Legal Update Article

Contested Safety Citation Struck Down as OSHA Fails to Make Its Case

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Inspectors from the Occupational Safety and Health Administration (OSHA) must be able prove that the employer should have been aware of hidden dangers to issue citations, the Occupational Safety and Health Review Commission has determined. ***Secretary of Labor v. Raymond – San Diego, Inc.***, OSHRC No. 21-0505 (Mar. 6, 2023).

This case illustrates how proactively complying with OSHA regulations and taking a critical look at the legal merits of any citation may reveal a viable defense. Any OSHA violation may prove to be more costly than the few thousand dollars saved by early settlement as it can disqualify contractors from bidding opportunities, set an employer up for a potential "repeat" violation that carry a maximum penalty of $156,259 per item, and trigger greater enforcement activity, such as inclusion in OSHA's Severe Violator Enforcement Program.

Background

The company was contracted to paint a rolling gate in front of a loading dock of a casino. The gate was installed by a different subcontractor. It was not fully functional, but no one at the company was aware of this. When the company's employees went to move the gate, an employee was fatally crushed by its weight. OSHA cited the company, alleging the company failed to "conduct frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons." 29 C.FR. 1926.20(b)(2). It also cited the company for its failure to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." The company contested the citation, which was vacated by an administrative law judge of the Occupational Safety and Health Review Commission (OSHRC), the quasi-judicial body overseeing enforcement actions by OSHA. The administrative law judge's order became OSHRC's final order.

Regular Inspections

OSHA argued that the company was non-compliant because it did not conduct frequent and regular inspections of the rolling gate. OSHRC stated that, while there is a requirement to conduct frequent and regular inspections, the standard does not define what "frequent" or "regular" is. OSHRC emphasized that the company had a policy that required competent employees to conduct daily inspections and complete forms that identified any hazards and how to address them. OSHRC found the three inspections on three different workdays conducted by the employees to be sufficient based on the circumstances — only four employees were to be working on the project and it was not a major project. Moreover, OSHRC noted the employees' knowledge at the time of the incident was sufficient and extra knowledge about how the gate works was not required on their part based on its scope of work as a painting contractor and experience on the job site. Their reasonable belief that it was safe to work after moving and observing the

gate led them to continue their work because nothing indicated that there was an unsafe condition.

OSHA also argued that the company should have known of the hazard. OSHRC rejected this argument, finding the company exercised reasonable diligence in inspecting its work area. OSHRC concluded the employees acted reasonably diligently and did not have constructive knowledge of any issues with the gate: (i) no one with the information related to the gate being incomplete told the company the gate was incomplete; and (ii) there were no obvious issues with the exposed wiring for the gate.

Recognition of Unsafe Conditions

Doing a similar analysis of non-compliance and employer knowledge, OSHRC also rejected the OSHA's claim that the company did not instruct the employees of the hazard in the work environment, under § 1926.21(b)(2), because the specific hazard was not known or reasonably known to the company and the employees were reasonably diligent in their evaluation of the hazards at the worksite.
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If you have questions or need assistance on OSHA compliance or defense of inspections and citations, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our Construction Industry Group or Workplace Safety and Health Practice Group.

(Law clerk Enaita Chopra contributed to this article.)