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Successfully Defending an OSHA Fatality Citation

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Introduction

Workplace accidents can occur no matter how many precautions are taken to avoid them. Even employers who provide their employees with the safest possible place of employment must still, on occasion, deal with the unfortunate and sometimes tragic reality of workplace accidents. The tumultuous post-accident period frequently is complicated by the presence of an OSHA Compliance Safety and Health Officer conducting a post-accident workplace inspection. OSHA often appears compelled to cite employers for workplace accidents involving a fatality, and the Occupational Safety and Health Review Commission often has been reluctant to vacate such citations. However, if employers have taken all of the necessary steps to protect their employees, holding employers responsible for the isolated and unpreventable acts of an employee is inappropriate since this is not a "strict liability" law based upon the occurrence of an accident.

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This article will discuss the fundamental legal framework for litigating OSHA citations, the recent case involving Paramount Advanced Wireless ("Paramount"), the resulting developments in the primary defenses available to an employer against OSHA liability (lack of knowledge of the violation and the "employee misconduct" defense), and the steps employers in the tower erecting and other industries must take to prepare these defenses and protect their business from legal liability. More importantly, these steps will substantially reduce the potential for employee injury. A copy of the decision entered in the Paramount case[†] is available from the authors.

Legal Framework

Employers have the right to contest an OSHA citation and have a legal hearing on the case in front of an Administrative Law Judge of the Occupational Safety and Health Review Commission or state equivalent. At the hearing, OSHA must put on its case first and prove the citation. If OSHA is able to offer proof of the citation, employers then have the opportunity to put on various defenses (which attack the sufficiency of OSHA's case) and affirmative defenses (which argue that even if OSHA can prove its case, the employer is not legally liable).

OSHA's Initial Burden to Prove Employer Liability

In order to prove a violation of an OSHA safety or health regulation (or the General Duty Clause, Section 5(a)(1)), the agency must show by a preponderance of factual evidence at the hearing the following elements:

(2) the regulation applies to the safety or health hazard (e.g., fall, confined space, machine guarding, etc.) which OSHA observed at the worksite; and

[†] *Secretary of Labor v. Paramount Advanced Wireless, LLC*, OSHRC Docket No. 09-0178 (Decision and Order of ALJ Covette Rooney, June 21, 2010).

(3) the requirements of the regulation were not met at the worksite (e.g., there was no fall protection, no confined space program, no machine guards in place, etc.); and

(4) one or more of the employer's employees were actually exposed to the hazardous condition so that the employee could have been injured by the hazard. NOTE: On multi-employer worksites, an employer may be liable for exposure of another employer's employee to the hazard if certain conditions are met; and

(5) the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

The Employer's Burden to Establish a Defense

Once OSHA presents enough evidence to establish each of these elements (which is called a prima facie case), the employer has the burden of presenting evidence at the hearing that the agency's evidence on each of the elements (1)-(4) above is not sufficient (e.g., the regulation is inapplicable; the hazard never existed; there was no employee exposure or the employer had no knowledge of the violation).

Affirmative Defense of Unpreventable Employee Misconduct

Assuming that the employer cannot directly refute any of the four (4) elements of OSHA's case, the employer still has certain affirmative defenses available to defend against the citation. An affirmative defense is a defense that the employer must establish and prove, and if the employer successfully proves the defense, the citation will be vacated. There are a number of such defenses, but the most potent affirmative defense available to the employer is that of "unpreventable employee misconduct" or "isolated event."

In order to establish the defense of "unpreventable employee misconduct," the employer must prove the following:

1. That it had a thorough safety program;

2. That it adequately communicated its safety program to its employees;

3. That it adequately enforced its safety program; and

4. That the violative conduct of the employee was a departure from a uniformly and effectively communicated and enforced safety rule (that is, the employer had no reasonable opportunity to become aware of the violation and to correct the violation.)

Secretary of Labor v. Paramount Advanced Wireless, LLC, OSHRC Docket No. 09-0178 (Decision and Order of ALJ Covette Rooney, June 21, 2010) (citations omitted). Frequently, when citations are based on an underlying accident, the Occupational Safety and Health Review Commission ("Commission") critically examines an employer's safety program. If there is any lapse in communication, training, or enforcement, the Commission will find that the defense has not been established. Only in cases where employers have demonstrated consistent communication, training, and enforcement of an adequate safety program is the defense available.

Paramount Advanced Wireless' Case

Just hours after a tragic and fatal accident involving one of Paramount's tower climbers (in which the employee inexplicably unhooked his connection device on his lanyard from the anchorage point on the tower and fell from the tower), OSHA initiated an accident inspection of the work site. Despite the fact that Paramount has been a leader in developing safety standards for tower climbers, OSHA cited the Company for failing to provide its employees with adequate fall protection as well as alleged blood borne pathogen violations. After preliminary negotiations, OSHA withdrew the blood borne pathogens citations, but the Agency proceeded to hearing on the fall protection citation despite the fact that there was no factual support for its contentions.

Following the hearing in the matter, the Administrative Law Judge vacated the remaining fall protection citation, and in so doing, found that Paramount had provided its employees with

adequate fall protection and praised Paramount for its safety program and its commitment to safety. The manner in which Paramount handled the underlying inspection and their conduct at the subsequent hearing provides a textbook example of how to defend yourself against citations that are unsupported by the facts of your case.

Paramount's Primary Defenses

Paramount had two primary defenses to the fall protection citation: that Paramount did, in fact, comply with the standard and provide its employees with proper fall protection, and that even if a violation existed, Paramount did not and could not have had knowledge of the violation. OSHA's position appeared to be conclusory and based on a misunderstanding of the facts. Simply, it was apparent that OSHA believed that since there was an accident, there must have been a violation. During the post-accident inspection, Paramount repeatedly explained to the Compliance Officer the Company's fall protection program and industry terms of art for its particular equipment and practices. Although the Agency nonetheless issued the citations, Paramount's conduct during the inspection laid the groundwork necessary to establish that the cited violation did not occur. Therefore, because of Paramount's repeated attempts to explain the fundamental principles of tower climbing safety to the Compliance Officer, the Company was able to explain to the Judge that OSHA's case depended on a misconception of the underlying facts, which discredited the Compliance Officer's testimony and OSHA's unsupported positions at the hearing. Indeed, Judge Rooney found that the Compliance Officer failed to understand basic fall protection equipment and practices and had misinterpreted the information she had obtained in the witness statements. As a result, OSHA failed to prove that Paramount's employees were not provided with necessary fall protection.

The Affirmative Defense – Unpreventable Employee Misconduct/Isolated Event

Where an accident results from a technical violation of an OSHA standard, employers may be able to utilize the affirmative defense of unpreventable employee misconduct or isolated event. Historically, the Review Commission has been reluctant to find that employers have established this defense where an accident has occurred, particularly a fatality. Paramount's case provides an example of just what is required to establish the defense.

It is clear that Paramount initiated the behavior necessary to establish its affirmative defense of unpreventable employee misconduct or isolated event years before the tragic accident and subsequent OSHA citation. The defense cannot be developed after an accident since it looks back to employer conduct prior to the accident, which can involve years of employer commitment. Therefore, an employer must make a commitment to safety and follow through in maintaining a safe work place for its employees. In her decision, the Judge praised Paramount as a "safety leader in the tower climbing industry" and praised the National Association of Tower Erectors ("NATE"), a well-respected industry association, for instituting its own rules for tower safety and lobbying OSHA for industry-specific regulations.[‡] The Judge then commended the Company's "well-communicated, comprehensive and properly enforced safety program that requires employees to be properly tied off at all times they are on the towers."

The Judge specifically noted that Paramount had an extensive written safety policy based in part on the ComTrain (a recognized service provider of fall protection training in the tower

[‡] The Company was able to demonstrate that its written safety training and policies were effective because it had utilized a program developed and provided by the National Association of Tower Erectors, its industry association. Employers should seriously consider participating in their industry associations, which frequently develop recognized safety and health practices based upon OSHA regulations and best practices. Industry programs can provide a critical benchmark for effective programs.

industry) climbing program. Paramount also required each of its climbers to take a written examination on proper climbing techniques and successfully complete ComTrain training before being allowed to step off the ground. In addition, Paramount's program required 100% fall protection for its employees and provided for regular inspections to monitor the effectiveness of the program. Although Paramount had not had occasion to discipline any employee for failing to follow its fall protection rules, Paramount had a progressive discipline policy that it had used for other safety violations, including wearing ripped clothing and failing to wear hard hats, which were documented.

In addition to its training and disciplinary programs, Paramount reinforced compliance with its safety rules daily. For example, Paramount required daily toolbox talks during which the foreman completed a Daily Hazard Assessment with the crew. In fact, on the day of the accident, the crew had discussed maintaining 100% fall protection and all employees (including the decedent) signed the Daily Hazard Assessment. Then, the foreman filled out a Pre-Construction Hazard Identification and Rescue Plan. Lastly, before work began, the employees were required to fill out a daily Personal Protective Equipment ("PPE") log, which the foreman reviewed to ensure that the employees utilized adequate PPE for the job. Most significantly, Paramount consistently followed its program, completed the required forms, and maintained written records of its various safety initiatives for many years prior to the accident. This type of evidence of compliance is invaluable if faced with an OSHA inspection or subsequent hearing.

Finally, on the day of the accident, Paramount's foreman had done everything correctly. He completed all the pre-shift safety assessments, evaluations, and toolbox talks. He maintained proper supervision over the crew as they worked. It became overwhelmingly clear that the employer could not have done anything further to prevent the accident. Accordingly, the Judge

found that the accident was an unforeseeable event caused by the idiosyncratic actions of the employee, and as such, vacated the citation.

Conclusion

Under the current Administration, OSHA is focusing its efforts on enforcement, emphasizing the issuance of citations. The only way to successfully defend against such citations (and prevent accidents) is to develop a comprehensive safety culture, evidenced by appropriate documentation of training and enforcement. Once an OSHA inspection commences, particularly after an accident, the employer must **take control** of the inspection and be prepared to demonstrate the breadth of its programs and commitment to enforcement. Finally, if the Agency issues citations that are not based upon fact or law, the employer must decide whether to proceed to hearing to establish, as did Paramount, that it took all reasonable actions to comply with the law.