

Will Trend of Favorable Decisions From Occupational Safety and Health Review Commission Last?

By Melanie L. Paul

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The Occupational Safety and Health Review Commission (OSHRC) has issued three new decisions that appear to continue a favorable trend. On December 31, 2020, the quasi-judicial body overseeing enforcement actions by the Occupational Safety and Health Administration (OSHA) vacated a serious citation, overturned a trial judge's credibility determination, and found an understandable mistake was an unforeseeable error.

Serious Citation Vacated

The OSHRC Commissioners, in a 2-1 decision, vacated a serious citation issued to the employer for not blocking pallets of merchandise stored in tiers in its distribution center in New York in *Secretary of Labor v. Walmart, Inc.*, a 2017 case. OSHA issued the employer a serious citation following an accident in which an employee was struck by crescent roll containers that fell from the standard selective racking system after another employee operating a forklift bumped the rack immediately behind the one where the injured employee was located. Commissioners James Sullivan and Amanda Laihow found the cited general industry standard for ensuring the storage of material does not create a hazard did not apply in these circumstances. They agreed with the employer that the standard applies only if material is stored in tier, meaning one on top of the other with nothing in between. In this case, there was no evidence the pallets were stacked this way. The racking levels were one above another, but each rack had only one pallet with space between the top of the merchandise on each pallet and the bottom of the next rack level. Significantly, the Secretary did not allege the racking itself was unstable.

Credibility Determination Overturned

A unanimous OSHRC upheld two violations and vacated a third in *Secretary of Labor v. Mansfield Industrial, Inc.*, another 2017 case. OSHA cited the company for violations of the Process Safety Management (PSM) standard, the Hazard Communication (Hazcom) standard, and the personal protective equipment (PPE) assessment standard following injury to two employees after a pipe ruptured and released a hazardous chemical. The OSHRC upheld the PSM and Hazcom violations, finding the company failed to raise its preemption arguments on those violations before the trial judge, and therefore, those arguments had been waived. However, it vacated the violation for failure to conduct a PPE assessment, finding the company actually had conducted a PPE assessment. This holding is significant because the OSHRC overturned the trial judge's credibility determination of the site supervisor who testified at trial. The trial judge concluded the site supervisor did not testify credibly at trial because of his demeanor and because his testimony was inconsistent with statements he and the safety manager made to OSHA during the inspection that they had not conducted a PPE assessment. However, the OSHRC found the documentary evidence objectively demonstrated the company, in fact, had performed the required PPE assessment, because the site supervisor had completed a Job Hazard Risk Assessment (JHRA) and a work permit, both of which noted the hazards and identified tools and PPE necessary for the work. The OSHRC found, "Both documents not only show that the company did, in fact, assess the worksite to determine if hazards were present requiring PPE, but cast sufficient doubt on the ALJ's decision to disregard the site supervisor's hearing testimony which is consistent with this documentation."

Unforeseeable Error

Finally, a unanimous OSHRC reversed the trial judge's decision to dismiss the company's late notice of contest and sent the case back to the trial judge for further proceedings in *Secretary of Labor v. Burlington Capital PM Group, Inc. d/b/a Post Woods Apartment Homes*, a 2020 case. OSHA cited an apartment complex in Ohio with a ladder violation and sent the citation to the company's corporate headquarters in Omaha, Nebraska. A paralegal in the company's legal department timely prepared a notice of contest (NOC) dated October 28, 2019, and gave it to an administrative assistant to send to OSHA in Columbus, Ohio, by UPS and charge the apartment complex's account. Unfortunately, the administrative assistant mistakenly sent the NOC to the apartment complex and OSHA never received it. The company discovered the mistake after OSHA sent it a deficiency letter for the penalty payment in January 2020. In March 2020,

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the company submitted to OSHA a late NOC and filed a motion with the OSHRC to accept the late NOC based on excusable neglect, with affidavits from the paralegal and the legal assistant explaining what had happened. The assigned judge determined that, although the company did not act in bad faith, there was no prejudice to the Secretary of Labor in accepting a late NOC, and that the company did assert meritorious defenses, the company lacked procedures to prevent the mailing error or to confirm that items were sent to the correct address, and therefore, the company was not entitled to relief. A unanimous OSHRC reversed, finding the administrative assistant committed an understandable mistake which was an unforeseeable error. The company's receipt of the citation and prompt preparation of the NOC demonstrates its procedures for handling OSHA citations were orderly, the OSHRC said.

OSHRC Chairman James Sullivan's term is set to expire in April 2021. President-Elect Joe Biden likely will fill his seat with a pro-employee voice. This would shift the ideology of future OSHRC decisions in favor of the Secretary of Labor. However, it is noteworthy that Commissioner Cynthia Atwood joined Commissioners Sullivan and Laihow in several recent cases where they found in the employer's favor.

These recent decisions remind the Secretary of Labor that simply because an accident or injury occurs, it is not a forgone conclusion that there is a violation and justice and fair play demand employers have their day in court. Employers should understand their rights to contest citations and consult with counsel to protect their valid defenses.

For safety and health compliance assistance or defense of OSHA inspections or citations, contact the Jackson Lewis attorney with whom you normally work or any member of our Workplace Safety and Health Practice.

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