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NO. 35495-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

J & S SERVICES, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Respondent,

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Appeal from Superior Court of Clark County

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error No. 1

The Board of Industrial Insurance erred by affirming a leading edge fall protection citation because the employer used a Safety Monitor, and was not required to use a warning line because the width was less than 50 feet.

II. ISSUES

A. Issues Pertaining to Assignments of Error No. 1

Where a Safety Monitor was used for leading edge work, was a warning line system also required where the width of the portion of the roof being worked on was less than 50 feet wide?

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This case involves a citation under the Washington Industrial Safety and Health Act (WISHA). The facts are not in dispute. The Employer, J & S Services, Inc. was the structural steel subcontractor for the construction of a new Big 5 Store in Vancouver, Washington. Certified Appeal Board Record, Transcript of dated Sciumbato, page 7, lines 2 - 11.¹ On November 7, 2003 the Department of Labor & Industries

¹ The Certified Appeal Board Record (CABR) is attached as separate Exhibit as noted on Page 6 of the Clerk's Papers. References throughout

conducted a WISHA compliance inspection while J & S Services, Inc. was laying out the steel decking. Sciumbato, page 7, lines 14 – 16.

The steel decking comes in strips that are approximately 3 feet wide and various lengths up to 36 feet long. Sciumbato, page 8, lines 10 – 15. The first step in laying out the steel deck was to lay out a working area on top of the joists. Sciumbato, page 10. As the employees were working at heights greater than 10 feet, they wore full body fall protection harnesses that were tied off to a centenary line. Page 12, lines 4 – 6. After the initial work platform was laid out, the workers then placed the decking strips and applied a “wind tack” to keep them from blowing away. Sciumbato, page 22, line 26 – page 27, line 3.

In the deck laying process, J & S Service, Inc. used a combination of fall protection systems. They used a method referred to as “leading edge” and they also used another method known as the “safety monitor”. L&I cited J & S Services, Inc. because the Employer did not place rope, wire or cable lines at least 6 feet away from the edge. Instead, J & S Services, Inc. painted a bright orange line that was 6 feet away from the edge, and also used a safety monitor to ensure that the employees were kept safe from an accidental fall. Sciumbato, page 12, lines 9 – 23.

Exhibit 3 shows the only instance where the Department alleges that a violation of WAC 296-155-24515(1)(b) occurred. The employee,

this brief will be made to the witness name, page and line of the transcript contained in the CABR.

identified as Keith Delaney was carrying a decking strip. Mr. Delaney's location in Exhibit 3 is marked with an "X" in Exhibit 4. Exhibit 4 also shows that the width where Mr. Delaney was working was approximately 35 feet. See also Sciumbato, page 14, lines 1 – 4, page 26, line 25. The Department's Compliance Officer agreed that for purposes of issuing the fall protection citation, the violation is based on Mr. Delaney's alleged exposure to a fall as shown in Exhibit 3. Davis, page 96, line 22 through page 97, line 4.

Mr. Davis also agreed that leading edge work safety regulations are set forth in WAC 296-155-245120. Davis, page 98, lines 3 – 5. Mr. Davis also agreed that a warning line system is contained in a different section of the WAC safety provisions. Davis, page 98, lines 10 -13.

Mr. Daniel Beyle was the safety monitor for this project at the time of the WISHA inspection. Beyle, page 42, line 23. As a safety monitor, his job was to watch the employees to make sure that they didn't get within six feet of the edge of the roof where they could fall. Beyle, page 43, lines 6 – 9. While acting as a safety monitor, he put his hands inside of his pockets so he could do no other work than to ensure the safety of the workers. Beyle, page 58, lines 14.

Mr. Kent Davis, the WISHA Compliance Officer did not take any measurements to dispute that the width of the roof area where Mr. Delaney was working was approximately 35 feet. Davis at page 106, lines 22 – 24.

