Secretary of Labor, Complainant, v. Lacerte Builders, Inc., Respondent.	OSHRC Docket No. 02-1657

Appearances:

Gwen Y. Anderson, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Hal Morrow
Morrow & Associates
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Lacerte Builders, Inc., is engaged in exterior building construction. On July 16, 2002, the Occupational Safety and Health Administration conducted an inspection of respondent's jobsite in Tampa, Florida. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the citation and the proposed penalties. A hearing was held pursuant to the EZ trial procedures in Tampa, Florida, on March 6, 2003. For the reasons that follow, Citation No. 1, Items 1a and 1b, are affirmed and a penalty of $1,500 is assessed; Citation No. 1, Item 2a, is affirmed and a penalty of $2,000 is assessed; and Citation No. 1, Items 2b and 2c, are vacated.

Background

Complainant's compliance officer, Lloyd Black, was conducting inspections of construction sites in the Tampa area on July 16, 2002, pursuant to OSHA Construction Accident Reduction Emphasis program (CARE). Under the program, inspections of construction sites are conducted when hazardous conditions are observed. Mr. Black

testified that he observed an elevated empty aerial lift on Lacerte's jobsite while driving past the front of the property on Linebaugh Avenue. He concluded that someone climbed out of the lift while it was elevated. Based on his observation of possible violations of OSHA standards, Mr. Black decided to conduct an inspection. He drove onto the property next to the construction site and spoke to a facility employee at a gatehouse at the entrance to the property, which was later determined to be Aston Gardens, a retirement community. There were no gates or fences around the property at this entrance. Mr. Black identified himself and presented his credentials. He told this individual that he wanted to drive to the back of the property to see the back side of the construction site. The gate attendant told the compliance officer that the construction site was further down the road. Mr. Black then told her that he knew where that entrance was, but restated that he really would like to drive to the back side of the property to see if anything was going on back there. The attendant told him to proceed. Ms. Palmer, the attendant, then notified the property residential manager of Mr. Black's arrival.

Mr. Black testified that he parked at the back of the complex next to a construction gate. He further stated that he observed several employees working from balconies on the back side of the building, applying stucco. He noticed that the employees were not tied off, and there were no guardrails or catch nets on the perimeter of the building to protect the employees from falling. At that time, Compliance Officer Black took several photographs of the violations. As he was preparing to leave the area and proceed to the front of the construction entrance, Compliance Officer Black heard someone yelling, "Tie off now, OSHA is here" (Tr. 23, 31, 81; Exh. R-2). Upon hearing this, the employees in the area attempted to tie off. Compliance Officer Black later learned that the individual who ordered the employees to tie off was Mr. Kevin Swift, the project superintendent for Lacerte Builders. Compliance Officer Black presented his credentials to Mr. Swift, introduced himself, and stated his purpose was to conduct an inspection of the jobsite. After some discussion, Mr. Black entered the site through an unlocked gate. Mr. Black informed Mr.

Swift of the observed hazards, and Mr. Swift stated that the workers should have been tied off.

Mr. Black recommended that Swift remove unprotected employees from the building. Swift and Black proceeded to the balcony of Building 6A to remove one of the employees who had attempted to tie off with a chain. Using visual commands, Mr. Swift ordered the employee off the building. The employee detached the chain he was using from his harness and climbed off the edge of the balcony into the scissor lift.

Mr. Swift then contacted the front office and was told to send Compliance Officer Black to the front office. There Mr. Black met with Tom Doyle, the project superintendent for Vestcor Construction Services, the general contractor for this jobsite. At that time, with the walkaround portion of the inspection concluded, the compliance officer held a closing conference with Mr. Doyle and Mr. Swift.

Reasonableness of the Inspection

Respondent argues that the OSHA inspection of its jobsite was a nonconsensual inspection in violation of the Fourth Amendment. Lacerte relies on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), in support of its argument that no consent was given by anyone with Aston Gardens retirement community to enter that property to inspect the adjacent construction site. It further argues that respondent did not consent to entry of the compliance officer onto the site to conduct an inspection.

It is well established that under *Barlow's, supra,* OSHA inspections under section 8(a) of the Act, 29 U.S.C. § 657(a), are subject to the Fourth Amendment and that evidence obtained in violation of the Fourth Amendment may be excluded from evidence in proceedings before the Review Commission. *Ackermann Enterprises, Inc.*, 10 BNA OSHC 1709 (No. 80-4971, 1982); *Sarasota Concrete,* 9 BNA OSHC 1608, (No. 78-5269, 1981), *aff'd,* 693 F.2d 1061 (11th Cir. 1982).

