

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.

Jesco, Inc.,

Respondent.

OSHRC Docket No. **16-0256**

Appearances:

John A. Black, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

McCord Wilson, Esquire, Rader & Campbell, P.C., Dallas, Texas
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Jesco, Inc. was hired by Sunshine Mills, a dry pet food manufacturer, to replace a bucket conveyor system at its plant in Tupelo, Mississippi. On September 13, 2015, an employee of Jesco was killed while working with other Jesco employees to remove the old bucket conveyor system. The Occupational Safety and Health Administration conducted a fatality investigation. On January 15, 2016, the Secretary issued a Citation and Notification of Penalty to Jesco alleging it committed four violations of OSHA’s Construction Standards.

At issue in this proceeding is Item 4 of the Citation, which alleges a serious violation of 29 C.F.R. § 1926.850(d), for failing to temporarily relocate or protect a necessary electrical power line during demolition.¹ The Secretary proposes a penalty of \$7,000.00 for Item 4.

The Court held a hearing in this matter on September 27, 2016, in Tupelo, Mississippi. The parties filed briefs on December 5, 2016. Jesco argues 29 C.F.R. § 1926.850(d) does not apply to the cited conditions.

¹ During the pre-hearing conference held in this proceeding on September 24, 2016, the parties informed the Court they had settled Items 1 through 3 of the Citation. The parties submitted a written settlement agreement regarding those items on October 26, 2016, which the Court approved October 31, 2016.

For the reasons that follow, the Court finds 29 C.F.R. § 1926.850(d) does not apply to the cited conditions. The Court **VACATES** Item 4. No penalty is assessed.

Background

In July of 2015, Sunshine Mills hired Jesco to replace one of two bucket conveyor systems in its plant in Tupelo, Mississippi. Sunshine Mills and Jesco had a longstanding working relationship. The system being replaced is referred to as Bucket Elevator #2 (Bucket Elevator #1, located approximately 8 feet from Bucket Elevator #2, was replaced in late 2013 or early 2014) (Exh. C-4; Tr. 25-30, 43). Bucket Elevators #1 and #2 are in the tunnel shaft of the facility (Exh. C-106A; Tr. 29-30). The bucket conveyor system operates as a vertical loop that carries pet food in buckets attached to a conveyor belt from the ground floor to a bin storage system at the top of the building. The bin storage system is approximately 50 to 60 feet above ground level (Tr. 28). The conveyor belt with attached buckets is housed vertically inside connected 8-foot long steel casings that make up the two “legs.” The casings are approximately 8 inches wide. On the up side of one leg, the conveyor belt transports the buckets upward. After reaching the top of the loop, the buckets travel downward on the down side of the other leg (Exh. C-110A; Tr. 45-47, 49).

Bucket Elevator #2 is 80 to 85 feet high (Tr. 48). The legs of Bucket Elevator #2 are attached to the tunnel shaft walls with angle iron (Tr. 185). Bucket Elevator #2 is powered by a motor and drive pulley located at the top of the elevator in the head section. The boot section of the elevator (at ground level) also contains a pulley wheel around which the conveyor belt runs. To remove the old bucket conveyor system, Jesco needed to cut through the angle iron attaching the assembly to the tunnel shaft walls and remove the old parts with a crane, which was parked in the south parking lot. The crane removed the steel casings in 20- to 30-foot long sections at a time. Sunshine Mills planned to sell the metal casings as scrap, dispose of the conveyor belt, and possibly keep the buckets, depending on their condition (Tr. 52, 55-56, 67, 97).

A man lift is located in the tunnel shaft area between Bucket Elevators #1 and #2. It is used to transport plant personnel between the ground level and the upper dry bin level. The man lift consists of a passenger compartment with a safety door that ascends and descends on guiderails. The passenger compartment is not enclosed. The man lift is operated by electrical power controlled in the motor control center (Tr. 68). During the bucket elevator replacement project, Jesco used the top of the man lift passenger compartment as a work platform for its

employees. An employee stood on top of the man lift to unbolt sections of Bucket Elevator #2 (Exh. C-4; Tr. 54).

