United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. RYDER TRANSPORTATION SERVICES, Respondent.	OSHRC Docket No. 10-0551

ON BRIEFS:

Jennifer R. Levin, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Carla J. Gunnin, Esq.; Constangy, Brooks & Smith, LLP, Atlanta, GA
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

Ryder Transportation Services rebuilds starters and alternators for its vehicles at the Ryder Rebuild Center in Doraville, Georgia. Ryder hired M.C. Dean, an electrical contractor, to perform work at the Center. On August 27, 2009, an M.C. Dean employee working on the roof of the Center fell 26 feet through an unguarded skylight, sustaining fatal injuries. Following an inspection, the Occupational Safety and Health Administration issued Ryder a citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging a serious violation of 29 C.F.R. § 1910.23(a)(4), a general industry standard skylight provision. The Secretary proposed a penalty of $5,000.

Former Administrative Law Judge Stephen J. Simko, Jr. vacated the citation based on his conclusion that the Secretary failed to establish Ryder's knowledge of the conditions constituting the violation. For the reasons that follow, we vacate the citation but on different grounds than those relied upon by the judge.

BACKGROUND

At the time of the accident, M.C. Dean had been working at the Center for nearly three weeks, energizing equipment that Ryder had transferred to the Center from a closed Ryder facility and performing other electrical work. M.C. Dean was tasked with installing new circuits, switches, and other devices to "bring electricity" to the newly-transferred equipment. The company was also tasked with installing a new switch to enable the manual operation of two rooftop exhaust fans that were previously controlled thermostatically. When the fans did not operate, M.C. Dean's employee went up to the roof and traversed a section that had an unguarded corrugated fiberglass skylight, which was not readily discernible because the skylight blended into the corrugated roof.

In the citation, the Secretary alleged that by failing to guard the skylight opening with either "a standard skylight screen or a fixed standard railing on all exposed sides[,]" Ryder violated 29 C.F.R. § 1910.23(a)(4).[1] On review Ryder renews the threshold argument it made before the judge, contending that the cited general industry standard does not apply to the alleged violative condition because M.C. Dean's work at the Center was construction work and, therefore, was covered by the construction standards. The judge had rejected Ryder's argument, concluding that M.C. Dean's work activities constituted maintenance rather than construction work.

DISCUSSION

It is well established that OSHA's construction standards, rather than any comparable general industry standards, cover activities that constitute "construction work" under 29 C.F.R. § 1910.12. *See, e.g., Jimerson Underground, Inc.*, 21 BNA OSHC 1459, 1462, 2004-09 CCH OSHD ¶ 32,800, pp. 52,464-65 (No. 04-0970, 2006) (holding that because the cited "activities constituted construction work . . . , the general industry standards do not apply"). Paragraph (b) of this provision defines "[c]onstruction work" as "work for construction, alteration, and/or

[1] Section 1910.23(a)(4) states: "Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides."

repair, including painting and decorating." 29 C.F.R. § 1910.12(b). The Commission has held that "the construction standards only apply to actual construction work or to related activities that are an integral and necessary part of construction work." *B.J. Hughes, Inc.*, 10 BNA OSHC 1545, 1546-47, 1982 CCH OSHD ¶ 25,977, p. 32,579 (No. 76-2165, 1982). Maintenance, on the other hand, involves work associated with "keeping something in proper condition." *See, e.g., Gulf States Utils. Co*., 12 BNA OSHC 1544, 1546, 1984-85 CCH OSHD ¶ 27,422, p. 35,524 (No. 82-867, 1985) (replacement of damaged porcelain insulators with epoxy insulators was maintenance where "lines were simply maintained in the same condition they were before the insulators were damaged" (internal quotation marks and citation omitted)).

We disagree with the judge's conclusion that M.C. Dean's work activities constituted maintenance. Ryder hired M.C. Dean to perform electrical work, including electrifying the newly-transferred equipment. Among other tasks, M.C. Dean: (1) used an aerial lift to run a total of about 200 to 250 feet of metal conduit and wiring along the Center's ceiling and walls; (2) added five new circuits; (3) installed a new 100-amp load center for additional power and wiring, three new 30-amp three-phase circuits for some test equipment, a new 90-amp two-volt circuit for a spot welder, a 125-three-amp circuit for a new oven, a new 200-amp switch in the main gear box, and a plug over the office door in the shipping area; (4) installed a new switch into a concrete wall; (5) ran metal conduit and wires to energize and manually control the two rooftop exhaust fans; (6) replaced a damaged 60-amp twin switch "in the main gear"; (7) disconnected and relocated power for existing ovens; and (8) demolished an old fan and two heaters in the Center's ceiling.

