IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PELICAN, LLC,
Appellant,
vs.
CHIEF ADMINSTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,
Respondent.

No. 79241-COA

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in an occupational health and safety matter. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

In 2017, the Nevada Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry (NOSHA), issued two citations to Pelican, LLC, for workplace safety violations.[1] The violations stemmed from safety hazards a NOSHA employee perceived while inspecting an apartment complex that Pelican was constructing. NOSHA cited Pelican for "serious" violations of 29 C.F.R. § 1926.404(b)(1)(i), for failing to use ground fault circuit interrupters (GFCI) on active power outlets, and 29 C.F.R. § 1926.405(a)(2)(ii)(I), for failing to protect flexible cords from damage. The penalty was a $3,000 fine. Pelican contested the penalty before the Nevada Occupational Safety and Health Review Board (Board), which affirmed the

[1]We do not recount the facts except as necessary to our disposition.

citations and concluded that NOSHA had sufficiently established a prima facie case against Pelican for the safety violations. Pelican petitioned for judicial review in the district court, which affirmed the Board's decision and effectively denied Pelican's petition for judicial review.

On appeal, Pelican raises the sole issue of whether substantial evidence supports the Board's finding that Pelican had actual or constructive knowledge of the violations.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We review the agency's decision for clear error or an arbitrary and capricious abuse of discretion and will overturn the agency's factual findings only if they are not supported by substantial evidence. *Id.* Substantial evidence is "evidence which a reasonable mind might accept as adequate to support a conclusion." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013). We review questions of law de novo. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

Pelican argues that it lacked actual knowledge because it only knew of the existence of the violative conditions, but not that it violated any laws or NOSHA regulations. Pelican further argues that it did not have constructive knowledge because it: (1) lacked the technical expertise to recognize the violations; (2) the violations were not obvious; and (3) under *Original Roofing Co. v. Chief Administrative Officer of OSHA*, 135 Nev. 140, 442 P.3d 146 (2019), it cannot be held liable for its subcontractor's safety violations when it included safety compliance in its subcontractor contracts.

When NOSHA cites an employer for a workplace safety violation, it must establish: "(1) the applicability of the OSHA regulation;

(2) noncompliance with the OSHA regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual or constructive knowledge of the violative conduct." *Original Roofing Co.*, 135 Nev. at 143, 442 P.3d at 149. Actual or constructive knowledge can by proven by showing "that the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Id.* (quoting *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 86-692, 1992)). Reasonable diligence includes conduct such as: foreseeing "potential hazardous conditions," implementing "measures to prevent those conditions," and routinely examining worksite conditions. *Id.* NRS 618.625(3) defines a "serious" violation to occur when there is "a substantial probability that death or serious physical harm could result from a condition which exists . . . unless the employer did not and could not, with the exercise of reasonable diligence, *know of the presence of the violation.*" (Emphasis added.)

Here, Pelican conflates the two standards governing serious and willful violations. It argues that it cannot be found liable for having "actual knowledge" of a violation if it did not know that the condition violated any regulation. But that is the standard required to prove a "willful" violation required by certain other regulations not at issue here. *See Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 589, 137 P.3d 1155, 1159 (2006) (emphasis added) (quoting 61 Am. Jur. 2d *Plant and Job Safety* § 73 (2002)). To prove "actual knowledge" for a serious violation in accordance with 29 C.F.R. § 1926.404(b)(1)(i) and 29 C.F.R. § 1926.405(a)(2)(ii)(I), NOSHA need only establish that Pelican knew of the existence of the condition itself, not necessarily that the condition violated any regulation. Alternatively, to

