



Are You a Reasonably Prudent Employer? Court Lowers "Burden" of Proof for OSHA Citations

By: Mark A. Lies, II*
and
Meagan Newman

Shortly before the new year the U.S. Court of Appeals for the 10th Circuit rendered an opinion that not only altered the agency's burden of proof for OSHA citations but effectively reduced that burden to little more than a semantic impediment. In *Compass Environmental, Inc. v. Occupational Safety and Health Commission; Department of Labor*, No. 10-9541 (Dec. 19, 2011), the Court declared that OSHA, or the Secretary of Labor (the "Secretary") need not establish the elements of the long established four-part *Atlantic Battery* test to prove a violation but instead must only prove that a "reasonably prudent employer" would have anticipated the hazard at issue and done more to prevent it. Further, the Court found this burden met where the Secretary had simply asserted that the employer at issue failed to act as a reasonably

* Mark A. Lies II is a labor and employment law attorney and Partner with Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, Illinois 60603, (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health law and related personal injury and employment law litigation. Meagan Newman is a Senior Associate with Seyfarth Shaw LLP, specializing in occupational safety and health and environmental law. Ms. Newman can be reached at (312) 460-5968 or mnewman@seyfarth.com.

prudent employer without offering any evidence regarding whether a reasonably prudent employer in the same industry would have even recognized the hazard and, if so, what protective measures, if any, would have been taken. In effect, the employer's liability is viewed in a vacuum with no reference to some recognized norms of safety recognition in the employer's industry. According to the Court, the Secretary only need to allege and prove that the specific employer's actions were "imprudent" and the violation will stand. This decision not only represents a dramatic change with respect to the proof necessary to sustain an OSHA violation, it also challenges traditional notions of due process and fairness in giving an employer notice of what conduct is permissible or prohibited so that it can act accordingly to be compliant.

The Atlantic Battery Test

In *Secretary v. Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (1994), and several other cases that followed, the Occupational Safety and Health Review Commission set forth a four part test for establishing violations of OSHA standards. Under this test, to establish a violation of an occupational safety or health standard, the Secretary must prove "(a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions)." *Id.*

In *Compass Environmental*, rather than applying the *Atlantic Battery* test, the Review Commission applied a training-specific test and focused on the issue of whether

a “reasonably prudent employer” would have anticipated the exposure at issue and provided the exposed employee with training on this hazard. The 10th Circuit affirmed the Commission’s decision, stating that the *Atlantic Battery* test was inapt and that the Secretary need only establish that a reasonably prudent employer would have taken more action. While this is not the first time the Commission has applied this reasonably prudent employer test for a training violation, it appears that it is the first time a reviewing federal Court of Appeals has sanctioned its application in the absence of proof that the *Atlantic Battery* test factors have been established. See *Capform, Inc.*, 19 BNA OSHC 1364 (No. 99-0322, 2001); *Baker Tank Co.*, 17 BNA OSHC 1177 (No. 90-1786, 1995).

While the 10th Circuit’s decision is significant for this change in the burden of proof, it is also significant in that the Court found that the Secretary met her burden without actually introducing *any* evidence of what a reasonably prudent employer in the employer’s industry would have done in the same or similar circumstances as those encountered by Compass Environmental.

Bad Facts Make Bad Law in *Compass Environmental*

In 2006 Compass Environmental began construction on an underground slurry wall at a surface mine in Colorado. A two person excavator crew, consisting of the excavator operator and a trench hand, were tasked with digging a trench for the slurry wall. The trench hand was required to walk alongside the excavator and periodically grease the excavator with a grease line, a rubber and metal hose with a dispensing

nozzle, that was attached to the excavator. He also checked the trench depth and watched for problems that the operator could not see.

During the first week of the project the company conducted a hazard assessment, prepared a Job Safety Analyses and provided training to employees regarding possible hazards. The trench hand was a new employee who had only joined the team a week into the project. The Job Safety Analysis for the excavation stated that the operator and trench hand were to maintain a 20 feet clearance between the excavator and overhead power lines. Because the trench hand joined the project after the initial training, he was given individual training, however, the record did not show that he received any instructions regarding the overhead power line. On March 18, 2006 the excavator operator--who had clearly been trained to maintain a safe distance from the power lines--moved the excavator close enough to the power line for an electric current to pass from the line through to the trench hand standing by, resulting in the trench hand's death.

OSHA investigated the incident and issued a two-item Serious citation for failing to adequately train the *operator* and *trench hand* and for failing to maintain proper clearance of the power line. While the citations were first vacated as to both the operator and trench hand after a hearing before an Administrative Law Judge, OSHA only appealed the vacation of the citation that related to the training of the trench hand. The Review Commission reversed the Judge's decision as to the trench hand's training and affirmed that citation.

While there is no doubt that the events of that 2006 day were tragic, there is also no doubt that the employer conducted a hazard assessment, identified the possible hazard posed by overhead power lines and trained employees with respect to his hazard. While the trench hand may not have received this training, the excavator operator whose actions led directly to this accident did receive that training (OSHA did not appeal the vacation of the training citation as to the operator). Even though the operator was fully trained and he caused the excavator to contact the electrical line, OSHA maintained there was still a training violation as to the trench hand who was never expected to perform work in proximity to the elevated electrical line since he worked at ground level. It is on this point that the Court's abandonment of the *Atlantic Battery* test and application of the "reasonably prudent employer" test leads to fundamental unfairness. Because the Secretary was not put to her burden to show that the cited training standard applied to trench hand, as he did not operate the excavator, or that he had "access" to the hazard as would have been required under *Atlantic Battery* (since he worked at ground level and did not control the excavator), the employer's ability to defend itself was materially impaired. Moreover, even though the Secretary conceded that she *had* the burden of at least showing that a "reasonably prudent employer in the industry" would have anticipated the sort of electrical hazard that the trench hand encountered in this case and provided the trench hand with more training, the Secretary failed to introduce any evidence to satisfy this burden with any evidence from any witnesses. To the contrary, the proof offered in this case indisputably showed that the excavator operator defied his training and years of

experience. While it may be a natural instinct to hold someone responsible when there is a fatality, the mere occurrence of a fatality does not establish a violation since it is critical to evaluate the employer's conduct up to the time of the accident, using established and recognized legal criteria, to determine if there was any violation. In affirming the Review Commission's decision in *Compass Environmental*, the Court has negatively impacted employers' legal defenses to citations.

Recommendations

Employers can protect themselves by establishing an effective safety program that:

- requires that a thorough hazard assessment for each worksite is performed
- includes programs and procedures addressing the possible hazards of the workplace and ensures that training is provided to all employees that may encounter those hazards
- communicates the importance of safety to employees and supervisors both in writing and in action;
- ensures that employees and supervisors are properly trained (including addressing potential language barriers or literacy issues involving employees), have the necessary equipment and properly use it;
- incorporates regular site inspections and work observations and corrects noted deficiencies in a timely manner;
- training and personal protective equipment requirements are altered wherever site inspections and assessments identify new possible hazards;
- contains an effective and progressive disciplinary system that is routinely and consistently followed; and
- document these elements.