United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
JAMES CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 95-1486

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 August 19, 1996. The decision of the Judge will become a final order of the Commission on September 18, 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 September 9, 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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: August 19, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1486

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SECRETARY OF LABOR,

Complainant,

v.

JAMES CONSTRUCTION COMPANY,

Respondent.

OSHRC DOCKET NO. 95-1486

APPEARANCES:

For the Complainant:
Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
Robert E. Rader, Jr. Esq., McCord Wilson, Esq., Rader, Campbell, Fischer & Pyke, Dallas, Texas

Before: Administrative Law Judge: James H. Barkley

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, James Construction Company (James), at all times relevant to this action maintained a place of business at 6805 West Bowles, Littleton, Colorado, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 28, 1995 the Occupational Safety and Health Administration (OSHA) conducted an inspection of James' Littleton worksite. As a result of that inspection, James was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest James brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 23, 1996, a hearing was held in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Dave Nelson, the OSHA Compliance Officer (CO), testified that James Construction was a framing subcontractor under JPI, the general contractor at the Littleton jobsite (Tr. 41). James' framing contract called for rough framing, siding and trim (Tr. 103-06). Grey Darrow, James' superintendent and foreman, testified that James subcontracted the rough framing to a subcontractor who was finished and off the site at the time of the OSHA inspection (Tr. 128). James then employed C.C.I. Construction as a siding subcontractor (Tr. 41-42, 56). With the exception of "repeat" citation 2, each of the violative conditions cited were created by C.C.I.; none of Respondent James' employees were exposed to those conditions (Tr. 71-73). CCI was also cited for the violations with which James is charged, and each of the "serious" violations was taken as established prior to the start of the hearing in this matter based on the final order entered against C.C.I. prior to this hearing (Tr. 8-9).

C.C.I. had a foreman on site (Tr. 56); however, James dictated which buildings C.C.I. worked on, and determined whether the work had been done properly (Tr. 114). James employed laborers to pick up trash, put up guardrails, and to do "punch" work, i.e. to straighten walls and stairs, clean up and assure that work would pass inspection (Tr. 106, 115, 127-28). James employees checked the quality of C.C.I.'s work, and controlled the flow of money (Tr. 115, 128, 167); C.C.I. could not be paid without James' authorization (Tr. 149-52; 167).

Tim Wolf, JPI's field engineer, testified that he noted C.C.I. employees violating safety regulations, including housekeeping and fall protection regulations, during his walkarounds prior to the June 1995 OSHA inspection (Tr. 107, 109-11). Because JPI's contract was with James, Wolf reported safety violations to Darrow (Tr. 108). Wolf stated that Darrow instructed the C.C.I. workers to abate the noted hazards (Tr. 108, 111-13). At no time did Darrow indicate that James was not responsible for ensuring C.C.I.'s compliance with safety regulations (Tr. 113-14). At the hearing Darrow testified that C.C.I. was an independent contractor, and that he had no authority to enforce safety rules (Tr. 130-31).

Dennis James, Respondent's owner (Tr. 164), admitted that James, as C.C.I.'s employer, controlled C.C.I.'s work performance (Tr. 167, 179). James testified that Respondent had no agreement, however, concerning unsafe working practices (Tr. 179). Respondent argues that it would have been infeasible either to withhold payment, or to terminate C.C.I. because of safety violations, due to the shortage of sub-contractors in the Denver area (Tr. 169, 185; James' Post-hearing brief). James testified that replacing C.C.I. would have been difficult, and would have resulted in a substantial delay in completion of the job (Tr. 169-72). James testified that such delay could cost "most, if not all" of James' profit (Tr. 174).

Alleged Violation of §1926.102(a)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.102(a)(1): Eye and face protective equipment was not used when machines or operations presented potential eye or face injury:

a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from eye and face injuries while using pneumatic nail guns and circular saws.

