United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
KIRILA CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 95-1453

# NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 17, 1996. The decision of the Judge will become a final order of the Commission on August 16, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 6, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 17, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1453

NOTICE IS GIVEN TO THE FOLLOWING:

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>KIRILA CONTRACTORS, INC.,<br>Respondent. | OSHRC DOCKET NO. 95-1453 |

Appearances:

Theresa C. Timlin, Esq.
U.S. Department of Labor
Office of Solicitor, Region III
Philadelphia, Pa.
For Complainant

Ronald James Rice, Esq.
Donald Duda, Esq.
48 West Liberty Avenue
Hubbard, Ohio 44425
for Respondent

Before: Judge Covette Rooney

## *DECISION AND ORDER*

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Occupational Safety and Health Act of 1979, 29 U.S.C. §651, *et seq.*, ("the Act"). This case arises from a fatality inspection conducted by Compliance Safety and Health Officer ("CO") Beverly Braughler and CO Trainee Jim Walton of the Occupational Safety and Health Administration, Erie Office, on August 4-7, 1995, at 639 Keystone Road, Greenville, Pa. As a result of this inspection, Respondent, Kirila Contractors, Inc. ("Kirila") was issued a serious citation alleging a violation of 29 C.F.R. §1926.501 (b) (4) (ii).[1] The total proposed penalty was $3, 000.00. By timely notice of contest Kirila brought this proceeding before the Occupational Safety and Health Review Commission. The Complainant filed a Complaint with this Commission on September 20, 1995. Respondent in its Answer and in Motion for Summary Judgment filed

[1] The subject citation was originally issued as a violation of 29 C.F.R. §1926.500 (b) (1). For good cause shown, on April 1, 1996, this court granted the Secretary's Motion to Permit the Amendment of the Citation and Complaint to allege a violation of 29 C.F.R.§1926.501(b)(4)(ii).

January 18, 1996, has contended that it did not maintain a workplace at the subject worksite. On February 8, 1996, this court denied Respondent's Motion for Summary Judgment. A hearing was held on April 2, 1996 in Pittsburgh, Pennsylvania. The parties have submitted briefs and this matter is ready for disposition.

*Facts*

On August 4, 1995, CO Beverly Braughler and CO Trainee Jim Walton began an investigation of a fatality which had occurred on August 3, 1995, at an industrial park in Greenville, Pennsylvania. On their way to the accident site, they passed heavy equipment with the Kirila logo displayed upon it, and a Kirila Contractors' job trailer (Tr. 16 ; 23). Upon their arrival, they met with Mr. Chuck Foltz, who identified himself as the superintendent of the job for the general contractor, Pyramid Composites (Tr. 22). At the accident site, they observed a self-propelled elevator work platform toppled over on its side. It had fallen into an open trough (Exh. C-1 to C-4; Tr. 23). The victim was an employee of an electrical subcontractor, I.C. Electric, Inc. He had been operating the vertical lift in an upright position when one wheel of the lift fell into the open trough.

CO Braughler testified that there were open troughs throughout this portion of the building (Tr. 23). They measured two feet wide and the seventeen inches at the furthest point (Tr. 24). These floor openings would eventually provide ventilation and drainage for the machine shop which was being built. The troughs were placed in the floor before the concrete was poured. They were held in place with rebar and covered with plywood to prevent concrete from getting into the troughs during the pour. As a result of CO Braughler's conversation with Mr. Foltz and several employees on the site, she learned that Kirila Contractors had installed the troughs (Tr. 25, 30, 53). She understood that once the concrete was poured around the troughs, grating was installed to cover the openings (Tr. 25). The record reveals that as of August 3rd the concrete floor had been poured approximately one and one half weeks prior to the accident. The floor had hardened and cured, and the electricians had started their work on Monday, July 31, 1995 (Tr. 29, 123). On August 4th, CO Braughler observed one-foot grating stored by one of the entrances. However, the open trough where the lift had toppled was two feet in width and no barricades were present (Tr. 26, 29). On August 7th, CO Braughler observed Mr. Foltz direct John McCurdy and another employee (Kirila employees) install two- foot grating in the area where the accident had occurred (Tr. 34, 60, 125).

