United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v. OSHRC DOCKET NO. 99-1763

DAYTON HUDSON CORP.,

Respondent.

APPEARANCES:

For the Complainant:
Andrea Phillips, Esq., Lisa R. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Diane Madison, Dayton Hudson Corp., Minneapolis, Minnesota

Before:
Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Dayton Hudson Corp. (Dayton), at all times relevant to this action maintained a place of business at 2600 108th Street, West Allis, Wisconsin, where it was engaged in roofing activities. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 19, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Dayton's West Allis work site (Tr. 23). As a result of that inspection, Dayton was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of

contest Dayton brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On February 8, 2000, a hearing was held in Milwaukee, Wisconsin. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations of §§1926.501 and 502 *et seq.*

Dayton does not dispute the existence of the cited fall protection violations, as listed below (Tr. 17). Both OSHA regulations and Dayton's safety policy require the use of a combination of personal fall arrest systems and warning lines when working on low sloped or flat roofs (Tr. 31). Dayton admits that safety harnesses and lanyards, though available, were not used at the site. Dayton acknowledges that though personal fall protection was not in use, no monitor was used in conjunction with the warning lines that had been erected, and that the warning lines were inadequate in that they were 1) too loose, 2) did not completely enclose the work area, 3) were placed too close to the edge of the roof, and 4) did not mark the material handling area (Tr. 31, 47, 80, 83, 86, 90). The uncontradicted record establishes that both Rustin Bird and Jose Angulo, acting as co-foremen at the site, were aware of the cited violative conditions, but took no action to correct them, because they were in a hurry to complete the job before a predicted rain storm (Tr. 28, 31, 69-70, 81, 91, 101).

Dayton raises the affirmative defense of unpreventable supervisory misconduct.

The Citations

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Serious citation 1, item 1a alleges:

29 CFR 1926.501(b)(10): Employees performing roofing activities on roofs with a slope of 4 to 12 or less, with unprotected sides greater that 6 feet or more above lower levels shall be protected from falling by guardrail systems, safety net system, personal fall arrest system, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system or warning line system and monitoring system.

(a)

Employees conducting roofing activities on a flat roof greater than 25 feet above the next lower level were not protected from falling by the use of an adequate fall protection system.

Serious citation 1, item lb alleges:

29 CFR 1926.502(f)(1): Warning lines were not erected around all sides of the roof work area.

(a)

Employees conducting roofing activities on a flat roof greater than 25 feet above the next lower level were not protected from falling by the use of an adequate fall protection system.

Serious citation 1, item 1c alleges:

29 CFR 1926.502(f)(1)(I): Where mechanical handling equipment was not being used, the warning line was erected less than 6 feet from the roof edge.

(a)

Employees conducting roofing activities on a flat roof greater than 25 feet above the next lower level were not protected from falling by the use of an adequate fall protection system.

Serious citation 1, item 1d alleges:

29 CFR 1926.502(f)(1)(iii): Points of access, materials handling areas, storage areas, and hoisting areas were not connected to the work area by an access path formed by two warning lines.

(a)

Employees conducting roofing activities on a flat roof greater than 25 feet above the next lower level were not protected from falling by the use of an adequate fall protection system.

Supervisory Misconduct

Facts

Compliance Officer (CO) Kenneth Nishiyama-Atha testified that during the OSHA inspection Dayton employees told him they had been trained in fall protection (Tr. 36). Foreman Bird testified that he conducted weekly safety meetings to reinforce that training (Tr. 83). CO Nishiyama-Atha testified that the employees, including foreman Bird, were generally aware of OSHA fall protection requirements (Tr. 43). Nishiyama-Atha, however, testified that they did not appear to be familiar with specific OSHA requirements regarding, *i.e.* the placement of warning lines, the use of a monitor, and tie off requirements (Tr. 38-40).

Dayton submitted written "competent person" training materials for fall protection (Exh. R-1), as well as blank copies of daily OSHA checklists, which are intended for the use of job foreman as reminders to check all employees for compliance with fall protection requirements (Exh. R-2).

Rustin Bird testified that he had worked approximately 36 roofing jobs during the three years he worked for Dayton (Tr. 76-77). Bird stated that he had received weekly training from Dayton, including training in fall protection (Tr. 77, 92). Bird testified that he had a good grasp of the fall protection requirements, but admitted that he had not completed the competent person training packet (Tr. 77, 84; Exh. R-1). Bird did know, however, that it was Dayton's policy to have employees wear harnesses and lanyards when exposed to a fall hazard (Tr. 78). Bird testified that he knew that warning lines were to be placed around the perimeter of the work area, 6 feet from the leading edge, and were to be used in conjunction with a monitor where personal fall protection devices were not used (Tr. 78-79, 106-07). Bird knew that the material loading area was to be guarded by warning lines from the point of

roof access to the work area (Tr. 78).

Bird, however, testified that he did not use Dayton's daily checklist on this job, and could not remember filling out the weekly checklist as required (Tr. 131-32; Exh. R-2, R-3).

Foreman Bird testified that he knew he was violating Dayton fall safety policies in allowing his crew to work without harnesses and lanyards (Tr. 89). Bird stated that he allowed the crew to work unprotected, based on the short term exposures he anticipated (Tr. 91). Bird knew that Dayton made no exceptions for short term exposures (Tr. 91, 123). Bird testified, however, that during the time he worked for Dayton he had often departed from Dayton's policy for short term exposures, perhaps 100 times (Tr. 95, 124-25). At least five times Bird's supervisors were aware of his violation of the fall protection rules (Tr. 94, 97). Bird received verbal warnings from his supervisors, Randy Heil and Mark Ribbe, and was instructed to tie off, but was never otherwise disciplined (Tr. 96, 120). The violations were not noted in his file; he was never suspended (Tr. 96). Rather, Bird was made a foreman; at the time of the inspection Bird had supervised two jobs (Tr. 100). Bird admitted that he followed company policies on neither job (Tr. 100-01).

