
SECRETARY OF LABOR,	:
	:
Complainant,	:
	:
v.	:
	OSHRC Docket No. 94-1546
L.R. WILLSON AND SONS, INC.,	:
	:
Respondent.	:
	:

DECISION

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

This case is before the Commission pursuant to a remand order from the United States Court of Appeals for the Fourth Circuit. *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir. 1998), *cert. denied*, 142 L.Ed.2d 328 (1998). In its initial decision in this case, the Commission affirmed the administrative law judge and held that a violation of the fall protection standard for steel erection at 1926.750(b)(1)(ii) by L.R. Willson & Sons, Inc. (“Willson”) was serious rather than willful as alleged by the Secretary of Labor (“the Secretary”). *L.R. Willson & Sons, Inc.* 17 BNA OSHC 2059, 1995-97 CCH OSHD ¶ 31,262. In finding a violation, the judge had imputed the acts and knowledge of a supervisory employee to Willson and rejected Willson’s claim that the violation was the result of unpreventable misconduct by this employee. The Commission did not review this part of the

judge's decision, focussing instead on issues related to the legality of the inspection and the characterization of the violation by the judge as not willful.

Willson appealed the Commission's decision to the Fourth Circuit, which affirmed the Commission's finding that the inspection had not violated either the Fourth Amendment of the Constitution or any provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. The court, however, reversed the finding of a violation, holding that the Commission's imputation of the supervisor's knowledge to Willson and its requirement that Willson show that it had made good faith efforts to comply impermissibly shifted the burden of proof to the employer in contravention of the rule announced in *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979). In *Ocean Electric*, the Fourth Circuit reasoned that strict imputation of a supervisor's acts to his employer would frustrate the purposes of the Act. The court held that, if a violation is reasonably foreseeable, the employer should be liable, but if the violation is an isolated incident of idiosyncratic or unforeseeable conduct, the violation should be vacated. In *Willson*, the court stated that, "despite a finding of knowledge on the part of a supervisory employee, the Commission [sic] bore the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable."¹ 134 F.3d at 1240. The court remanded this case to the Commission to determine whether, under *Ocean Electric*, the Secretary has proved in this case that the supervisor's conduct cited was foreseeable or preventable.

We find that the Secretary has not carried that burden. Although the record shows that Willson had reason to know that its locally-hired work force, which included this supervisor, was not diligent about following safety requirements, and that it might have foreseen violations of the fall protection standard, the supervisory employee involved in the

¹As the Supreme Court has noted, the Commission is a "neutral arbiter" in these proceedings. *Martin v. OSHRC*, 499 U.S. 144 (1991), citing *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam). As such, it is not an active party and therefore has no burden to carry. It is the Secretary of Labor, as complainant in each case before the Commission, who has the burden of proof.

misconduct had been specifically instructed on the morning of the inspection by Willson's vice-president of field operations, its highest-level employee on the site, to finish work in another area and wait for the safety cables before beginning work in the area where the violation occurred. He nevertheless disregarded those instructions and took one of his three crew members with him to that area even though he knew that safety cables could not be erected until the day after the inspection.

Under these circumstances, we conclude that the Secretary has not carried her burden of establishing foreseeability under *Ocean Electric*. Therefore, consistent with the court's remand, we vacate the citation and proposed penalty.

/s/

Stuart E. Weisberg
Chairman

Date: April 7, 1999

/s/

Thomasina V. Rogers
Commissioner