There is no Fourth Amendment violation when consent is voluntarily given to a warrantless search or inspection. *Ackermann Enterprises, Inc., supra,* at 1711. In this case,

consent for the compliance officer to enter the property adjacent to the construction site was given by the Aston Gardens employee, Kathy Palmer. Consent to enter the construction site was given by Kevin Swift, respondent's project superintendent.

Kathy Palmer testified that when Mr. Black, the compliance officer, arrived at the entrance to Aston Gardens and identified himself, she told him that the construction entrance was 500 feet west. He persisted, saying that he needed to go to the back of the property and she said, "Okay." She further testified that she did not tell Mr. Black that he could not come onto the property.

Ms. Palmer stated that she was a meeter/greeter for residents and others and was not trained or certified as a security guard. There was no gate or fence at this entrance to the property. Ms. Palmer said that people can come on and off the property as they like. The security she offers is security to the residents of the retirement community, and she carries a beeper to assist them. Her duties do not include restricting entry to the property. She is often away from the gatehouse to take residents food or assist them in other matters. When she is gone from the entrance, no one is there in her place. While Ms. Palmer was very nervous during her testimony, I found her to be very sincere and highly credible.

Mr. Black parked his car at the back of the Aston Gardens property and observed and photographed employees working on a building at the rear of the adjacent construction site. After ten or fifteen minutes observing these conditions, he heard Kevin Swift yell to these employees that OSHA was there and to tie off.

At that time, the compliance officer called to Mr. Swift, identified himself, and presented his credentials. Swift told Black at first to go around to the front of the construction entrance to enter the jobsite. When both men discovered that the gate near them was not locked, the compliance officer entered the site at that location. Mr. Black testified that Mr. Swift opened the unlocked gate for him to enter. Mr. Swift has no recall as to

whether he or Mr. Black opened the gate. Mr. Black's testimony is convincing on this point.

The compliance officer testified that he was never asked to leave the jobsite at any time during the inspection. He discussed hazardous conditions with Mr. Swift at the rear of the jobsite and later with Mr. Doyle, the general constructor's project superintendent, along with Mr. Swift in the jobsite trailer.

After considering the totality of circumstances surrounding the compliance officer's entry onto this jobsite, I conclude that this was a consensual entry and inspection. While Mr. Swift did not specifically tell Mr. Black that he was consenting to this inspection, his actions clearly indicated that he was allowing the inspection to proceed. Mr. Doyle, representing the general contractor, specifically told Mr. Black to proceed with the inspection when Mr. Black asked whether a warrant would be necessary to continue the inspection.

Since the Aston Gardens agent, Ms. Palmer, consented to Mr. Black's presence in the back parking area of the retirement community, the compliance officer was not barred from observing activities or objects around him. His observations of objects and activities in plain view from that area is not a constitutional violation. *Ackermann Enterprises, Inc., supra,* at 1712; *Harris v. United States,* 390 U.S. 234 (1968). Since the conditions Black observed from this location were in plain view, there is no Fourth Amendment violation.

Mr. Black's observations were outdoors in an open parking area adjacent to the construction site. There is no Fourth Amendment violation where, as here, observations occurred in "the open fields" rather than inside houses, commercial buildings, or other premises from which the public is excluded. *Ackermann Enterprises, Inc., supra,* at 1712 (and the cases cited therein).

The working conditions on Building 6A at the rear of Lacerte's jobsite were readily observable from the open area of the adjacent property. Respondent, therefore, had no reasonable expectation of privacy with respect to its operations and work activities. *Ackermann Enterprises, Inc., supra,* at 1712. *See also Katz v. United States,* 389 U.S. 347 (1967).

Since there was no violation of the Fourth Amendment by complainant in obtaining evidence prior to actual physical entry onto the jobsite and presentation of credentials, that evidence will not be excluded. Furthermore, permission for Mr. Black's entry onto the Aston Gardens property was granted by Ms. Palmer, Aston Gardens' agent. Mr. Swift opened the unlocked gate at the rear of the jobsite to allow Mr. Black to enter the site. The two men then discussed possible hazards. Mr. Black was then told to report to the general contractor's trailer at the front of the worksite. At no time was the Secretary's compliance officer asked by Mr. Swift or the general contractor to leave the jobsite, to stop the inspection, or to obtain a warrant before continuing his inspection.[1]

I conclude that the inspection was consensual. Furthermore, the inspection was conducted at a reasonable time, within reasonable limits, and in a reasonable manner in accordance with the provisions of section 8(a) of the Act. Evidence gathered before and after presentation of credentials will not be suppressed and will be considered.

