United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

SUPERIOR CUSTOM
CABINET COMPANY, INC.,

Respondent.

OSHRC Docket No. 94-200

DECISION

Before: WEISBERG, Chairman; and GUTTMAN, Commissioner.

BY THE COMMISSION:

Superior Custom Cabinet Co., Inc. ("Superior"), which is based in Garland, Texas, makes custom cabinets for new houses. A Superior delivery crew member carrying a cabinet upstairs in a house under construction was fatally injured in a fall. After its investigation of the accident, the Occupational Safety and Health Administration ("OSHA") issued a citation to Superior alleging four serious violations of the construction safety standards requiring instructions to employees in recognizing and avoiding hazards, regular inspections of the worksite by a competent person, and guardrails for landings and stairways. Administrative Law Judge Stanley M. Schwartz affirmed all four items in the citation and assessed a total penalty of $2,000. For the reasons that follow, we affirm the judge's decision.

I. Background

After a Superior salesperson takes the measurements for the cabinets at a house under construction, Superior's shop makes the cabinets to specifications in three to four weeks. One of four Superior delivery crews, each headed by a "leadman," then delivers the cabinets,

usually following a call from the builder that the house is ready for them. Later, a different crew installs the cabinets. During all this time construction of the house is progressing, and the conditions are changing as the various subcontractors do their work. Generally by the time the delivery crew arrives there are railings on the stairs and landings.[1]

On September 16, 1993, a delivery crew consisting of driver and leadman Tracy Sims and two "haulers" Larry Tiner and William Walton was assigned to deliver a custom-made cabinet for the master bathroom in a house under construction in Rockwall, Texas. The cabinet measured 5-1/2 feet tall, 2 feet wide, and 1-1/2 feet deep. Sims checked the first floor of the house for obstructions that could cause the haulers to trip or fall. He testified that he did not check upstairs because the delivery ticket did not show any cabinets to be delivered to the second floor. After Sims' first-floor check, Tiner and Walton unloaded the cabinet, carried it into the house, and asked another person working in the house for the location of the "master bedroom."[2] They were told that it was upstairs. They then proceeded up the stairs, with Tiner holding one end and walking backwards up the stairs followed by Walton holding the other end and walking forward. The stairs, after a switchback point at a small landing midway up, led up to the top landing; the exposed sides of the stairway and the top landing were not guarded by any railing or other protection. When Tiner reached the second floor, he stepped backwards off the unguarded top landing and fell 10 feet 5 inches to the floor below. He died after being hospitalized.

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[1]It is undisputed that the crew's delivery of the cabinets fabricated off-site is "construction work." *See* 29 C.F.R. § 1910.12(b), which refers to 29 C.F.R. § 1926.13(a), which refers to 29 C.F.R. § 5.2(j); *see generally Brock v. Cardinal Industries, Inc.*, 828 F.2d 373, 376-78 (6th Cir. 1987).

[2]The record does not establish where Sims was at this particular time; some testimony could be read to suggest, as Superior's counsel does, that Sims had gone back to the truck to get some light items to carry in.

II. Lack of Adequate Instructions in Recognizing and Avoiding Fall Hazard

Item 2 alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), which requires:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Tom West, Superior's vice president, who had been with the company for twenty-three years, testified that the delivery crews are orally instructed that, if in trying to deliver a cabinet they see an "unsafe condition" that they cannot avoid, "like in this situation [where the cabinet goes] upstairs and there is no railing," they should leave the cabinet downstairs (unless the builder tells them not to) and call the office to speak with West, who has a pager if he is not in the office. West testified that he had "personal knowledge" that Sims, Tiner, and Walton "were instructed on potential fall hazards when they delivered cabinets." Superior had no written safety rules specifically addressing unguarded stairs or landings.[3]

Leadman Sims testified that, prior to the accident, he had never been told not to go up stairs or walk on "floors" without guardrails. However, he acknowledged that he had been told to watch out for "dangerous situations" including fall hazards. Sims understood that, if he saw conditions at the worksite that were unsafe, he was supposed to call the shop and, if the conditions were upstairs, leave the cabinet downstairs. Sims testified that he has left cabinets downstairs before but had never called West to notify him of the problem. West confirmed this testimony, noting that he had been "chewed out" by builders because Sims had left cabinets downstairs. According to Sims, there are some situations where unguarded stairs and landings do not pose a fall hazard because their configuration or width allows a person traversing them to stay far enough away from any unguarded edge.