Bird testified that during the OSHA inspection, he notified Mark Ribbe about the presence of the OSHA CO, and of the CO's concerns about fall protection (Tr. 104). Bird stated that Ribbe did not ask him to take any corrective action (Tr. 104).

Finally, Bird stated that after Dayton's investigation of the alleged violations, he was told that he would not be considered for promotion from assistant foreman to full foreman (Tr. 110). Bird testified that he was never told there was any connection between the loss of his candidacy for foreman and the OSHA inspection (Tr. 110).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

In this case, the evidence establishes that Dayton had a safety program that was designed to ensure that personal fall protection was used, and perimeter warning lines installed, for the benefit of all its employees who were exposed to fall hazards. The record further establishes that fall protection training was provided to Dayton employees. Rustin Bird, the foreman responsible for the violative

conditions, testified that he was fully aware of Dayton's fall protection policies. Dayton, however, failed to establish that its safety program was enforced.

The Commission has found that unanimity of noncomplying conduct by all employees suggests ineffective enforcement *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). In addition, it is well settled that misconduct by a supervisor constitutes strong evidence that the employer's safety program is lax. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991). An employer may rebut the presumption that its safety program was lax, however, by showing that it had a progressive disciplinary plan with increasingly harsh measures taken for repeated infractions of work rules. The Commission has held that a program consisting only of pre-inspection verbal warnings is insufficient. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (No. 93-2971, 1995).

It is clear that in this case, Dayton did not have a progressive disciplinary plan. None of the employees on the roof wore personal fall protection. Both Bird and Angulo participated in the violative conduct. Bird's testimony establishes that he repeatedly violated both OSHA regulations and Dayton work rules with impunity. His superiors were aware of his infractions, having personally observed them on approximately five different occasions. Bird was repeatedly warned to comply with the rules, but was never disciplined. Instead he was promoted to foreman. Given Bird's record of safety infractions, Dayton should have anticipated that he would also take a lax approach to ensuring that his work crews complied with the safety regulations.

The record establishes that Dayton did not effectively enforce its safety program. Dayton has, therefore, failed to make out the affirmative defense of unpreventable employee misconduct.

Penalty

A combined penalty of $5,000.00 is proposed for these violations.

Dayton is a large employer (Tr. 53). Nine employees, including the two foremen were exposed to a 28 foot fall hazard for approximately two to three hours (Tr. 35, 46, 49, 84). A 28 foot fall would likely result in serious bodily harm, up to and including death. Foreman Bird testified that only two or three people actually worked at the edge of the roof right up next to a 1'x1' parapet (Tr. 82, 118). Moreover, CO Nishiyama-Atha testified that, because the roof was flat, an accident was not likely to occur (Tr. 51-52). The violation was properly classified as serious, though this judge finds that the gravity of the violation is low. This judge further finds that credit for good-faith was improperly denied by CO Nishiyama-Atha, based solely on his perception that the gravity of the violation was high (Tr. 53). Credit was properly denied for history because Dayton had received other "serious" OSHA

citations within the preceding three years (Tr. 54).

Taking into account the relevant factors, this judge finds that a penalty of $2,500.00 is appropriate and will be assessed.

Alleged Violation of §1910.1200(f)(5)(ii)

Other than serious citation 2, item 1 alleges:

29 CFR 1910.1200(f)(5)(ii): The employer did not ensure that each container of hazardous chemicals in the workplace was labeled, tagged or marked with the appropriate hazard warnings:

(a)

Metal container containing approximately one gallon of acetone was not labeled with the appropriate hazard warning label.

Facts

CO Nishiyama-Atha testified that while he was at the work site, he observed Dayton employees using acetone that was in an unlabeled secondary container (Tr. 34-35). Nishiyama-Atha testified that foreman Bird told him the acetone was used by all the employees as needed to apply to the roof membrane (Tr. 44, 116). During employee interviews, Nishiyama-Atha found that the employees knew that the secondary container held acetone, but that they were not familiar with the health hazards associated with acetone (Tr. 73), though CO Nishiyama-Atha admitted the crew were Spanish speaking and that he relied on an interpreter to convey his questions.

Nishiyama-Atha testified that contact with acetone may result in burns, dermatitis, and irritation of the eyes (Tr. 45).

Discussion

Dayton does not dispute the factual allegations contained in the citations, but argues that the Complainant did not establish that the conditions created a hazard, in that there was no credible evidence either that the crew was unaware of the hazards associated with acetone, or that they were using the acetone in an unsafe manner. Dayton argues that it did not, therefore, violate the "intent" of the cited standard.

The cited standard provides:

> Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s) contained therein; and,
(ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

It is well established that when a standard prescribes a specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978). Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (No. 76-93, 1979).

The violation is established and will be affirmed.

Penalty

A penalty of $1,000.00 is proposed for this item. This judge finds that the gravity was overstated by the CO. A penalty of $500.00 is appropriate.

ORDER

1. Serious citation 1, items 1a through 1d, alleging violation of §1926.501(b)(10), 502(f)(1), 502(f)(1)(I) and (502)(f)(1)(iii) are AFFIRMED, and a combined penalty of $2,500.00 is ASSESSED.

2. Other than serious citation 1, item 1, alleging violation of §1910.1200(f)(5)(ii) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: April 17, 2000