



MOB MENTALITY AS A "RECOGNIZED HAZARD": OSHA CITATION UPHELD FOR EMPLOYEE TRAMPLING DEATH

By Mark A. Lies II*
& Elizabeth Leifel Ash**

INTRODUCTION

During a "Black Friday" sale at a Valley Stream, NY, Wal-Mart store, an employee was killed when a crushing mob of shoppers stormed the store. As the crowd surged into the store, the vestibule doors were torn from their hinges. An employee was later found crushed underneath the fallen vestibule door. Upon learning of the employee's tragic death, OSHA inspected the store and issued a citation to Wal-Mart under the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, together with a proposed penalty of \$7,000.

On March 25, 2011, an Administrative Law Judge (ALJ) upheld the citation after a lengthy trial. The ALJ found that, although the hazard of unruly crowds is not a "recognized hazard" in the retail industry, in general, Wal-Mart had *actual* knowledge

* Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment law and civil litigation.

** Elizabeth Leifel Ash is an associate with Seyfarth Shaw, (312) 460-5845, eash@seyfarth.com. Her practice focuses on regulatory compliance and litigation, including occupational safety and health and environmental matters.

that uncontrolled crowds presented a hazard to employees at the Valley Stream store due to the store's previous experiences. This article address the legal basis for the ALJ's decision and recommends preventive measures for employers who operate concert venues, hotels, retail stores, and other places where crowds may be present.

THE GENERAL DUTY CLAUSE

Section 5(a)(1) of the Occupational Safety and Health Act, also referred to as the General Duty Clause, requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." The General Duty Clause essentially operates as a catchall provision designed to require employers to identify and correct hazardous conditions, even when those conditions are not specifically prohibited by an existing OSHA regulation.

In order to sustain a citation under the General Duty Clause, OSHA is required to prove the following: 1) a condition or activity in the workplace presents a hazard to employees; 2) the hazard or activity is recognized as a hazard; 3) the hazard is likely to cause death or serious physical harm to employees; and 4) a feasible means exists to eliminate or materially reduce the hazard. *See, e.g., Wiley Organics, Inc. v. OSHRC*, 124 F.3d 201 (6th Cir. 1997). The key to the General Duty Clause is the term "recognized." Employers are not required to provide a workplace that is free from *all* hazards, but rather to provide a workplace that is free from *recognized* hazards.

In determining whether a particular hazard was "recognized," the courts and the Review Commission look at whether the employer's industry as a whole recognizes the

hazard described in the citation, or whether the employer had actual knowledge of the hazard. *See, e.g., St. Joe Materials Corp. v. OSHRC*, 647 F.2d 840 (8th Cir. 1981). This actual knowledge can be shown by the occurrence of previous accidents, employee complaints, an employer's voluntary safety efforts, or the obvious and apparent nature of the hazard.

WAL-MART'S ACTUAL KNOWLEDGE

In the Wal-Mart case, OSHA conceded that the hazard of asphyxiation or being struck due to crowd crush, crowd surge, or crowd trampling was not recognized by the retail industry as a whole. However, OSHA argued, and the ALJ found, that the Valley Stream store had experienced previous incidents during "Black Friday" or "blitz day" sales that put Wal-Mart on notice that crowds presented a hazard to employees at that particular store. Specifically, the ALJ found that the Valley Stream store had attracted massive numbers of shoppers since it began advertising the blitz events in 2004. During these sales in 2005, 2006, and 2007, crowds surging into the store had damaged the vestibule doors, shattered glass, and caused minor injuries to customers and employees. The ALJ also found that prior to the 2008 event that was the subject of the citation, the store manager had warned employees to stand to the side of the doors when the crowds entered the store. The store manager had also instructed employees to assist customers who fell in the store vestibule as people entered the store. The ALJ found that these instructions placed employees squarely within the "zone of danger."

The ALJ also found that a feasible means existed for the Valley Stream store to control or eliminate the hazard of crowd crushing. She found that Wal-Mart itself had implemented procedures for subsequent blitz events in 2009 that included ticketing or tags for popular items, individual lines of customers depending on the item being purchased, and barricading the entrance to prevent a surge of customers from entering all at once. The ALJ found that by implementing these measures at stores nationwide, Wal-Mart itself had demonstrated that controlling crowds was feasible.

EMPLOYER RECOGNITION OF HAZARD TRIGGERING GENERAL DUTY CLAUSE

This case is also very instructive as to those employers who may have no involvement with crowds since it focuses on the employer's "recognition" of a hazard at its workplace, rather than in the employer's industry, through events that occurred at that workplace. It reaffirms the idea that an employer cannot ignore accidents or "near misses" at its workplace because, at some time, these accidents or near misses can trigger liability under the General Duty Clause where OSHA has no regulation to address the hazard that gave rise to the accident or near miss event.

CONCLUSION AND RECOMMENDATIONS

Importantly, the ALJ in the Wal-Mart case did not look beyond the Valley Stream store itself to find that Wal-Mart had actual knowledge of the hazard. The ALJ determined that Wal-Mart's corporate office had delegated authority to manage blitz sales to the individual stores. The question of whether previous events at one store could be used as "actual knowledge" of a crowd hazard at locations across the country remains unanswered by this particular case. It is therefore recommended that

employers with facilities that draw large crowds be aware of any incidents or employee complaints about crowd management and take measures to prevent employee injuries due to crowd behavior.

Specifically, it is recommended that employers who expect to be involved with crowds, especially those in the retail, hospitality, and event staging industries, consider the following:

- Develop a site-specific plan for managing large crowds, including hiring professional security personnel, scheduling extra employees, and controlling entry to the venue;
- Train employees to implement crowd control measures and to avoid placing themselves in the “zone of danger;”
- Enforce crowd management procedures and policies through disciplining employees who do not follow required procedures;
- Track incidents involving injuries to customers or employees related to crowd behavior. Use those incidents to implement changes to crowd control procedures as appropriate.