*Alleged violation of 29 C.F.R. §1926.501 (b) (1) (4) (ii)*

29 C.F.R. §1926.501 (B) (4) (ii) *Holes* provides:

Each employee on walking/working surfaces shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

Citation 1, Item 1 alleges:

a. 639 Keystone Road, Greenville, Pa.: electrical employee working from a Genie Vertical Lift, installing industrial lighting fixtures, was not protected from floor openings (troughs) in the concrete floor.

*Discussion*

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary 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 (i.e., the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.,* 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

CO Braughler recommended the issuance of the subject citation because employees on the worksite were exposed to a hazard of uncovered floor holes on walking and working surfaces - there were no barriers or covers on the open troughs. It was this condition which caused the lift to topple and result in the death of an employee of the subcontractor, I.C. Electric, Inc. The respondent does not dispute that the subject regulation is applicable. The instant work site was a construction workplace which required fall protection to the cited condition. The area where the accident occurred was a walking/working surface in which an uncovered hole existed. *See* 29 C.F.R. 1925.500(b) *Definitions.*

Respondent maintains that that it was not an employer in violation of the cited standard. Respondent alleges that it was not a subcontractor on the subject worksite, and thus, not an employer of any "employees" at the subject worksite. The record reveals that CO Braughler cited Respondent after talking to the carpenters who identified themselves as Kirila employees, and learning from them that they had installed the troughs (Tr. 30, 53, 60). These carpenters described the manner in which the troughs were installed (Tr. 30; 59). During the course of CO Braughler's investigation, she was also provided a copy of a subcontract between Pyramid and Kirila signed and dated April 3, 1995. She testified that during the course of her inspection she was never told or given any reason to believe that this contract was not in effect (Tr. 30 & 60).[2] Accordingly, CO Braughler believed that

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[2] CO Braughler testified that Mr. Foltz showed her a copy of this subcontract. (Tr.29-30, 60). However, Mr. Foltz during the course of his testimony, denied that he gave CO Braughler a copy of the subcontract. He acknowledged that he told her that another employee, Brett, was in charge of the records, and it was probably Brett who showed her the contract. Brett's office was adjacent to his office in the two-room the job trailer (Tr. 132). The undersigned finds that Mr. Foltz was knowledgeable of the fact that CO Braughler had seen a copy of this document during the time she was at the job trailer.

Kirila created the cited hazard - tripping or stepping into open holes as well as equipment falling into said holes (Tr.33, 61).

Review Commission precedent has established that "[t]he question of whether an employment relationship exists is answered by considering all the facts in light of the Act's purpose. . . . we must define employment relationships on a case by case basis, considering both the economic realities of the situation and the remedial purposes intended by Congress." *Gordon Construction Company*, 4 BNA OSHA 1581 (No. 7390, 1976). A key factor in determining whether a party is an employer under the Act is whether it has the right to control the work involved. *C. Abbonizio Contractors Inc.*, 16 BNA OSHA 2125, 2126 (No. 91-2929, 1994), citing *Vergona Crane Co.*, 15 BNA OSHA 1782, 1784 (No. 88-1745, 1992). The Commission has considered a number of factors when making such a determination, including the following:

1) Whom do the workers consider their employer?
2) Who pays the workers' wages?
3) Who has the responsibility to control the workers?
4) Does the alleged employer have the power to control the workers?
5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7) How are the workers' wages established?

*Loomis Cabinet Co.*, 15 BNA OSHA 1635, 1637 (No. 88-2012, 1992), *aff'd* 20 F. 3d 938, 16 BNA OSHA 1680 (9th Cir.1994), citing *Van Buren-Madawaska Corp.*, 13 BNA OSHA 2157, 2158, (No. 87-214, consolidated 1989)[ quoting *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHA 1702,1703 (No. 14801, 1978]. The Review Commission, in determining whether there is an employment relationship for purposes of the Act, places primary reliance upon who has control over the work environment such that abatement of work hazards can be obtained. *Van Buren* at 2159. *See also Nationwide Insurance Co. V. Darden*, 112 S.Ct. 1344, 1348 (1992). Thus, the central inquiry is whether the alleged employer has the right to control the work involved. *Loomis* at 1638.

