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. HOME DEPOT #6512, and its successors, Respondent.	OSHRC Docket No. 07-0359

APPEARANCES:

Gregory F. Jacob, Solicitor; Joseph M. Woodward, Associate Solicitor; Charles F. James, Counsel for Appellate Litigation; Gary Stearman, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Matthew T. Deffebach, Esq.; Haynes and Boone, LLP, Houston, TX
For the Respondent

DECISION AND ORDER

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

On August 17, 2006, an employee of Home Depot #6512 ("Home Depot"), located in Houston, Texas, was found lying on the ground in the store's parking lot. After being hospitalized for two days, the employee died. On August 31, 2006, the Occupational Safety and Health Administration ("OSHA") conducted an investigation and issued Home Depot an other-than-serious citation for failing to report "the death of an[] employee from a work-related incident" within eight (8) hours of its occurrence as required by 29 C.F.R. § 1904.39(a). After a hearing on the merits, Administrative Law Judge Benjamin R. Loye affirmed the citation and assessed the $1,000 proposed penalty. For the reasons that follow, we reverse the judge's decision and vacate the citation.

ISSUE

On review, Home Depot argues that it was not required to report the employee's death to OSHA because "there is simply no evidence but conjecture and speculation by the Secretary that a work-related event or exposure caused or contributed to the employee's condition" when he was found in the Home Depot parking lot. The Secretary responds that the judge reasonably inferred from the evidence it was more likely than not the employee fell in the Home Depot parking lot, which she claims the judge properly identified as a work-related incident.

The only issue before us is whether the Secretary established by a preponderance of the evidence that the death of Home Depot's employee was from a "work-related incident" and therefore reportable to OSHA as required under § 1904.39(a).

FINDINGS OF FACT

The employee in question worked as a parking lot associate at Home Depot. His job duties included keeping the parking lot clear of shopping carts and assisting customers with loading items into their cars. His shift normally began at 7:00 a.m.

On August 17, 2006, at approximately 8:30 a.m., a customer found the employee lying under a truck on the ground in Home Depot's parking lot. When Home Depot associates called to the scene approached the employee, he was incoherent, lying on the ground, and moving, putting his hands behind his head. The employee lacked any visible evidence of physical trauma at this time. Shortly thereafter, the employee was transported by ambulance to a hospital for medical treatment. He died two days later on August 19, 2006. Home Depot stipulated that it "learned of [the employee's] death on or about August 19 or 20," and that it did not report his death to OSHA within eight hours. The autopsy report, dated November 10, 2006, stated the cause of the employee's death was "blunt head trauma with subdural hematoma and brain contusions," with a contributory cause of "hepatic cirrhosis due to chronic alcoholism and hepatitis C infection."

Following its investigation, OSHA issued Home Depot a single citation alleging an other-than-serious violation of § 1904.39(a) for the company's failure to report the employee's death to OSHA within eight hours of its occurrence. In affirming the violation, the judge concluded that the incident resulting in the employee's death was work-related. He found "the evidence suggest[ed] that [the employee] fell in the Home Depot parking lot, sustaining the head injuries to which he eventually succumbed."

PRINCIPLES OF LAW

The Secretary has the burden of establishing a violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, by a preponderance of the evidence. *Trinity Indus. Inc.*, 15 BNA OSHC 1788, 1790, 1992 CCH OSHD ¶ 29,773, p. 40,493 (No. 89-1791, 1992). Because the Secretary has the burden of proof, she must produce the necessary facts in the record to establish the violation. *Id.* The Commission is the ultimate fact-finder. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

Section 1904.39(a), the regulation cited here, directs an employer to orally report the death of any employee from a work-related incident to OSHA within eight (8) hours after it occurs. 29 C.F.R. § 1904.39(a). Under 29 C.F.R. § 1904.5(a), an injury is "work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in § 1904.5(b)(2) specifically applies." 29 C.F.R. § 1904.5(a).[1]

ANALYSIS

Based on our review of the record, we conclude the judge's finding that the employee fell in the Home Depot parking lot is not supported by a preponderance of the evidence. The employee was first found under a truck and, according to those present at the time the employee was found, he had no visible signs of physical trauma. There were no shopping carts nearby and few customers at the store at this time of morning. Although we could speculate as to how the employee came to be in the position in which he was found or the source of his head trauma, the evidence in this record simply is not sufficient to support a conclusion that a fall in the parking lot, or any other "event. . . in the work environment either caused or contributed" to the employee's death. 29 C.F.R. § 1904.5(a).