M.C. Dean's work amounts to a substantial alteration of the Center's electrical system and, thus, fits squarely within the definition of construction work set forth under § 1910.12(b). *See Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1186, 2004-09 CCH OSHD ¶ 32,803, p. 52,497 (No. 00-0553, 2005) (concluding that building's "conversion from oil to gas heat constituted an alteration of [it] and its surrounding property," and that cited employer's removal of "oil tanks and oil-burning equipment was an integral part of this alteration" and, therefore, was construction work).[2] M.C. Dean's work cannot be deemed maintenance because it involved

[2] The Commission's decision in *Royal Logging Co.*, 7 BNA OSHC 1744, 1750, 1979 CCH OSHD ¶ 23,914, p. 28,996 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir. 1981), referenced by the Secretary in his reply brief, is inapposite. In that case, the Commission relied on its

much more than just keeping the electrical system in proper condition.[3] *See Gulf States Utils. Co*., 12 BNA OSHC at 1546, 1984-85 CCH OSHD at p. 35,524. Because we find that M.C. Dean's work at the Center comes within the definition of "[c]onstruction work" for purposes of Part 1926, 29 C.F.R. § 1910.12(b), we conclude that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here.[4]

"decisions apply[ing] the construction standards . . . to related activities that are an integral and necessary part of construction work" as analogous authority to find that the construction standards did not apply to a logging company's building of trails, roads and bridges. *Id.* at 1749-50, 1979 CCH OSHD at p. 28,996. Specifically, although recognizing that such building activities "might normally be considered construction," the Commission concluded that the construction standards were inapplicable because the work was "ancillary to and in aid of [the company's] primary non[-]construction function to cut and deliver logs." *Id*. at 1750, 1979 CCH OSHD at p. 28,996. In short, the Commission viewed these building activities as an ancillary but integral component of the company's primary, non-construction operation.

The present case, however, does not involve an employer whose non-construction business has an intertwined construction-activity component. Ryder's "primary non-construction function" at the Center was the rebuilding of starters and alternators for use in Ryder-owned vehicles. M.C. Dean's work consisted of discrete electrical projects—such as the installation of electrical equipment for the newly-transferred machines and the fan work—rather than activities integral to rebuilding starters and alternators. Indeed, M.C. Dean's electrical work was no more integral to Ryder's "primary" function than a contractor's modification of a building's heating system was to that building's primary function as a house of worship. *Active Oil*. *Serv., Inc.*, 21 BNA OSHC at 1186, 2004-09 CCH OSHD at p. 52,497 (finding that removal of oil tanks for converting heating system from oil to gas was construction and not covered by general industry confined space standard). Accordingly, *Royal Logging* is distinguishable.

[3] The Secretary has previously stated that "the scale and complexity of the project are relevant" in determining whether work is construction or maintenance—a project's larger scale, which includes the time and amount of material involved, weighs in favor of considering the work construction. OSHA Interpretation Letter from Directorate of Construction to Raymond V. Knobbs (Nov. 18, 2003). Under that approach, the nearly three weeks M.C. Dean worked at the Center and the nature of the tasks performed over that time support our finding that the company was performing construction work rather than maintenance.

[4] We note that before the judge, the Secretary moved to amend the citation to allege, in the alternative, a violation of 29 C.F.R. § 1926.501(b)(4)(i), the construction standard that addresses unprotected skylights. The judge denied the motion and the Secretary does not challenge his ruling on review. Under these circumstances, we deem the amendment issue abandoned. *See Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1107 n.2, 2013 CCH OSHD ¶ 33,277, p. 56,448 n.2 (No. 07-0437, 2013) (issue deemed abandoned where judge's ruling not challenged on review).

Accordingly, we vacate Serious Citation 1, Item 1.[5]

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 29, 2014

[5] With respect to Commissioner MacDougall's concurrence, Chairman Rogers and Commissioner Attwood simply note that as an adjudicative body we decide the dispositive issues in the cases before us, as we have done here. For that reason, we decline to address Commissioner MacDougall's concurrence further.