The undersigned finds that, in light of the aforementioned analysis, the record reveals that Kirila was an employer on the subject worksite. During the course of the trial, testimony was elicited from several witnesses regarding the involvement of Kirila employees in the development of the troughs. Mr. Foltz testified that Kirila carpenters were among a number of people who participated in the placement of the two-foot troughs (Tr. 124-125). Gene Kirila, President of Pyramid acknowledged that Kirila carpenters had assisted in the development of the troughs (Tr.97). Hugh Paden, a Kirila employee testified that he had worked on the installation of the troughs inside the building (Tr. 137). Kirila was hired by Pyramid to perform certain tasks on this jobsite because of its expertise in the construction field. The record reveals that Gene Kirila, Jr., President of

Pyramid is the nephew of Ron Kirila, President of Kirila. Ron Kirila acknowledged that his company possessed expertise in construction as the result of his 30 year history in construction (Tr. 77). His nephew, whose company was not in the business of construction - but in the business of composite manufacturing - looked to his uncle for his construction expertise (Tr. 77, 100). The testimony adduced at trial reveals that Kirila provided expertise through its employees. Pyramid President, Gene Kirila testified that he specifically requested Chuck Foltz because of his 30 years of expertise (Tr. 99). T. Jerry Kirila, Kirila's Safety Officer and Superintendent, testified that Mr. Foltz worked for Pyramid "through us" (Tr 84-85). He also testified that he had been on the subject jobsite not in a supervisory capacity, but to see what was going on (Tr. 88). Mr. Foltz supervised and gave daily direction to the carpenters on site (Tr. 129). The carpenters, when questioned, considered themselves employees of Kirila (Tr. 30). One carpenter, Hugh Paden testified that, during his eight year employment with Kirila, he had previously worked under Mr. Foltz's supervision (Tr. 139). Although Respondent maintains that the executed subcontract was not effect at the time of the inspection, Ron Kirila testified that he leased his employees and equipment to his nephew at the hourly rates set forth in said subcontract (Tr. 73; Exh. 8). The record reveals that Mr. Foltz as well as the carpenters were also paid by Kirila at wage rates established by Kirila (Tr. 126, 136, 143). The health benefits and other benefits for the Kirila employees were maintained by Kirila through the union while they worked at the subject worksite (Tr. 138, 144). These employees were sent to the Pyramid worksite by Kirila (Tr. 136-137 & 145). During the time that the carpenters worked at the Pyramid job, they were occasionally sent to other locations to work by Kirila (Tr. 138, 140, 144).

Respondent maintained control over the subject worksite through Mr. Foltz. When Mr. Foltz needed equipment or laborers on the job he called Kirila (Tr. 117). He also keep track of the hours the Kirila employees worked at the subject worksite (Tr. 120). He testified that he kept track of their hours every day "as to who worked and what they were paid" (Tr. 120-121). He signed off on field daily reports which reflected the time and equipment used (Tr. 122). The record also reveals that Kirila also purchased building equipment, e.g., lumber, piping, grass seed, gravel, for Pyramid (Tr. 75-76; Exh. J-1). Gene Kirila testified that this was the typical manner in which subcontractors worked with him (Tr. 99).

The undersigned finds the facts in the instant matter are similar to those before the Review Commission in *Gordon Construction Company, supra,* where the respondent, a contractor engaged in excavating and trenching, was hired by the city to assist in sewer repair. Respondent was hired because of its expertise in digging through solid rock. Respondent provided three laborers and equipment pursuant to an oral contract. Respondent maintained employee records, including a tabulation of hours worked, paid employees, and remained responsible for their workman's compensation coverage. When questioned by the compliance officer the employees identified themselves as employees of the respondent. One of the three employees, the backhoe operator, was hired to head the crew, and he was responsible for maintaining the records which reflected the hours worked by the laborers. This record was used by respondent to charge the city. The respondent argued that it was not the employer because it did not maintain control of the worksite. The Review Commission found that the evidence established respondent maintained a significant degree of

control over the employees. Although, the worksite was under the supervision and control of the city, the laborers were directed by the backhoe operator in the performance of tasks related to the sewer repair. The Commission in a footnote further noted that even if the respondent had shown that the city was responsible for safety under the terms of their agreement, the respondent as an employer subject to the requirements of the Act, had a duty to take measures which were reasonable under the circumstances to protect its employees. *Gordon, supra* at 1583 n.3