[1] To determine work-relatedness for this alleged reporting violation, the judge relied upon the criteria for determining work-relatedness under 29 C.F.R. § 1904.5(a) of the recordkeeping standards. Neither party has questioned the recordkeeping provision's applicability here and we agree that its terms provide the relevant criteria for assessing work-relatedness in this context.

The Secretary would have us infer from the paucity of evidence in this case that "some event or exposure" in the Home Depot parking lot caused the employee's head trauma.[2] However, an examination of the rulemaking history shows that the Secretary rejected such a blanket approach to assessing work-relatedness. *American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1991-93 CCH OSHD ¶ 29,575, p. 40,016 (No. 86-1179, 1992) (stating that the language of the preamble is "the best and most authoritative statement of the Secretary's legislative intent."). In the proposed regulation, the Secretary considered three alternative views of work-relatedness. The third alternative would have identified an injury or illness as work-related if a "worker *ever* experienced a workplace event. . . that had *any possibility* of playing a role in the case." Occupational Injury and Illness Recording and Reporting Requirements: Proposed Rules, 61 Fed. Reg. 4030, 4044 (Feb. 2, 1996) (to be codified at 29 C.F.R. pts 1904 and 1952) (emphasis added).

In the preamble to the final rule, the Secretary stated that under this third alternative, OSHA would consider "an injury or illness work-related if the work environment had *any possibility of playing a causal role*." Occupational Injury and Illness Recording and Reporting Requirements: Final Rule, 66 Fed. Reg. 5916, 5929 (Jan. 19, 2001) (codified at 29 C.F.R. pts. 1904 and 1952) ("Final Rule") (emphasis added). The Secretary, however, ultimately dismissed this alternative:

> The third alternative theory. . . would sweep too broadly. A work-relationship test that is met if work has 'any possibility of playing a role in the case' would include virtually every injury or illness occurring in the work environment. Recording cases in which the causal connection to work is so vague and indefinite as to exist only in theory would not meaningfully advance research, or serve the other purposes for requiring recordkeeping.

Id. at 5930. Instead, as the Secretary explained in the final rule, "injuries and illnesses are work-related if events or exposures at work either caused or contributed to the problem." Final Rule, 66 Fed. Reg. at 5917. By her own explanation, the work itself must be a "tangible, discernible causal factor" to render an injury or illness work-related. *Id*. at 5929; *see also* Dept. of Labor Standard Interpretation Ltr. (Jan. 13, 2004) (stating that "a case is presumed work-related under the recordkeeping rule if an event or exposure in the work environment is a discernable cause of

[2] We note that even in the Secretary's post-hearing brief, she could not identify the event. Instead, she simply claimed that "it is…clear… [the employee] suffered from some event or exposure, whether it be tripping, fainting, etc.[.]" (Secretary's Post-Hearing Brief at 6.)

the injury or illness" and "[i]f an injury or illness did not result from an identifiable event or exposure in the work environment, but only manifested itself during work, the injury is not work-related."). Under these circumstances, pure speculation that "some" event in the workplace may have caused or contributed to an injury or illness would not be enough to trigger the application of the cited regulation.

Based on the record in this case, we conclude the Secretary has not shown by a preponderance of the evidence that an identifiable event occurred in the Home Depot parking lot to cause the employee's head trauma. Accordingly, the Secretary has failed to make the threshold showing that the employee's death was from a work-related incident.[3]

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude the Secretary has not met her burden of establishing a violation of § 1904.39(a).

ORDER

We reverse the judge's decision and vacate the citation.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Horace A. Thompson III
Commissioner

Dated: September 16, 2009

[3] Because we do not reach the issue of knowledge, the Secretary's February 1, 2008 request to address Home Depot's arguments on this issue is moot.

