

SECRETARY OF LABOR,

Complainant,

v.

CONAGRA BEEF COMPANY, and its
successors,

Respondent.

OSHRC DOCKET NO. 03-0179

APPEARANCES:

For the Complainant:

Lindsay A. McClesky, Esq., Danielle Jaberg, Esq., Office of the Solicitor, U.S. Department of
Labor,
Dallas, Texas

For the Respondent:

Thomas H. Wilson, Esq., Michael J. Muskat, Esq, Vinson & Elkins, 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").

Respondent, Conagra Beef Company (Conagra), at all times relevant to this action maintained a place of business at the Schroeter Industrial Park, Cactus, Texas, where it was engaged in beef packing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 27-28, 2002 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Conagra's Cactus, Texas work site. As a result of that inspection, Conagra was issued two citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Conagra brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Prior to the commencement of the hearing in this matter, the Secretary withdrew all but one citation, Citation 1, item 1, which alleges violations of §1910.23(c)(1). *See*, this judge's orders of July 16, 2003; August 6, 2003; and the hearing transcript at page six (Tr. 6).

On July 29, 2003, a hearing was held in Amarillo, Texas. Following the hearing, the

Secretary moved to dismiss instance (d) of the remaining citation. The parties have submitted briefs on the matters remaining at issue, *i.e.*, item 1, instances (a-c). This matter is ready for disposition.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1910.23(c)(1): Open sided floor(s) or platform(s) 4 feet or more above the adjacent floor or ground level were not guarded by standard railings (or the equivalent as specified in 29 CFR 1910.23(e)(3)(i) through (v)), on all open sides _____:

At the facility, Swift and Company, formerly Con Agra Beef Packing Company, in the following instances: (a-c) Kill side of the facility at the three carcass splitting platforms;

Workers on the three carcass splitting platforms were exposed to the hazard of falling from the platform to the floor below and to the hazard of being crushed by the platform as it cycled back to the floor level. The adjustable platforms cycled from approximately floor level to a maximum height of approximately six to seven feet.

Facts

In Respondent's facility, beef carcasses are rendered as they move through the processing plant on a suspended line chain. As the beef carcass moves past the carcass-splitting platform, an operator saws through the spine, halving the carcass. The mechanized platform descends, allowing the operator to cut down from the tail to the shoulder of the suspended beef (Tr. 30-32; Exh. C-1A). At its highest point, the platform is seven feet above the plant's floor (Tr. 34).

Compliance Officer (CO) David Trigg testified that on or about September 24, 2002, while he was participating in an inspection of Respondent's beef packing plant, he observed an employee working on a carcass-splitting platform without the benefit of fall protection (Tr. 26-27, 68). The platform, though guarded on the backs and sides, had no guardrails on the fronts (Tr. 28). CO Jessica Martinez, who was assisting Trigg in his investigation, also testified that on the first day of the inspection the employee on the carcass-splitting platform was not using the restraint system provided, *i.e.* a short restraining tether attached to a belt (Tr. 39, 58, 67-69, 120, 123). Trigg stated Respondent could have known of the cited violation, as the violation was open and obvious, and there are supervisory personnel in the area daily (Tr. 37).

According to Martinez, Trigg notified Brian Atchley of the alleged violation (Tr. 122). CO Trigg testified that a day or two later he observed employees on the platform using the

restraint system (Tr. 39, 58, 67-69). Martinez also stated that during subsequent visits, employees were wearing the restraining lanyards (Tr. 122). The Secretary acknowledges that the lanyard, when attached to the back of the platform, provides effective fall protection and complies with the requirements of 29 C.F.R. §1910.23(c)(1) (Tr. 38-39).

Brian Atchley, the safety and environmental manager at the plant testified that he accompanied CO Trigg on his initial walk-around (Tr. 100). Atchley testified that the employee on the carcass-splitting platform was tied off when they walked past the area (Tr. 101).

Discussion

To prove a violation of a standard, the Secretary must establish that (1) the standard applies to the conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171, 2000 CCH OSHD P32,137, p. 48-443 (No. 99-257, 2000).

The two CO's independently testified that on the first day of their inspection they walked by a carcass-splitting platform on which an employee was working without using the tether provided for fall protection. Though Respondent's safety manager claims that the employee was tied off, this judge finds that an insufficient basis to discount the clear testimony of COs Trigg and Martinez. The Secretary has shown, in that single instance, that the terms of 29 CFR §1910.23(c)(1) were not met. At no time, however, did either CO state that they *ever* saw the operators on the other two carcass-splitting platforms working – with or without fall protection. Nothing in the record supports the Secretary's inclusion of two additional instances under citation 1, item 1(a-c).

Moreover, the Secretary failed to carry her burden of establishing Respondent's constructive knowledge of the violation. Here, where fall protection had been provided, it is insufficient to show that, during the brief OSHA walk-around, a single employee failed to use that fall protection. Even though Respondent's employee was in plain sight at the time of the inspection, the Secretary must show that Respondent's failure to discover the violation was due to a lack of reasonable diligence. An inquiry into whether an employer was reasonably diligent involves several factors, including whether the employer had adequate work rules and training programs, adequately supervised employees, and/or took other measures to prevent the

occurrence of violations. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407, 2001 CCH OSHD P32,331, p. 49,552 (No. 99-707, 2001). Where, as here, the Secretary failed to make any inquiry into the length of time the violation existed or the adequacy of the employee's supervision, this judge cannot find that Complainant has carried her burden of proving that the employer failed to exercise reasonable diligence. *See, Stahl Roofing, Inc.*, 202 CCH OSHD ¶32,646, (No. 00-1268, 00-1637, 2003). The alleged violation is, therefore, vacated

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1910.23(c)(1) is VACATED.

/s/ _____
Benjamin R. Loye
Judge, OSHRC

Dated: October 9, 2003