At some point, Jesco removed sheet metal siding at the upper level of Bucket Elevator #2 and discovered a junction box mounted to an I-beam with conduit running into it on one side and out from the other side (Tr. 105). Neither Jesco nor Sunshine Mills had been aware of the existence of the junction box. Jesco and Sunshine Mills representatives examined the junction box and held a meeting to discuss it. Sunshine Mills plant electrician Bobby Norris told the Jesco representatives he could move the junction box. Jesco declined, responding it “could work around the junction box.” (Tr. 128) Due to the location of the junction box, Jesco decided it needed to remove one side of the leg casing at a time with the crane, instead of lifting both sides simultaneously as it had planned (Tr. 77, 104-108, 110, 125-129).

Work on the project began around the second week of September 2015. To use the top of the man lift as a work platform, Jesco secured the man lift guide rail to the bin walls. On Sunday, September 13, 2015, Jesco was using the crane to remove three connected sections of leg casings from the shaft of Bucket Elevator #2. Jesco Employee #1 was on top of the man lift, cutting the angle iron that connected the metal legs to the tunnel shaft walls. Employee #2 was inside the passenger compartment of the man lift so he could operate the controls to position it for Employee #1. As the crane lifted the connected leg casings, a section struck the conduit connected to the junction box, causing the man lift to ascend to the top of its shaft. Employee #1 was crushed between the top of the man lift and the shaft ceiling (Tr. 79, 93).

OSHA compliance safety and health officer (CSHO) David Young arrived at the Sunshine Mills’s facility the next day, Monday, September 14, 2015, and opened a fatality investigation. He conducted interviews and took photographs. Based on CSHO Young’s inspection, the Secretary issued the Citation to Jesco on January 15, 2016.

JURISDICTION AND COVERAGE

Jesco timely contested the Citation and Notification of Penalty on January 28, 2016. The parties stipulate the Commission has jurisdiction over this action and Jesco is a covered employer under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 13). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Jesco is a covered employer under § 3(5) of the Act.

CITATION NO. 1

Item 4: Alleged Serious Violation of § 1926.850(d)

Item 4 of the Citation alleges, “On or about September 14, 2015, electrical power to the special purpose personnel elevator was not temporarily relocated, as necessary, and protected during demolition work.”

Section 1926.850(d) provides:

If it is necessary to maintain any power, water or other utilities during demolition, such lines shall be temporarily relocated, as necessary, and protected.

The Secretary’s Burden of Proof

To establish a violation of a safety or health OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff’d in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Applicability of the Cited Standard

Section 1926.850(d) is found in *Subpart T—Demolition* of the Construction Standards. Jesco’s sole defense in this case is the Secretary cited an inapplicable standard. Counsel for Jesco stated in his opening argument, “The standard simply doesn’t apply because this wasn’t demolition.” (Tr. 18)

The Work Being Performed Was Not Demolition

Section 1926.32(g) defines *construction work* as “work for construction, alteration, and/or repair, including painting and decorating.” Therefore, to qualify as demolition, a work assignment must manifest some quality other than “construction, alteration and/or repair,” which applies to general construction work. OSHA’s Construction Standards do not define *demolition* (Tr. 150, 183).

CSHO Young testified that when he interviewed Jesco superintendent Darryl Cooks, Cooks referred to the removal of Bucket Elevator #2 as “‘demo,’ meaning demolition.” (Tr. 199) CSHO Young stated Cooks’s use of the word “demo” “weighed a little bit in the factor” of his conclusion Jesco was engaged in demolition work (Tr. 201). The inspection at issue was CSHO Young’s first inspection for which he recommended issuing a citation for violations under *Subpart T—Demolition* (Tr. 197).

The Court concludes the text of the cited standard alone does not make clear the definition of *demolition*.