Mr. Herb Heinold testified that he is a safety consultant who represents management on the Construction Advisory Council, a group made up of labor, management and the Department of Labor & Industries to assist in the promulgation of construction safety standards. Heinold at page 132, line 23 – page 133, line 25. Mr. Heinold testified that a Safety Monitor system where the warning line is painted on the deck instead of erecting stanchions with wire or rope serves as an adequate method of protecting employees against falls. Heinold at page 147, line 16. In particular, he testified that the Safety Monitor warns the employee if they enter the control zone, ie get within six feet from the edge. Heinold at page 147, line 17 – page 148, line 22. Moreover, he testified that pursuant to WAC 296-155-24515, the regulations specifically allow a safety monitor without warning lines if the width is less than 50 feet wide.

IV. ARGUMENT

A. **Standard of review**

The standard for judicial review of a WISHA citation is set forth in RCW 49.17.150(1). In relevant part, this section declares:

The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, **if supported by substantial evidence on the record considered as a whole, shall be conclusive.**

(Emphasis added).

The Board's conclusions must also be based on its findings of fact.

Martinez Melgoza & Associates v. Department of Labor & Industries, 125 Wn. App 1004. Based on this standard, for the reasons set forth below the Employer respectfully asserts that there was no substantial evidence in the record that Mr. Delaney was exposed to a fall greater than 10 feet.

B. The Department has the ultimate burden of proof in establishing serious violations.

Washington was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan administration. As such, the Washington State Department of Labor & Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited employer either knew, or should have known of the presence of the violation. In relevant part, RCW 49.17.180(6) declares:

(6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, ***unless the employer did not, and could not with***

the exercise of reasonable diligence, know of the presence of the violation.

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6).

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or 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. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

The Appellant respectfully asserts that the superior court erred by affirming the Board's decision because there were no facts in the record that the Department demonstrated that an employee was exposed to a fall hazard greater than 10 feet.

C. The WISHA fall protection regulations allow for several different methods of fall protection.

As set forth in the regulations on fall protection, Employers may select from a variety of methods to protect employees against fall hazards. These methods include fall arrest, fall restraint, warning line system, leading edge and safety monitor. Fall arrest, which includes the use of a full body harness attached to a lifeline keeps an employee from falling off an edge in the event he/she should fall. The fall is literally “arrested” and keeps the employee from hitting the ground. Other methods of fall arrest include safety nets, catch platforms, and scaffolds.

“Fall restraint” describes a method of fall protection where the employee physically is prevented from going off the edge. A body harness connected to a lanyard is a form of “fall restraint” when the employee is tied to a line which is too short to keep the employee from going over the edge. Guard rails are another method of fall restraint. That is the guard rail prevents the employee from going over the edge.

The third method of fall protection for flat and low pitch roofs includes a warning line system, and leading edge. For a warning line system, a physical line made of wire, rope or cable is erected at least 6 feet away from the edge. The line must be connected by stanchions that are capable of withstanding 16 lbs of force. The theory behind this method is that employees are kept at least 6 feet away from the edge, and are therefore protected against a fall. Requiring the lines to withstand 16 lbs of force allows an employee to feel the line in the event he/she should

inadvertently back into it. Under the warning line system, so long as the employee stays at least more than 6 feet away from the edge, a safety monitor is not required. WAC 296-155-24515(3).

“Leading edge” is another method of fall protection under the third method of fall protection. As defined in WAC 296-155-24503, leading edge is defined as:

“Leading edge” means the advancing edge of a floor, roof, or formwork which changes location as additional floor, roof, or formwork sections are placed, formed, or constructed. Leading edges not actively under construction are considered to be "unprotected sides and edges, and positive methods of fall arrest or fall restraint shall be required to protect exposed workers.

Leading edge is different than a warning line system because the employee is working right at the edge of a fall, and not 6 feet away under the warning line system. WAC 296-24520. Under leading edge method, a warning line is used. However, as specifically allowed in WAC 296-155-24520(1)(c), the warning line need not be made of wire, rope or chain as an “alternative” line may be used. This WAC section specifically provides:

(c) The warning line system shall consist of wire, rope, or chain supported on stanchions, *or a method which provides equivalent protection.*

(Emphasis added).