The cited standard provides:

(a) *General* (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

Facts

Nelson testified that he observed employees on a roof using saws and pneumatic nailers without protective equipment (Tr. 57). Nelson stated that the violations were clearly visible from the parking lot of the job site (Tr. 57; Exh. C-11 through C-14). James' foreman, Darrow, knew that C.C.I. employees used nail guns and circular saws without wearing face shields (Tr. 137). JPI's Wolf discussed C.C.I.'s failure to use face shields with Darrow (Tr. 109). Darrow testified that he requested that the employees use shields, and that "sometimes they would, and sometimes they wouldn't" (Tr. 137). Darrow stated that he was unable to obtain C.C.I.'s compliance (Tr. 114-16, 169).

Multi-employer Worksite/Economic Infeasibility Defense

Respondent does not dispute the existence of the violation, but maintains that it had no authority to enforce safety rules on its Littleton site with respect to C.C.I. employees, and therefore could not have been expected to prevent C.C.I.'s violation of OSHA regulations.

The Commission has held that on a multi-employer site: "[t]he general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. The general contractor is, therefore, responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity. *Red Lobster Inns of America*, 8 BNA OSHC 1762, 1980 CCH OSHD ¶24,636 (No. 76-4754, 1980); *Blount Int'l, Ltd.*, 15 BNA OSHC 1897, 1991-93 CCH OSHD ¶29,854 (No. 89-1394, 1992). The evidence establishes that the supervision of C.C.I. employees in their performance of the siding sub-contract was virtually James' *only* function on the worksite. James determined the adequacy of C.C.I.'s work and controlled C.C.I.'s right to receive

payment. Contrary to its assertions, James was, therefore, well situated to prevent OSHA violations by insisting that the work be performed in a manner consistent with OSHA guidelines.

The evidence establishes that James' foreman instructed C.C.I. to use face protection, but did not take *any* further steps to assure such precautions were taken, though he knew that his instructions were being ignored. James made no attempt to supervise C.C.I. more closely to ensure its instructions were heeded, but abandoned any efforts to enforce safety regulations as futile. James now argues that it could not reasonably be expected to take further action, such as withholding payment, or termination of C.C.I.'s contract, because of the possible economic repercussions.

The Commission has held, however, that evidence that compliance would be difficult, inconvenient, or expensive is, in itself, insufficient to establish the defense of economic infeasibility. To show economic infeasibility, the employer must show the effect of the required measures on the company's financial position as a whole, showing that the employer's existence would be adversely affected by the cost. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1995 CCH OSHD ¶30,757 (No. 92-1891, 1995). James failed to establish that further attempts to enforce OSHA safety regulations through its supervisory authority would affect its economic existence. James failed to address the possibility of hiring additional supervision. Its speculation that withholding payments would result in C.C.I. walking off the job (Tr. 185), is merely that -- speculation. Moreover, there is no evidence that the loss of profits from this job would have threatened James' existence.

Reduced to its essentials, Respondent's argument is that it was forced to choose between profits and employee safety. Respondent chose the profits and now asks this Commission to legitimize its choice under the guise of economic infeasibility. Respondent's invitation is declined. The violation is affirmed.

Penalty

A penalty of $1,200.00 was proposed. James is a medium employer, with approximately 50 employees (Tr. 57). James has a prior history of OSHA citations; in 1992 it was cited for violations found at an Austin, Texas worksite (Tr. 58; Exh. C-32). CO Nelson testified that the likelihood of injury was low, but that a nail ricochetting off a pneumatic nailer could result in scratched limbs or loss of an eye (Tr. 58). Taking into account James' knowledge of C.C.I.'s repeated violation of the cited standard, as well as the other relevant factors, I find the proposed penalty appropriate.

Alleged Violations of §1926.405 *et seq.*

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury or illness.

Serious citation 1, item 2a alleges:

29 CFR 1926.405(d): Panelboards mounted in cabinets, cutout boxes, or other enclosures were not provided with dead fronts.

a) 6850 W. Bowles Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected from electrical hazards by ensuring that the temporary power panel located between buildings 1 and 2 was provided with a dead front.

The cited standard provides:

(d) *Switchboards and panelboards.* Switchboards that have any exposed live parts shall be located in permanently dry locations and accessible only to qualified persons. Panelboards shall be mounted in cabinets, cutout boxes, or enclosures designed for the purpose and shall be dead front.

Serious citation 1, item 2b alleges:

29 CFR 1926.405(g)(2)(iv): Flexible cords were not connected to devices of fittings so that strain relief is provided to prevent pull from being directly transmitted to joints or terminal screws:

a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from electrical hazards by ensuring that flexible cords were provided with adequate strain relief.

The cited standard provides:

(iv) *Strain relief.* Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Facts

Nelson testified that between Building 1 and Building 2 he noted a panelboard with exposed wires. The panel was not protected with a dead front (Tr. 59; Exh. C-15, C-16). Nelson stated that the exposed panel was inside a covered switch box, which was open three or four inches at the time of the inspection (Tr. 52-53). Nelson did not know how long the panel's dead front had been missing (Tr. 59, 84). Nothing in the record shows that the switch box was used by C.C.I. employees. Darrow testified that he was unaware that the panel board's dead front was missing (Tr. 138).

Nelson testified that inadequate strain relief was provided on an extension cord located on a roof (Tr. 60-61; Exh. C-17). He stated that extension cords are supposed to be inspected prior to each use, and

that casual inspection would have revealed the condition (Tr. 60). Wolf testified that he had previously complained to James about damaged extension cords being used in the rain (Tr. 109-10).

Up to 100 extension cords were in use on the site (Tr. 85, 143). Nelson admitted that he did not know how long the strain relief device on the extension cord had been defective, and that the defect could not be seen from the ground (Tr. 85-86). Darrow testified that he had not seen the defective cord, and could not see the defects in the cord from the ground (Tr. 143).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 1991-93 CCH OSHD ¶29,239 (No. 87-1359, 1991). The duty imposed upon a general contractor, however, does not exceed that of any other employer, in that a general contractor will not be held liable for violations which it could not reasonably be expected to detect or prevent. *Blount International Ltd., supra*, at 1899.

Here Complainant failed to establish that James should have discovered either of the cited violations. Neither condition was readily visible. JPI's warnings regarding the use of damaged cords in the rain would not indicate a need for James' heightened supervision or inspection of either switchboxes or extension cord connections. Complainant failed to introduce any evidence of either the frequency of James' inspections, or the length of time either cited condition existed. Finally, Complainant provides no support, either legislative or judicial, for the CO's statement that inspection of electrical equipment is required prior to each use.

Given the paucity of relevant evidence, it cannot be said that James, in exercising reasonable supervision of C.C.I., should have discovered either condition. Citation 1, items 2a and 2b are vacated.

Alleged Violation of §1926.501(b)(1)

Serious citation 1, item 3 alleges:

29 CFR 1926.501(b)(1): Employees on walking/working surfaces with unprotected side or edges 6 feet or more above the lower level were not protected from fall hazards by the use of guardrails systems, safety net systems, or personal fall arrest system:

> a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from fall hazards while working next to or on unprotected platforms that exceeded 6 feet in height.

(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

Nelson testified that numerous stairway openings, landing platforms and patios were unguarded, posing a fall hazard of from 8 to 20 feet onto a hard surface (Tr. 62). Nelson's testimony that from 12 to 20 employees were exposed to the hazard was undisputed (Tr. 62). The absence of guarding was plainly visible (Tr. 62; Exh. C-18 through C-22). Nelson testified that he was told James had installed guardrails on the landings originally, although he stated that he found no evidence of nail holes in the headers he examined (Tr. 87-89). Wolf testified that James had put up some handrails but that not all of them were installed immediately (Tr. 122). In addition, it is undisputed that other subcontractors would take down guardrails that had been installed in order to move materials through the openings (Tr. 122-23, 132). Darrow was well aware of the unguarded openings, and testified that he repeatedly asked Wolf to ensure that JPI, who was contractually responsible for maintaining the guardrails, ensure that the other subcontractors put the guardrails back up (Tr. 134-35, 162).

