the affirmative defense of unpreventable employee misconduct. In order to establish the affirmative defense of employee misconduct, the employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). The Review Commission has noted that the elements of proof for the employee misconduct defense overlap the proof establishing constructive knowledge. *See Revoli*, 19 BNA OSHC 1682 (No. 00-0315, 2001); *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497 (No. 98-1192, 2001).

The previous section on constructive knowledge determined that RKH had an established work rule designed to prevent the violation of § 1926.501(b)(1) and that RKH's training program had adequately communicated that work rule to its employees. It also concluded that RKH failed to take steps to discover the violation through adequate supervision and that it failed to effectively enforce the rule once a violation was discovered.

RKH's employee misconduct defense fails for the same reasons that constructive knowledge was held to be established.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history

of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

RKH employed approximately 32 employees at the time of the inspection (Tr. 24). It had no prior history with OSHA (Tr. 25). The gravity of the violation is high. Acateca was leaning over the edge of a roof 30 feet above the ground without fall protection. Death would be the likely result of a fall.

The Secretary proposed a penalty of \$2,500.00. Despite the high gravity of the violation, it is determined that a significant reduction in the penalty is warranted due RKH's history and the good faith demonstrated by the company.

RKH has an extensive written safety program. The company provides each employee with a complete safety bag and trains them in the use of the equipment. Its intensive safety training seminars given to new employees and twice a year to all other employees demonstrate a strong commitment to employee safety. The Secretary had never cited RKH before in its 20-year history, despite RKH's being in a highly visible industry.

For these reasons, it is determined that an appropriate penalty is \$750.00.

**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 the citation, alleging a serious violation of § 1926.501(b)(1), is affirmed, and a penalty of \$750.00 is assessed.

/s/ Nancy J. Spies

NANCY J. SPIES

Judge

Date: December 15, 2003