

SECRETARY OF LABOR,

Complainant,

v.

FOSS MARITIME ,

Respondent.

OSHRC DOCKET NO. 98-0038

APPEARANCES:

For the Complainant:

Cathy Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Frank H. Williamson, Esq., Foss Maritime Company, Seattle, Washington

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Foss Maritime (Foss), at all times relevant to this action maintained a place of business on the Columbia River in Ranier, Oregon, where it operated a repair and support facility for its water transportation business. Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 26, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Foss' Ranier work site. As a result of that inspection, Foss was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Foss brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 27, 1998, an E-Z hearing was held in Seattle, Washington. No briefs are required in a Commission E-Z proceeding; this matter is, therefore, ready for disposition.

Alleged Violation of §1910.151(c)

Serious citation 1, item 1 alleges:

29 CFR 1910.151(c): Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use:

(A) For the “floating shops” eye wash station that the employer demonstrated its effectiveness, which only allowed a trickle of water to flow and did not allow flushing of eyes exposed to caustic materials.

Facts

OSHA Compliance Officer (CO) Alex Bedard testified that, at its Ranier work site, Foss utilized caustic soda in a tank to dip parts (Tr. 13, 16). The material safety data sheet for the caustic states that, in the event of eye contact, the eye should be continuously flushed with water for 30 minutes while holding the eye open (Tr. 21-22; Exh. C-5). When Bedard examined the eyewash station, located between 7 and 11 feet from the tank, he discovered that the pipes were clogged with sediment, allowing only a trickle of water to flow through the spouts (Tr. 14, 18, 94; Exh. C-1).

Bedard testified that the shipyard manager, Bob Sold (Tr. 11), told him he had been aware that the eye wash needed a filter for some time (Tr. 15). Sold told Bedard that there was running water available in a sink approximately 25 feet from the dipping station, and from a garden hose outside a double door approximately 9 feet from the dipping tank (Tr. 18, 93). At the hearing it was established that there was a second hose immediately adjacent to the tank (Tr. 91-94; Exh. C-2). Sold believed that the hoses were suitable eye flushing facilities (Tr. 91). Bedard could not recall discussing the second hose at the time of the inspection (Tr. 19, 52, 122).

Discussion

Under Commission precedent, whether an employer has complied with its obligation to provide "suitable facilities" within the meaning of section 1910.151(c) depends on the "totality" of the relevant "circumstances," including the nature, strength, and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities. The Secretary bears the burden of proving that the facilities provided by the employer are not "suitable" within the meaning of the standard, a burden that he cannot meet merely by showing that the flushing apparatus provided was not an eyewash fountain.

Atlantic Battery Company, Inc., 16 BNA OSHC 2131, 2167-68, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). Here, the Secretary made no attempt to establish that a hose was not “suitable” within the meaning of the standard. The CO testified only that, at the time of the inspection, he was not told that the hose

immediately adjacent to the tank of caustic was working. This judge concludes, therefore, that had the CO known that running water was available from the hose next to the tank, this citation would not have been issued.

Citation 1, item 1 is vacated.

Alleged Violation of §1915.73(d)

Serious citation 1, item 2 alleges:

29 CFR 1915.73(d): Edges of decks, platforms, flats or similar flat surfaces more than 5 feet above a solid surface were not guarded by adequate guardrails:

(A) For the access platform of the Alison yacht having no midrails on either side of the ramp. The Alison was located on the ways.

Facts

CO Bedard testified that he observed employees crossing a walkway leading to the yacht ALISON, where Foss was engaged in raising the rudder (Tr. 32, 34; Exh. C-10). The walkway was 14 feet above any solid surface, and was inadequately guarded, in that it had no midrails (Tr. 36, 48).

Bob Sold testified that Ron Greer, a journeyman, installed the walkway and guardrails to the ALISON (Tr. 67, 84). Sold stated that Foss has safety rules requiring midrails on all guardrails, and that the cited walkway was constructed contrary to Foss' policy (Tr. 101-02; Exh. R-2, ¶III.B.2). Sold further stated that those rules were communicated to Greer on several occasions (Tr. 97).

Greer testified that he and another employee, Todd Hall, were working on the yacht, pulling the rudder (Tr. 67-69). Greer testified that he and Hall only planned on using the walkway for two or three trips across, and he thought it would take too long to add the midrail (Tr. 112). Greer testified that he had been made aware of Foss' rules requiring midrails on all guardrails (Tr. 110). Greer stated that he had constructed handrails in the past under direct supervision, at which time he had been instructed to put in a midrail (Tr. 110, 112-13). Greer testified that he was verbally reprimanded for violating Foss' policy following the OSHA inspection (Tr. 115). Dag Lunde, Foss' manager of loss control and compliance, testified that employees are verbally reprimanded for failing to adhere to Foss' safety program; gross negligence may result in termination (Tr. 80-81).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work

rules to its employees; taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

The evidence establishes that Foss has a work rule specifically describing the required configuration of all guardrails, and that said rule was effectively communicated to its employees, including Ron Greer, who put up the cited guardrail. Moreover, Foss showed that Greer had erected guardrails before under direct supervision.¹ Had Greer constructed the guardrail in accordance with his instruction, the hazard would have been eliminated. Finally, Greer was reprimanded for incorrectly installing the guardrail.

Though Foss' failure to introduce evidence specifically describing a progressive disciplinary scheme makes this a close case, I find that Foss has met its burden and has proved the affirmative defense alleged.

Item 2, therefore, is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1910.151(c) is VACATED.
2. Citation 1, item 2, alleging violation of §1915.73(3) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated:

¹ The Act does not require constant supervision of experienced employees in anticipation of possible future safety violations. *e.g. New England Tel. & Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 82 (1st Cir. 1978); *Hanovia Lamp Division, Canrad Precision Industries, Inc.*, 1 BNA OSHC 1073 (No. 89, 1972).