When determining the meaning of a standard, the Commission must first look to its text and structure. *Superior Masonry Builders Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). “If the meaning of the [regulatory] language is ‘sufficiently clear,’ the inquiry ends there.” *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated) (citing *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)), *aff’d in relevant part*, 541 F.3d 193 (3d Cir. 2008). If “the meaning of [regulatory] language is not free from doubt,” the standard is ambiguous. *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150-51 (1991); *see also Exelon Generation Co. v. Local 15, Int’l Bhd. of Elec. Workers*, 676 F.3d 566, 570 (7th Cir. 2012) (“A regulation is ‘ambiguous’ as applied to a particular dispute or circumstance when more than one interpretation is ‘plausible’ and ‘the text alone does not permit a more definitive reading.’” (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011))); *Sec’y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 197-98 (3d Cir. 2008) (citing *CF & I’s* “‘free from doubt’ test). Only if the standard is ambiguous will the Commission defer to the Secretary’s reasonable interpretation of that standard. *CF & I*, 499 U.S. at 150-51, 158; *Unarco*, 16 BNA OSHC at 1502-03.

The Davey Tree Expert Co., 25 BNA OSHC 1933, 1934 (No. 11-2556, 2016).

CSHO Young acknowledged OSHA does not define *demolition*, but “it’s referenced, though, through the ANSI standard.” (Tr. 183) ANSI/ASSE A10.6-2006 addresses *Safety and Health Program Requirements for Demolition Operations*. Section 3.9 of A10.6 defines *demolition* as, “Dismantling, razing, destroying or wrecking any building or *structure* or any part thereof.”² (emphasis added) This definition leads to consideration of another ambiguous term upon which the parties cannot agree. It is undisputed Bucket Elevator #2 is not a building. But is it a “structure”? “The Secretary’s position is that the bucket elevator was a structure within the meaning of the ANSI standard (and, thus, encompassed by ‘demolition’ in the OSHA standard). The bucket elevator was a large object—more than 80 feet tall—comprised from many different parts, which had been assembled, erected, and physically attached to and made a part of the Sunshine Mills plant.” (Secretary’s brief, p. 11) Jesco disagrees. “The unambiguous commonly understood meaning of both building and structure do not include things such as the conveyor belt system being removed by Respondent.” (Jesco’s brief, p.11)

² The Court took judicial notice of ANSI/ASSE A10.6-2006 at the hearing (Tr. 175-176).

CSHO Young was unable to provide a reference for his assertion the bucket elevator conveyor was a structure.

Q.: I understand you're saying that [Jesco was] removing [the bucket elevator conveyor], cutting it away, whatever. I'm trying to focus on why you're saying it's a structure. And I think what you said was that it's part of their manufacturing work, correct?

CSHO Young: That is correct.

Q.: Are those the two elements that you looked to to determine that the conveyor system was a structure?

CSHO Young: No. The conveyor system is a structure by itself.

Q.: Based on what definition?

CSHO Young: My judgment.

Q.: Anything else?

CSHO Young: No.

(Tr. 189)

Structure has been defined as “a building or other object constructed from several parts.” *Structure*, *New Oxford American Dictionary* (3rd ed. 2010) The *Scope* section of the A10.6 § 1.1, provides, “This standard applies to the demolition of buildings and other structures.” The use of the word *other* before *structures* must be considered when determining the meaning of *structures*. “See, e.g., *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (“[W]ords in statutes should not be discarded as ‘meaningless’ and ‘surplusage’ when Congress specifically and expressly included them...”); accord [*AKM LLC dba*] *Volks* [*Constructors v. Secretary of Labor*], 675 F.3d [752,] 756 [(D.C. Cir. 2012)] (“[W]e must be ‘hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.’ ” (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011))).” *Delek Ref., Ltd. v. Occupational Safety & Health Review Comm'n*, 845 F.3d 170, 177–78 (5th Cir. 2016).

In *Thibodeaux v. Grasso Production Management Inc.*, 370 F.3d 486 (5th Cir. 2004), the Court of Appeals for the Fifth Circuit addressed the issue of whether a fixed oil production

platform was a covered situs under § 903(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA). Section 903(a) provides:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

The Court of Appeals stated it had adopted “a functional approach to construing the parenthetically enumerated structures in § 903(a).” *Id.* at 488-89. The Court of Appeals interpreted the word *other* before the phrase *adjoining area* as meaning “additional.”

[W]e note that in context the word “other” in the phrase “or *other* adjoining area customarily used by an employer in loading [or] unloading” (emphasis added) means something to the effect of “additional,” and necessarily refers back to the enumerated structures, indicating that what follows will have some resemblance to what preceded. It is reasonable to surmise that Congress intended for the additional unspecified “adjoining areas” to have qualities similar to those possessed by the enumerated structures, such as being used for a maritime purpose. Thus the similarity between the enumerated structures and any qualifying structure in the catch-all “other adjoining area” category is that structures in both categories customarily are used for a maritime purpose such as loading and unloading vessels.

Id. at 491.

This approach is in accordance with two other basic principles of statutory construction, *noscitur a sociis* and *ejusdem generis*. “The canon *noscitur a sociis*, ‘a word is known by the company it keeps,’ is ‘often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.’ *Hickman v. Texas*, 260 F.3d 400, 403 (5th Cir.2001) (quotations omitted).” *Id.* at 491. “*Ejusdem generis* means ‘of the same kind,’ and is a variation of the maxim *noscitur a sociis*. *Ejusdem generis* instructs that, where general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *United States v. Kaluza*, 780 F.3d 647, 657 (5th Cir. 2015)

The Court of Appeals concluded the fixed oil production platform did not qualify as any of the enumerated structures in § 903(a), nor as an “other adjoining area,” because it was not customarily used for a maritime purpose.

Here, *other* must refer to “buildings,” which is the only other item listed in the *Scope* section of the A10.6. Jesco argues,

Since the language used [in the *Scope* section of A10.6] was “buildings and *other* structures,” instead of “buildings and structures” we know that the two words are used synonymously in the standard. . . . The OSHA demolition standards also use the two words synonymously and interchangeabl[y]. 1926.850(k) states that “[e]mployee entrances to multistory *structures* being demolished shall be completely protected by sidewalk sheds or canopies, or both, providing protection from the face of the *building* for a minimum of 8 feet.” (Emphasis added). The standard switches midsentence between structures and building, but it is clear that both words are referring to the same thing: the building/structure being demolished.

(Jesco’s brief, p. 7)

The Court does not agree the words *building* and *structure* are synonymous and interchangeable (otherwise the ANSI and OSHA standards would just choose one word to use), but agrees, as explained by the court in *Thibodaux* “that what follows [*other*] will have some resemblance to what preceded. It is reasonable to surmise that Congress intended for the additional unspecified [*structure*] to have qualities similar to those possessed by [*building*.]” *Thibodaux*, 370 F.3d at 491.

CSHO Young conceded the bucket elevator conveyor was not structural, in that it did not support anything. Bucket Elevator #2 was not load-bearing or foundational, and Jesco did not remove any walls or floors during the project (Tr. 185, 195-196). Section 1926.850(a) provides:

Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

In this subpart of § 1926.850 (the same standard cited here), the employer is required to have a competent person, prior to starting demolition operations, make an engineering survey of

the *structure*, to determine the condition of the *framing, floors, and walls*.³ The standard presumes the elements of a structure are similar to the elements of a building: framing, floors, and walls. Nothing in the standard indicates *structure* encompasses a conveyor system such as the one at issue.

Section 1926.851(a) provides:

Only those stairways, passageways, and ladders, designated as means of access to the structure of a building, shall be used. Other access ways shall be entirely closed at all times.

The standard refers to the *structure of a building*, indicating again the elements of framing, floors, and walls.

Section 1926.852(a) provides:

No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected.

Again, the standard presumes the structure will have exterior walls. Section 1926.854 addresses the removal of walls; § 1926.855 addresses the removal of floors. “Regulations are to be read as a whole with each part or section construed in connection with every other part or section.” *The Davey Tree Expert Co.*, 25 BNA OSHC at 1934. The demolition standards as a whole address “dismantling, razing, destroying, or wrecking” elements associated with buildings. Because A10.6 applies to “buildings and other structures,” the structures must have a quality in common with buildings. Bucket Elevator #2, which is a conveyor belt housed inside an 8-inch wide steel casing, is not akin to framing, floors, or walls.