Although hauler Walton did not testify at the hearing, a statement he made to the compliance officer ("CO") was admitted over objection. According to the CO, Walton told

[3]Superior gave its employees general instructions when they were hired and in monthly meetings, but the record does not show that those instructions specifically addressed unguarded stairs and landings.

him that he would deliver cabinets upstairs where stairs and landings had no guardrails, as he tried to do the day of the accident, because the lack of guardrails "had never stopped [him] before."

The judge concluded from the evidence that Sims, Tiner, and Walton were inadequately trained in the avoidance of fall hazards. We agree.

Section 1926.21(b)(2) requires instructions to employees on (1) how to recognize and avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions. *Concrete Construction Co.*, 15 BNA OSHC 1614, 1619, 1991-93 CCH OSHD ¶ 29,681, p. 40,243 (No. 89-2019, 1992)*; see National Industrial Constructors, Inc. v.* OSHRC, 583 F.2d 1048, 1054 (8th Cir. 1978). An employer's instructions are adequate under section 1926.21(b) if they are "specific enough to advise employees of the hazards associated with their work and the ways to avoid them" and are modeled on the applicable standards. *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7, 1993-95 CCH OSHD ¶ 30,231, p. 41,621 nn. 6 & 7 (No. 90-1106, 1993).

Because Superior's work rule was so general, employees developed their own different ideas about what was "unsafe." As noted above, according to Sims, a stairway without a railing could be safe depending on how it is constructed. This comports with his testimony that when ascending unguarded stairs he hugs the wall. Sims also thought that a landing without a railing could be safe if the landing was wide enough so that he did not need to get close to the unguarded edge. While the CO testified that he had seen landings (not necessarily in houses) where the unguarded end was 15 to 20 feet away from where employees worked or traveled, and that he agreed that in such instances that was a safe distance, Superior's instructions to its employees gave no guidance on a safe distance. In his capacity as a supervisor, Sims' decisions as to what is "unsafe" affect the employees on his crew.

Moreover, the decision to identify a condition as "unsafe" was left not just to leadman Sims, it was apparently also left to the interpretation of the haulers. When asked at the

hearing whether hauler Walton indicated to him during his interview that the conditions (that is, the unguarded stairway and landing) at this house were unsafe, the CO responded that he did not. As noted, Walton told the CO that he would deliver cabinets upstairs despite the lack of any railing, as he had done in the past.

Rules such as Superior's that give employees too much discretion in identifying unsafe conditions have been found too general to be effective. *See, e.g., Bechtel Power Corp.*, 10 BNA OSHC 2003, 2008, 1982 CCH OSHD ¶ 26,261, p. 33,172 (No. 77-3222, 1982) (instructions to report "any unsafe practice"); *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076, 1977-78 CCH OSHD ¶ 21,585, p. 25,903 (No. 12354, 1977) (warning to "avoid unsafe areas"). As the Fourth Circuit noted in *Tri-State Roofing & Sheet Metal, Inc. v. OSHRC,* 685 F.2d 878, 881 (4th Cir. 1982): "The particular views of workmen are not necessarily, and often times are not, the best determination as to what is safe and what is unsafe. Convenience rather than safety considerations often dictates a worker's perspective." We find that Superior's instructions to its employees to leave the cabinet downstairs and call the office if they encountered "unsafe" conditions were not specific enough to inform employees how to recognize and avoid the fall hazards posed by unguarded stairways and landings.