prove "constructive knowledge" for a serious violation, NOSHA need only establish that Pelican should have known of the condition itself, and again not necessarily that the condition violated any regulation. *See* NRS 618.625(3) (requiring knowledge of the "presence of the violation"); *see also Original Roofing Co.*, 135 Nev. at 143, 442 P.3d at 149 (requiring knowledge of the "presence of the violative condition"). The Nevada statute parallels the federal standard. *See, e.g., Brennan v. OSHRC*, 511 F.2d 1139, 1143 (9th Cir. 1975) ("[T]o prove the very existence of a serious violation, the Secretary must prove that the employer had knowledge of the condition alleged to be a violation."); *Sec'y of Labor v. Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not . . . be shown that the employer understood or acknowledged that the physical conditions were actually hazardous."), *aff'd sub nom. Phoenix Roofing, Inc. v. OSHRC*, 79 F.3d 1146 (5th Cir. 1996) (unpublished); *see also Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) (concluding that the relevant inquiry in proving a serious violation is whether "an employer knew or should have known of a hazardous condition").

Thus, because Pelican admitted to knowing of the violative conditions, we conclude that substantial evidence showed Pelican had actual knowledge as required under the statute to impose the two serious violation citations. Furthermore, even if Pelican lacked actual knowledge of the conditions, substantial evidence also demonstrates that Pelican had constructive knowledge of the violations. While Pelican may have attempted to exercise reasonable diligence by routinely examining the worksite conditions, it ignored potentially hazardous conditions and failed

to implement measures to prevent those conditions. Pelican's managing member expressly denied use of a generator and ordered the subcontractors to use the non-GFCI outlet. Although the subcontractor never stated that it wanted the generator specifically in order to avoid a NOSHA violation, the request alone was enough to make it foreseeable that its nonuse may pose a hazard. Pelican also approved its subcontractor to run power cords across a paved road. Even if Pelican initially did not foresee a hazard, the length of time that the cords were on the road (one month) and the several tire marks indented in them later made it foreseeable that there was potential for a hazardous condition. Further, both of these conditions were obvious and in plain view for one month. *See Brennan v. OSHRC*, 511 F.2d at 1141-45; *see also Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985) (finding the employer's actual knowledge was not relevant where the violative conditions "were readily apparent to anyone who looked").

Pelican is correct that, in some instances, an employer who exercises reasonable diligence by implementing safety policies can avoid liability even where a supervisor violates those policies in a way that might otherwise constitute a NOSHA regulation. *Original Roofing*, 135 Nev. at 144, 442 P.3d at 150 (holding that an employer's extensive safety efforts to prevent specific violative conduct rendered the subsequent violation unforeseeable). But here, Pelican did not have a safety practice explicitly forbidding the violative conduct and Pelican's managing member, Ben Farahi, actually instructed its subcontractors to engage in the actions which created the violations. Thus, even if Pelican and the subcontractors had generally agreed to abide by NOSHA guidelines in the construction contract, this alone would not protect Pelican from being issued the

citations. *See Frohlick Crane Serv., Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975) (concluding that any private agreements between parties cannot circumvent an OSHA statute).

Moreover, the record demonstrates that Pelican is an experienced, licensed contractor and as such was required to demonstrate before a professional board "such general knowledge of the building, safety, health[,] and lien laws of the State of Nevada and the administrative principles of the contracting business as the Board deems necessary for the safety and protection of the public." NRS 624.260(1). The record also demonstrates that the hazardous conditions at issue were not uncommon or highly technical. Pelican's managing agent specifically testified that he was familiar with GFCI versus non-GFCI outlets, he knew that generators were commonly used on construction sites for power, and the subcontractor had requested a generator for power purposes. Thus, we conclude that the Board's decision, finding that Pelican "knew, or with the exercise of reasonable diligence could have known, of the violative conditions" was supported by substantial evidence.

Based on the foregoing, we affirm the district court's order denying judicial review of the Board's decision.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Kaempfer Crowell/Reno
Dept. of Business and Industry/Div. of Industrial Relations/Las Vegas
Dept. of Business and Industry/Div. of Industrial Relations/Carson City
Washoe District Court Clerk