ENTRY ORDER

SUPREME COURT DOCKET NO. 2000-191

SEPTEMBER TERM, 2001

Contractors Crane Service, Inc.	}	
	}	
v.	}	APPEALED FROM:
	}	
Commissioner of Labor and Industry	}	Commissioner of Labor and Industry
	}	
	}	DOCKET NO. 162-7-95 Lecv
	}	
	}	Trial Judge: Ben W. Joseph
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Contractor Crane Service, Inc. (CCS) appeals the judgment of the superior court affirming a decision by the Vermont Occupational Safety and Health Act (VOSHA) review board that CCS was in violation of three separate regulations with respect to a construction site in Rutland. CCS argues that the board's findings are not supported by the record; that the Commissioner of Labor and Industry cited the wrong regulation when finding its primary violation, thus failing to meet its burden of establishing the violation before the board; and that the record as a whole does not support the three violations as found by the board. We affirm.

In September 1994, CCS was serving as the steel erection subcontractor on a job site in Rutland. In the course of laying steel decking for the roof of a one-story structure that was to serve as an auditorium, one of its employees fell approximately twenty-eight to thirty feet to the ground. A safety compliance officer was sent to the site to conduct an investigation, after which the Commissioner of Labor and Industry cited CCS for three separate violations of the Occupational Safety and Health Act (OSHA), levying fines totaling $27,000. CCS sought review. Following an evidentiary hearing, the hearing officer likewise found three violations and imposed the same fine. Notably, the hearing officer rejected CCS's argument that the Commissioner had relied on the wrong regulation in finding its primary violation and that another regulation applied, with which CCS was compliant. Specifically, the hearing officer relied in part on its determination that the regulation cited by CCS only applied to tiered buildings.

CCS then sought review of the decision before the full VOSHA review board, which affirmed and adopted the hearing officer's decision. CCS appealed to the superior court. Following a status conference, the court remanded to the board for either clarification or additional findings regarding where the employee landed following his fall. On remand, the board found that the employee's fall was an exterior fall, but did not otherwise amend its decision.

CCS again appealed to the superior court. The court affirmed the decision of the board and subsequently denied CCS's motion to amend its decision and enter judgment in CCS's favor. CCS now appeals to this Court.

CCS's argument to this Court proceeds as follows: the finding of the board that the fall was an exterior fall was erroneous. The finding of an exterior fall was the basis for the board's application of 29 C.F.R. 1926.105(a),[(1)] thus the application of this regulation was likewise erroneous. The board's erroneous application of that regulation formed the basis for its finding that CCS also violated 29 C.F.R. 1926.21(b)(1) and (2), thus those findings of violation were also erroneous. In CCS's own words, "VOSHA's entire case rises and falls on evidence of a building perimeter fall." We do not agree, however, that the violations all rise and fall on the location where CCS's employee landed following his fall.

Rather, the applicability of 1926.105(a) in this case is based on the fact that the structure at issue is a one-story structure and was not a multi-tier structure; the characterization of the fall in this case is not material.

Vermont has adopted the federal standards set forth under the Occupational Safety and Health Act (OSHA) as the standards applicable to the health and safety of employees in-state. 21 V.S.A. 201(c); see also Green Mountain Power Corp. v. Comm'r of Labor & Indus., 136 Vt. 15, 23-24, 383 A.2d 1046, 1051 (1978) (describing the interplay between the state and federal oversight of occupational health and safety matters). Notably, OSHA, being remedial and preventative in nature, is construed liberally in favor of the workers it was designed to protect. Bristol Steel & Iron Works, Inc. v. Occup'l Safety & Health Review Comm'n, 601 F.2d 717, 721 (4th Cir. 1979); see also Daniel Int'l Corp. v. Donovan, 705 F.2d 382, 385 (10th Cir. 1983) (where provisions of OSHA can be read two ways, interpretation that better achieves goal of ensuring safe workplaces should control). The Secretary of Labor's interpretation of OSHA regulations, if reasonable and consistent, is authoritative and entitled to deference, even when it conflicts with the interpretation given by the Occupational Safety and Health Review Commission. Martin v. Occup'l Safety & Health Review Comm'n, 499 U.S. 144, 152-53 (1991).

At the time of the citations for the violations, the relevant regulations provided in part:[(2)]

Safety nets. (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

29 C.F.R. 1926.105(a).

(b) Temporary flooring - skeleton steel construction in tiered buildings.

. . .

(2)(i) Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed . . . .

29 C.F.R. 1926.750(b)(2)(i). There is an explicit preemption provision that reads as follows:

(c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable . . . .

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies . . . .

29 C.F.R. 1910.5(c).

CCS argues that it is bound by the 30-foot rule set forth in 1926.750(b)(2)(i) and not the 25-foot rule set forth in 1926.105(a). Specifically, CCS argues that 29 C.F.R. 1926.750 preempts 1926.105(a) with regard to safety precautions to be taken to guard against any and all interior falls in the steel erection industry and, because the record evidence indicates that the fall giving rise to the citation in this case was an interior fall (contrary to the board's finding of fact), it cannot be cited for a violation of 1926.105(a).

Notably, "general safety standards are not preempted for an entire industry simply because some specific standards for that industry have been promulgated." Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807 (3d Cir. 1985) (internal quotation marks and citation omitted; emphasis in original). Several courts have noted under the preemption clause above that the regulations governing steel erection in 1926.750 (also known as subpart R) do not completely displace the general standards governing the construction industry. See L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 669-70 (D.C. Cir. 1982) (noting "[s]ubpart R does not provide the exclusive source of standards for the steel erection industry," and holding that 1926.750 does not preclude the application of 1926.28(a) and 1926.105(a)); see

also Adams Steel Erection, Inc., 766 F.2d at 807-08 (noting no general preemption and proceeding to analyze whether regulations specifically preempted by 1926.750); L.R. Willson & Sons, Inc. v. Occup'l Safety & Health Review Comm'n, 698 F.2d 507, 511-12 (D.C. Cir. 1983) (holding 1926.750 does not set forth the only measures in the steel erection industry required to guard against the hazard of falling); Bristol Steel & Iron Works, 601 F.2d at 720-22 (general standards complement specific standards found in 1926.750, thus no general preemption). Thus, 1926.750 does not preempt 1926.105 wholesale. CCS concedes as much at least with respect to exterior falls. See also Adams Steel Erection, Inc., 766 F.2d at 808-10 (holding with respect to multi-floor, multi-tier project that 1926.105(a) is not preempted by 1926.750(b) with respect to exterior fall hazards); accord L.R. Willson & Sons, 685 F.2d at 670-73.

The question remains, however, whether 1926.750 preempts 1926.105 at all with respect to single-story, single-tier structures such as the one in this case.[(3)] The overwhelming weight of authority indicates that 1926.750 applies only to multi-story and multi-tier structures.[(4)] In fact, for a time, the prevailing view was that 1926.750 applied only to multi-story buildings, without regard to whether the building was multi-tiered. See, e.g., Sec'y of Labor v. Daniel Constr. Co., 1976-77 O.S.H.D. (CCH) 21,521 (1977) (Daniel I); Sec'y of Labor v. Havens Steel Co., 1975-1976 O.S.H.D. (CCH) 20,467 (1976). That rule was refined, however, such that 1926.750 may also apply to a single-story structure if it is demonstrated that it is nevertheless multi-tiered. See Sec'y of Labor v. T.C. Erectors, Inc., 2001 WL 1631748 (O.S.H.R.C.) (2001); Sec'y of Labor v. Daniel Constr. Co., 1981 O.S.H.D. (CCH) 25, 385 (1981) (Daniel II), aff'd Daniel Int'l Corp. v. Donvoan, 705 F.2d at 386; see also Memorandum re: Fall Protection in Steel Erection, Deputy Assistant Sec'y, 1995-1996 Employment Safety & Health Guide - New Developments (CCH), 12,431 (July 10, 1995) (noting that both interior and exterior fall hazards in non-tiered buildings are governed by 1926.105(a), while 1926.750(b)(2)(i) governs interior fall hazards in tiered buildings having floors or adaptable to temporary floors). But see Daniel II, 1981 O.S.H.D. (CCH) 25,385 (1981) (Barnako, dissenting) (adhering to view that 1926.750 applies only to multi-floored structures).

Because the auditorium was neither a multi-tiered nor multi-story structure, 1926.750 had no applicability to the fall hazard at issue in this case, and CCS's preemption argument fails. The location of the employee's landing is beside the point. Accordingly, we conclude that CCS was properly cited under 1926.105(a). Cf. T.C. Erectors, 2001 WL 1631748, at *5 (noting that in non-tiered, single-story structures both exterior and interior falls of 25 feet or more are governed by 1926.105(a)); see also Directive No. 00-03 (CPL 2-1) re: Steel Erection, Assistant Sec'y (Feb. 11, 2000) (noting with regard to non-tiered buildings that "[e]xterior and interior fall hazards of 25 feet or more are covered by 1926.105(a)"). Thus, the finding of violation should be affirmed.

Because CCS's challenges to the other two findings of violation stem from its assertion that 1926.105(a) was not applicable to the fall at issue in this case, thus no fall protection was required to guard against it, we find the remaining challenges to be without merit.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

Publish

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Do Not Publish James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Retired)

Specially Assigned

1. CCS does not contest the fact that it was not providing any exterior fall protection whatsoever, which it concedes is required by 29 C.F.R. 1926.105(a), under which it was cited. Injury to an employee is not necessary in order to find a violation. Green Mtn. Power Corp. v. Comm'r Labor & Indus., 136 Vt. 15, 23-24, 383 A.2d 1046, 1051 (1978). The Commissioner relied, however, on the fall in this case when determining the seriousness of the violation for purposes of establishing a fine. Thus, we will assume in our analysis of CCS's arguments that the employee's fall was partially determinative of the finding of the nature of the violation in this case.

2. The regulations governing steel erection were generally amended on January 18, 2001, with the amendments taking effect on January 18, 2002. Safety Standards for Steel Erection; Final Rule, 60 Fed. Reg. 5196, 5196-5280 (Jan. 18, 2001) (codified at 29 C.F.R. pt. 1926).

3. Implicit in the hearing officer's rejection of CCS's argument that 1926.750 applied to the fall giving rise to the citation in this case based on the conclusion that it applies only to multi-tier structures is a finding that this building was not a multi-tier structure. In its brief to this Court, CCS has not pointed to any evidence to the contrary, nor has it argued at any previous stage of the proceedings that this is a multi-tier structure despite having only one floor. Nevertheless, at oral argument before this Court, CCS for the first time represented that this was a multi-tier structure. It relied, however, on the very same exhibit that the State used as evidence that the structure was single-tiered. Rather than trying to resolve the question based on the oral argument, we conclude that CCS's contention came too late, and we uphold the hearing officer's finding as not erroneous based on the evidence and argument before him.

4. CCS cites one isolated case that conforms to its interpretation of the preemptive scope of 1926.705. See Builders Steel Co. v. Marshall, 622 F.2d 367, 369-70 (8th Cir. 1980) (appearing to hold, with little analysis, that 1926.750 applies to both single-story and single-tier structures). But, as the State notes, this decision appears to be simply wrong in light of the above-cited authorities and the development of the law subsequent to that decision.