Discussion

James argues that JPI was responsible for maintaining guardrails. James argues that it was not liable for the violation under the limited multi-employer worksite defense,[1] since it did not create or control the violative condition such that it could realistically abate the condition. In its brief, James argues that it was "obviously" not feasible for James to replace missing guardrails with its limited manpower. James further maintains that it made reasonable alternative efforts to protect its employees from the violative conditions by requesting that JPI erect new guardrails.

First, this judge notes that, according to Darrow's testimony, putting up guardrails was one of the few duties actually assigned to James' laborers (Tr. 128). It is not "obvious," therefore, that it was infeasible for James to replace missing guardrails. Moreover, as discussed above, James was cited because, like a general contractor, it was well situated to obtain abatement of hazards, either through its own re-

[1] Under the limited multi-employer worksite defense a subcontractor must show, by a preponderance of the evidence that: 1. It did not create the violative condition; and 2. It did not control the violative condition such that it could not realistically have abated the condition in the manner required by the standard; and 3. (a) It made reasonable alternative efforts to protect its employees from the violative condition; or (b) It did not have, and with the exercise of reasonable diligence could not have had, notice that the violative condition was hazardous. *Lee Roy Westbrook Construction Company, Inc.*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989).

sources or through its supervisory role with respect to other contractors. As above, I find that James had virtually no purpose on the Littleton worksite other than to supervise C.C.I.'s work, and, by reason of its supervisory capacity, could have required C.C.I. to install guardrails to abate fall hazards to which C.C.I. employees were exposed. The limitations of James' own manpower are, thus, not relevant.

Finally, it is well settled that an employer may not avoid its responsibilities under the Act, by contractually assigning required safety measures to another party. *Pride Oil Well Service,* 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). *See also, Lee Roy Westbrook Construction Company, Inc.*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989)[holding sub-contractor responsible for violation of §1926.500(b)(1), though general contractor was expressly bound by contract to provide and be responsible for guardrails].

The cited violation is established.

Penalty

The Secretary has proposed a penalty of $3,000.00. Numerous unguarded landings were observed on the job site, exposing between 12 and 20 employees. Rather than installing missing guardrails or having C.C.I. abate the fall hazard created by their absence, James relied on JPI to correct the problem, though the landings clearly remained unguarded. A fall of from 8 to 20 feet onto a hard surface could result in broken bones or death (Tr. 62). Nelson testified that the probability of an accident occurring was high due to the presence of debris on working surfaces (Tr. 62). However all the working surfaces here were flat, and no injuries occurred as a result of this violation. There is no specific evidence of debris within the zone of danger.

The penalty reflects the CO's overstatement of this item's gravity. Taking into account James' good faith, size, history of prior violations and the gravity of this item, a $1,200.00 penalty is appropriate and will be assessed.

Alleged Violation of §1926.501(b)(11)

Serious citation 1, item 4 alleges:

29 CFR 1926.501(b)(11): Employees working on steep roofs greater than 6 feet in height were not protected from falls by either the use of a guardrail system with toeboards, safety net system, or personal fall arrest system:

> a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from fall hazards while doing siding working on a roof that exceeded 6 feet in height and had a slope grater then (sic) 4-12.

The cited standard provides:

(11) *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

Facts

Nelson stated that eight C.C.I. employees were exposed to a three story fall hazard as they worked on roofs without the benefit of any fall protection (Tr. 63; Exh. C-11 through C-14, C-22 through C-26). Darrow admitted he was aware that C.C.I. employees routinely failed to utilize fall protection, though it was available on the site (Tr. 64, 130-31, 159). Darrow testified that he instructed both C.C.I.'s foreman, and the employees themselves, to tie off two or three times a day (Tr. 130-31, 159). Darrow also knew that in response, the employees working on the roof tied off only temporarily, or simply ignored his instructions (Tr. 130-31, 159-60). Darrow took no further action, believing he did not have the authority to control C.C.I. employees, and could not compel their compliance (Tr. 130-31).

Discussion

The underlying violation was taken as established. As discussed under item 1, James, though aware of the violations, failed to exercise its supervisory authority to ensure C.C.I.'s adherence to OSHA safety requirements, and is liable for C.C.I.'s violation of §1926.501(b)(11). James' failure to enforce safety regulations on the worksite is not excused by the possibility that James might incur economic losses by doing so.

Penalty

A penalty of $3,000.00 was proposed. Nelson testified that the severity of the violation was high. A fall from a 28' roof would likely result in serious injury or death (Tr. 63). Nelson further stated that the probability of a fall was increased by the presence of scrap material in the working area (Tr. 63). The failure to use fall protection was a recurring problem of which James was well aware.

Taking into account James' size, good faith and history of prior violations and the gravity of this item, a $3,000.00 penalty is appropriate and will be assessed.

Alleged Violation of §1926.501(b)(14)

Serious citation 1, item 5 alleges:

29 CFR 1926.501(b)(14): Employees working on, at, above, or near wall openings when the outside bottom edge of the wall opening was 6 feet (1.8m) or more above the lower level were not protected from falling by either the use of a guardrail system, safety net system, or personal fall arrest system:

a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from fall hazards while working next to unprotected wall openings.

The cited standard provides:

(14) *Wall openings.* Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.

Facts

Nelson testified that numerous wall openings were unguarded and posed a fall hazard of from 8 to 20 feet onto a hard surface (Tr. 64-65). C.C.I. employees were exposed to the hazard (Tr. 65). The absence of guarding was plainly visible (Tr. 65; Exh. C-27).

Discussion

The underlying violation is taken as established. As noted by James, this item differs from item 3 only in that it concerns window openings rather than platforms and landings.[2] As in item 3, James failed either to replace missing guardrails, or to exercise its supervisory authority to have C.C.I. install fall protection for its employees. James is, therefore, liable for the exposure of C.C.I.'s employees to the hazard.

Penalty

A penalty of $3,000.00 was proposed. A 20 foot fall onto a hard surface could result in broken bones or death (Tr. 64-65). Twelve C.C.I. employees were exposed to the hazard (Tr. 65).

However here, as with item 3, the gravity was overstated. The working surfaces were flat and no injuries resulted from the violation. There is no evidence of debris or other tripping hazards within the zone of danger. A $1,200.00 penalty is appropriate and will be assessed.

Alleged Violation of §1926.503(a)(1)

Serious citation 1, item 6 alleges:

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[2] It is not duplicative, however, in that abatement, or guarding, of the stairway openings, landing platforms and patios cited in item 3 would not abate the hazard posed by the unguarded window openings. *J.A.Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993).

29 CFR 1926.503(a)(1): The employer did not provide a training program which enabled employees to recognize and minimize the hazards of falls:

a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI had trained their employees in the recognition and avoidance of fall hazards.

The cited standard provides:

(a) *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Facts

CO Nelson testified that through employee interviews, he ascertained that 12 C.C.I. employees had not received training in the avoidance and recognition of fall hazards (Tr. 65).

Discussion

James maintains that the evidence fails to establish its knowledge of this violation. James argues that the mere exposure of C.C.I. employees to the proven fall hazards is insufficient, in itself, to establish such knowledge.

In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). Though the repeated failure of C.C.I. employees to protect against fall hazard cannot, in itself, establish the absence of training, it was sufficient to put James on notice of the possibility that C.C.I. workers had been inadequately trained. James could have easily ascertained C.C.I.'s compliance with the training requirements through inquiries such as CO Nelson's or a request to see C.C.I.'s training certifications, required under §1926.503(b).[3] The evidence establishes James had the requisite knowledge, and the existence of the violation.

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[3] 1926.503(b)(1) states that:
The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification of record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

Penalty

A penalty of $3,000.00 was proposed for this item. Taking into account James' size, good faith, and history of prior violations and the gravity of this item, a $3,000.00 penalty is appropriate and will be assessed.

