

SECRETARY OF LABOR,

Complainant,

v.

LeTOURNEAU, INC, and its successors,

Respondent.

OSHRC DOCKET NO. 99-0352

APPEARANCES:

For the Complainant:

David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Thomas H. Wilson, Esq., Merritt B. Chastain, III, Esq., Vinson & Elkins L.L.P., Houston Texas

Before: Administrative Law Judge: James H. Barkley

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, LeTourneau, Inc., and its successors (LeTourneau), at all times relevant to this action maintained a place of business at 8010 South First Ave., Sabine Pass, Texas, where it was engaged in shipbuilding (Tr. 48-49; Exh. C-10). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 24, 1998, in response to a report of a fatality, the Occupational Safety and Health Administration (OSHA) conducted an inspection of LeTourneau’s Sabine Pass work site. As a result of that inspection, LeTourneau was issued a citation alleging two violations of the Act’s “general industry” standards at 29 CFR §§1910.23(a)(2) and (a)(8), respectively. By filing a timely notice of contest LeTourneau brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 19, 1999, a hearing was held in Houston, Texas. At the hearing Complainant submitted a motion to clarify the citation, identifying the date of the alleged violation as September 23, 1998, the date of the fatality. Complainant further moved to allege, in the

alternative, violation of the Act's shipbuilding standards, specifically, §§1915.73(b) and (g). Because the motion did not raise any additional factual issues, and because LeTourneau was not prejudiced, said motion was granted (Tr. 10). The parties have submitted briefs on the issues, as amended, and this matter is ready for disposition.

Applicability of §1915 et seq.

Compliance Officer (CO) David Doucet testified that on September 24, 1998, he inspected the cited LeTourneau's work site at the Sabine Pass shipyard, where a Gorilla V jack-up oil rig was under construction (Tr. 20, 22; Exh. C-7). Doucet testified that the Gorilla V rig is an offshore drilling platform, which has been classified as a "vessel" by OSHA (Tr. 48; Exh. C-12). George Cupstib, LeTourneau's manager of projects and engineering, and the project manager for the Gorilla V construction (Tr. 90-91), agreed that the oil rig is a "vessel" (Tr. 92). Cupstib testified that the rig had been constructed at LeTourneau's Vicksburg, Mississippi site, and had been transported to the Sabine Pass shipyard for installation of a derrick fabricated by its subcontractor, Rowan (Tr. 40; 91, 93).

29 CFR §1915.2 **Scope and application** states that Part 1915 applies to all shipbuilding and related employments. *Shipbuilding* is defined at §1915.4(k) as "the construction of a vessel, including the installation of machinery and equipment." LeTourneau admits that its Gorilla V rig is a vessel. Equipment and/or machinery, in the form of a derrick was being installed as of the date of the accident. Part 1915 is clearly applicable to LeTourneau's employment, and to the cited conditions.

Alleged Violation of §1915.73(b)

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Repeat citation 1, item 1a, as amended, alleges:

29 CFR 1915.73 Guarding of deck openings and edges.

* * *

(b) When employees are working in the vicinity of flush manholes and other small openings of comparable size in the deck and other working surfaces, such openings shall be suitably covered or guarded to a height of not less than 30 inches, except where the use of such guards is made impracticable by the work actually in progress.

Near the northeast corner of the derrick walkway platform, where employees were exposed to the hazard of stepping through the ladderway access/egress opening that was not guarded from direct entry by the use of an access gate or equivalent.

Hazard: Fall from elevation (90 feet) causing death or serious physical harm.

Facts

George Cupstib testified that the rig had been constructed at LeTourneau's Vicksburg, Mississippi site, and had been transported to the Sabine Pass shipyard for installation of a derrick fabricated by a second employer, Rowan (Tr. 40; 91, 93). Cupstib testified that a third employer, Crown Derrick Builders, was responsible for the fabrication and installation of the metal grate platform around the perimeter of the derrick floor, which was 90 feet above ground (Tr. 26-27, 41-42, 104; Exh. C-7, C-8).

The platform was accessed by means of a ladder at the northeast corner (Tr. 26; Exh. C-5). While the platform was guarded with rails inside and out, the ladder access was not guarded (Tr. 30, 42; Exh. C-5, C-8). Cupstib testified that installation of the ladder was Rowan's responsibility (Tr. 99).

Greg Miller, LeTourneau's safety coordinator, testified that he was unaware of the cited hazardous conditions (Tr. 145). Miller admitted that it was his responsibility to inspect the work site for potential hazards, though he relied on supervisors and safety technicians to do daily inspections and to identify and report hazardous conditions (Tr. 146-47). Miller stated, however, that LeTourneau had not had employees working on the derrick platform for approximately a month before the accident, therefore, neither he, nor his crew had inspected those areas (Tr. 147). Miller testified that he had inspected the site several times while LeTourneau had employees working there, the last time approximately one month before the incident (Tr. 147).

Doucet testified that, because LeTourneau was the general contractor on the site, it should have been aware of the unguarded ladder access (Tr. 44, 71-71). As Doucet testified, the ladder on the northeast corner was the only access to the derrick floor (Tr. 44).