Discussion

The Secretary has the burden of proving violations of standards promulgated

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[1] During his conversation with Mr. Doyle, the general contractor's project superintendent, Mr. Black, asked Mr. Doyle whether a warrant was necessary to continue the inspection. Mr. Black indicated that he needed only names and addresses of workers observed during his inspection. He further stated that if a warrant was obtained, he would conduct a wall-to-wall inspection. Mr. Doyle then met privately with Mr. Swift. After that discussion, Mr. Swift provided the requested information to Black. A closing conference was then held, and the inspection was concluded. Mr. Doyle did not testify in this case. During his testimony, Mr. Swift did not indicate that he had been intimidated by Mr. Black's discussion of a need to get an inspection warrant or the scope of such warrant.

After consideration of the testimony of Mr. Black and Mr. Swift, and observing the demeanor of both witnesses, I conclude that Mr. Black's reference to getting a warrant was not intended to intimidate or coerce Mr. Doyle or respondent to allow the inspection to proceed.

under the Act.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) 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 OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that all standards at issue in this case are applicable to the construction activities involved at this jobsite. Mr. Swift admitted that the violations took place. Employees directed and controlled by respondent clearly had access to the violative conditions.

Respondent as Controlling Employer

Respondent claims that employees exposed to the fall hazards at issue are not its employees, and that Lacerte is not responsible for the violative conditions which occurred on the date of the inspection. While respondent actually employs one employee, Mr. Swift, on this jobsite, it directly controls the work of at least twenty-four other workers. These workers are employees of four subcontractors of Lacerte. Respondent manages and supervises all aspects of exterior construction work at this site. On the day of the inspection, Mr. Swift, Lacerte's project superintendent, was supervising the stucco work on building 6A, the location of the alleged violations. Respondent directed the work of the only stucco contractor on this job.

Throughout the inspection and at the hearing, Mr. Swift consistently referred to the exposed workers as his employees. He attempted at hearing to explain away this reference, but it was clear from his testimony and statements during the inspection that he directly controlled, and supervised the work of these employees, and truly considered these

workers to be his employees.

During the inspection, Mr. Swift sent all these employees home when rain began falling. He had authority to correct hazards and, in fact, did so when hazards were observed. When the compliance officer arrived on site, Mr. Swift rode a scissor lift to an upper level balcony to remove an employee working at the edge of the balcony with improper fall protection. The only factor limiting Mr. Swift's ability to supervise and control the work of these employees is the language barrier. Most of these employees speak only Spanish. Mr. Swift does not speak Spanish, so he gives orders by means of hand signals or he speaks to the foremen or leadmen of the companies working directly for Lacerte. These individuals are usually bilingual, enabling them to communicate with Mr. Swift and convey his instructions directly to the workers. Lacerte exercises both direct control and indirect control, through foremen, of these employees. Respondent also has in place a safety violation program that it uses to discipline subcontractors for noncompliance with OSHA guidelines. Respondent has authority to stop work and replace subcontractors as needed.

Mr. Swift, at hearing, described his job duties and function on this jobsite as project superintendent as follows:

> A. To make it easier -- to pretty much give the GC one person to go to correct any problems that may occur from the siding guys, the form guys, lathing, stucco, anybody that we would have out there, the subs from Lacerte, instead of the GC having to go to five or six different lead foremens, he has one person that's in contact which was me.

> And, I also coordinate, order material, organize scheduling for the buildings, monitor safety programs, make sure that things are in place, make sure that any of the employees that are working unsafe gets their stuff corrected when noticeable. But, like I said, you can't hold everybody's hand all day long. (Tr. 37)

In his capacity as Lacerte's project superintendent, on arrival at the jobsite on the inspection date, Mr. Swift did a quick walk-around of the various buildings and saw one employee without fall protection. Swift ordered this worker to tie off, and the employee complied.

While Lacerte was not the general contractor on this job, it acted in the same capacity in relation to its own subcontractors, including the stucco sub whose employees performed the stucco work at issue. Respondent had responsibility for, managed, and supervised all exterior construction work on buildings on this site. It exercised its authority for safety. It corrected safety hazards affecting or created by its subcontractors. It treated its subcontractor's employees as its own and gave these employees direct instructions, being limited only by language. Respondent directed and
controlled the day-to-day work of these employees.

The multi-employer doctrine provides that an employer who controls or creates a worksite safety hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer. *Universal Construction Company, Inc. v. OSHRC,* 18 BNA OSHC 1769 (No. 98-9519, 1999), ____ F.3d ____ (10th Cir., June 28, 1999). *See also U. S. v. Pitt-Des Moines, Inc.,* 168 F.3d 976 (7th Cir. 1999); *R. P. Carbone Constr. Co. v. OSHRC,* 166 F.3d 815 (6th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596 (8th Cir. 1977); and *Brennan v. OSHRC,* 513 F.2d 1032 (2d Cir. 1975).

Under the multi-employer doctrine, Lacerte controlled the worksite safety hazards at issue and is responsible, as the controlling employer, for violative conditions even though the employees threatened by the hazards are those of its subcontractor.

Here, respondent could reasonably be expected to detect and abate the violations due to its supervisory authority and control of the stucco work on this jobsite. Mr. Swift was in the immediate work area, observed the safety conditions, and specifically directed employees to tie off before the inspection and when he learned that the OSHA inspector had arrived. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000).

Citation No. 1, Item 1a

Alleged Serious Violation of 29 C.F.R. § 1926.453(b)(2)(iv)

The Secretary in Citation No. 1, Item 1a, alleges that:

> a) On or about 7/16/02--employees using the extensible boom aerial lifts were elevating the baskets to the second and third floor balconies where they would exit the aerial lift by stepping out of the unlanded basked [*sic*] onto the floor of the balcony.

The standard at 29 C.F.R. § 1926.453(b)(2)(iv) provides:

> (iv) Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

Kevin Swift, respondent's project superintendent, testified that Lacerte was the only contractor that had boom lifts, a type of aerial lift, on this jobsite. Compliance Officer Lloyd Black's undisputed testimony established the violative conditions as alleged. He observed at least three instances of employees elevating the aerial lift to the second and third floor balconies, opening the gates of the elevated lift, carrying materials from the lift to the balconies, stepping back onto the lift, closing the gate and then moving the lift.

Mr. Black explained that the lift basket may drop 6 inches to 2 feet in case of hydraulic failure. This could create a hazardous condition if this occurred while an employee was walking between the aerial lift and a balcony while the lift was elevated. When workers walk between the basket of the elevated lift and the building, they are not standing firmly on the floor of the basket and are exposed to a fall hazard in the event of sudden drop due to hydraulic failure. Mr. Swift was working in the immediate area and knew, or should have known, of this violative condition. He testified he knew that these employees were using the boomlift on the morning of the inspection. Respondent owned the boomlifts and provided them for use on this jobsite. If an employee fell from the elevated basket, death or serious physical injury could result. The violation of 29 C.F.R. § 1926.453(b)(2)(iv) is affirmed as a serious violation.

Citation No. 1, Item 1b

Alleged Serious Violation of 29 C.F.R. § 1926.453(b)(2)(v)

In Citation No. 1, Item 1b, the Secretary alleges:

> 29 CFR 1926.453(b)(2)(v): A body belt (as a restraint) or a full body harness (for fall arrest) was not worn and a lanyard was not attached to the basket or boom when working from an aerial lift:
>
> > a) On or about 7/16/02--the employees using aerial lifts for access to the second and third floor balconies were not using a body belt or harness in the platforms of the aerial lift and when they did have on a harness and lanyard on, they unattached their lanyards from the attachment point of the basket and exited the aerial lift on to the second or third floor balcony.

The standard at 29 C.F.R. § 1926.453(b)(2)(v) provides:

> (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.
>
> NOTE TO PARAGRAPH (b)(2)(v): As of January 1, 1998, subpart M of this part (§ 1926.502(d) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under § 1926.502(e).

As discussed above in Item 1a, respondent owned the aerial lifts, and Mr. Swift knew employees used the lifts on the morning of the inspection. Mr. Swift was working in the immediate area of this work. Knowing employees used the lifts that morning, he knew, or should have known, of this violation. Mr. Black's undisputed testimony established that employees were not wearing a harness, body belt or lanyard attached to the basket when working from the aerial lift. He observed two employees without the required protection while working on the aerial lift and while walking between the elevated lift and the building balconies. He described the fall hazard to be similar to that in Item 1a, specifically, in the event of hydraulic failure, the basket could drop 6 inches to 2 feet causing an employee to be thrown from the elevated basket, if not tied off by a lanyard hooked to a body belt or harness. The violation of 29 C.F.R. § 1926.453(b)(2)(v) is affirmed as a serious violation.

Citation No. 1, Item 2a

Alleged Serious Violation of 29 C.F.R. § 501(b)(1)

In Citation No. 1, Item 2a, the Secretary alleges that:

> 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 was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> a. On or about 7/16/02--Northside of building

> 6A, one employee was working from the third floor balcony and had not attached his retractor device to an anchorage of any type.
>
> b. On or about 7/16/02--Northside of building 6A, the anchorage points (eyelets) for the fall protection required that the employees walk next to the edge of the unprotected sides and edges of the balcony before they could attach their lanyard.