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APPEARANCES:

For the Complainant:
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For the Respondent:
Matthew T. Deffenback, Esq., Haynes and Boone, LLP, Houston, Texas

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Home Depot #6512 (Home Depot), operated a retail establishment at 21530 Tomball Parkway, Houston, Texas. Respondent Home Depot admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On August 17, 2006, a Home Depot lot attendant, ***(redacted)***, was discovered lying under the side of a truck in Home Depot's Tomball parking lot. ***(redacted)*** was transported, by ambulance, to a hospital.***(redacted)*** died on August 19, 2006, of "blunt head trauma and subdural hematoma and brain contusions," complicated by "hepatic cirrhosis due to chronic alcoholism and hepatitis C infection." Though aware of ***(redacted)*** death, Home Depot failed to report the death to OSHA (Joint Stipulations, Exh. C-9). After learning of the incident, the Occupational Safety and Health Administration (OSHA) initiated an investigation, and at its completion, Home Depot was issued a citation alleging violation of 29 CFR §1904.39(a).

By filing a timely notice of contest Home Depot brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Houston, Texas on June 19, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §1904.39(a)

Other than serious citation 1, item 1 alleges:

> 29 CFR 1904.39(a): Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, the employer must orally report the fatality/multiple hospitalization by tlelphone (sic) or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. The OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742) may also be used:
>
> On or about August 19, 2006, a death of an employee was not reported to the Occupational Safety and Health Administration.

OSHA regulation 29 CFR 1904.5 instructs employers:

> You must consider an injury or illness work-related if an event of exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in §1904.5(b)(2) specifically applies.

Discussion

Home Depot recognizes that the regulations create a "geographic presumption" of work relatedness where an injury or illness resulted from an event or exposure in the workplace. Home Depot maintains, however, there was no credible evidence of a specific event causing ***(redacted)*** condition. The record does not support Respondent's contention. To the contrary, the evidence suggests that ***(redacted)*** fell in the Home Depot parking lot, sustaining the head injuries to which he eventually succumbed. That the cause of his fall cannot be established is not relevant. In the preamble to the cited standard the Secretary stated:

> In applying [the presumption of work-relatedness], the question employers must answer is whether there is an identifiable event or exposure which occurred in the work environment and resulted in the injury or illness. "Thus if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event - the tripping accident - occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur."

(Exh. C-4). It is clear that, under the Secretary's interpretation, a fall at the workplace must be treated as if it were "work related" even though the cause of the fall is undetermined, and may not be attributed to

any workplace hazard. The geographic presumption would, therefore, apply in this case unless an exception can be established.

Home Depot argues that ***(redacted)*** may have sustained head trauma prior to August 17, 2006. If so the exception set forth in §1904.5(b)(2)(ii) would apply. That exception exempts injuries or illnesses involving "signs or symptoms that surface at work, but result solely from a non-work-related event or exposure that occurs outside the work environment." When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). Exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980). ***(redacted)*** brother,***(redacted)***, testified that he was with his brother the evening prior to ***(redacted)*** collapse at the Tomball store, and that he did not then, and had not at any time prior to that date experienced any kind of head injury while he was with ***(redacted)***(Tr. 20-21). According to ***(redacted)***, his brother was fine on the morning of August 17, 2006. Pat Kuntz, the Tomball store manager, also testified that ***(redacted)*** appeared fine, "just like he was every other morning" at 7:30 a.m. on August 17, 2006 (Tr. 45). Nothing in the record supports Home Depots contention that ***(redacted)*** head injuries predated his August 17, 2006 fall in the Tomball parking lot. The exemption has not been established.

Though the record does not establish that ***(redacted)*** fall was due to any occupational hazard present in Home Depot's work place, his injury was "work-related" for purposes of the cited regulation, solely because it took place in the work place. The cited violation has been established.

Penalty

The parties stipulate that the proposed penalty of $1,000.00 is appropriate for the cited violation in the event it is affirmed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1904.39(a) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: September 7, 2007