

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States *
Department of Labor, *

Complainant, *

v. *

DEMOULAS SUPER MARKETS INC., *
dba MARKET BASKET, *

Respondent. *

DOCKET NOS. 11-2870 & 11-2871

REGION I

INSPECTION NOS. 29247 & 63192

COMPLAINT

Inspection has disclosed that at the times and in the manner stated in Inspection Nos. 29247 and 63192 and in the related Citations, the provisions of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 USC 651, et seq.) (the “Act”) and the provisions of the specific standards promulgated under Section 5(a)(2) of the Act, have been violated. It is, therefore, averred and charged that:

I.

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission (the “Commission”) by Section 10(c) of the Act.

II.

Respondent DeMoulas Super Markets Inc. d/b/a Market Basket (“DeMoulas”) is, and at all times hereinafter mentioned was, a corporation with an office and place of business located at 875 East Street, Tewksbury, Massachusetts 01876 and is engaged in the operation of a chain of supermarkets and/or grocery stores.

III.

During the course of business activities Respondent and its employees are engaged in receiving, handling and otherwise working on and with goods and materials that are moving or have moved across state lines in interstate commerce. By virtue of these activities, Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act.

THE RINDGE INSPECTION, OSHA INSPECTION NO. 29247

AND RELATED CITATIONS

IV.

On the dates of April 19, 2011 through September 1, 2011, an authorized representative of Complainant conducted an inspection of Respondent's supermarket facility located at 497 U.S. 202, Rindge, New Hampshire 03461 (the "Rindge Supermarket"), OSHA Inspection No. 29247 (the "Rindge Inspection").

V.

Following the Rindge Inspection, on October 7, 2011, Complainant issued the following four (4) Citations and Notifications of Proposed Penalty to Respondent: (1) Serious Citation 1, Items 1, 2a, 2b, 3, 4, 5, 6, 7a, 7b, 7c, 8, 9, 10, 11 and 12 (attached as Exhibit A-1) ("Rindge Citation 1"); (2) Willful Citation 2, Items 1a, 1b, 2a and 2b (attached as Exhibit A-2) ("Rindge Citation 2"); (3) Repeat Citation 3, Items 1, 2, 3, 4, 5 and 6 (attached as Exhibit A-3) ("Rindge Citation 3"); and (4) Other Citation 4, Item 1 (attached as Exhibit A-4) ("Rindge Citation 4," and together with Rindge Citation 1, Rindge Citation 2 and Rindge Citation 3, the "Rindge Citations").

VI.

At or about the time of the Rindge Inspection, Respondent violated the standards set forth in the Rindge Citations in the manner described therein.

VII.

The Rindge Citations identify the specific standards or general duty clause violations alleged, describe the violations, specify the abatement dates proposed for the violations, and set forth the penalties for the violations.

VIII.

The violations alleged in Rindge Citation 1 (Exhibit A-1) constitute serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical injury could result from the conditions that existed and Respondent knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

IX.

The violations alleged in Rindge Citation 2 (Exhibit A-2) constitute willful violations within the meaning of Section 17(a) of the Act, and the violations are serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions that existed and Respondent knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

X.

The violations alleged in Rindge Citation 3 (Exhibit A-3) constitute repeat violations within the meaning of Section 17(a) of the Act in that Respondent was previously cited for same or similar violations that became Final Orders of the Commission, and the violations are serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions that existed and Respondent knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

XI.

The violation alleged in Rindge Citation 4 (Exhibit A-4) constitutes an other-than-serious violation within the meaning of Section 17(c) of the Act.

XII.

The Rindge Citations set forth the penalties proposed for the violations alleged therein. Considering, as required by Section 17(j) of the Act, the gravity of the violations, the size of Respondent's business, Respondent's history of previous violations and good faith, the proposed penalties are appropriate.

XIII.

The abatement dates set forth in the Rindge Citations represent the earliest practicable times within which Respondent could reasonably be expected to abate the violations.

XIV.

On October 7, 2011, the Rindge Citations and Notifications of Penalty were mailed to Respondent proposing the penalties referenced in Paragraph VII above.

XV.

On November 1, 2011, Respondent filed with a representative of the Secretary of Labor a notification of intent to contest the Rindge Citations and proposed penalties. Pursuant to Section 10(c) of the Act, this notification was duly transmitted to the Commission.

THE CONCORD INSPECTION, INSPECTION NO. 63192

AND RELATED CITATIONS

XVI.

On the dates of May 16, 2011 through September 8, 2011, an authorized representative of Complainant conducted an inspection of Respondent's supermarket facility located at 108 Fort Eddy Road, Concord, New Hampshire 03301 (the "Concord Supermarket"), OSHA Inspection No. 63192 (the "Concord Inspection").

XVII.