The standard at 29 C.F.R. § 1926.501(b)(1) 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.

At the hearing, respondent admitted, through its representative, that the violative conditions existed, but did not admit respondent's responsibility for these conditions. Mr. Black testified that he observed and photographed two employees pulling up materials while standing at the edge of the third floor balcony with no fall protection. One employee's toes even extended over the edge of the balcony. One employee was observed scrambling to attach a chain to his harness when Mr. Swift yelled, "Tie off now. OSHA's here" (Tr. 81). In Mr. Black's photograph, this employee is applying stucco. Mr. Swift was in the area at the time of the violation, as shown by this employee's response when Mr. Swift yelled for employees to tie off. Mr. Swift supervised stucco work and all exterior work on this building. Respondent, acting through its agent, Mr. Swift, is the controlling employer and had knowledge of these violative conditions. Mr. Swift clearly knew that these employees were not tied off when he yelled to them. He was very specific in telling them to tie off. No other protective measure was mentioned by Swift. The only inference to be drawn from this statement is that Swift, and through him, respondent, had actual knowledge

of the violative conditions. Mr. Swift even admitted to Mr. Black that he knew these guys were not tied off.

Citation No. 1, Item 2b

Alleged Serious Violation of 29 C.F.R. § 1926.502(d)(9)

In Citation No. 1, Item 2b, the Secretary alleges that:

> Lanyards and vertical lifelines did not have a minimum breaking strength of 5,000 pounds:
>
> a) On or about 7/16/02--North side of building 6A, employees were using light weight dog tie out chains for lanyards.

The Secretary has produced evidence showing that two employees used a lightweight dog chain as a lanyard. She proved that this chain had a working strength of 255 pounds and a breaking strength of no more than 600 pounds. The general contractor indicated this chain was used only as a warning barrier and was not intended to be used as a lanyard.

Respondent provided harnesses, retractable lifelines, and eye bolts attached to the building, all of which will support 5,000 pounds. The Secretary produced no evidence to show that respondent had actual or constructive knowledge that these employees would grab a lightweight chain for use as a lanyard. From the evidence produced at hearing, the employees appear to have grabbed the first chain they found in the area to attach to their harnesses in response to Mr. Swift's call for all to tie off as OSHA was there. No evidence was produced showing that employees had used that chain as a lanyard prior to Swift's warning to tie off. The Secretary has failed to produce sufficient evidence to prove respondent's knowledge of the violative conditions. The alleged violation of 29 C.F.R. § 1926.502(d)(9) is vacated.

Citation No. 1, Item 2c

Alleged Serious Violation of 29 C.F.R. § 1926.502(d)(21)

In Citation No. 1, Item 2c, the Secretary alleges that:

> Personal fall arrest systems were not inspected for wear, damage and other deterioration, and defective components were not removed from service;
>
> > a) On or about 7/16/02--North side of building 6A--the personal fall arrest equipment (which includes lanyards) in use on the third floor balconies had not been inspected prior to their use thereby permitting the use of dog tie out chains as lanyards.

The violation alleged in this item relates to the same hazard as addressed in Citation No. 1, Item 2b. As discussed above, the Secretary failed to prove actual or constructive knowledge on the part of the respondent of the violative condition, specifically, that Lacerte knew employees were using lightweight chain as lanyards. For the reasons discussed above relating to Item 2b, this duplicative alleged violation of 29 C.F.R. § 1926.502(d)(21) is vacated.

Penalties

Respondent has approximately 300 employees. While it had one employee on this jobsite, it controlled 24 workers on this job. The company has not received a serious violation during the past three years. The violations found in this case are high gravity which could result in serious physical injuries or death. They involve potential falls from the second and third floor balconies onto equipment and materials. Employees were working at unprotected edges at these levels and on aerial lifts which could suddenly fall 6 inches to 2 feet. Employees were continuously applying wet stucco which dropped on the floors, creating slippery conditions,

Upon due consideration of these factors, it is determined that the following penalties are appropriate.

1. For Citation No. 1, Items 1a and 1b, I find a penalty of $1,500 appropriate.

2. For Citation No. 1, Item 2a, I find a penalty of $2,000 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:

1. Citation No. 1, Items 1a and 1b, are affirmed and a penalty of $1,500 is assessed.

2. Citation No. 1, Item 2a, is affirmed and a penalty of $2,000 is assessed.

3. Citation No. 1, Items 2b and 2c, are vacated.

/s/
STEPHEN J. SIMKO, JR.
Judge

Dated: April 21, 2003