

01-1076

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, DC 20210

Richard J. Fiore, Regional Solicitor
Helen Schuitmaker, Esq.
Office of the Solicitor, U.S. DOL
230 South Dearborn Street, Room 844
Chicago, IL 60604

Gregory J. Iverson
Associated Construction of Wisconsin, LLC
820 E. Holum Street
De Forest, WI 53532

Benjamin R. Loye
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

ASSOCIATED CONSTRUCTION,

Respondent.

OSHRC DOCKET NO. 01-1076

APPEARANCES:

For the Complainant:

Helen J. Schuitmaker, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Ray Iverson, *pro se*, Associated Construction Co., DeForest, Wisconsin

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Associated Construction Co. (Associated), at all times relevant to this action maintained a place of business at 715 Fell Street, Madison, Wisconsin, where it was engaged in construction. Because construction is an activity which as a whole affects interstate commerce, *see, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983), Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 15, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Associated's Fell Street work site. As a result of that inspection, Associated was issued a citation alleging violation of §1926.501(b)(1) of the Act together with a proposed penalty. By filing a timely notice of contest Associated brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 2, 2001, an E-Z hearing was held in Madison, Wisconsin. No briefs are required in E-Z proceedings, and this matter is ready for disposition.

Alleged Violations

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface)

with an unprotected side or edge which was 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

Employees erecting exterior walls did not have fall protection in place to prevent them from falling to the exterior of the building.

The cited standard provides:

(b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Facts

OSHA Compliance Officer (CO) Chad Greenwood testified that on May 15, 2001 he observed two Associated employees, including the foreman, Michael McFadden, working on the top floor of a four story multi-use building at 715 Fell Street, in Madison, Wisconsin (Tr. 9-10). Greenwood testified that the two employees spent approximately 15 to 20 minutes tipping prefabricated walls into place and fastening them to the deck (Tr. 12). The employees worked within a few inches of the outside edge of the building; CO Greenwood testified that he could see McFadden's toes from his position on the ground (Tr. 12, 16-17). Although stanchions and wire rope guardrails was in place around the edge of the top floor in other areas, there was no fall protection in the area where Associated's employees were working (Tr. 12).

Michael McFadden admitted that he and another Associated employee were working near the unguarded edge of third floor of the Fell Street building for approximately 10 to 15 minutes (Tr. 49). The two were erecting the prefabbed wooden walls of an octagonal "cabana" and fastening them to the concrete deck (Tr. 48). They had previously erected an identical cabana on the other end of the building, while the stanchions and safety cables, which had been installed by the general contractor, were still in place (Tr. 48, 58). According to McFadden, before Associated began to erect the second cabana, the general removed the angle iron that had been supporting the safety cable in that area (Tr. 48, 54).

Discussion

Associated does not dispute the facts as set forth above. Associated argues, however, that it should not have been cited because the cited work was "residential construction." Under §1926.501(b)(13), employers engaged in residential construction may "develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502" in lieu of using standard fall protection measures *if* the employer can demonstrate that it is infeasible or creates a greater hazard to use guardrails, safety nets, or personal fall protection.

OSHA directive STD 3-0.1A defines residential construction as construction of a structure, or distinct portion of a structure, which utilizes materials, methods and procedures that are essentially the same as those used in building a typical single family home, *i.e.* wood framing (not steel or concrete), wooden floor joists and roof, and which is assembled with traditional wood frame construction techniques.

The Fell Street building had a concrete foundation; the three upper floors were constructed of steel posts, beams, columns, and bar joists (Tr. 10, 29-30). The third level deck was concrete; Associated employees were attaching a wood frame cabana to that deck (Tr. 47-48). As a threshold matter, based on the evidence in the record, this judge cannot find that the wooden cabana is sufficiently distinct from the rest of the steel and concrete structure so as to be treated separately as residential construction.

Moreover, even assuming, *arguendo*, that the construction of the third floor cabanas on the Fell Street site *was* residential construction as defined by OSHA, this judge cannot find that Associated proved that traditional fall protection techniques, *i.e.*, guardrails, were infeasible on this site. Associated admits that it erected an identical cabana on the other side of the third floor while guardrails were in place. Under the described circumstances, Associated cannot argue that guardrails were infeasible.¹

Because traditional fall protection was feasible on the site, it was not necessary, or permissible for Associated to develop or utilize an alternative fall protection plan. In any event, it is clear from the evidence that Associated did *not* develop an alternative fall protection plan intended to comply with §1926.502(k). At minimum, subparagraph (k) requires the designation of a competent person to monitor the location of employees working in demarcated controlled access zones at the building's edge. Foreman McFadden admitted that there was no monitor on the Fell Street site. Associated had only two employees on the site; both of them were fully engaged in raising the prefabbed walls at the edge of the building.

The Secretary has made out its *prima facie* case. Associated has not made out a cognizable defense. The cited standard will be affirmed.

Penalty

A penalty of \$375.00 was proposed. CO Greenwood stated that the cited violation was serious, in

¹ Michael McFadden's opinion that the general contractor's guardrails would not have stopped a falling employee (Tr. 59) is irrelevant. Standard guardrails as described at §1926.502(b) are mandated by the standard. An employer may not use the adjudicatory process to challenge the wisdom of required safety measure. *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985). If Howe believed the general's guardrails were inadequate, and once it realized the general had removed required guardrails, Howe had a duty to make reasonable efforts to protect its employees from the resulting hazardous condition. *Lee Roy Westbrook Construction Company, Inc.*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989). The Commission has held that a subcontractor must, *at least*, notify the responsible contractor. *McLean-Behm Steel Erectors, Inc.*, 6 BNA OSHC 1712, 1978 OSHD ¶22,812 (1978).

that a 35 foot fall from the third floor could result in death or permanent disability (Tr. 13, 28). Greenwood took into account the low probability of an accident occurring; two employees were exposed to a one time hazard for approximately 15 minutes. In computing a proposed penalty, Greenwood figured in a 60% reduction based on Associated's small size. An additional 60% reduction was provided because of Associated's good safety record and safety program (Tr. 24).

Taking the relevant factors into account, the proposed penalty is deemed appropriate and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED, and the proposed penalty of \$375.00 will be ASSESSED.

/S/
Benjamin R. Loye
Judge, OSHRC

Dated: November 26, 2001