MACDOUGALL, Commissioner, concurring:

I join in my colleagues' decision to vacate the citation. I agree with the majority's conclusion that the cited general industry standard is preempted by this specifically applicable construction standard. Although the Secretary sought leave before the judge to amend the citation to allege a violation of a construction standard, 29 C.F.R. § 1926.501(b)(4)(i), I agree, as discussed in footnote 4 of the majority's opinion, that we should not amend the pleadings to allege a violation of this construction standard because the Secretary abandoned his request to amend. Additionally, I would go one step further than the majority. I would conclude that even if the Secretary had not procedurally abandoned his request to amend, alternatively, in reviewing the merits, the citation should still be vacated. I write separately to express my opinion on this issue, which is raised in the briefing notice and addressed by the parties, as I believe there is a compelling party and public interest in discussing its merits, and the majority opinion leaves the parties and members of the regulated public uncertain as to the law for future cases.[1]

The stated purpose of the Occupational Safety and Health Act of 1970 (the "Act") is to assure "safe and healthful working conditions" by, among other things, "authorizing the Secretary of Labor to set mandatory occupational safety and health standards." Section 2(b), 29 U.S.C. § 651(b). Since standards are a basic mechanism by which the purpose of the Act is to be

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[1] I disagree with the majority's suggestion in footnote 5 that it is improper to discuss alternative grounds for vacating the citation. The Commission's policy in determining the issues to address on review is codified in Rule 92(a), which provides:

> (a) Jurisdiction of the Commission: Issues on Review. Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission but ordinarily will be those stated in the direction for review, those raised in the petitions for discretionary review, or those stated in any later order.

29 CFR § 2200.92(a). The issues discussed herein were raised in the petition for discretionary review, and following the Commission's direction for review, they were ordered to be addressed in the briefing notice, which the parties did.

The majority may choose not to deal with the thorny issues, arguments, and case precedent discussed by this concurrence, and certainly, my colleagues have the discretion to not address these issues, given that the vacation of the citation meets the requirement of the Administrative Procedure Act for an agency's conclusions and findings to resolve the controversy. *See* 5 U.S.C. § 557. However, given the decision to vacate on procedural grounds, I prefer that the parties and regulated public not be left to guess with respect to the material issues of this case; thus, my separate opinion on the merits of a violation of 29 C.F.R. § 1926.501(b)(4)(i).

achieved, it is appropriate in determining the scope of a particular set of standards to consider the nature of the working conditions sought to be regulated. When an employer is cited for violations under one of the specific industry standards, rather than the general industry standards, the Secretary must establish that the workplace falls under that industry's standards. The Commission has held that the construction standards apply only to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of the construction work.[2] *Cardinal Indus., Inc.*, 12 BNA OSHC 1585, 1586-87, 1984-85 CCH OSHD ¶ 27,446, p. 35,557 (No. 82-427, 1985), *rev'd*, 828 F.2d 373 (6th Cir. 1987) (abrogated on other grounds by *Martin v. OSHRC*, 499 U.S. 144 (1991)); *United Geophysical Corp*., 9 BNA OSHC 2117, 2121, 1981 CCH OSHD ¶ 25,579, p. 31,906 (No. 78-6265, 1981), *aff'd without published opinion*, 683 F.2d 415 (5th Cir. 1982); *B.J. Hughes, Inc.*, 10 BNA OSHC 1545, 1547, 1982 CCH OSHD ¶ 25,977, p. 32,579 (No. 76-2165, 1982). A citation to Ryder based on a construction standard, even if an amendment were granted, would have to be vacated as Ryder is neither an employer engaged in construction work nor one engaged in operations that are an integral and necessary part of the construction work at issue. Thus, I would find the construction standards inapplicable to Ryder.

The Secretary's proposed amendment sought to hold Ryder liable for failing to ensure that "[e]ach employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes." 29 C.F.R. § 1926.501(b)(4)(i). However, the construction-specific requirements of § 1926.501(b)(4)(i), and the conditions which the standard seeks to address, are wholly inapplicable to Ryder and its employees. Ryder's employees did not walk or work on any surface with any hole or skylight which presented any hazard, and they did not participate in the construction work performed by M.C. Dean. Indeed, Ryder employees were prohibited from going on the rooftop where the skylight in

[2] Section 1910.12 provides in part:

> § 1910.12 Construction work.
>
> (a) Standards. The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work.
>
> . . . .

question was located. Ryder's business took place on the ground floor of its facility where it is in the business of rebuilding engine parts.

Ryder is not engaged in construction work by any stretch of reasonable argument. It is not a general contractor or a construction professional. It is not an architectural, engineering, or construction management firm engaged in construction.[3] Ryder lacks experience in any construction trade or any safety practices attendant to any construction trade. None of Ryder's employees were engaged in construction work. Quite to the contrary, Ryder's activities were wholly unrelated to the performance or supervision of any construction work.[4] There is simply no nexus between Ryder's work—manufacturing—and the performance of construction work.[5]

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[3] An issue that has come before the Commission is whether firms such as those involved in architecture, engineering, or construction management are engaged in construction for purposes of the Act. The Commission has found that if the firm has broad supervisory authority over the project and controls the actual work, or if the firm is responsible for administration and coordination of the work, including the safety program, the firm may be subject to the construction standards. By contrast, a firm with a more limited (i.e. less broad) role in a project may be deemed *not engaged in construction* even though it plays some active (albeit limited) role at the construction site. *See Simpson, Gumpertz & Heger, Inc*., 15 BNA OSHC 1851, 1991-93 CCH OSHD ¶ 29,828 (No. 89-1300, 1992), *aff'd*, 3 F.3d 1 (1st Cir. 1993); *Skidmore, Owings & Merrill*, 5 BNA OSHC 1762, 1977-78 CCH OSHD ¶ 22,101 (No. 2165, 1977); *CH2M Hill Central, Inc.*, 17 BNA OSHC 1961, 1995-97 CCH OSHD ¶ 31,303 (No. 92-0888, 1997), *petition for review dismissed by* 131 F.3d 1244 (7th Cir. 1999); *Fleming Constr., Inc.*, 18 BNA OSHC 1708, 1710, 1999 CCH OSHD ¶ 31,809, p. 46,699 (No. 97-0017, 1999) ("The Commission [has] held that employers who are not themselves engaged in construction work cannot be subjected to the construction standards unless they substantially supervise or otherwise directly control the actual performance of construction trade labor."). Clearly, Ryder's role does not constitute broad supervisory authority over M.C. Dean's actual work.

[4] While I agree with the majority that *Royal Logging Co.*, 7 BNA OSHC 1744, 1750, 1979 CCH OSHD ¶ 23,914, p. 28,996 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir. 1981), is distinguishable, I find it inapplicable here for a different reason than stated by the majority. Namely, the holding in *Royal Logging* was focused on the broader business conducted by the cited employer—Royal Logging, itself—rather than the broader business conducted by an independent contractor. In simplistic terms, *Royal Logging* simply holds that an employer does not fall under the construction standards merely because one of its employees swings a hammer; instead, the applicability (or inapplicability) of the construction standards depends upon the nature of the employer's work as a whole. Applied here, M.C. Dean's work is properly subject to the construction standards—rather than the general industry standards—because it was not ancillary to a broader non-construction business conducted by M.C. Dean. It is immaterial whether the electrical work was ancillary to *Ryder's* broader business.

[5] Thus, the facts of this case do not even come close to those presented in *Cardinal Industries, Inc.*, 12 BNA OSHC 1585, 1984-85 CCH OSHD ¶ 27,446 (No. 82-427, 1985), *rev'd*, 828 F.2d

Further, notwithstanding the Secretary's claim, the Secretary cannot cite Ryder under the construction standards simply by relying upon OSHA's multi-employer citation policy ("MEP") as either a "creating" or "controlling" employer. The MEP was created by the Secretary to cite multiple employers at a multi-employer site without regard to which entity directly employed the exposed individual.[6] *See* OSHA Instruction CPL 02-00-124 (Dec. 10, 1999) (discussing that employers at multiemployer worksite—defined as either creating, exposing, correcting, or controlling employers—may be cited, whether or not their own employees are exposed). I share the concerns noted by former Commissioner Horace A. Thompson, III in his vigorous dissent in *Summit II* with regard to the MEP. In sum, like former Commissioner Thompson, I too see tension between OSHA's MEP and the Act's statutory language.[7] My concerns are especially

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373 (6th Cir. 1987) (abrogated on other grounds by *Martin v. OSHRC*, 499 U.S. 144 (1991)), where the employer was manufacturing modular housing units in a factory. There, the respondent was cited under the general industry standards for failing to have guardrails on two platforms. The ALJ affirmed the violations, but the Commission reversed. The Commission majority concluded that the general industry standards did not apply because the employer was engaged in construction. "Although Cardinal's employees construct housing units in a factory setting, the carpentry, plumbing, roofing, and electrical work they perform is identical to that performed at a construction site, and identical to the kind of work that OSHA specifically intended Part 1926 to cover." *Id.* at 1587, 1984-85 CCH OSHD at p. 35,557. The Sixth Circuit rejected this analysis and reversed the Commission. According to the court, in determining whether the work performed is "construction" as defined by 29 C.F.R. § 1910.12, it is not the nature of the work in the abstract, but the nexus of the work to a particular construction site. 828 F.2d at 379. Applying this interpretation to § 1910.12, the court concluded that the employer was not engaged in construction as its operations occurred wholly within its plant, with no connection to any construction site. *Id.* at 380.

[6] The Secretary states that the MEP was created in recognition that an employer should not be able to shirk its safety obligations simply because the worker who was injured happened to be working for a different entity, such as a subcontractor. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1199-1200, 2009-12 CCH OSHD ¶ 33,079, p. 54,690 (No. 05-0839, 2010) ("*Summit II*") (citing Compliance Operations Manual ¶ 10 at VII-6 to -8 (May 20, 1971)), *aff'd unpublished per curiam*, 442 Fed. App'x 570 (D.C. Cir. 2011); *Teal v. DuPont*; 728 F.2d 799, 805 (6th Cir. 1984) ("once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace"). The doctrine recognizes that an employer's duty under the construction standards extends to "every employment and place of employment of every employee engaged in construction work." 29 C.F.R. § 1910.12(a).

[7] As former Commissioner Thompson notes in his *Summit II* dissent, the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden* ("*Darden*") reinforced that Congress is presumed to use "employee" in the common law master-servant sense. 23 BNA OSHC at 1208, 2010 CCH OSHD at p. 54,697 (citing *Darden*, 503 U.S. 318, 322-25 (1992)). The *Darden* Court

grave under the circumstances here, where the Secretary attempted to use the MEP as a tool to hold a general industry employer liable under the construction standards. Despite my misgivings regarding the MEP, I acknowledge the MEP has been used to impose liability on employers engaged in construction work. *E.g.*, *Summit II*; *Red Lobster Inns of Am., Inc.*, 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,636 (No. 76-4754, 1980) (construction standards applicable to restaurant which engaged in construction work by managing build out of new restaurants). It has also been used to impose general industry liability upon general industry employers. *E.g.*, *Harvey Workover Inc.*, 7 BNA OSHC 1687, 1688-89, 1979 CCH OSHD ¶ 23,830, pp. 28,908-09 (No. 76-1408, 1979). However, the Commission has never extended the MEP to apply the construction standards to a general industry employer like Ryder, which is simply not engaged in any construction work.[8] Indeed in this instance, Ryder's employees were not even present on the rooftop worksite where M.C. Dean was performing the electrical work in question.[9] As to whether a non-construction employer can be cited under the construction standards, I answer that question with an emphatic no—such application would be improper on the basis that it is contrary to the language of § 1910.12(b) and Commission precedent.

The record does not establish that Ryder took control over M.C. Dean's construction work other than simply being a company that contracted with another to perform a specific job that it did not have the expertise to perform. In sum, it would be patently unjust to subject Ryder to liability under the construction standards simply because Ryder, as property owner, necessarily possessed control over its own property. There is no logical reason Ryder should

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rejected the premise that the word "employee" in a statute, such as the Act, should be expansively interpreted to achieve a statute's remedial objective, a purpose said to justify enforcement of controlling and creating employer duties under the MEP. *Id.*, 2010 CCH OSHD at p. 54,697.

[8] *See generally Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306 (D.C. Cir. 1995) (holding, despite MEP argument from Secretary, that construction standards can only apply to respondent if respondent is engaged in construction).

[9] Notably, even in those cases where the MEP has been applied, it has been limited to those instances in which the cited employer *itself* has employees present at the site of the violative conditions. *E.g., Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 824 (8th Cir. 2009) ("an employer's duty to protect the place of employment [includes] others who work at the place of employment, so long as the employer also has employees at that place of employment"). Even viewing the MEP in the most favorable light, it would be a distortion of the doctrine to apply it here merely because Ryder's employees were repairing engines in the shop beneath M.C. Dean's rooftop worksite.

have contemplated the requirements of the construction standards, including § 1926.501(b)(4)(i), much less with respect to an independent contractor hired to independently perform construction work on the property. The Secretary should not be permitted to use the MEP to extend application of the construction standards where they are plainly inapplicable. If the Secretary were allowed to prosecute this case under OSHA's MEP, the specific duty defined by the cited construction standard may be imposed on employers who merely own the buildings in which they engage in business.

/s/
Heather L. MacDougall
Commissioner

Dated: September 29, 2014

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
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Secretary of Labor, Complainant, v. Ryder Transportation Services, Respondent.	OSHRC Docket No. **10-0551**

Appearances:

Jeremy Fisher, Esquire, Atlanta, GA
For Complainant

Carla J. Gunnin, Esquire, Atlanta, GA
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Ryder Transportation Services rebuilds starters and alternators for Ryder vehicles at its facility in Doraville, Georgia. On August 27, 2009, an employee working for an electrical contractor at the facility fell from the roof through a skylight, sustaining fatal injuries.

Occupational Safety and Health Administration (OSHA) compliance officer Reinaldo White was assigned to investigate the accident. Based on his inspection, the Secretary issued a one-item citation to Ryder on February 24, 2010. Item 1 of Citation No. 1 alleges Ryder committed a serious violation of 29 C. F. R. § 1910.23(a)(4), by failing to guard its facility's skylights with standard skylight screens or fixed standard railings. The Secretary proposed a penalty of $ 5,000.00 for this item. She issued the citation under her multi-employer citation policy. (The Secretary also issued a citation to M. C. Dean, the electrical contractor on the site.)

Ryder timely contested the citation. In its answer, Ryder admitted jurisdiction and coverage. A hearing was held in this matter on September 30 and October 1, 2010, in Decatur, Georgia. The parties have filed post-hearing briefs. Ryder contends (1) the cited standard does not apply to the cited condition; (2) its employees were not exposed to an unsafe condition; (3) M. C. Dean's employees were not exposed to unsafe conditions, in accordance with the Secretary's multi-employer citation policy; and (4) Ryder had no knowledge of the violative condition.

Based on the Secretary's failure to establish Ryder's knowledge of the violative condition, as discussed below, the court vacates Item 1 of Citation No. 1.

Background

Ryder owns and operates a facility on Button Gwinnett Drive in Doraville, Georgia, where it rebuilds, or "remanufactures" starters and alternators for its vehicles. Ryder was not the original owner of the facility; the company moved into the existing structure in 1985. The structure was described at the hearing as a "pretty big warehouse," but no exact dimensions were given (Tr. 27). It was suggested the facility may be as large as a football field, but the only estimate ventured was the building was approximately 100 feet long by 70 feet wide (Tr. 132). Compliance officer Reinaldo White measured the height of the facility's ceiling, and found it to be 25.8 feet high.

At least two fiberglass skylights were installed in the roof. The skylights were approximately 3 feet wide and 10 to 12 feet long. The skylights were clearly visible from the inside of the warehouse. They were more difficult to discern from the roof because they were made in the same corrugated pattern and were of the same color as the roof. The skylights were not guarded with screens or railings.

At the time of the hearing, Ryder employed fourteen full-time and ten part-time employees at the facility. The general manager was John Kaiser. He supervised foreman Brooks Bryan, who in turn supervised leadman Jeffrey Thompson.

Ryder had operated a similar remanufacturing facility in Pennsylvania, which it had closed some time before August 2009. Ryder moved some of the equipment from the Pennsylvania location to the Doraville facility. The company hired M. C. Dean, an electrical contractor, to perform the necessary electrical work to install the transferred equipment, and to perform other miscellaneous repairs. Ryder and M. C. Dean had a longstanding relationship, and Kaiser regarded M. C. Dean as "a reliable contractor" (Tr. 90).

Three M. C. Dean employees worked at Ryder's facility in August 2009: supervisor Boyd Young, journeyman electrician Lewis Quinn, and apprentice electrician Sam Ditmore. In order to perform some of the electrical work near the ceiling, M. C. Dean had rented an aerial lift. When M. C. Dean's employees first arrived in August, Ryder had gone over a list of repairs and installations to be completed by M. C. Dean. At some later point, Ryder asked M. C. Dean to install conduit and

a switch for two exhaust fans located in the ceiling of the facility. The exhaust fans had not worked since Ryder took over the facility in 1985. After M. C. Dean installed the conduit and switch, the exhaust fans still did not work. M. C. Dean decided it needed to examine the exhaust fans to determine why they were not working. The exhaust fans extended through the ceiling to the outside of the building. M. C. Dean concluded one of its employees needed to go up on the roof to examine the exhaust fans.

On August 27, 2009, the three M. C. Dean employees arrived at Ryder's facility at approximately 7:00 a. m. Quinn used the aerial lift to perform some work inside the facility. Around 10:00, Boyd Young and Quinn decided to move the aerial lift outside the facility and use it to lift Quinn to the roof. Quinn was the employee chosen to go up because he already was wearing his safety harness and attached lanyard. After the aerial lift was moved outside, Quinn entered the basket, tied off to the rails, and used the lift's controls to elevate himself to the roof. Quinn unhooked his lanyard and stepped out onto the roof.