A single LeTourneau employee, the decedent Paul Dew, and four Rowan employees were on the derrick platform at the time of the accident (Tr. 13, 24). Dew, a piping draftsman and engineer, was a supervisor, or section leader, reporting directly to Cupstib (Tr. 96). On the day of the accident, Dew was inspecting the area in preparation for LeTourneau's anticipated

installation of the derrick's plumbing system (Tr. 24). Cupstib testified that he and Dew examined the derrick platform from the ground the day before the accident, discussing the field wiring for the piping lines, and how they would run through the derrick (Tr. 97). Cupstib testified that it was his recommendation, that they proceed no further up into the derrick; he believed they could see what they needed from the ground (Tr. 97). Cupstib admitted that he did not actually forbid Dew to go up onto the platform (Tr. 98).

Cupstib testified that LeTourneau employees, or employees of their designated subcontractor, would be installing service lines from the platform (Tr. 100).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Applicability. LeTourneau argues that the cited standard which applies to “flush manholes and other small openings of comparable size in the deck and other working surfaces,” does not contemplate, and is not intended to govern the ladder opening of a fixed, caged ladder. LeTourneau maintains that 1) the ladder opening is not a manhole, and 2) construction standards specifically governing fixed ladders exist under Part 1926.

LeTourneau's arguments are not convincing. As noted above, LeTourneau was engaged in shipbuilding, which is governed by the standards codified under Part 1915. The specifically cited standard governs not just manholes, but openings in decks which are of comparable size. The ladder opening meets that definition, and so must be suitably guarded, as mandated by the standard, with a cover or guard not less than 30 inches high.

Compliance. The photographic evidence establishes that the ladder opening was not guarded in any way.

Exposure. It is undisputed that LeTourneau's employee, Dew, was exposed to the cited hazard.

Knowledge. In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986).

The Secretary introduced no evidence that any LeTourneau employee had been on the derrick platform for a month prior to the accident, or that anyone from LeTourneau had actual knowledge of the condition of the platform on the day for which they were cited. Complainant relies on LeTourneau's failure to conduct regular inspections of the entire work site to establish its constructive knowledge of the hazard.

The Commission has held that a general contractor such as LeTourneau may be held liable for the violations of its subcontractors where it was reasonable for the general to detect or abate those violations. *Red Lobster Inns of Am., Inc.*, 8 BNA OSHC 1762, 1980 CCH OSHD ¶24,635 (1980). The Fifth Circuit, however, has held that the Act creates no duty to non-employees. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981). Under the law of the circuit in which this case arises, therefore, no duty to detect or abate violative conditions arises unless the employer anticipates, or reasonably should have anticipated that its employees will be in the area of the cited violation.

In this case, the Secretary has failed to show, by a preponderance of the evidence, that LeTourneau should have anticipated that Dew, or any other LeTourneau employee would access the derrick platform, or be exposed to any hazards existing there. No LeTourneau employees had worked on the platform for a month. Cupstib and Dew were planning how the field wiring and piping would run through the derrick; however Cupstib testified that he believed the work could be done without climbing to the derrick platform, and told Dew it was unnecessary to go up into the derrick. There is no evidence that Dew shared his intention to climb to the platform with anyone from LeTourneau. Based on their conversation the night before, Cupstib had no reason to believe that Dew would go up into the derrick to get a closer look.

Complainant failed to establish that LeTourneau had any duty to inspect the cited derrick platform, or, therefore, that LeTourneau failed to exercise due diligence in discovering hazardous conditions to which its employees might be exposed. Citation 1, item 1a is vacated.

Alleged Violation of §1915.73(g)

Repeat citation 1, item lb alleges:

29 CFR 1915.73(g): Gratings, walkways, and catwalks, from which sections or ladders have been removed, shall be barricaded with adequate guardrails.

Near the southwest corner of the derrick walkway platform, where employees were exposed to a floor hole measured at 30 1/2 inches by 31 inches and were not protected from falls by the use of a cover or a guardrail system in accordance with the standards.

Hazard: Fall from elevation (90 feet) causing death or serious physical harm.

Facts

It is undisputed that Rowan had removed another section of grate from the platform for a second ladderway, creating a 30-1/2 x 31" hole (Tr. 25, 31, 34; Exh. C-1, through C-4). A rope had been draped across the guardrails on either side of the floor hole to warn workers of the opening (Tr. 27-28; Exh. C-2, C-3, C-4). The rope was located approximately two to three feet on either side of the hole; one side of the rope was approximately 24" high, the other was about 38" (Tr. 28, 34-35; Exh. C-2). CO Doucet testified that the rope was inadequate (Tr. 34).

Both Cupstib and Miller testified that they were unaware that Rowan had removed the grating, creating an open hole on the derrick platform (Tr. 94-96, 147).

Discussion

As noted in the item above, Complainant must show, as part of its *prima facie* case, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra*. For the reasons discussed above, this judge finds that Complainant failed to show, by a preponderance of the evidence, either that LeTourneau had actual knowledge of the cited hazard, or failed to exercise reasonable diligence in discovering hazards to which it could reasonably anticipate its employees would be exposed.

Citation 1, item b is, therefore, vacated.

ORDER

1. Citation 1, item 1a, alleging violation of §1915.73(b) is VACATED.
2. Citation 1, item b, alleging violation of §1915.73(g) is VACATED.

/s/

James H. Barkley
Administrative Law Judge

Dated: February 10, 2000