Moreover, Superior's instructions did not meet the other prong of the two-part test for adequate instructions under section 1926.21(b)(2): instructions should be modeled on applicable regulations. *See El Paso*, 16 BNA OSHC at 1425 n . 6, 1993-95 CCH OSHD at p. 41,621 n. 6 (and cases cited therein). Under the applicable OSHA guardrail standards, 29

C.F.R. §§ 1926.500(d)(1)[4] and 1926.1052(c)(1),[5] which Superior was also cited for violating, railings are necessary with a few exceptions, none of which are the situations relied on by Sims. Section 1926.1052(c)(1) requires that a stairway have a guardrail system along each unprotected side and at least one handrail *unless* the stairway has less than four risers or rises 30 inches or less. Section 1926.500(d)(1) requires that a landing be guarded except where it is less than six feet above the adjacent floor or ground except where there is entrance to a ramp, stairway, or fixed ladder.

For the reasons above, we agree with the judge that Superior violated section 1926.21(b)(2).[6]

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[4]Section 1926.500(d)(1) provided:

> Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, . . . on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . . .

This is the standard as of the date of the citation, December 21, 1993; it was revised and became 29 C.F.R. § 1926.501(b)(1) in August of 1994.

[5]Section 1926.1052(c)(1) reads:

> Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with:
> (i) At least one handrail; and
> (ii) One stairrail system along each unprotected side or edge.

[6]Superior contends that the Secretary has "no quarrel with the content of the instruction" because the CO admitted that Superior's instructions were adequate and that his main concern was that the instructions had not been enforced. We have carefully examined the transcript pages Superior cites and find that, when considered in context, the CO's comments do not support Superior's claims. Viewing the CO's testimony as a whole it is clear that he considered the work rule inadequate.

III. Failure to Have Inspection by Competent Person

Item 1, as amended, alleges a serious violation of 29 C.F.R. § 1926.20(b)(2), which provides:

> (b) *Accident prevention responsibilities.*
> . . . .
> (2) Such [accident prevention] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The term "competent person" as used in section 1926.20(b)(2) is defined at 29 C.F.R. § 1926.32(f) as:

> one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

E.g., Ed Taylor Constr. Co., 15 BNA OSHC 1711, 1714, 1991-93 CCH OSHD ¶ 29,764, p. 40,479 (No. 88-2463, 1992).

The leadman is in charge of the delivery crew and is responsible for the haulers and the truck, and for "walking the house" before the haulers enter with the cabinet. Sims asserts that he "walked" this house by checking the first floor for obstructions, like bricks or nails in the walking areas. Sims testified that he did not go up to the second floor because the delivery ticket did not show any cabinets to be delivered to the second floor. However, Sims acknowledged that in a two-story house there is usually a bathroom upstairs.

Superior's vice president West testified that usually the drawings with the delivery ticket include the upstairs, but for some reason this one did not. According to West, there were a bathroom and a bedroom on the first floor, but "clearly, it was not the master [bathroom]."

West testified that leadmen are chosen based on their experience, and the leadman is always the same for each crew. Sims had delivered cabinets for seven years and had been a leadman

for about five years. While Sims testified that in his years of experience most houses had railings up when the cabinets are delivered, he acknowledged that not all of them did.[7]

We agree with the judge that "in view of his experience and the circumstances at the site it was unreasonable for Sims to not check the upstairs . . . ." We base our decision on the totality of the evidence. As the judge particularly noted, Sims testified that most two-story homes have a bathroom upstairs, and Tiner and Walton ascertained that the master bathroom was on the second floor by simply asking one of the other subcontractors. We also note West's testimony that the bathroom on the first floor was "clearly" not the master bathroom.

For the reasons above, we affirm the judge's conclusion that Superior did not comply with section 1926.20(b)(2). *See DiGioia Bros. Excavating*, 17 BNA OSHC 1181, 1184, 1993-95 CCH OSHD ¶30,751, p. 42,723-3 (No. 92-3024, 1995) (where "inspections were insufficient to identify the recognizable hazard" there was noncompliance with the inspection-by-a-competent-person requirement of 29 C.F.R. § 1926.651(k)(1) (excavations)); *see also C.J. Hughes Constr.*, 17 BNA OSHC 1753, 1757, 1996 CCH OSHD ¶ 31,129 (summary) (No. 93-3177, 1996) (designated "competent person" under 29 C.F.R. § 1926.650(b) "acted in a competent manner . . . if his conclusion is reasonable" but if that person made a "determination that . . . was not reasonable" there would be a violation of 29 C.F.R. § 1926.652(a)(1) (excavations)).

IV. Failure to Establish Unpreventable Employee Misconduct

As noted above, Superior was also cited for violating the two standards that specifically require guarding of landings and stairways: section 1926.500(d)(1) (item 3, see note 4 *supra*) and section 1926.1052(c)(1) (item 4, see note 5 *supra*). Superior does not dispute that the landing and stairway were not guarded and that the employees were exposed to the

[7]Sims testified that in his seven years of experience delivering cabinets to about 2,000 houses, ten to 15 did not have guardrails by that time. Vice president West testified that in his more than 25 years of experience in the field with 200 houses a year, by the time of cabinet delivery 15 or 20 did not have guardrails on the stairs, and four or five did not have guardrails on the landing.

hazards addressed in the standards. Rather, Superior contends that it is not responsible for the violations because Tiner's and Walton's misconduct was unpreventable.

In order to establish the unpreventable employee misconduct defense, the employer must show that it has: (1) adopted work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations have been discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, 1995 CCH OSHD ¶ 30,910, p. 43,034 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997)

Superior did not establish this defense because it did not show that it had a work rule designed to prevent the violations. As noted above, Superior had an unwritten work rule that employees were not to take cabinets upstairs if they thought it was unsafe, but rather were to leave them downstairs and call the office. As discussed above, this rule gave employees too much discretion in identifying unsafe conditions and was therefore too general to be effective in preventing employee exposure to unguarded stairways and landings.

Moreover, although West testified that, with regard to Superior's work rules in general, he conducted spot checks and had fired an employee for violating a work rule as part of a progressive disciplinary system, there is evidence that the specific work rule to avoid unsafe stairs and landings was not effectively enforced. As noted above, the CO testified that Walton indicated that he had delivered cabinets upstairs before where there were no guardrails on stairways and landings. Furthermore, despite the work rule's requirement to do so, Sims testified that in the seven years he had been with Superior he had *never* called back to the office when leaving cabinets downstairs due to an unsafe condition.[8] Although

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[8]Although Superior does not argue that Sims' conduct was improper or unpreventable, evidence concerning Sims and his interpretation of the work rule and its enforcement (or lack thereof) is relevant here as evidence of Superior's safety program.

West was well aware of this, there is no evidence that Sims was disciplined for not calling the office.

For the reasons above, we find that Superior did not prove the unpreventable employee misconduct defense and we therefore affirm items 3 and 4.[9]

V. Characterization and Penalty

Superior does not take issue with the serious characterization of the items. The Secretary does not challenge the judge's penalty assessments of $500 for each item (based on the statutory factors in 29 U.S.C. § 666(j)), reduced from the $1,750 per item penalty proposed in the citation. Therefore, we affirm the four items as serious violations and assess a penalty of $500 for each, for a total penalty of $2,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: September 26, 1997

[9]Superior contends that it could not have known with the exercise of reasonable diligence that Tiner and Walton would carry the cabinet upstairs. We consider the evidence discussed above in Part III that established that Superior failed to comply with the inspection-by-competent-person standard to also establish that Superior had constructive knowledge, imputed from its supervisory employee Sims, of the stairway and landing hazards involved in items 3 and 4. *See generally Ed Taylor Constr. Co.*, 15 BNA OSHC at 1717, 1991-93 CCH OSHD at p. 40,482 (Commission agrees that, where the employer claims no knowledge of the hazard and the employer's inspecting supervisors should have known that a dry manhole could be dangerous, their "admitted lack of knowledge" upon which the employer relies proves that the inspecting supervisors were not competent persons).