Alleged Violation of §1926.1053(a)(1)(iii)

Serious citation 1, item 7 alleges:

29 CFR 1926.1053(a)(1)(iii): Job made ladders were not built in accordance with the requirements of the American National Standards Institute A14.4-1972, Safety Requirements for Job-Made Ladders as referenced by 29 CFR 1926.1053(a)(1)(iii):

> a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected their employees from fall hazards by ensuring that job-made ladder that were built in accordance with the ANSI standards (sic).
>
> The cited standard provides:
>
> (1) Ladders shall be capable of supporting the following loads without failure:
>
> * * *
>
> (iii) Each fixed ladder: At least two loads of 250 pounds (114 kg) each, concentrated between any two consecutive attachments. . ., plus anticipated loads caused by ice buildup, winds, rigging, and impact loads resulting from the use of ladder safety devices. Each step or rung shall be capable of supporting a single concentrated load of at least 250 pounds (114 kg) applied in the middle of the step or rung. Ladders built in conformance with the applicable provisions of appendix A will be deemed to meet this requirement.
>
> Appendix A to Subpart X states:
>
> . . . A ladder designed and built in accordance with the applicable national consensus standards, as set forth below, will be considered to meet the requirements of §1926.1053(a)(1):
>
> * * *
>
> * Job-made ladders: ANSI A14.4-1979 -- Safety Requirements for Job-Made Ladders.

Facts

Nelson observed four job-made ladders on top of the roofs and throughout the worksite that were not built in accordance with the ANSI standards (Tr. 66; Exh. C-23 through C-25). Both Darrow and Wolf testified that C.C.I.'s use of improperly constructed job-made ladders was a recurring problem (Tr. 111-112, 136). Wolf told Darrow about the ladders he observed, whereupon Darrow would instruct C.C.I. to throw the ladder away (Tr. 113). Other non-conforming ladders would then appear on the job (Tr. 112, 120).

Discussion

The violation was taken as established. As discussed under item 1, James failed to exercise its supervisory authority to ensure C.C.I.'s adherence to OSHA safety requirements, and is liable for C.C.I.'s repeated use of non-complying job-made ladders in violation of §1926.1053(a)(1). James' failure to enforce safety regulations on the worksite is not excused by the possibility that James might incur economic losses by doing so.

Penalty

A penalty of $3,000.00 was proposed for this item. Nelson observed one employee exposed to the hazards of up to 30 foot falls from a non-complying ladder. The hazard was exacerbated by the employee's use of the ladder on a roof top (Tr. 66-67).

Taking into account James' size, good faith and history of prior violations and the gravity of this item, a $3,000.00 penalty is appropriate and will be assessed.

Alleged Violation of §1926.25(a)

Repeat citation 2, item 1 alleges:

29 CFR 1926.25(a): Debris was not kept cleared from the work areas:

> a) 6850 W. Bowles, Littleton, Co.: As a controlling employer James Construction did not ensure that their sub-contractor CCI protected for injuries on the job site by ensuring that all scrape (sic) building materials were kept clear of the work area.

James Construction was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard 1926.25(a) which was contained in OSHA inspection 107427064, citation number 1, item number 1, issued on 12-10-92.

The cited standard provides:

> During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Facts

CO Nelson testified that breezeways and work areas on the roofs were not kept clear of debris, exposing C.C.I. employees to the danger of tripping, and on the roofs, of falling 28 feet onto a hard surface (Tr. 67-68; Exh. C-11 through C-14, C-26, C-28). In addition, large piles of debris had accumulated on the site outside the buildings (Exh. C-19, C-29). It is undisputed that JPI was responsible for trash removal

from the site (Tr. 96-97). Wolf admitted that JPI's troubles with its trash hauler had resulted in the large piles of debris on the site (Tr.119-20, 139-40; Exh. C-19, C-29). Darrow testified that James had neither the manpower, nor the equipment to remove the large trash piles depicted in Exh. C-19 and C-29, had complained to JPI about the trash piles, and had instructed its employees to avoid them (Tr. 140-42, 176). Wolf stated that James was responsible, however, for putting all of its trash into the two piles at either end of each building (Tr. 110). Wolf testified that trash would get scattered around and piled in the middle of the buildings under useable rough lumber (Tr. 110). Wolf stated that JPI's instructions to move the material were ignored for months at a time (Tr. 111). Nelson's uncontradicted testimony establishes that C.C.I. employees would be exposed to the debris in the breezeways while gaining access to their work areas (Tr. 68). Nelson did not know how long the material on the roof had been there (Tr. 97-98). Darrow testified that the material on the roof was useable and would have been thrown off the roof when C.C.I. finished, in two hours or less (Tr. 141).

Discussion

Because James neither created nor controlled the large trash piles, and because it took the only steps available to it to protect its employees from the hazard created thereby, the conditions in C-19 and C-29 cannot support the citation. Darrow admitted, however, that one of the few duties of James employees was trash pickup (Tr. 128). The testimonial and photographic evidence establishes that James nonetheless routinely allowed scrap lumber and other debris to accumulate inside the buildings where C.C.I. employees were exposed to a tripping hazard. Complainant has also shown that scrap as well as useable materials, *see* Exh. C-12 through C-14, accumulated on the roof, where C.C.I. employees were exposed to a trip and fall hazard.

James' argument that the standard requires clean up only at regular intervals (James suggests every three hours), is rejected. The standard specifically requires that work areas be *kept* clear, that is maintained constantly in a clear condition, in order to avoid the tripping hazard being addressed. James' interpretation would lead to an absurd result, as here, where James suggests that the roof need only be cleared after the job is finished and the employees have finished using it as a working space.

Penalty

A prior citation issued to James for violation of the same standard, at the same job site, became a final order of the Commission on January 8, 1993 (Tr. 69; Exh. C-32). The entry into the record of a prior citation issued to respondent alleging a violation of the same standard, combined with respondent's further concessions that the prior citation was not contested and had become a final order prior to the date of the

inspection giving rise to the present citation is sufficient to complete the Secretary's prima facie case. *Stone Container Corp.*, 14 BNA OSHC 1757, 1990 CCH OSHD ¶29,064 (No. 88-310, 1990). The burden of demonstrating the dissimilarity of the violation is then shifted to the Respondent.

James presented no evidence that the present citation differed substantially from that whieh became a final order in 1993. The citation is affirmed as a "repeat" violation.

Having discounted one of the instances relied upon by the CO, the gravity is now overstated. Adjusting the Secretary's proposed penalty to reflect the lower gravity, I find $4,000.00 to be appropriaate and assess the same.

ORDER

1. Serious Citation 1, item 1, alleging violation of §1926.102(a)(1) is AFFIRMED and a penalty of $1,200.00 is ASSESSED.

2. Serious Citation 1, item 2a and 2b alleging violations of §1926.405(d) and (g)(2)(iv), respectively, are VACATED.

3. Serious Citation 1, item 3, alleging violation of §1926.501(b)(1) is AFFIRMED and a penalty of $1,200.00 is ASSESSED.

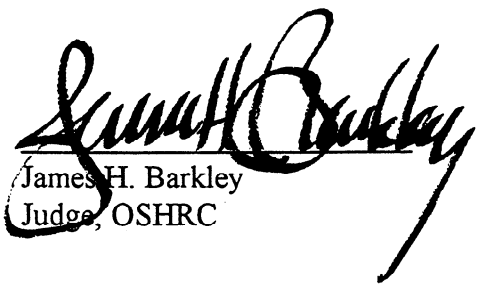
4. Serious Citation 1, item 4, alleging violation of §1926.501(b)(11) is AFFIRMED and a penalty of $3,000.00 is ASSESSED.

5. Serious Citation 1, item 5, alleging violation of §1926.501(b)(14) is AFFIRMED and a penalty of $1,200.00 is ASSESSED.

6. Serious Citation 1, item 6, alleging violation of §1926.503(a)(1) is AFFIRMED and a penalty of $3,000.00 is ASSESSED.

7. Serious Citation 1, item 7, alleging violation of §1926.1053(a)(1)(iii) is AFFIRMED and a penalty of $3,000.00 is ASSESSED.

8. Repeat Citation 2, item 1, alleging violation of §1926.25(a) is AFFIRMED and a penalty of $4,000.00 is ASSESSED.



James H. Barkley
Judge, OSHRC

Dated: August 9, 1996