

BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR)
AND WORKFORCE DEVELOPMENT, DIVISION)
OF LABOR STANDARDS & SAFETY,)
OCCUPATIONAL SAFETY & HEALTH SECTION,)
Complainant,)
)
)
v.)
)
SATORI GROUP, INC.,) Docket No. 09-2244
Contestant.) Inspection No. 310855192
) OAH No.09-0575-OSH

DECISION AND ORDER

I. Introduction

Satori Group, Inc. (Satori), was hired as a subcontractor on an asbestos abatement project at the Alaska State Office Building in Juneau. In the course of his duties, a Satori employee fell from a fixed roof access ladder on the building premises. Because the ladder was not in compliance with 29 C.F.R. §1910.27, the Division of Labor Standards & Safety (Division) cited the owner of the building, and Satori, for violation of an applicable safety standard.

Satori contested the citation issued to it, and the parties agreed to submit the case for a decision on the written record. Satori argues that it is not liable, because it neither created nor controlled the hazard posed by the ladder, and because it was unaware of the hazardous condition of the ladder. The Division contends that Satori failed to exercise reasonable diligence to discover the hazardous condition.

This case was submitted to us for a decision on the written record. Having considered the evidence in the record, we conclude that under the specific facts of this case, Satori exercised reasonable diligence to discover the hazardous condition. The citation is therefore vacated.

II. Facts

The State of Alaska, the owner of the Alaska State Office Building in Juneau, hired Silver Bow Construction Co. (Silver Bow) as the general contractor on a construction project at that location. Silver Bow hired Satori as a subcontractor to perform environmental remediation

work as part of the project. Satori's duties included asbestos abatement in an elevator shaft at the building. The only access to the top of the elevator shaft was by means of a seventeen foot fixed ladder. The ladder had been engineered and installed by the State in 2003 and was unrelated to the construction project, other than that it provided the only means of access to that particular work site. The ladder had been used since 2003 by a variety of trades persons and State employees when it was necessary, for any purpose, to access the top of the elevator shaft.

The ladder, in its installed condition prior to the construction project, was not compliant with 29 C.F.R. §1910.27 in three respects. First, a light switch at midriff height on the wall behind the ladder extended to within four inches of the centerline of a ladder rung, in violation of the seven inch clearance requirement of 29 C.F.R. §1910.27(c)(4). Second, a plastic barrier at the base of the ladder, intended to prevent unauthorized use, interfered with gripping the ladder side rails, in violation of 29 C.F.R. §1910.27(b)(2). Third, the side rails at the top of the ladder extended only 39 inches, in violation of the 42-inch minimum extension requirement of 29 C.F.R. §1910.27(d)(3).

On August 3, 2009, before beginning its work at the elevator shaft work site, Satori conducted a walk-through at the elevator shaft work site with its employees, in order to identify potential safety hazards. The participants in the walk-through ascended and descended the fixed ladder as part of that walk-through. None of the participants noticed that the ladder was not in compliance with 29 C.F.R. §1910.27.¹

On August 6, a Satori employee was descending the ladder when his foot slipped from a rung and he fell, causing serious injuries. The non-compliant features of the ladder were not a cause of the fall.

III. Discussion

In a multi-employer workplace, it is a well-established principle of federal occupational safety law that a subcontractor may be held liable for a hazardous condition in the workplace that the subcontractor's employees are exposed to, notwithstanding that the subcontractor neither created nor controlled the hazardous condition.² However, it is an equally well-established principle of federal occupational health and safety law that it is an affirmative defense that the

¹ See Lucas Aff., ¶10. Mr. Lucas's affidavit states only that Satori could not reasonably be expected to know that the ladder was not compliant. That statement is a legal conclusion. However, it is reasonable to infer from his statement that Satori did not actually notice the non-compliant condition.

² See, e.g., M. Rothstein, Occupational Safety and Health Law, §168 at p. 224 (4th ed. 1998).

subcontractor who neither created nor controlled the condition did not know of the existence of the hazardous condition and with the exercise of reasonable diligence could not know of it.³

We have previously adopted these federal principles to govern Alaska cases with respect to liability in the multi-employer context.⁴ In this particular case, it is undisputed that Satori, a subcontractor, neither created nor controlled the hazardous condition, and was unaware of the existence of the hazardous condition posed by the ladder. Thus, the dispositive factual issue in this case is whether, in the exercise of reasonable diligence, Satori could have discovered the existence of the hazardous condition posed by the ladder. Satori has the burden of proof with respect to that issue.⁵

In addressing this issue, we note that “reasonable diligence” by a non-creating and non-controlling subcontractor at a construction site may not be the same as “reasonable diligence” by a creating or controlling employer. In particular, a non-controlling and non-creating subcontractor at a construction site is not necessarily liable for failing to discover a hazardous condition that existed on a work site before the construction project began, even if the employer who occupies the premises and created the hazardous condition (in this case, the State of Alaska), or a general contractor who bears overall responsibility for the work site after the construction project begins (in this case, Silver Bow), might be liable for failing to discover that same condition.⁶ As we have stated, “OSHA liability in multi-employer situations must be evaluated on a case-by-case basis.”⁷ Determining whether a non-creating and non-controlling subcontractor’s efforts to identify hazardous conditions at a construction work site were “reasonable” under all of the circumstances is a highly fact-intensive, individualized inquiry.

³ Anning-Johnson Co., 4 OSH Cases 1193 (Rev. Comm’n. 1976); Grossman Steel & Alum. Corp., 4 OSH Cases 1185 (Rev. Comm’n. 1976). *See generally*, M. Rothstein, Occupational Safety and Health Law, §168 at p. 225 (4th ed. 1998); American Bar Association, Section of Employment and Labor Law, Occupational Safety and Health Law, Ch. 6 at 151 (R. Rabinowitz, ed., 2nd ed. 2000).

⁴ *See State, Department of Labor v. Macomber Corporation*, at 8 Docket No. 89-780 (Occupational Safety and Health Review Board 1990) (“Since the Alaska OSHA Act is modeled after the virtually identical federal OSHA law, we believe it is appropriate to apply the federal multi-employer worksite principles in [a multi-employer construction site] case”).

⁵ 8 AAC 61.205(i). *See State, Department of Labor and Workforce Development v. Kiewitt Cornerstone JV* at 5, note 25, OAH No. 08-0640-OSH (Occupational Safety and Health Review Board 2009).

⁶ As mentioned above, the State of Alaska was cited, and accepted liability, for the same violations as Satori (the general contractor, Silver Bow, was not cited). In order to meet its burden of proof, the Department was required to show that the employer had actual or constructive knowledge of the violative condition (although not knowledge of the standard itself), and “constructive knowledge exists whenever an employer fails to exercise reasonable diligence in detecting hazardous conditions, particularly ‘plain view’ hazards.” State, Department of Labor v. State, Department of Transportation and Public Facilities at 5, Docket No. 90-817 (Occupational Safety and Health Review Board 1990). *See generally*, M. Rothstein, Occupational Safety and Health Law, §105 at p. 158 (4th ed. 1998).

⁷ Macomber Corp. at 13, note 1.

In this particular case, we are persuaded that Satori, as a non-creating, non-controlling subcontractor, exercised reasonable care to discover the existence of the hazardous conditions at issue. It is not sufficient, to establish constructive knowledge by Satori (a non-creating and non-controlling subcontractor), that Satori failed to notice that the ladder was not in compliance with an applicable safety standard. Rather, the question is, was Satori's failure to discover the hazardous condition (as compared with the technical violation of an applicable standard) due to the absence of reasonable diligence? We conclude that it was not, for several reasons.

First, the evidence is undisputed that Satori conducted a work site inspection before beginning its work, and there is no evidence that the inspection was in any way deficient. Second, the non-compliant condition was in existence independent of the construction project. Third, as Satori points out, the violative conditions had been in existence for more than five years, and yet had escaped the notice of the employer who created the conditions, occupied the premises, and controlled the worksite. That employer was the State of Alaska, which is an entity that, in our experience, is generally attentive to its obligations under the law to provide its employees with a safe place of work. That a responsible employer failed to identify the violations for such a lengthy period of time is persuasive evidence that the hazardous nature of the conditions was not readily apparent.

The physical conditions that existed were, of course, readily apparent, and the employer who installed, maintained, and controlled use of the ladder was properly held responsible for the non-compliant conditions. However, the hazard those conditions posed was not readily apparent to Satori in its role as a subcontractor. With respect to the placement of the light switch, we observe that the top of the light switch was substantially level to the top of the adjacent rung, such that it would be unlikely to interfere with the safe use of the rung. With respect to the plastic barrier at the bottom of the ladder, the purpose of the barrier was to prevent unauthorized use of the ladder; the rungs of the ladder could be used as a climbing aid even though the side rails at that low level were non-compliant for that purpose. Finally, with respect to the top of the ladder, the three-inch difference between the required height of the extension and the actual height was less than 10% of the allowed height and could easily escape notice.

IV. Conclusion

Satori lacked actual knowledge of the existence of the hazardous condition for which it was cited, and it exercised reasonable diligence to discover that condition. Under the facts of

this case, as a non-creating, non-controlling subcontractor, Satori is not liable for the existence of the hazardous condition that was created by the owner before the construction project began. Accordingly, the citation is **VACATED**.

DATE: February 22, 2012

By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Signed

Timothy O. Sharp, Chairperson

Signed

Tomas A. Trosvig, Member

Signed

James Montgomery, Member

[This document has been modified to conform to the technical standards for publication.]