Following the Concord Inspection, on October 7, 2011, Complainant issued the following four (4) Citations and Notifications of Proposed Penalty to Respondent: (1) Serious Citation 1, Items 1, 2, 3, 4a, 4b, 4c, 5, 6 and 7 (attached as Exhibit B-1) (“Concord Citation 1”); (2) Willful Citation 2, Items 1, 2a and 2b (attached as Exhibit B-2) (“Concord Citation 2”); (3) Repeat Citation 3, Item 1 (attached as Exhibit B-3) (“Concord Citation 3”); and (4) Other Citation 4, Item 1 (attached as Exhibit B-4) (“Concord Citation 4,” and together with Concord Citation 1, Concord Citation 2 and Concord Citation 3, the “Concord Citations”).

XVIII.

At or about the time of the Concord Inspection, Respondent violated the standards set forth in the Concord Citations in the manner described therein.

XIX.

The Concord Citations identify the specific standards or general duty clause violations alleged, describe the violations, specify the abatement dates proposed for the violations, and set forth the penalties for the violations.

XX.

The violations alleged in Concord Citation 1 (Exhibit B-1) constitute serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical injury could result from the conditions that existed and Respondent knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

XXI.

The violations alleged in Concord Citation 2 (Exhibit B-2) constitute willful violations within the meaning of Section 17(a) of the Act, and the violations are serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions that existed and Respondent

knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

XXII.

The violations alleged in Concord Citation 3 (Exhibit B-3) constitute repeat violations within the meaning of Section 17(a) of the Act in that Respondent was previously cited for same or similar violations that became Final Orders of the Commission, and the violations are serious violations within the meaning of Sections 17(b) and 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions that existed and Respondent knew, or with the exercise of reasonable diligence could have known, of the presence of the violations.

XXIII.

The violation alleged in Concord Citation 4 (Exhibit B-4) constitutes an other-than-serious violation within the meaning of Section 17(c) of the Act.

XXIV.

The Concord Citations set forth the penalties proposed for the violations alleged therein. Considering, as required by Section 17(j) of the Act, the gravity of the violations, the size of Respondent's business, Respondent's history of previous violations and good faith, the proposed penalties are appropriate.

XXV.

The abatement dates set forth in the Concord Citations represent the earliest practicable times within which Respondent could reasonably be expected to abate the violations.

XXVI.

On October 7, 2011, the Concord Citations and Notification of Penalty were mailed to Respondent proposing the penalties referenced in Paragraph XIX above.

XXVII.

On November 1, 2011, Respondent filed with a representative of the Secretary of Labor a

notification of intent to contest the Concord Citations and proposed penalties. Pursuant to Section 10(c) of the Act, this notification was duly transmitted to the Commission.

ALLEGATIONS OF RESPONDENT'S FAILURE TO COMPLY
WITH OSHA'S STANDARDS FOR WALKING-WORKING SURFACES
AND PERSONAL PROTECTIVE EQUIPMENT, AT LOCATIONS OTHER THAN RINDGE
AND CONCORD

XXVII.

In addition to the Rindge Supermarket and the Concord Supermarket, Respondent owns and operates more than sixty (60) supermarkets and/or grocery stores in Massachusetts and New Hampshire (each, a "DeMoulas Store"). Respondent operates these supermarkets and/or grocery stores under the common control of its corporate executives, officers and management officials.

XXVIII.

Upon information and belief, Respondent has failed to protect open-sided floors, platforms, and runways, as required by 29 C.F.R. §§ 1910.23(c)(1) and (c)(2) at DeMoulas Stores, in addition to those located in Rindge and Concord, thereby exposing employees to violative conditions that are similar at multiple locations. As alleged in Rindge Citation 2, Items 1a and 1b, and Concord Citation 2, Item 1, the Rindge and Concord Inspections revealed multiple instances where Respondent willfully failed to guard an open-sided floor, platform or runway. Further, information gathered during the Rindge and Concord Inspections revealed that employees at other DeMoulas Stores likely have been, and are, exposed to similar violative conditions.

XXIX.

Since 2007, or earlier, Respondent has been aware of the need to implement enterprise-wide measures to protect open-sided floors, platforms, and runways at its DeMoulas Stores, as required by 29 C.F.R. §§ 1910.23(c)(1) and (c)(2). In 2007, an employee at Respondent's store in Billerica, Massachusetts fell from the open side of a storage loft and was seriously injured.

The storage loft was not equipped with guardrails. Following the incident, Respondent's head safety liaison notified three of Respondent's vice-presidents about the accident and the lack of guardrails at the site. The safety liaison also informed the vice-presidents that similar conditions were present at almost every DeMoulas Store. However, these conditions were not in fact abated enterprise-wide, as the violations referenced at Exhibits A-2 and B-2 reveal.

XXX.

Upon information and belief, Respondent has failed to assess its workplaces to determine if hazards necessitate the use of personal protective equipment, as required by 29 C.F.R. § 1910.132(d)(1). As alleged in Rindge Citation 2, Item 2a, and Concord Citation 2, Item 2a, the Rindge and Concord Inspections revealed that Respondent willfully failed to assess whether work in its produce, deli, bakery, grocery, dairy and/or front end departments necessitated the use of hand, eye and/or face protection. Further, information gathered during the Rindge and Concord Inspections revealed that Respondent has failed to assess whether similar work in the produce, deli, bakery, grocery, dairy and/or front end departments at other DeMoulas Stores requires employee use of personal protective equipment.

XXXI.

Upon information and belief, Respondent has also failed to select and require employees to use appropriate hand protection when exposed to laceration hazards, as required by 29 C.F.R. § 1910.138(a). As alleged in Rindge Citation 2, Item 2b, and Concord Citation 2, Item 2b, the Rindge and Concord Inspections revealed that Respondent willfully failed to provide hand protection to employees who were exposed to lacerations in connection with their use of knives and other cutting instruments in the produce, deli and/or bakery departments. Further, information gathered during the Rindge and Concord Inspections revealed that Respondent has failed to provide hand protection to employees who performed similar work in the produce, deli and/or bakery departments at other DeMoulas Stores.

XXXII.

Since 2005, or earlier, Respondent has been aware of its enterprise-wide failure to determine whether hazards in DeMoulas Stores necessitated the use of personal protective equipment, as required by 29 C.F.R. § 1910.132(d)(1). On or about October 17, 2005, a meat department employee at Respondent's store in Westford, Massachusetts sustained a partial finger amputation while operating a meat saw. Complainant conducted an inspection following the incident, and cited Respondent for multiple violations including a serious violation of 29 C.F.R. § 1910.138(a) for failure to select and provide hand protection to the injured employee, and a repeat violation of 29 C.F.R. § 1910.132(d)(1) for failure to assess whether hazards in the meat department necessitated the use of personal protective equipment.¹

XXXIV.

On April 26, 2006, the parties executed an informal settlement agreement, which, inter alia, upheld and amended the citations, and provided that "The Employer agrees to progressively implement the completion of a job hazard analysis for all departments at all Market Basket locations." Despite this commitment, Respondent, as of the date of the Rindge Inspection, had failed to assess hazards in its stores' produce, deli, bakery, grocery, dairy and/or front end departments to determine whether personal protective equipment was needed.

XXXV.

Furthermore, following the accident and OSHA inspection at Respondent's Westford, Massachusetts store, Respondent failed, on an enterprise-wide basis, to require employees in its produce, deli and/or bakery departments to wear appropriate hand protection when working with knives and other cutting instruments. Respondent failed to do so despite its knowledge of numerous laceration injuries at multiple DeMoulas Stores. For example, from 2008 until the time of the Rindge and Concord Inspections, Respondent was aware that its employees sustained at least forty (40) recorded hand or finger lacerations while working at the Rindge and Concord Supermarkets. Upon information and belief, employees are required to perform similar work in

¹ The repeat classification was based on a previous serious citation issued to Respondent on February 4, 2004 for a substantially similar violation.

the produce, deli and/or bakery departments at other DeMoulas Stores and are similarly exposed to lacerations due to a lack of hand protection.

RELIEF REQUESTED

Under 29 U.S.C. § 659(c), the Commission is authorized to “issue an order . . . affirming, modifying, or vacating the Secretary’s citation or proposed penalty or directing other appropriate relief” Based on this statutory grant of authority, Complainant respectfully requests that the Commission:

- (1) affirm the Rindge Citations, Concord Citations and all associated proposed penalties; and
- (2) to the extent that Respondent has failed to comply with 29 C.F.R. §§ 1910.23(c)(1) and (c)(2), 1910.132(d)(1) and 1910.138(a) at any DeMoulas Store, direct other appropriate relief available under section 10(c) of the OSH Act, including:
 - entering an order of enterprise-wide abatement against Respondent compelling its compliance with 29 C.F.R. §§ 1910.23(c)(1) and (c)(2), 1910.132(d)(1) and 1910.138(a) at all of Respondent’s workplaces; and
 - based on the evidence provided at trial, such additional relief as appropriate under section 10(c) of the OSH Act.

Post Office Address:
U.S. Department of Labor
Office of the Regional Solicitor
JFK Federal Building
Room E-375
Boston, Massachusetts 02203
TEL: (617)565-2500
FAX: (617)565-2142
Miller.Scott.M@dol.gov

M. Patricia Smith
Solicitor of Labor

Michael D. Felsen
Regional Solicitor

Scott M. Miller
Trial Attorney

U.S. Department of Labor
Attorneys for Complainant

DATE: December 22, 2011

NOTICE TO: DeMoulas Supermarkets Inc. d/b/a Market Basket

You are hereby notified that you must file an Answer to this Complaint within twenty (20) days of your receipt of this Complaint. If you do not file an Answer to this

Complaint within twenty (20) days, or request an extension of time to do so, judgment may be entered against you.

29 C.F.R. 2200.34 provides in pertinent part: The answer shall contain in short and plain terms a response to each allegation of the complaint which the party intends to contest. Any allegation not denied shall be deemed to have been admitted.

For further information regarding the required content of an Answer, including the raising of any affirmative defenses, see 29 C.F.R. 2200.34.

Your Answer should be filed by mailing the original to the Occupational Safety and Health Review Commission, One Lafayette Centre, 1120 20th Street, N.W., Room 980, Washington, D.C. 20036-3419, and by mailing a copy of same to the Regional Solicitor's Office, U.S. Department of Labor, JFK Federal Building, Room E-375, Boston, Massachusetts, 02203.