“An agency’s interpretation of its standards is entitled to deference when it is reasonable and consistent with the language of the standard.” *Brand Energy Sols. LLC*, 25 BNA OSHC 1386, 1390 (No. 09-1048, 2015). Here, the Secretary’s interpretation of *structure* is not reasonable and is at odds with the language of the standard. The Secretary is asking the Court to strain the common meaning of *structure* to cover a piece of equipment.

“In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words....” *Bethlehem Steel Corp. v. Occupational Safety &*

³ Despite his conclusion that Jesco was engaged in a demolition operation, CSHO Young did not recommend citing Jesco for a violation of § 1926.850(a) because “it depends on what you’re doing with the demolition to get an engineering survey. *If it involves structure, that you’re removing a wall*, yeah, you’d want to get a competent person . . . to look at that before you do the dismantling because it could bring on a whole new kind of ball game. [In this case, Jesco] didn’t need an engineer to look at it.” (Tr. 196-187) (emphasis added). Section 1926.850(a) does not distinguish among different types of demolition operations in its requirement of an engineering survey.

Health Rev. Comm'n, 573 F.2d 157, 161 (3d Cir.1978). There is a clear purpose behind this precedent of refusing to support strained interpretations of agency regulations: To do so “for the purpose of alleviating a perceived safety hazard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them.” *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 650 (5th Cir.1976).

Fabi Const. Co. v. Sec'y of Labor, 508 F.3d 1077, 1088 (D.C. Cir. 2007).

The Court determines the Secretary failed to establish Bucket Elevator #2 was a structure within the meaning of *Subpart T—Demolition* and the *Scope* section of A10.6. Because Bucket Elevator #2 was not a structure, Jesco was not engaged in a demolition operation when removing it. Section 1926.850(d) does not apply to the cited conditions.

It Was Not Necessary to Maintain the Electrical Power to the Man Lift

Even if Bucket Elevator #2 were determined to be a structure within the meaning of *Subpart T—Demolition* and the *Scope* section of A10:6, the Secretary still failed to establish applicability of the cited standard. Section 1926.850(d) requires the employer to temporarily relocate or protect a utility line “[i]f it is necessary to maintain.” Here, it was not necessary to maintain the electrical power for the man lift. Philip Bates, vice-president of manufacturing for Sunshine Mills, testified the electrical controls for the man lift could have been locked out (Tr. 69-70). He stated Jesco could still use the top of the man lift as a work platform if it were locked out. “[Jesco] would have taken the man lift to the location that they wanted to work and then basically come down—there’s a ladder system next to the man lift that they could have come back to ground level and locked and tagged out the elevator and then went back to that location to work on it.” (Tr. 74)

Bobby Norris, the plant electrician for Sunshine Mills, testified the junction box serviced only the man lift, so no other system would be affected if the man lift power were locked out. “[The junction box] was strictly the controls for the push buttons, limit switches, door switches, everything that controlled the man lift. . . . We knew all along that it did not serve anything except the man lift. It only served the man lift.” (Tr. 129)⁴ The Secretary conceded it was

⁴ Jesco Employee #3, who flagged the crane the day of the accident, stated the junction box powered both the man lift and Bucket Elevator #1 (which was still in use) (Tr. 106). This is contrary to the testimony of Bates and Norris, both of whom worked for Sunshine Mill and who were more knowledgeable about the plant’s electrical system. The Court does not credit the testimony of Employee #3 on this issue.

possible for Jesco to lockout the man lift, acknowledging it was not necessary to maintain the power. “Jesco elected not to lock-out and tag-out the man lift power when [Employee #1] was on top of the passenger compartment, which would have de-energized the junction box and conduit while the crane lifted out the leg casing sections.” (Secretary’s brief, p. 8) The Court determines it was not necessary to maintain the electrical power to the man lift while removing the Bucket Elevator #2; thus, § 1926.850(d) does not apply to the cited conditions.

Item 4 is **VACATED**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 4 of Citation No. 1, alleging a violation of § 1926.850(d), is **VACATED** and no penalty is assessed.

Date: April 3, 2017

/s/
SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia