United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. M.C. Dean, Inc., Respondent.	OSHRC Docket No. **10-0549**

Appearances:

Kristina T. Harrell, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

J. Larry Stine, Esq., Mark A. Waschak, Esq., and Elizabeth K. Dorminey, Esq.,
Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act or Act). M.C. Dean, Inc. (Dean) is an electrical contractor that, as part of its business, services existing electrical installations. On August 27, 2009, three Dean employees were performing such service at a Ryder Transportation Services (Ryder) warehouse in Doraville, Georgia, when journeyman electrician Lewis Quinn fell through a skylight on the warehouse roof. Quinn died two weeks later. As a result of this fatality, the Occupational Safety and Health Administration (OSHA) inspected the site and issued Dean a single serious citation. The citation alleges that Dean violated 29 C.F.R. § 1910.23(a)(4) for failing to guard the skylight through which Quinn fell. The Secretary proposed a $7,000.00 penalty for this citation.

Dean timely contested the citation and a hearing was held on September 2-3, 2010, in Atlanta, Georgia. The parties stipulated to jurisdiction and coverage (Tr1. 6). Both parties have submitted post-hearing briefs.

Dean contends the Secretary failed to prove it had knowledge of the fall hazard posed by the skylight. Additionally, Dean asserts both the infeasibility and greater hazard affirmative defenses, arguing the means of compliance proposed by the Secretary were "impractical, ineffective, would expose employees to greater harm, or all three" (Dean's Brief at 13).

For the following reasons, the citation is affirmed as serious and a penalty of $7,000.00 is assessed.

Background

Although servicing existing electrical installations is not Dean's primary business, it had a 20-year relationship with Ryder to provide such service at this warehouse, formalized in a "time material" contract (Tr1. 20, 147, 222-23). Ryder's warehouse, approximately 300 feet by 100 feet, had a pitched roof containing approximately eight or ten skylights (Tr1. 198, 217). The skylights were spaced approximately 25 feet apart and were a similar distance from the exhaust fans (Tr1. 198). The height of the warehouse at the location of the skylight Quinn fell through was nearly 26 feet (Exh. C-6). The skylights were "obvious" from the floor inside the warehouse (Tr1. 197, 213). However, they were not nearly as visible from the roof, and instead of bulging up from the roof, lay flush with it (Tr1. 57, 159, 204).

Dean requires prior to beginning work each day, its employees complete an "activity hazard analysis"—referred to as a "pre-task planner"—a document that identifies and assesses the hazards that could be confronted during that day's work (Tr1. 49, 57, 150-52; Tr2. 48). If conditions change, employees are supposed to address any new hazards on the pre-task planner (Tr1. 181-82).

On the day of the accident, Dean's three-man team was installing and upgrading electrical equipment inside the warehouse (Tr1. 20). The team consisted of Lewis Quinn and Boyd Young, both journeyman electricians, and Samuel Dittmore, an apprentice (Tr1. 20-21). Dean's service group manager, Tommy McGregor, assigned Young to serve as the "field supervisor" at the worksite, a position indicating that he was in charge of Dean's onsite operations (Tr1. 98, 141-43, 193, 222). At the time of the accident, these employees had been on site between one to two weeks (Tr1. 149).

At the beginning of the day, the employees filled out a pre-task planner but did not include skylight hazards because they did not think they would be working on the roof[1] (Tr1. 152-54; Exh. C-8). While working inside the warehouse running conduit and mounting junction boxes, the employees used an articulating boom lift to reach the ceiling (Tr1. 155-56). As part of the job, they modified the control configuration for the warehouse's two exhaust fans whose flumes were in the roof (Tr1. 173). However, after this rewiring, the exhaust fans did not turn on when the power switch was flipped and the Dean employees determined that it was necessary to "verify the voltage at the local disconnect" and access the exhaust fans via the roof (Tr1. 174).

None of these Dean employees had previously accessed the roof of the warehouse (Tr1. 155). They received permission to access the roof from their contact with Ryder, Jeff Thompson, and discussed fall protection for the lift (Tr1. 157-58, 175-76, 182). Although Young testified that the skylight hazard should have been identified in the pre-task planner, they did not update it (Tr1. 182).

Young and Quinn moved the lift outside of the warehouse to raise Quinn to the roof (Tr1. 169). While on the roof, Quinn was only expected to inspect, not work on, the exhaust fans (Tr1. 205). He was on the roof for 15 to 20 minutes (Tr1. 176). Although he was tied off on the lift, he had no additional fall protection while on the roof, nor was there any on the roof (Tr1. 64-65, 179). Young was in radio contact with Quinn while he was on the roof (Tr1. 167). Quinn checked the voltage of each of the two exhaust fans. Afterwards, he fell through an approximately 8-foot by 3-foot skylight while walking on the roof (Tr1. 162, 167-68). He died from his injuries two weeks later, triggering the OSHA inspection (Tr1. 18.)

Based upon this inspection, the Secretary issued the instant citation to Dean on February 22, 2010.

Discussion

Item 1: Alleged Violation of § 1910.23(a)(4)

To establish a violation of an OSHA standard, the Secretary has the burden of proving, by a preponderance of the evidence:

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[1] The pre-task planner for that day includes two notations for "100% Fall Protection" (Exh. C-8). Young explained that these notations signified a Dean rule requiring employees to tie off unless "you're more than six feet away from a fall hazard or opening" (Tr1. 199-200).

> (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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The citation alleges:

> On or about 09/11/09 an employee of M.C. Dean, Inc. was exposed to falling approximately 25.8 feet through a skylight as the employer did not provide any guarding protection around all sides of the skylight. Section 1910.23(a)(4) provides:
>
> Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.

Dean contends only that the Secretary failed to prove knowledge. The skylight at issue fits within the standard's definition of "floor opening," establishing applicability. 29 C.F.R. § 1910.21(a)(2) (defining "floor opening" as "an opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard through which persons may fall"); *see Lancaster Enters., Inc.*, 19 BNA OSHC 1033, 1036-37 (No. 97-0771, 2000) (finding similar construction skylight standard applied to many different types of skylight openings). Young testified that there was no guarding for the skylights on the warehouse roof, establishing noncompliance (Tr1. 177). Quinn was working on the roof when he fell through the skylight, establishing actual exposure. *See Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (finding actual exposure to skylight guarding violation where employee fell through skylight opening), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

Knowledge

To establish knowledge, the Secretary must prove that "a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *A.P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). "[K]nowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing*, 17 BNA OSHC at 1079. "The actual or constructive knowledge of an employer's foreman or supervisor can be imputed to the employer." *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001).

Dean contends that Young—because he and Quinn "were equals, both journeymen electricians, hourly employees" with the same internal company designation of "E Prep"—was not a foreman or supervisor and therefore his knowledge of the conditions at the site is not imputable to the company (Dean's Brief at 9-10). Young, according to Dean, "lacked supervisory indicia such as the authority to discipline, hire or fire," which instead rested with McGregor (Dean's Brief at 10). Acknowledging that McGregor assigned Young to be the onsite field supervisor the day of the accident, Dean notes that Quinn had been assigned that duty on other jobs (Dean's Brief at 10). Dean also argues that the Secretary "recognized that Young was not a supervisor" by denying Dean's counsel to be present at its interview with Young.

"Under Commission precedent, '[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer.' " *Diamond Installations Inc.*, 21 BNA OSHC 1688, 1690 (No. 02-2080, 2006) (consolidated) (quoting *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993)). Moreover, " '[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having the authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee.' " *Id.* (quoting *Dover Elevator*, 16 BNA OSHC at 1690). "Supervisory status is not dependent on job titles, but may be established by other indicia of authority that the company has empowered the employee to exercise on its behalf." *Id.*

The record evidence establishes that Young was a supervisor. McGregor, the Dean service group manager, assigned Young as the onsite field supervisor or "lead" for the day of the accident (Tr1. 140-41, 226-27, 256, 259-60; Exhs. C-11, C-12). McGregor acknowledged in his testimony that Young controlled the "method and manner" in which he performed the assigned tasks and maintained the ability to assign tasks to other employees, including other journeymen (Tr1. 259). Thus, at least for the day in question, Dean had delegated Young with authority over other employees. *Diamond Installations*, 21 BNA OSHC at 1690 (permitting imputation of knowledge based on temporary delegation of authority). Although Young did not have the authority to hire or fire, such power "is not the *sine qua non* of supervisory status." *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

Young had other indicia of authority as well. For instance, McGregor relied on Young to determine the tasks to be performed at the warehouse (Tr1. 260). Indeed, Young served as Dean's contact with Ryder and had the "latitude" to agree on changes or modifications to the project (Tr1. 256). Young testified his duties as field supervisor included ensuring the team had all necessary materials and that "the tasks were completed . . . " (Tr1. 142). Dean's vice president of safety, John Bennett, testified McGregor had to rely on Young as his "lead person" to monitor safety at the worksite. *See Rawson Contractors*, 20 BNA OSHC at 1080 (finding foreman supervisor for purposes of knowledge imputation where he was assigned to supervise his crew's work activities, controlled all steps for completing the job, and ensured that work was done safely); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2068-69 (No. 96-1719, 2000) (considering crew leader a supervisor because he "was responsible for seeing that the work was done safely and properly"); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1538 (No. 86-360, 1992) (permitting imputation of leadermen where they reported directly to supervisors, including with respect to safety concerns). This evidence establishes that Young was a supervisor such that his constructive knowledge may be imputed to Dean.

Dean argues that the record does not establish constructive knowledge because it had "effective safety rules, effective enforcement through safety inspections, and effective communication of the rules, and authorizes any employee to stop a job if he has safety concerns" (Dean's Brief at 8). The Secretary establishes constructive knowledge "by showing that the employer could have discovered the existence of the violative condition with the exercise of reasonable diligence." *Diamond Installations*, 21 BNA OSHC at 1691. "In assessing reasonable diligence, the Commission has considered 'several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.' " *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007) (quoting *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001)). As part of its reasonable diligence to anticipate hazards, "an employer has a general obligation to inspect its workplace for hazards," and that obligation " 'requires a careful and critical examination, and is not satisfied by a mere opportunity to view' " the hazardous condition. *Hamilton Fixture*, 16 BNA

OSHC 1073, 1087 (No. 88-1720, 1993) (quoting *Austin Commercial v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979)).

Although the cited condition—the lack of guarding on the skylights—was not "readily apparent" from the ground, the existence of the skylights was (Tr1. 59, 156, 213). The team had been working at the warehouse for one to two weeks prior to the accident and this work involved using the lift to service the exhaust fans and other equipment at the warehouse's ceiling (Tr1. 149, 155, 173). When the Dean employees determined they needed to access the roof, however, they did not consider the safety concerns concomitant with such access. Young never discussed with Ryder management "if there was any guarding or any safety precautions" that needed to be taken while on the roof (Tr1. 179). Although they discussed "how the roof had been accessed in the past," they did not discuss the location of the skylights in relation to the exhaust fans, whether there were designated path lines on the roof, nor whether there were guardrails or covers for the skylights (Tr1. 158-59). According to Young, fall protection was discussed only with respect to using the lift (Tr1. 214). Young did not recall discussing with Quinn a path of travel on the roof that could have avoided the skylights and did not determine that Quinn should use fall protection while on the roof (Tr1. 177, 179, 182). Indeed, Young admitted that a skylight hazard should have been included on the pre-task planner (Tr1. 181). McGregor concurred this should have been done (Tr1. 254).

Further, Young admitted and McGregor confirmed it was "uncommon" for service group employees to work on roofs (Tr1. 181, 263). This lack of experience with roofs makes Young's failure to investigate the conditions on the roof and discuss safety issues related to the roof with Ryder's Thompson more questionable. *See N&N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) ("An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition."); *Acchione & Canuso, Inc.*, 7 BNA OSHC 2128, 2130 (No. 16180, 1980) (finding constructive knowledge of crane operating too close to energized power line where superintendent was on worksite, knew power lines were "all over" site, and crane operator "lacked experience" working near power lines). The record evidence thus establishes that Young failed to exercise reasonable diligence to anticipate the skylight hazard. *See Automatic Sprinkler*, 8 BNA OSHC at 1387 (finding employer had constructive knowledge of violation where company could have anticipated hazard if it had inspected area where its employees

would be working). Because Young's constructive knowledge may be imputed to Dean, the Secretary established knowledge.[2]

Affirmative Defenses

Generally, a respondent must raise any affirmative defenses in its Answer or risk that later assertion of those defenses will be barred. Commission Rule 34(b)(3)-(4), 29 C.F.R. § 2200.34(b)(3)-(4). Dean asserted in its Answer neither the infeasibility nor greater hazard defenses. However, the Secretary has not objected to Dean raising these challenges and, indeed, addressed the merits of these claims in her brief. *Cf. Westvaco Corp.*, 16 BNA OSHC 1374, 1380 n.14 (No. 90-1341, 1993) (Commission permitting assertion of infeasibility affirmative defense where not raised in Answer because Secretary did not object to its inclusion in direction for review and issue was briefed by both parties). Moreover, Commission Rule 34 permits the presiding judge to allay such a prohibition if the judge "finds that the party has asserted the defense as soon as practicable." Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4). As Dean raised these defenses in its pre-hearing statement, the undersigned finds it has raised these defenses as soon as practicable, and thus does not bar the assertion of these defenses.

Infeasibility

Dean argues implementation of prescribed means of compliance such as installing guardrails, portable screens, or mounts for tie-offs would have been "impossible" because "Dean was not the building owner" (Dean's Brief at 13). Dean also opines the expense for installing compliant fall protection would have been "considerable" (Dean's Brief at 13). Finally, Dean asserts it used an "alternative method of fall protection": Dean's rule that its employees stay six or more feet from fall hazards (Dean's Brief at 13-14). To establish infeasibility, an employer must prove that

> (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would be technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection.

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[2] Dean attempts to import the "recognized hazard" requirement of the Commission's "general duty clause," section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), jurisprudence to show that the skylight hazard was not a "recognized hazard." However, Dean was cited under § 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), which does not require proof of a recognized hazard. *J.M. Martinac Shipbuilding Corp.*, 6 BNA OSHC 1645, 1647 n.5 (No. 14767, 1978) (finding "recognized hazard" issue is not relevant in a § 5(a)(2) case).

A.J. McNulty & Co., 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000).

The fact Dean was not the warehouse owner does not prevent it from maintaining its duty to take safety precautions. *See A.C. Dellovade*, 13 BNA OSHC 1017, 1018 (No. 83-1189, 1987) (finding lifeline use not infeasible where subcontractor could have welded eyes to vertical members of building's A-frame to hold lifeline). Dean neither introduced nor cites to any evidence that purchasing and installing the requisite fall protection for the skylights would "have had a 'severe adverse economic effect' on the company." *Dayton Tire*, 23 BNA OSHC 1247, 1256 (No. 94-1374, 2010) (quoting *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993)). The only record evidence related to the effort needed to properly guard the skylights was Compliance Officer (CO) Reinaldo White's testimony that it would have taken between two to five hours to set up the requisite protection on the roof (Tr1. 121-22). CO White testified there were many different ways Dean could have protected Quinn on the roof, including installing temporary, inexpensive guardrails, or skylight screens, establishing a control zone, or appointing a monitor (Tr1. 65-70). Indeed, perhaps the easiest way for Dean to resolve this issue would have been to talk with Ryder and to seek their assistance in providing protections. Young testified Ryder officials would have spoken with him about safety precautions, but that conversation never happened (Tr1. 179-80, 186). Dean has not shown why installing the fall protections listed in the standard or following the alternatives described by the CO were infeasible. Such a showing is required to make out a defense of infeasibility. *See R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1072 (No. 91-2027, 1995) (rejecting employer's infeasibility claim because it failed to prove that it could not have used safer alternatives); *State Sheet Metal*, 16 BNA OSHC at 1161 (noting that employer has burden of proving infeasibility of compliance). Accordingly, Dean failed to establish the infeasibility affirmative defense.

Greater Hazard

Dean contends installing the skylight protections described in the standard would expose its employees to the fall hazard for longer than the time Quinn was working on the roof (Dean's Brief at 13). The Commission considers such a claim separately from infeasibility, as an assertion "that compliance with the standard would have exposed its employees to a greater hazard than noncompliance." *Peterson Bros. Steel Erection Co.* 16 BNA OSHC 1196, 1204 (No. 90-2304, 1993); *State Sheet Metal*, 16 BNA OSHC at 1159 (considering as greater hazard defense employer's

argument that it was infeasible to use safety nets because employees would have been more exposed to a fall hazard while erecting the nets than performing their assigned task). To establish the greater hazard affirmative defense

> the employer must prove that the hazards caused by complying with the standard are greater than those encountered by not complying, that alternative means of protecting employees were either used or were not available, and that application for a variance under section 6(d) of the Act would be inappropriate.

State Sheet Metal, 16 BNA OSHC at 1159. Moreover, "[b]efore an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore *all* possible alternatives and is not limited to those methods of protection listed in the standard." *Id.*

Dean failed to elicit evidence to establish abating the hazard would be more hazardous than allowing Quinn to walk on the roof unprotected. *See Peterson Bros.*, 16 BNA OSHC at 1204-05 (rejecting greater hazard defense based on "unsubstantiated conclusions as proof"). Indeed, Young testified he would have been comfortable installing a temporary guardrail around the skylight (Tr1. 186). Although Dean claims Quinn was using the company's "six-foot rule" on the roof, Dean has produced no evidence showing it considered any alternatives to using this rule. The CO testified, without rebuttal, that Dean could have used temporary guardrails that are "mobile" and "very cost effective" (Tr1. 69). According to the CO, Dean also could have established a control zone or used a safety line to identify the hazard (Tr1. 119). *See Peterson Bros.*, 16 BNA OSHC at 1204-05 (finding evidence that additional protections could be set up safely trumps conclusory opinions that protections constitute a greater hazard). Additionally, Quinn used fall protection while on the lift and wore a harness while on the roof (Tr1. 179). Moreover, Dean neither claimed nor established that a variance was inappropriate. Accordingly, Dean did not establish the greater hazard defense.

Characterization

In the citation, the Secretary characterized this violation as serious. Dean does not challenge this characterization. A violation is serious "if there is a substantial probability that death or serious physical harm could result from the violation." *Capform, Inc.*, 16 BNA OSHC 2040, 2042 (No. 91-1613, 1994) (citing section 17(k) of the Act, 29 U.S.C. § 666(k)). The record evidence supports a serious characterization as Dean's failure to protect its employees from the skylight hazard could,

and did, result in death. *See Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) (characterizing training violation as serious where untrained employee died).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Although only one employee was exposed to the unprotected skylight hazard, the likelihood of injury was high and there were no precautions taken to prevent an accident from occurring. Accordingly, the gravity of this violation is high, especially in light of the fatality. Dean employs approximately 3,000 employees nationwide (Tr1. 22). Dean had been cited for a separate violation of an OSHA standard within three years prior to the instant citation (Tr1. 86). Additionally, Dean does not assert a basis for a good faith credit. Accordingly, the undersigned finds the proposed penalty appropriate and assesses a $7,000.00 penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1910.23(a)(4), is affirmed and a penalty of $7,000.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: May 16, 2011
Atlanta, Georgia