Respondent alleges that the April 3, 1995, subcontract agreement with Pyramid Composites Manufacturing executed April 3, 1995, was subsequently canceled ( Exh. C-8). The record reveals that, when asked for a subcontract, CO Braughler was shown the subject agreement. Ronald Kirila testified that the arrangement with Pyramid involved Pyramid calling Kirila whenever they needed a piece of equipment or labor. This equipment and labor was supplied on an hourly basis (Tr. 69). He admitted that the last page of the written contract did contain terms of hourly rates for employees. He also admitted that when this agreement was originally entered into that Kirila agreed to be bound by OSHA regulations and take responsibility for the safety of its employees (Tr. 73). The undersigned finds that the hourly rates set forth in this contract were valid at the time of the inspection. The validity of the remainder of the agreement is not material in light of the fact that the record reveals that the oral understanding between Pyramid and Respondent was similar in many respects to the written agreements Pyramid maintained with the other subcontractors on the worksite.

Gene Kirila testified that the April 3, 1995, subcontract with Kirila was similar to and looked like all the other subcontracts given out on this job (Tr. 91;95). He subcontracted the electrical, plumbing and concrete work on this project. He testified that most of the subcontracts were time and material contracts, where the subcontractors were responsible for the safety and health of their employees and compliance with OSHA. He testified that the majority of those contractors provided their own supervision, and "were responsible for their own safety and OSHA type details" (Tr. 91; 96). He acknowledged that at some point in time he asked Kirila to send someone over to help supervise, and Mr. Charles Foltz was sent (Tr. 91). During cross-examination, he admitted that the time and material contract he had with Kirila was similar to the contract he had with most of the subcontractors on this job (Tr. 91). For example, he acknowledged that Kirila had the same kind of arrangement with his company as the electrical subcontractor (Tr. 99). Furthermore, when shown the April 3, 1995, subcontract between Pyramid and Kirila, Jerry Zreliak, President of I.C. Electric acknowledged that their contract was similar and his company was responsible for the safety of its employees (Tr. 108).

The undersigned finds that but for the question of safety, Pyramid's oral agreement with Kirila was essentially similar to the written subcontracts it had with the other subcontractors on the job. Pyramid maintained control over the entire project as the general contractor, however, the all of the subcontractors maintained some type of supervision and responsibility over its employees on the project. Respondent, through Mr. Foltz, maintained control over its employees. Respondent's attempt to differentiate its arrangement with Pyramid is unsuccessful. Furthermore, the undersigned finds that safety cannot be contracted out especially where the party maintains the type of relationship which Kirila maintained at this worksite.

Having found that respondent was an employer on this worksite, the next inquiry is whether respondent violated §1926.501(b)(4)(ii). As previously discussed, the Kirila employees admittedly created the troughs in the floor. Kirila argues however that it was not their responsibility to install the grates after the cement was poured. CO Braughler testified that it was her understanding that once the concrete hardened, the plywood was taken out and the grating was cleaned and installed by Kirila (Tr. 25). Respondent alleges that the concrete contractor, Combine Concrete Company was responsible for installing the grating and covering the openings after the concrete work was finished (Tr. 93, 123 & Respondent's Post Hearing Brief p. 2). In its Answer, respondent alleges as an affirmative defense employee misconduct, in view of the fact that the deceased was not under its supervision, direction or control.

The undersigned finds that the Secretary has proven by a preponderance of evidence Respondent was involved in the creation of the troughs. As forth above, employees of Kirila admittedly participated in the creation of these troughs. There is no evidence in the record which indicates that Respondent followed any work procedures which ensured employee safety against uncovered holes at the completion of their duties. At the time of the accident, no measures to cover or barricade the troughs had been taken by any of the subcontractors involved in creating the troughs. Furthermore, it was Mr. Foltz's responsibility, in his capacity as superintendent, to ensure that the open troughs were covered. During the course of his testimony, Mr. Foltz stated that he had supervision over everyone on the jobsite (Tr. 119). As superintendent for the jobsite, he was charged with ensuring that the jobsite was free of hazardous conditions. Additionally, his power and control for the abatement of the condition was demonstrated when he directed the Kirila carpenters to abate the condition on August 7, 1996. Accordingly, the undersigned finds that the record contains ample evidence which reveals that Kirila violated the cited standard.

Respondent's employees, as well as all other employees on the worksite, were exposed to this hazardous condition. All employees on the jobsite, working inside or walking through the building, were exposed to the hazard of tripping or stepping into the uncovered holes. The uncovered troughs were in an open building which was accessible to all employees going into this unbarricaded area (Exh C- 3 to C-5). Employees had several reasons for entering this area. The general contractor's trailer, which contained a telephone, was approximately 100 yards from the building. The area where employees parked their cars was also nearby. Furthermore, equipment was also kept right outside the building. (Tr. 33-34). Equipment with the Kirila emblem and the Kirila job trailer were was observed outside the building (Tr. 16 & 23). Kirila employees clearly could have visited this area in the performance of their duties on the job.

The record reveals that, during the course of the inspection, Mr. Foltz advised CO Braughler that he had advised employees not to go into areas near the uncovered holes (Tr. 54; Exh. C-9). The undersigned finds that this statement clearly demonstrates Mr. Foltz's knowledge of the cited hazardous condition. "Employee knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing Inc.*, 17 BNA OSHA 1076, 1079 (No. 90-2148, 1995), *aff'd without op*, 79 F.3d 1146 (5th Cir. 1996). In view of the obvious location of the uncovered holes, Mr. Foltz's supervisory control over everyone on the worksite and

his instruction to employees not to go near the unguarded holes, the undersigned finds that respondent had actual knowledge of the cited hazardous condition. Furthermore, with exercise of reasonable diligence, he could have taken adequate preventative steps to ensure that uncovered holes had been covered in an area so readily accessible to all employees.

In view of the above, the undersigned finds that respondent's affirmative defense is without merit.[3]

*Classification of violation*

In order to prove a serious violation the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. 29 U.S.C.§ 666(k). The Secretary need not prove that an accident is probable. *Flintco Inc.*, 16 BNA OSHA 1404, 1405 (No 92-1396, 1993). In the instant matter, it is clear that a fatal accident occurred as a result of the cited hazardous condition. Accordingly, the Secretary properly classified this violation as serious.

*Penalty Determination*

> Section 17(j) of the Act, 29 U.S.C. §666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business; gravity of the violation; good faith; and prior history of violations. *J.A. Jones Construction Co.*, 15 BNA OSHA 2201, 2213-14 (No. 87-2059, 1993)(citation omitted) These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHA 1481, 1483 (No. 88-2691, 1992)(citation omitted). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHA at 2214 (citation omitted).

*Hern Iron Works, Inc.*, 16 BNA OSHA 1619 (No. 88-1962, 1994). CO Braughler determined the severity was high and probability of the violation was great in light of the fact that fatal injury had occurred. Thus, she determined that the gravity based penalty was $5,000.00. She then adjusted this

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[3] Under the principles of the multi-employer worksite defense set forth in *Anning-Johnson Company*, 4 BNA OSHA 1193 (No. 3694, 1976)(consolidated cases), and *Grossman Steel & Alum. Corp.*, 4 BNA OSHA 1185 (No. 12775, 1976), if a hazardous condition exists at a multi-employer worksite: (1) an employer that neither creates nor controls the condition may, under certain circumstances be relieved of liability for exposing its employees to the hazard, and (2) an employer that does create or control, a hazardous condition, on the other hand, is obligated to protect not only its own employees, but those of other employers as well.

penalty by reducing it by forty percent based upon the size of the respondent. She accorded no other adjustment for history or good faith because of the high severity and great probability.

After considering the above factors and the gravity of the violation, a penalty of $3,000.00 is deemed appropriate.

*Findings of Fact and Conclusions of Law*

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

**ORDER**

Based upon the foregoing decision, it is ORDERED that, the citation as amended alleging a violation of 29 C.F.R. §1926.501(b)(1)(4)(ii) is affirmed, and a penalty of $3,000,00 is hereby assessed.

Covette Rooney
Judge, OSHRC

Dated: JUL 16 1996
Washington., D.C.