United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1290 **September Term, 2018**

FILED ON: JUNE 4, 2019

CENTURY COMMUNITIES, INC., D/B/A CENTURY COMMUNITIES OF GEORGIA, LLC,
PETITIONER

v.

SECRETARY OF LABOR AND UNITED STATES DEPARTMENT OF LABOR,
RESPONDENTS

On Petition for Review of a Final Order of the
Occupational Safety & Health Review Commission

Before: GRIFFITH, KATSAS, and RAO, *Circuit Judges*.

JUDGMENT

This appeal from an order of the Occupational Safety and Health Review Commission was presented to the court and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

ORDERED and **ADJUDGED** that the petition for review be denied.

This case arises from a tragic electric shock accident. In 2016, on a residential construction site in Alpharetta, Georgia, supervised by Century Communities, Inc., a subcontractor employee operated a crane within twenty feet of live overhead power lines, resulting in an electrical arc flash that seriously injured two subcontractor employees on the ground, one of whom later died from his injuries. The Occupational Safety and Health Administration (OSHA) conducted a fatality investigation and issued a citation to Century for a serious violation of 29 C.F.R. § 1926.1408(a)(2). This regulation requires employers, "[b]efore beginning equipment operations," to "[d]etermine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line." *Id*. If so, the employer must implement one of the

safety measures specified in the regulation. *Id*. On July 16, 2018, a Commission Administrative Law Judge (ALJ) affirmed the citation and assessed a penalty of $12,675, concluding that Century had actual or constructive knowledge of the violation and that while none of Century's employees were exposed to the violation, OSHA's Multi-Employer Worksite Policy provided for Century's liability. After the Commission declined to exercise its discretion to review the matter, the ALJ's decision became the final decision of the Commission. 29 U.S.C. § 661(j). On October 19, 2018, Century petitioned this court for review.

Under the Occupational Health and Safety Act, a reviewing court must uphold an ALJ's factual findings if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a). "[U]nless they are patently unsupportable," this court will "accept the ALJ's permissible credibility findings." *Fabi Const. Co. v. Sec'y of Labor*, 370 F.3d 29, 39–40 (D.C. Cir. 2004). The same legal standards apply "with undiminished force where . . . the Commission . . . adopts an ALJ's findings of fact." *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 115 F.3d 100, 108 (1st Cir. 1997); *see also Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). In order to establish a violation of the OSHA standards, "the Secretary of Labor has the burden of proving: (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." *AJP Const., Inc. v. Sec'y of Labor*, 357 F.3d 70, 71 (D.C. Cir. 2004) (citations and quotation marks omitted).

Century concedes that the standards in 29 C.F.R. § 1926.1408(a)(2) applied to its construction site and that the operation of the crane violated those standards. On appeal, Century disputes the ALJ's conclusions that Century had actual or constructive knowledge of the violative condition and that the Secretary could impose liability on Century under OSHA's Multi-Employer Worksite Policy. Although the parties stipulated that Century had general supervisory authority over the worksite, Century argues it could not be cited as a controlling employer because the company had established reasonable precautionary policies and procedures, such as frequent inspections of house construction sites by its construction managers, and that it had reasonably relied on the expertise of its subcontractor crane operator to avoid the power line hazard.

Substantial evidence supports the ALJ's finding that at least one of Century's managers had actual knowledge of the violation. The ALJ found that testimony by both the crane operator and the subcontractor who survived the accident established it was more likely than not a Century manager had stopped by the worksite on the morning of the incident and had seen the crane was positioned such that it could be operated within twenty feet of the power lines. The ALJ found contrary testimony from a Century manager to be unreliable and untrustworthy due to multiple impeachments and contradictions and ultimately afforded no weight to that testimony. A supervisor's knowledge of a violative condition is properly imputed to the employer. *A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1347 (D.C. Cir. 2002). Thus, substantial evidence showed that Century had actual knowledge of the violative condition.

The ALJ did not abuse its discretion when it held that Century could be cited as a controlling employer who owed the subcontractor employees a duty of care under the Multi-

Employer Worksite Policy. This OSHA policy allows the Secretary to cite an employer for a violation even if its employees were not exposed to the hazardous condition created by the violation. *See OSHA's Multi-Employer Citation Policy,* OSHA Instruction CPL 02-00-124 (Dec. 10, 1999) ¶ X.A.1–2. As the ALJ noted, whether the Secretary has statutory authority to cite an employer under such circumstances has been questioned, including by this court. *See, e.g.*, *IBP, Inc. v. Herman*, 144 F.3d 861, 865–66 & n.3 (D.C. Cir. 1998). But this statutory question was not raised or briefed here.

Finding that Century had actual knowledge of the violative condition, the ALJ correctly concluded that Century's general safety policies and procedures could not defeat liability under Commission precedent: Century had actual knowledge of the specific hazard and the authority to abate it but did nothing to correct it. OSHA Instruction CPL 02-00-124, ¶ X.E.1–4; *see Fabi Const. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1083 (D.C. Cir. 2007); *Sec'y of Labor v. Peter Miller, Inc.*, No. 99-0947, 2000 WL 675527, at *2 (CMPAU May 22, 2000). The ALJ also found that Century's written safety manual provided a legally incorrect standard for the operation of cranes near overhead power lines under 29 C.F.R. § 1926.1408(a)(2). Century's precautions were inadequate to ensure compliance with the regulations governing crane operations. The subcontractor employees' access to the violative condition thus gave rise to Century's liability in this case.

Because the Commission decision under review comports with our law, we deny the petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk