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"AM I MANAGEMENT?" NEW OSHA CASE BLURS LINES BETWEEN EMPLOYEES AND SUPERVISORS DURING INSPECTIONS

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I. Introduction

On August 17, 2009, three journeymen electricians from M. C. Dean ("Dean"), an outside contractor, were servicing electrical installations at a warehouse owned by Ryder Transportation Services ("Ryder"). One of the journeymen electricians fell through a skylight on the warehouse roof and suffered fatal injuries. Following this accident, OSHA issued citations to Ryder under the Agency's multi-employer worksite doctrine as the "controlling" employer, alleging that Ryder was in the position to control access to the skylight and failed to properly guard the skylight on the roof of its warehouse. OSHA cited Dean as the actual exposing employer, alleging that Dean also failed to properly guard the skylight.

A previous article, entitled "OSHA Expansion of Fall Hazard Liability for Host Employers" addressed the citation issued to Ryder and made recommendations related to the

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obligations of a "host" or controlling employer who hires contractors to perform specialized work at its facility. *See* http://www.environmentalsafetyupdate.com/osha-compliance/. This article discusses the citation issued to Dean and the recent decision from an Administrative Law Judge upholding that citation, specifically the finding that an hourly journeyman electrician was a "supervisor."

II. Employer Knowledge

The Occupational Safety and Health Act and regulations promulgated by OSHA do not impose strict liability. Employers are not liable under the Act or a particular OSHA standard simply because a violative condition exists or an accident has occurred. An OSHA citation can only be upheld if OSHA proves that the employer ***either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.*** Because many employers are corporations, it may be difficult to determine what a corporation "knows." Case law involving OSHA citations, therefore, has established a general rule that the actual or constructive knowledge of an employer's foreman or supervisor can be imputed to the employer. In other words, if OSHA can prove that a supervisor or foreman knew or, with the exercise of reasonable diligence, could have known that a violative condition exists, OSHA can satisfy the employer knowledge element of its burden of proof in a contested case.

III. Who is a Supervisor or Foreman?

According to Review Commission precedent, "[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer." *Diamond Installations Inc*., 21 O.S.H. Cas. (BNA) 1688, 1690 (O.S.H.R.C. 2006). Thus, it is not the employee's title or compensation

structure that controls whether he or she is a supervisor, but whether, in substance, the employee is empowered to direct other employees on behalf of the employer.

Under this broad rule, even hourly employees assigned to be a "lead" for a day could be considered part of management for purposes of imputing knowledge to the employer. Such was the case for Dean. Dean argued that because all three journeyman electricians working at the Ryder site were hourly employees, the Company could have had no knowledge of any potentially hazardous condition that they encountered on the roof, and the OSHA citation should be vacated. The ALJ rejected the Company's argument, finding that one of the hourly journeyman electricians was, in fact, a "supervisor." The Judge found that the journeyman electrician in question had been assigned as the "lead" for the day of the accident, and had been delegated the ability to control the method and manner in which he performed the assigned tasks, as well as the ability to assign tasks to the other journeymen.

Ultimately, the Judge found that Dean had delegated supervisory authority to the journeyman electrician for the day of the accident, and that his knowledge of the potentially hazardous condition was properly imputed to the employer.

V. Beware of OSHA Inspection Conduct

Perhaps the most vexing part of the Dean case for employers is the Judge's acknowledgement that the ultimate determination that the "lead" journeyman electrician was a supervisor was inconsistent with OSHA's own behavior during its inspection. During the inspection, OSHA interviewed the "lead" journeyman electrician outside of the presence of Dean's legal counsel and in fact denied Dean's counsel the right to be present at the employee interview. Under existing case authority, the employer has a right to be present for interviews of management representatives. Dean further argued at trial that if OSHA had believed the "lead"

journeyman to be a member of management during its inspection, Dean's legal counsel would have had the right to be present during his interview. The Judge did not address this argument in her findings.

This conduct by OSHA during its inspection is an example of the difficult quandary into which OSHA can place an employer on deciding how to respond:

- On the one hand, if the "lead" journeyman is an hourly employee, he would have the right to be voluntarily interviewed by the OSHA inspector in private (although any employee has the right to have another individual of their selection present for the interview), but his knowledge of an alleged hazard could not be imputed to the employer.
- On the other hand, if the "lead" journeyman is a management employee, his knowledge could be imputed to the employer, but his interview would have to be held in the presence of counsel or another management representative at the employer's election.

The Judge's decision affirming the citation based upon the testimony of the "lead journeyman", despite this conduct by OSHA, is essentially a validation of OSHA's conduct which deprived Dean of its constitutional right to counsel. The lesson to be learned is that employers must not rely on an inspector's representation that a particular employee will not be considered as part of management during the interview process and the employer may have to assert its rights or they are waived. In the following section, we have outlined some recommendations for fronting this issue during an OSHA inspection.

V. Recommendations

What the Dean case teaches is that the threshold for determining which employees are "management" for purposes of OSHA liability is minimal and can change daily based on the roles and responsibilities of a particular individual at a particular job site. This has implications not only for imputing knowledge of potentially hazardous conditions to the employer, but also for allowing OSHA to obtain binding legal admissions of liability against the employer during

the course of an inspection through an employee whom the employer does not consider to be a member of management with authority to make such admissions.

Accordingly, it is recommended that all employers carefully evaluate the degree to which they delegate authority to a shift "lead," "field supervisor," or other hourly employees and consider the following:

- In assigning a shift "lead" who is an hourly employee, ensure that the individual is fully trained to inspect the worksite and identify potentially hazardous conditions and report any such conditions immediately to management. On construction sites, this individual would be the "competent person."

- Consider alternatives to assigning a shift "lead," such as assigning a management point person to direct the method and manner of the work with input from field personnel as the job progresses.

- When assigning a shift "lead" who is an hourly employee, delegate specifically rather than broadly. Instead of giving the "lead" person a general instruction to "get the job done safely," give specific instructions as to the method and manner in which the job is to be done, i.e., specific practices to be followed or equipment to be used to limit the assertion that the employee has general supervisory authority.

- In the event of an OSHA inspection, ensure that the inspector is immediately directed to a management point person instead of the informal shift "lead." If the OSHA inspector remotely infers or somehow states that a shift "lead" is a supervisor, then the employer should insist on having legal counsel and/or another management representative present during any interviews with the "lead." Ask OSHA to commit to its position in writing and if the inspector will not do so, which is likely, then the employer must memorialize in writing what the inspector represented.

- If OSHA considers an hourly employee to be a member of management, legal counsel and/or another management representative have the right to attend the employee's interview. If the inspector refuses to permit legal counsel or other members of management to attend the interview, the employer may refuse to allow the interview to proceed until legal counsel is consulted or the Area Director is called to address the issue.

- If the employer decides to allow the interview to proceed, notify the inspector in writing that the interview is being allowed "under protest," and that the employer will object to the introduction of any evidence obtained during the interview.

If the employer carefully assesses the status and responsibilities of each of ties employees prior to an OSHA interview and asserts its rights to be present at the interview, if warranted, the employer can avoid a potential waiver of its rights and the prospect of an unrepresented employee making binding admissions of legal liability during an OSHA interview.