Secretary of Labor, Complainant, v. Wal-Mart Super Center, Respondent.	OSHRC Docket No. 03-0392

APPEARANCES:

Joseph B. Luckett, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Ronald W. Taylor, Esquire
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Baltimore, Maryland
For Respondent

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

DECISION AND ORDER

Wal-Mart Super Center (Wal-Mart) is a retail sales store in Hoover, Alabama. The store is designated "Store #2111" by its owner, Wal-Mart Stores, Inc. On November 21, 2002, based on a formal complaint, Occupational Safety and Health Administration (OSHA) Compliance Officer Gwendolyn Marino conducted an inspection of the stockroom/receiving area of the store. As a result of the inspection, Wal-Mart was issued a repeat citation and proposed penalty of $25,000.00 on January 23, 2003. Wal-Mart filed a timely notice of contest.

Citation No.1, Item 1, alleges a repeat violation of 29 C. F. R. § 1910.37(k)(2), for failing to have a continuous and unobstructed means of egress to the exit in the stockroom/receiving area, which was clear for instant use in case of an emergency. The hearing was held on September 25, 2003, in Birmingham, Alabama. Jurisdiction and coverage are admitted. For the following reasons, the repeat violation is affirmed and a penalty of $5,000.00 is assessed.

Background

The Birmingham, Alabama OSHA office received a complaint regarding possible hazardous conditions in the receiving area of the Wal-Mart Super Center in Hoover, Alabama. On November 21, 2002, Ms. Marino arrived at the store at 3:30 p. m. to begin her inspection. She held an opening conference with Glen Smith, general manager of the store. Ms. Marino testified that Smith told her that the controlling corporation of the store was Wal-Mart Stores, Inc. Wal-Mart Stores, Inc., is a corporation that owns a national chain of retail stores. Store No. 2111 in Hoover has approximately 500 employees.

Ms. Marino inspected the stockroom/receiving area of the store and took photographs. She observed and interviewed seven employees working in the area stacking boxes and unloading trucks. The stockroom/receiving area, which is one large room, is roughly 5,000 square feet of the total store space of 225,000 square feet. At the time of the inspection, the stockroom consisted of four aisles, which were 75 feet long and 8 feet wide (Exhs. C-1, C-2, R-1). The aisles were created by five sets of shelves or racks (which were 44 inches wide) that held merchandise (Exhs. C-1, C-2, R-1). Marino identified the four aisles by numbering them "1" through "4". The aisles ran parallel to the back wall, Aisle 4 being closest to the back wall (Exhs. C-1, R-1). The emergency exit door and a desk next to it were located on the back wall. The aisles ran perpendicular to three truck bay doors. Trucks pulled up to these doors for unloading of merchandise (Exhs. C-1, R-1).

The exits from the stockroom/receiving area to the exterior of the building consisted of: (1) one emergency exit door (with a red and white "Fire Exit" sign on it) and a roll-up door for the fork lift/industrial trucks, both located on the back wall, and (2) three truck bay doors, which were roll-up doors, on the adjoining wall (Exhs. C-1, R-1, R-5). There were two swinging doors that exited into the electronics department on the sales floor of the store (Exh. C-4). These swinging doors were at the opposite end of the room from the three bay doors and diagonally at the other end of the room from the emergency exit door (Exhs. C-1, R-1). There was an aisleway in the stockroom that accessed the swinging doors.

Besides shelves, the stockroom/receiving area contained cardboard boxes, wood pallets, shopping carts, a fork lift/industrial truck, and a mobile conveyor rail system (Exhs. C-2 thru C-6). The conveyor rail system, which was on wheels, facilitated moving boxes from the trucks into the

aisles by means of rollers (Exh. C-2). Each section of the system was approximately 10 feet long and could expand to about 20 feet long. According to Marino, the height of the conveyor system was in the region of the height of an employee's knee to mid-thigh, depending on the height of the employee. At the time of the inspection, the conveyor rail system was stretched out from the back of the truck in the middle bay door into Aisle 3 (Exh. C-2).

Marino conducted a closing conference with Smith and left the site at 6:30 p.m. On January 16, 2003, the compliance officer conducted a second closing conference with Smith, Wal-Mart's district manager Brent Wood, and risk management representatives Walt Neisser and Sheila Rogers.

DISCUSSION

The Secretary has the burden of proving violations of standards promulgated under the Act. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

It is undisputed that the general industry standards apply to Wal-Mart's business operations.

The test for knowledge is whether "the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Wal-Mart had actual knowledge of the violative condition. The boxes, which blocked the aisles, were in plain view (Exhs. C-2 thru C-6). Manager Smith admitted that the receiving/stock room area had been full of boxes for the previous three or four weeks (since the beginning of November) due to the upcoming holiday season.

Wal-Mart's knowledge of the violative condition is imputed to it through its manager, Smith. "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was

responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). "[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Alleged Repeat Violation of 29 C. F. R. § 1910.37(k)(2)

> The Secretary, in Citation No. 1, Item 1, alleges that:
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> On or about November 21, 2002, in Stock Room/Receiving Area – Boxes were being stored in the aisle ways allowing minimal to no access to the exit throughout the stockroom/Receiving Area.
>
> Wal-Mart Stores, Inc. was previously cited for a violation of the Occupational Safety and Health Standard which was contained in OSHA inspection number: 300652641, Citation 1, Item 1, issued on 05/23/00, to the Waycross, GA store #0556.[1]

The standard at 29 C. F. R. § 1910.37(k)(2) provides:

> (k) *Maintenance and workmanship.* (2) Means of egress shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

Section 1910.35(a) defines means of egress as "a continuous and unobstructed way of exit travel from any point in a building or structure to a public way and consists of three separate and distinct parts: the way of exit access, the exit, and the way of exit discharge."

The Secretary contends that the means of egress to the one emergency exit door in the stockroom/receiving area was blocked by various obstructions. Of the four aisles in the stockroom/receiving area, Marino observed that Aisle 1 was completely blocked across the full width of the aisle with cardboard boxes and wood pallets; Aisle 2 was completely blocked with boxes and a forklift/industrial truck; Aisle 3 was completely blocked with boxes, which were stacked up to a height

[1] This is based on the Secretary's Motion to Amend Citation that was granted September 23, 2003.

taller than 5 feet 2 inches (the height of Ms. Marino), and part of the conveyor rail system; and Aisle 4 was partially blocked with boxes, but there was a 44-inch wide pathway (as measured by Marino) through the aisle (Exhs. C-2 thru C-5). The regulations require a minimum width of 28 inches for a single way of exit access. 29 C. F. R. § 1910.37(f)(6).

Marino also observed that the aisleway from the stockroom into the sales floor (electronics department) had boxes and some carts on each side (Exh. C-4). She measured the unobstructed part of the aisleway as 34 inches wide. Marino saw two employees working in the area blocked from the emergency exit by the conveyor rail system which extended from the middle truck bay into Aisle 3 (Exh. C-2).

Ms. Marino testified that Smith told her that the stockroom/receiving area had been full of boxes since the beginning of November due to the approaching holiday season. This was confirmed by employee Brian Gallups, who told Marino that the stockroom had been full of boxes for about a month.

During the inspection, the Secretary's compliance officer saw two trucks parked at two of the truck bay doors; the third bay door was closed. She discovered that truck delivery was scheduled for 4:00 p.m., 6:00 p.m., and 8:00 p.m. In addition to the boxes blocking the aisles, employees were going to unload approximately 3,000 boxes from the three trucks making deliveries that night (Exh. C-7). Employees told Marino that the boxes in Aisles 1, 2 and 3 were supposed to be cleared away at the end of the shift, which was 1:00 a.m.

Wal-Mart contends that there is no violation because Aisle 4 was never completely blocked, and it was the designated means of egress for employees. Smith stated that employees are instructed to keep Aisle 4 open, although he admitted that there was no rule against blocking the aisles. Smith said he has never seen Aisle 4 completely blocked. Furthermore, Wal-Mart claims that all aisles would be cleared at the end of the shift at 1:00 a.m. because boxes would be moved out to the sales floor. Also, Wal-Mart asserts that the conveyor rail system is not an obstruction because it is made up of sections that can be disassembled easily and quickly by flipping the latch that holds the sections together and pulling the sections apart (Exhs. R-2 thru R-4). It further argues that employees working on the side of the conveyor rail system away from the emergency exit door were only 20 feet from that door.

The standard requires a continuous and unobstructed means of egress. It is undisputed that three aisles were totally blocked. Employees, working on the side of the conveyor rail system, away from the

emergency exit door, are impeded from full and instant use of the means of egress. During the inspection, Marino observed two employees in this situation. Unless employees were working in Aisle 4, they would lose valuable time attempting to reach it if they are working near Aisles 1, 2 and 3 which are blocked.

Contrary to Wal-Mart's contention, the conveyor rail system is an obstruction to the means of egress. In an emergency situation, employees cannot be expected to unlatch the conveyor sections and push them apart, especially if there are boxes on the conveyor. Smoke could affect visibility, and employees could not see the latches. Employees could panic in an emergency and their first response might be to climb or jump over the system, which could result in injuries and time lost in reaching the exit. A distance of 20 feet to the exit, which is blocked by the conveyor rail system, is not insignificant as the employer contends since time is critical in an emergency.

Wal-Mart's assertion that any obstruction of aisles is for a minimal amount of time is immaterial. "The Secretary need not establish how long the condition existed in order to prove a violation. The short duration of exposure to a violative condition is no defense against the evidence of a violation." *Hamilton Fixture*, 16 BNA OSHC 1073, 1094 (No. 88-1720, 1993), *aff'd on other grounds*, 16 OSHC 1889 (6th Cir. 1994) (not recommended for full text publication).

Wal-Mart maintains that there are 39 emergency exits in the building. In addition to the emergency exit in the receiving area, there are emergency exits on the sales floor on the other side of the swinging doors that open onto the electronics department. There is also a double door exit near the "Claims Storage" area. Wal-Mart contends that employees could exit through the truck bay doors.

Wal-Mart's argument that there are more emergency exits and other types of exits in the building is misplaced. "[R]eliance upon other means of egress confuses the requirements of other standards to provide an adequate number of exits with the requirement of section 1910.37(k)(2) that, when means of egress are provided, they must be continuously available for 'full instant use.'" *Allegheny Airlines, Inc.*, 9 BNA OSHC 1623, 1625 (Nos. 14291 & 14345, 1981). *See also Hamilton Fixture, supra,* at 1094 (hazard posed by blockage of access to door marked as "Fire Door" is not diminished by existence of another door). In the instant case, using the double doors near the "Claims Storage" as an emergency exit is not feasible because these doors are approximately 88 feet away from the stockroom at their nearest point and 189 feet away from it at their farthest point (Exhs. C-1, R-1). Because of their distance from the

stockroom, these doors cannot reasonably be considered an exit in time of an emergency since employees would lose time getting to those doors. The truck bay doors could not be used for emergency exits because the exit from the bay doors is not level with the ground but involves a 4-foot drop to ground level. When there are trucks in the bays, the doors are entirely blocked by the trucks. The truck bay doors are not a "safe access to a public way" since employees would be required to jump 4 feet to the ground and could be injured jumping that far. 29 C. F. R. § 1910.37(h)(1).

Wal-Mart claims that it is undisputed that the emergency exit door was not blocked. Even if this is correct, a blocked exit door is not the issue under consideration here. Because the blocked aisles would delay employees from reaching the emergency exit door, employees could suffer smoke inhalation, burns, or other serious injuries, and possibly death, in an emergency situation. The likely consequences of employees trying to climb over the boxes in an emergency would be trips and falls or boxes falling on top of them, both resulting in serious injury or possibly death. The conveyor rail system is not fixed but moveable. If an employee tried to climb or jump over it, the system could move and employees could hurt themselves. Even if the system did not move, employees trying to climb over it could sustain bruises, fractures, and sprains.

It is undisputed that respondent's employees use these conveyors to unload merchandise from the trucks. Ms. Marino found boxes containing merchandise measuring up to 5 feet in width and some over 5 feet high. These boxes on the conveyor during the unloading process further enclose the employees in this area and create an even greater obstruction to their access to the means of egress. Mr. Smith testified that the conveyor could be unlatched and moved. His testimony described this process referring to an empty conveyor prior to unloading. The conveyor is not in this area for show, but for use. When in use, boxes flow continuously over the conveyor rollers. The height, width, and weight of these boxes, on top of the conveyor, create additional obstructions and increase the difficulty of unlatching the sections of the conveyor. Employees would need to unload merchandise from the conveyor before unlatching and moving the conveyor section to gain access to the means of egress. Alternatively, employees could attempt to move the conveyor section while fully loaded with boxes. Both the conveyor and the boxes on the conveyor during unloading are obstructions and impediments to employee access to exits.

Boxes were off loaded from the conveyor and placed in the aisles. These off-loaded boxes were obstructions and impediments to egress. While the original citation referred specifically to boxes being

stored in aisleways, the issue of whether the conveyor was an obstruction or impediment to egress was tried by the consent of the parties. No objection was raised by either party at any time during the proceeding relating to the receipt of evidence on this issue. In fact, both parties presented testimony addressing the issue of whether the conveyor was an obstruction or impediment to use of the means of egress.

As discussed above, there were four aisles leading away from the stockroom/receiving area where seven Wal-Mart employees worked. It is undisputed that Aisles 1, 2 and 3 were totally blocked by boxes of merchandise and a forklift truck. The conveyor was situated between the exit in Aisle 4 and at least two employees in the receiving area. This conveyor created a final barrier for these employees and precluded them from reaching the only available means of egress open to them. The boxes, when loaded onto the conveyor from the trucks, created additional obstructions as did the boxes off loaded from the conveyor to the aisles.

Wal-Mart argues that the violation is not serious because employees have had emergency evacuation training; there is a sprinkler system in the stockroom/receiving area; and the fire department is located only one mile away. Again, Wal-Mart misses the point that the means of egress to the exit must be continuous and unobstructed so that in an emergency, employees may quickly access the exit. In such emergency, employees could panic and forget their training. In case of a fire, the sprinkler system might not be activated quickly enough and might not dissipate the smoke. Also, the fire department could be delayed. Where every second counts, employees could be seriously injured by any delay. "The Commission has held that, in determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur." *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-12387, 1989).

Wal-Mart argues that even if it was not in compliance with the standard, the violation is *de minimis*. Section 9(a) of the Act indicates that violations are *de minimis* when they "have no direct or immediate relationship to safety or health." 29 U. S. C. § 658(a). This argument is rejected. "A violation should be classified as *de minimis* when there is technical noncompliance with a standard but the violation has such a negligible relationship to the safety or health of employees that it is not appropriate to order abatement or assess a penalty." *Whiting-Turner, supra,* at 2156. In this case, it cannot be concluded that Wal-Mart's failure to comply with the standard has a "negligible relationship to the safety or health of employees."

Because the means of egress was not continuous and unobstructed, employees' safety was compromised. As noted previously, employees could be subject to serious injury or even death.

Accordingly, the violation of 29 C. F. R. § 1910.37(k)(2) is affirmed.

Repeat Classification

Under the Commission's longstanding test, a repeat violation under § 17(a) of the Act occurs if the Secretary shows "a Commission final order against the same employer for a substantially similar violation." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003). The Secretary establishes substantial similarity "by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The repeat classification is based on a citation issued to "Wal-Mart Supercenter #0556" of Waycross, Georgia, on May 3, 2000, for repeat violation of 29 C.F.R. § 1910.37(k)(2) because "shopping carts were aligned against the walls adjacent to the emergency exit and found to be obstructing path of egress on or about 4-6-00" (Exh. C-8). The parties entered into a settlement agreement changing the classification of the violation from repeat to serious, and a reduced penalty was paid. The Order Approving Settlement was entered on November 27, 2000. This prior citation was for violation of the same standard under similar conditions as the instant case. *See Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994), *aff'd*, 901 F.2d 1112 (5th Cir. 1990) (employer was found to have previously violated same standard. This is enough to characterize current violation for failure to keep work area clear of debris as repeated).

Even though both violations involve the same standard, 29 C.F.R. § 1910.37(k)(2), Wal-Mart disputes the similarity of the violations asserting that Store #0556 involved shopping carts in the customer service area, and Store #2111 involved primarily boxes in the stockroom/receiving area.

The Commission holds that the "principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards." *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990) (citations involving the same standard and applied to similar conditions of employee exposure to similar fall hazards are repeat violations). *See also Superior Electric Co.*, 17 BNA OSHC 1635 (No. 91-1597, 1996) (prior violation for

failure to have midrail was substantially similar to current violation for failure to have guardrail in that both violations involved same standard and dealt with same hazard of falling).

Contrary to Wal-Mart's argument, the items obstructing a means of egress and the locations of the means of egress need not be identical for the violations to be substantially similar, and thus classified as repeat. Both of these violations involve the same hazards to employees of a blocked means of egress in case of fire or other emergency. Accordingly, these two violations are substantially similar.

Wal-Mart also claims that the same employer is not involved because both the current and previous citations cite the individual stores and not Wal-Mart Stores, Inc. This argument fails because each and every store in the Wal-Mart chain belongs to Wal-Mart Stores, Inc., making each store a part of the corporation (Exhs. C-9 thru C-11). Smith told Marino that Store #2111 was owned by Wal-Mart Stores, Inc. Marino testified that the OSHA 1a Form for Store #0556 in Waycross notes that the controlling corporation for that store was Wal-Mart Stores, Inc. The Commission holds that:

> Corporations commonly administer policy in several or many locations, and we see no reason why compliance with this [OSHA] statute should be fragmented . . . In short it is not unrealistic to require that an employer observe the law (as with any other statute) in all locations where it transacts business.

Potlatch Corporation, 7 BNA OSHC 1061, 1064 (No. 16183, 1979). "Geographical proximity is not necessarily a factor in determining substantial similarity[.]" *Center-Rooney Construction Co.,* 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) (floor opening and guardrail violations were properly characterized as repeat even though previous citations involved different sites in different cities).

Wal-Mart argues that the compliance officer did not follow the *Field Inspection Reference Manual* (*FIRM*) because a repeat violation only applies if the repeated violation recurred within the same OSHA area office jurisdiction. However, that section of the *FIRM* begins with the statement that "(w)here a national inspection history has not been obtained, the following criteria regarding geographical limitations shall apply." (*FIRM* Chapter III.C.2.f.(4)(c)). In this case, Marino obtained Wal-Mart's national inspection history. Moreover, the FIRM does not have the force of law. It provides guidance to assist inspections in the uniform enforcement of the Act but creates no substantive rights for an employer. *See Andrew*

Catapano Enterprises, Inc., 17 BNA OSHC 1776, 1780 (No. 90-0050, 1996) (consolidated). Wal-Mart's contention that OSHA did not follow the *FIRM* is without merit.

The violation of 29 C.F.R. § 1910.37(k)(2) is affirmed as repeat.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Wal-Mart Stores, Inc., is an extremely large company employing over a million employees, including 500 at this location. The violation involved seven employees who were working in the receiving/stockroom area during the truck delivery shift. Boxes were in the stockroom/receiving area from the first truck delivery at 4:00 p.m. until 1:00 a.m. when all boxes were supposed to be out on the sales floor. Smith stated that boxes started going out to the sales floor between 8:00 p.m. and 8:30 p.m. Marino's investigation, however, revealed that boxes had been blocking the aisles for approximately one month. In all likelihood, boxes would continue to block the aisles until the end of the holiday season. The means of egress for two employees, working on the side of the conveyor rail system away from the exit door, was not continuous and was obstructed. In the case of an emergency, because of the blocked means of egress, it would be dangerous for employees to scramble over boxes and the conveyor rail system in order to get to the emergency exit door. Additionally,

employees would lose valuable time in trying to reach the exit when every second could make a difference between life and death in an emergency situation.

OSHA's recommended penalties did not include any reduction for gravity or good faith because the violation was repeat. Wal-Mart, however, exhibited good faith and was cooperative during the inspection. After due consideration of the factors discussed above, it is determined that a penalty of $5,000.00 is appropriate for this violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the finds of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing decision, it is ORDERED:

Citation No. 1, Item 1, alleging a repeat violation of 29 C.F.R. § 1910.37(k)(2), is affirmed and a penalty of $5,000.00 is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: December 29, 2003