Quinn was carrying a voltage tester with him, and a two-way radio with which he communicated with Young. Quinn walked to the first exhaust fan and discovered it had no motor in it. Quinn radioed this information to Young. Quinn then walked over to the second exhaust fan, and discovered it too was missing its motor. Quinn started to return to the aerial lift. After analysis of all evidence, it is reasonable to infer that, instead of retracing his steps and passing back by the first exhaust fan he had checked, Quinn set off in a direct path from the second exhaust fan to the aerial lift. A skylight lay in his path. Quinn stepped on the skylight and it broke under his weight. Quinn fell 25.8 feet to the concrete floor below, suffering grievous injuries. Ryder and M. C. Dean employees rushed to his aid. Someone called 911, and an ambulance eventually arrived and took Quinn to Atlanta Medical Center. Quinn died there 13 days later.

The Citation

> The Secretary has the burden of establishing the employer violated the cited standard.
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> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1910.23(a)(4)

The citation states:

> 29 CFR 1910.23(a)(4): Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.
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> On or about 9/11/09[1] an employee was performing electrical voltage testing on some exhaust fans at Ryder. The employee stepped on a skylight on the roof and fell through to approximately 25.8 feet and was fatally injured. Ryder Transportation did not have any skylight screen or standard railing on all exposed sides to protect the employee.

The standard at 29 C. F. R. § 1910.23(a)(4) provides:

> Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.

(1) Does the Cited Standard Apply?

The Secretary chose to cite Ryder under 29 C. F. R. § 1910.23(a)(4), a general industry standard. That standard applies when employees are engaged in maintenance activities. In the present case, Ryder contends, M. C. Dean's employees were engaged in construction activities.[2] Therefore, it argues, the cited general industry standard does not apply to the construction work in which the employees were engaged.

The standard at 29 C. F. R. § 1910.12 defines "construction work" as work for "construction, alteration, and/or repair, including painting and decoration." "Maintenance" is not defined in the standards. The *American Heritage Dictionary* (Second Coll. Ed.) defines "maintenance" as "The work of keeping something in proper condition."

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[1] This date is in error. It is undisputed Quinn fell through the skylight on August 27, 2009. September 11, 2009, is the date White began his inspection at Ryder's facility. Both parties referred to the correct date throughout the proceeding. The erroneous date in the citation caused no prejudice toward Ryder. The citation is amended to reflect the correct date

[2] There is a construction standard addressing fall hazards created by working around skylights. The standard at 29 C. F. R. § 1926.501(b)(4) provides:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Ryder leadman, Jeffrey Thompson, testified M. C. Dean's work included: repairing security lights by the back door by replacing the bulbs, repairing fixtures in the paint booth, installing a new 100-amp load center, adding five new circuits, re-securing loose receptacles in the shop walls, repairing a damaged conduit in the shipping area, installing three new 30-amp circuits for test equipment, installing a circuit for a spot welder and an oven, relocating power for the existing oven, installing a new switch in the main gear box, troubleshooting problems with the air conditioning, and installing a plug over the office door. The "demolition" work M. C. Dean performed consisted of removing a fan using a screwdriver and some wirecutters. M. C. Dean did not transport or install the equipment transferred from the Pennsylvania facility. Thompson stated that Ryder "had the equipment sitting where we wanted it, and then we let them run the power to it" (Tr. 160).

Boyd Young had worked as a foreman for M. C. Dean for three years at the time of the hearing. Although M. C. Dean has a construction division for its electrical work, Young and his crew worked in the service division. He characterized M. C. Dean's job with Ryder as "[m]iscellaneous electrical repairs and additions" (Tr. 176). The parties did not enter into a written contract for the job, but reduced it to a purchase order for "electrical repairs" (Exh. C-4).

The record establishes M. C. Dean's employees were engaged in maintenance, and not construction, activities. Ryder hired M. C. Dean to keep the existing electrical system and the transferred equipment in proper condition. The cited general industry standard applies.

(2) Did Ryder Fail to Comply with the Terms of the Cited Standard?

It is undisputed Ryder did not guard the skylights in the roof of its facility with screens or standard railings.

(3) Did Employees Have Access to the Violative Condition?

No Ryder employees were exposed to the unguarded skylights. The last time a Ryder employee had been on the roof was in 2006, when Thompson had used two ladders (one to access a mezzanine, and a second to climb to the main roof) to reach the roof in order to change a belt on an exhaust fan on one of the lavatories. At that time, Thompson noted there were no screens or railings guarding the skylights. He stated at the hearing that the skylights "look like they're corrugated because they match the tin on the roof" (Tr. 33).[3]

[3]M.C. Dean foreman Young went up on the roof after the accident with Ryder's safety director. He stated the skylights were not as obvious from the roof as they were from the ground: "They were the same pattern as the roof metal and they were actually the same color as the roof metal" (Tr. 193).

Ryder later classified the roof as a restricted area, forbidding its employees to access it. Ryder safety manager Bill Stewart instructed employees not to go up on the facility roof or trailer roofs. No one from Ryder informed M. C. Dean of this directive.

The Secretary contends that, under her multi-employer citation policy, Ryder exposed Quinn to the unguarded skylight. The Commission has recently reversed its previous position, holding the Secretary may cite a non-exposing, controlling employer under this policy. In *Summit Contractors Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the Commission holds:

> "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees, but those of other employees engaged in the common undertaking." *McDevitt Street Bovis,* 19 BNA OSHC at 1109, 2000, CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability, 'an employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Id.* (citation omitted); *Grossman Steel,* 4 BNA OSHC at 1188, 1975-1976 CCH OSHD at p. 24,791.

The violation at issue here is the lack of guarding on the skylights. Only Ryder could take steps to abate this violation. John Kaiser, Ryder's general manager, testified he was in charge of maintenance at the facility, and that Ryder was responsible for the condition of the facility's roof. The Secretary has established Ryder was the controlling employer, and thus liable under the multi-employer citation policy.

Quinn was on the roof pursuant to his assigned duty of testing the exhaust fans. Quinn's tragic death is proof of his exposure to the unguarded skylight.

(4) Did Ryder Have Actual or Constructive Knowledge of the Violative Condition?

The Secretary contends Ryder had actual knowledge of the violative condition. Thompson was aware someone from M. C. Dean was going to go on the roof to check out the exhaust fans. Foreman Brooks Bryan was not at Ryder's facility on August 27, 2009. When Bryan was away, Thompson, as leadman, had supervisory authority over the site. "[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Ryder argues that neither of its employees who testified at the hearing, Kaiser and Thompson, knew Quinn was going to go up on the roof. This assertion is not supported by the evidence presented during the hearing. At several different points during his testimony, Thompson acknowledged he knew someone from M. C. Dean was going to go up on the roof:

> Q. Did [M. C. Dean] tell you that they were definitely going to go up on the roof?
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> Thompson: I knew they had to, but I didn't know when, you know.

(Tr. 151).

> Q. Did [M. C. Dean] talk to you about using an aerial lift to work on those fans at that time?
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> Thompson: Well, when we talked about doing the electrical on them, we said if they didn't work, we had a ladder that we could access the roof if they needed it. And he said if they had to access the roof, they'd use the airlift.

(Tr. 165-166).

> Q. Did you talk to anybody with Ryder in management about that conversation?
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> Thompson: No.
>
> Q. So you're the only one that knew about it?
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> Thompson: Right.
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> Q. You didn't tell them about the policy not to go up on the roof?
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> Thompson: No. We just stated that Ryder employees couldn't do it.
>
> Q. Okay. So you just figured that somebody else might do it?
>
> Thompson: Right.

(Tr. 166-167).

Thompson had actual knowledge an M. C. Dean employee was going to go on the roof, but he did not have actual knowledge the employee would walk within 6 feet of the skylights. The Secretary equates knowing an M. C. Dean employee was going to go on the roof with actual knowledge of a violative condition. Accessing the roof, however, is not tantamount to exposure to the violative condition of unguarded skylights. As White conceded, not all skylights need to be guarded. Guarding is only required when it is anticipated an employee is going to be exposed to the

hazard of falling through the skylight. "At that point in time, if there's any type of activity *going on right around the skylight*, then it should be guarded" (Tr. 75, emphasis added).

Thompson testified it was possible to walk on the roof without coming within 6 feet of the skylights or the edge of the roof. Although the exact dimensions of the roof are lacking in the record, it is undisputed an employee could walk on the roof while avoiding exposure to fall hazards existing at the edge of the roof as well as around the skylight. Only two skylights, measuring 3 feet by 10 to 12 feet are mentioned in the record. Thompson testified it was possible to access the exhaust fans without coming within 6 feet of the skylights or the edge of the roof.

Undoubtedly, someone should have reminded Quinn that there were skylights in the roof, and informed him that the skylights were more difficult to see from the roof than from the ground. Ryder was required, however, to guard the skylights only when it reasonably anticipated an employee would be within 6 feet of them. Ryder had neither actual nor constructive knowledge that an employee would be exposed to the unguarded skylights that were remote from his work area. The Secretary has failed to establish knowledge of the violative condition. The item is vacated.

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 Citation No. 1, alleging a serious violation of 29 C. F. R. § 1910.23(a)(4), is vacated, and no penalty is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: February 28, 2011