In our present case, there is no dispute that a safety monitor was used and that his only function was to warn employees when they

approached the edge of the deck. Moreover, it is undisputed that a fluorescent line was painted as a warning line that was 6 feet away from the edge of the deck. This not only allowed the employees to see the warning line, it also allowed the monitor to know if an employee was within the 6 foot control zone.

The regulation specifically allows an alternative method for the warning line. As testified by Herb Heinold, one of the original purposes of the warning line for leading edge work was to keep other trades out of the work zone. Thus, not only did the method used by J & S Service, Inc. comply with the leading edge requirements, employees were adequately protected against fall hazards. Thus, under the leading edge regulations, the painted line was in compliance with the WISHA regulations.

Not only do the regulations allow an alternative method, the testimony was clear that a warning line constructed of wire, rope or cable attached to stanchions would not allow the employees to safely perform their work. If such a line were used, the employees would have to lift the steel decking strips over the line to put it into place. Then, they would either have to climb over the line, or go under the line to get into proper position to work. Even the WISHA Compliance Officer conceded that this was not feasible.

The only feasible way to work under the third method allowed by the regulations was to use the leading edge method set forth in WAC 296-155-24520 and implement an alternative method to the wire, rope or cable warning line.

Even if the Board were to adopt the Department's assertion that only the warning line method as set forth in WAC 296-155-24515 (as compared to the leading edge method under WAC 296-155-24520) is applicable, the WAC provisions do not even require that a warning line be used at this location. WAC 296-155-24515(2)(b) clearly states that when the width of the work area is less than 50 feet, no warning lines are necessary if a safety monitor is used. The exception to the warning line declares:

(b) Employees engaged in roofing on low-pitched roofs less than 50 feet wide, may elect to use a safety monitor system ***without warning lines.***

(Emphasis added).

Appendix A, set forth in WAC 296-155-24523, provides non-mandatory guidance to assist employers determine the proper width for purposes of the WAC 296-155-24515(2)(b) exception. The examples in the Appendix show various roof or work areas showing a top down view. Example E shows where there are openings in the middle of the roof for courtyards, penthouses, etc. This example is most similar to our present case where the work area was less than 50 feet where the employee is seen in Exhibit 3. As testified by Beau Sciumbato, the area where Mr. Delaney was shown in Exhibit 3 was approximately 35 feet. As such, the WAC 296-155-24515(2)(b) exception allows the employer to use just a monitor without warning lines.

V. CONCLUSION

For the above stated reasons, the correct fall protection standards for this work location is WAC 296-155-24520 for leading edge work. Under the leading edge standards, an alternative “warning line” may be used. The testimony is undisputed that the alternative method used by J&S Services, Inc. of painting a bright orange line 6 feet away from the edge was effective in warning employees that they were approaching an exposed edge. As the Compliance Officer refused to go up and observe the lines, he has no personal knowledge as to the effectiveness of the method used.

Even if the Board applied WAC 296-155-24515, the warning line system, WAC 296-155-24520(2)(b) specifically allows an employer to substitute a warning line with a safety monitor if the roof is a low pitch roof and the width is less than 50 feet. Here, it is undisputed that the roof was flat pitch and the work area was less than 50 feet.

Under either method, the Department has failed to prove that J & S Services, Inc. violated the fall protection standards. The citations should be dismissed.

DATED this 25th day of January, 2007.

The Law Offices of Aaron K. Owada



Aaron K. Owada, WSBA No. 13869
Attorneys for Appellant

CERTIFICATE OF SERVICE

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I, Michelle Crawford, hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I filed with the Court via legal messenger the original of the foregoing:

1. Opening Brief

And a copy via US Mail upon:

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SIGNED in Lacey, Washington on January 26, 2007.


Michelle Crawford

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