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. UNITED STATES POSTAL SERVICE, Respondent.	OSHRC Docket No. 19-1072

DECISION AND ORDER

Attorneys

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

In this proceeding, the United States Postal Service (USPS) was issued a one-item citation with a proposed penalty of $10,423 under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651 *et seq.*, by the United States Department of Labor's Occupational Safety and Health Administration (OSHA)[1] for violating an OSHA general housekeeping standard, 29 C.F.R. § 1910.22(a)(1), when ceiling tiles allegedly "were not kept in sanitary condition in that water stains and discoloration were observed." (Compl., Ex. A.) After USPS timely contested the

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order 8-2020, *Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health*, 85 Fed. Reg. 58393 (Sept. 18, 2020), superseding Order No. 1–2012, 77 Fed. Reg. 3912 (Jan. 25, 2012) (Order No. 1–2012 was in effect when the citation was issued). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

citation, the Secretary of Labor filed a formal complaint with the Commission seeking an order affirming the citation and proposed penalty.[2] A bench trial was held in Birmingham, Alabama.

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. C-1 ¶ 1). The Court also finds, and the parties have stipulated, that USPS was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5). (Ex. C-1 ¶ 2). Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 661(j) of the Act. 29 U.S.C. § 661(j). All arguments not expressly addressed have nevertheless been considered and rejected.[3] For the reasons indicated *infra*, the Court holds the Secretary has not proven his prima facie case, the Citation is **VACATED** and no civil penalty is assessed.

II. BACKGROUND

USPS operates as a nationwide employer engaged in the business of providing postal services. (Ex. C-1 ¶¶ 2, 3.) It employs approximately 16 employees at its Dora, Alabama, Post Office facility. (Tr. 19-20; Ex. C-1 ¶¶ 3, 4.) On April 2, 2019, OSHA Compliance Safety and Health Officer Alisha Sledge initiated an inspection of the Dora facility following an employee complaint, which alleged employee exposure to mold and mildew due to water leaking onto ceiling tiles throughout the building. (Tr. 16; Exs. C-1 ¶ 5; C-2, R-8.) Sledge completed a walkaround inspection of the facility and observed water stains and discoloration on ceiling tiles and insulation in the mail sorting area, HVAC room, and utility closet. (Tr. 27-34; Ex. C-1 ¶ 6; *see also* Exs. C-9, C-10, C-13, C-14, C-15.) Although some of the ceiling tiles had been removed from the ceiling before the inspection, (C5, C-6; C-8 to C-10; C-11 to C-13), there is no evidence in the record that the water stains and discoloration on ceiling tiles and insulation resulted in any mold or mildew. Sledge did acknowledge the appearance of remediation already underway on the day she inspected the facility. (Tr. 56-57.) Following the walkaround inspection, Sledge conducted interviews with

[2] Attached to the Complaint and adopted by reference was the citation at issue. (Compl., Ex. A) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[3] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

two employees. (Tr. 34-35). As a result of the inspection, OSHA issued the one-item "repeat"[4] citation for an alleged violation of 29 C.F.R. § 1910.22(a)(1). (Compl., Ex. A; Tr. 35-36; Ex. R-1; *see also* Ex. C-1 ¶8.)[5]

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Martin v. Occupational Safety & Health Review Comm'n* (*CF & I Steel Corp.*), 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id.* "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). "They also have a 'special duty' to comply with all mandatory health and safety standards." (*Id.* citing *id.* at § 654(a)(2)).

"With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies." (*Id.*) "The Secretary establishes these standards through the exercise of rulemaking powers." *CF & I Steel Corp.*, 499 U.S. at 147. *See* 29 U.S.C. § 665. Pursuant to that authority, the standards at issue in this case were promulgated. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

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[4] The Act contemplates various grades of violations of the statute and its attendant regulations— "willful"; "repeated"; "serious"; and those determined "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. § 666. Only a serious violation is defined in the Act. *See* 29 U.S.C. § 666(k).

[5] USPS was previously cited for violations of this same standard in OSHA inspection number 1221504, citation number 1, item number 1, which was affirmed as a final order on August 18, 2017, with respect to a workplace located in Birmingham, Alabama, and in OSHA inspection number 1119279, citation number 1, item number 1, which was affirmed as a final order on December 30, 2016, with respect to a workplace located in Center Point, Alabama. (Ex. C-1 ¶¶10, 11; *see also* Exs. C-19, C-20 .)

Under the law of the Eleventh Circuit where this case arose,[6] the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *ComTran*, 722 F.3d at 1307; *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014).

The cited regulation, section 1910.22(a)(1), mandates that the employer must ensure that "[a]ll places of employment, passageways, storerooms, service rooms, and walking-working surfaces are kept in a clean, orderly, and sanitary condition." 29 C.F.R. § 1910.22(a)(1). As indicated *supra*, the citation asserts USPS violated this general housekeeping standard when ceiling tiles in the mail sorting area, the HVAC room, and the utility closet allegedly "were not kept in sanitary condition in that water stains and discoloration were observed." (Compl., Ex. A.)

The cited standard is contained in Part 1910, OSHA's Occupational Safety and Health Standards, and more specifically, is found in Subpart D, the "Walking-Working Surfaces" Standards. The Secretary asserts that "[b]y its own terms, the standard applies to "[a]ll places of employment, passageways, storerooms, service rooms, and walking-working surfaces." (Sec'y's Br. 6.) The Court finds no merit in the Secretary's position, which fails to acknowledge the 2016 amendments to Subpart D.

Prior to 2016, Subpart D "include[d] separate scope requirements in various sections in the subpart[.]" *Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems)*, 81 Fed. Reg. 82494 (Nov. 18, 2016). And prior to 2016, section 1910.22 did have its own scope provision, which indicated it applied "to all permanent places of employment, except where domestic, mining, or agricultural work only is performed." 29 C.F.R. § 1910.22 (2014). However, that provision was eliminated with the 2016 amendments to Subpart D.

[6] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Dora, Alabama, in the Eleventh Circuit, and USPS's principal place of business is in Washington, D.C., in the D.C. Circuit. *See* 29 U.S.C. § 660(b). The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The Court therefore applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable the case would be appealed.

Prior to 2016, "[e]xisting subpart D [did] not have a single scope provision *that applie[d] to the entire subpart*." *Walking-Working Surfaces*, at *id*. (*emphasis added*). However, with the 2016 amendments, OSHA added a new single scope provision, section 1910.21(a), that did apply to the entire subpart. That consolidated scope provision provides that Subpart D "covers all *walking-working surfaces* unless specifically excluded by an individual section of this subpart." 29 C.F.R. § 1910.21(a) (emphasis added). Thus, it is clear the consolidated scope provision contained in Subpart D's section 1910.21(a) limits the applicability of the various sections in that subpart to "walking-working surfaces," including the cited section 1910.22(a)(1).

A "walking-working surface" is defined as any "horizontal or vertical surface *on or through which an employee walks, works, or gains access to a work area or workplace location*." 29 C.F.R. § 1910.21(b) (emphasis added). Thus, the plain language of the scope of Subpart D indicates the provisions of Subpart D do not apply to ceilings tiles since, by definition, they are not "walking-working surfaces" since they are not surfaces "on or through which an employee walks, works, or gains access to a work area or workplace location."[7]

Therefore, the Court concludes that after the 2016 revisions to Subpart D, it only applied to "walking-working surfaces," and since ceiling tiles by definition were not "walking-working surfaces," the Secretary was not authorized to cite USPS for ceiling tile violations under Subpart D or any individual section of that subpart, including section 1910.22(a)(1). Thus, the Secretary has failed to make out a prima facie case for a violation since he failed to show that section 1910.22(a)(1) applied. Accordingly,

[7] "In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' *Ehlert v. United States*, 402 U.S. 99, 105 (1971), that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations,' *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975)." *Id.* 149-50. Even assuming the language is ambiguous, the Court does not find the Secretary's position reasonable. It does not sensibly conform to the purpose and wording of the regulation since a ceiling is not a horizontal or vertical surface *on or through which an employee walks, works, or gains access to a work area or workplace location*.

IV. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED** and a civil penalty is not assessed.

SO ORDERED.

/s/

First Judge John B. Gatto

Dated: January 25, 2021
Washington, D.C.