

"Am I Management?"

New OSHA Case Blurs Lines between Employees and Supervisors during Inspections

By Mark A. Lies II & Elizabeth Leifel Ash

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, the Occupational Safety and Health Administration (OSHA) issued citations to Ryder under the Agency's multiemployer 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.

This article discusses the citation issued to Dean and the recent decision from an Administrative Law Judge (ALJ) upholding that citation—specifically, the finding that an hourly journeyman electrician was a "supervisor."

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 condition that violates the law exists or an accident has occurred. Rather, 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 that such a condition existed*. Because many employers are corporations, it may be difficult to determine what a corporation "knows." Caselaw 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 about such a condition, OSHA can satisfy the employer knowledge element of its burden of proof in a contested case.

Who Is a Supervisor or Foreman?

According to Review Commission precedent, "An 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 (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.

Beware of OSHA Inspection Conduct

Perhaps the most vexing part of the Dean case for employers is the judge's acknowledgment 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.

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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 or she

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 or her 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 or her knowledge could be imputed to the employer, *but* his or her 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 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 outline some recommendations for dealing with this issue during an OSHA inspection.

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, 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—that is, provide detailed 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 its employees prior to an OSHA interview and asserts its rights to be present at the interview (if warranted), the employer can (1) avoid a potential waiver of its rights and (2) prevent an unrepresented employee from making binding admissions of legal liability during an OSHA inspection. EPLiC

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