Secretary of Labor,
Complainant,

v.

Williams Brothers Construction, Inc.,
Respondent.

OSHRC Docket No. **00-2324**

EZ

APPEARANCES

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

Mr. Allen Durr, Safety Director
Williams Brothers Construction, Inc.
Peoria, Illinois
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Williams Brothers Construction, Inc. (WBC), a construction contractor, was performing interior demolition work on September 13, 2000, at the Booth Library, Eastern Illinois University, Charleston, Illinois. After an inspection by the Occupational Safety and Health Administration (OSHA), WBC received an "other" than serious citation on November 16, 2000, for alleged violation of 29 C.F.R. § 1926.501(b)(4)(ii)[1] by failing to cover floor holes on the second floor which exposed employees to a tripping hazard. No penalty is proposed. WBC timely contested the citation.

Pursuant to E-Z Trial proceedings under Commission Rule 209, 29 C.F.R. § 2200.209, the hearing was held in Peoria, Illinois, on March 6, 2001. WBC is represented *pro se* by its safety director Allen Durr. Jurisdiction and coverage are stipulated (Tr. 6). WBC filed a post-hearing statement of position.

WBC denies the violation based on the multi-employer worksite defense. WBC argues that as project coordinating contractor, it did not control other project contractors whose

[1]The Secretary's unopposed motion to amend citation to correctly identify the standard violated to § 1926.501(b)(4)(ii) was granted during the prehearing conference telephone call on February 20, 2001 (Tr. 4).

demolition work caused the floor holes. WBC asserts that it was not the general contractor. If a violation is found, WBC also argues that it should be reclassified as *de minimis*.

For the reasons discussed, the multi-employer defense is rejected because WBC failed to show it protected its own employees from the hazard. The violation is affirmed as "other" than serious.

The Inspection

WBC is a large construction contractor in Peoria, Illinois. It employs approximately 230 employees. WBC has been in business for 27 years. On many projects, WBC is the general contractor (Tr. 36, 59).

At Eastern Illinois University, WBC was awarded a contract by the Capital Development Board (CDB), a governmental agency of the State of Illinois, to perform interior demolition and reconstruction work on the Booth Library (Tr. 37, 59-60, 62). It was a public funded project (Tr. 10). WBC's demolition work involved removing interior walls and some floors. It did not include mechanical, electrical, heating or vent demolition work (Tr. 38, 63). These demolitions were performed by other contractors.

WBC's demolition work began in May, 2000 (Tr. 37, 70). WBC had approximately eight laborers and carpenters performing its demolition work (Tr. 23, 56). During OSHA's inspection, approximately six other contractors were also performing demolition work (Tr. 11).

In addition to performing interior demolition work, WBC was designated by CDB as the coordinating contractor because it had the majority of work on the project (Exh. R-1). Pursuant to the contract with CDB, WBC, as coordinating contractor, was responsible for scheduling and coordinating the other contractors' demolition work. It had "no obligations or liability for the assigned contractors' contracts or for the assigned contractors'obligations for the payment of labor and materials in connection with the performance of their contracts" (Exh. R-1).

After receiving a complaint of fall and overhead hazards at the Booth Library project, OSHA compliance safety and health officer (CO) William Hancock initiated an inspection on September 13, 2000 (Tr. 9). After requesting to meet the general contractor, CO Hancock conducted an opening conference with WBC project superintendent Greg Barna (Tr. 10, 22). At

the time of OSHA's inspection, WBC's demolition work was approximately 90 % complete (Tr. 38-39).

During the walkaround inspection, CO Hancock observed a cluster of four or five floor holes on the second floor of the library (Tr. 13, 26, 43). The cluster of holes were not covered and were located in a main walkway (Tr. 14, 26). One hole against a wall was approximately 4 inches wide and 18 inches long (Tr. 20-21). The other holes were approximately 4 or 5 inches in their least dimension and up to a foot in their other dimension (Tr. 21, 28). There was nothing to warn employees of the holes and the area was not well lighted (Tr. 13, 27). CO Hancock observed approximately four employees walking within three feet of the floor holes (Tr. 26-27). Although CO Hancock was unable to identify for whom the employees worked, WBC acknowledged that its employees also walked in close proximity of the floor holes (Tr. 34, 56-57). WBC's office was located in a corner on the second floor of the library approximately 25 feet away (Exh. J-1; Tr. 26). At least two of the floor holes were created by the removal of a toilet and sink by McWilliams Mechanical, the plumbing contractor. Other holes involved the electrical contractor (Exh. J-1; Tr. 41-42, 64-65).

When CO Hancock returned to the project on September 14, 2000, covers had been placed over the floor holes by WBC (Exh. J-2; Tr. 15, 33, 44, 55). WBC states that it covered the floor holes "out of good faith" (WBC post-hearing statement of position). CO Hancock's recommended "other" than serious citation was issued on November 16, 2000.[2]

Discussion

The Secretary has the burden of proving a violation.

> 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

[2]Other contractors received citations (Tr. 29). WBC's argument that citations to other contractors on the project did not include an allegation of § 1926.501(b)(4)(ii) is noted (Exhs. R-3 through R-9; Tr. 46-47). However, the failure to cite other contractors would not excuse WBC's failure to comply. OSHA has broad discretion in proposing citations. There is no showing that a violation could be established against other contractors.

> 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).

WBC does not dispute the application of § 1926.504(b)(4)(ii) to the floor holes observed by CO Hancock. Also, it is undisputed that the floor holes were not covered.

Alleged violation of § 1926.501(b)(4)(ii)

The citation alleges that WBC failed to cover floor holes on the second floor of the library, which exposed employees to tripping hazards. Section 1926.501(b)(4)(ii) provides:

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

The floor holes observed by CO Hancock were required to be covered pursuant to § 1926.501(b)(4)(ii). Section 1926.500(b) defines a "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension in a floor, roof or other walking or working surface." The five holes were at least four inches wide and up to 18 inches long. The holes were located in a "walking/working surface" because they were along a main walkway used by employees to work or access WBC's office. WBC's office was located on the same floor, approximately 25 feet from the cluster of uncovered floor holes.

In order to establish employer knowledge of a hazardous condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of the condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-1966 (No. 82-928, 1986).

WBC's knowledge of the uncovered floor holes is shown by its project superintendent. His office was on the second floor where the holes were located. The floor holes were in the main walkway. Employees passed within three feet of the uncovered holes to access the WBC office (Tr. 26, 56-57). The holes were plainly visible to supervisory personnel. *A. L. Baumgartner Construction, Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

WBC has a duty to inspect its work area for hazards and, even if it lacked actual knowledge of the floor holes, it nevertheless had constructive knowledge of conditions because the uncovered holes could have been detected through an inspection of the worksite. An

employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Pace Construction Corp.*, 14 BNA OSHC 2216 (No. 86-758, 1991). WBC's twice per month safety audits at the library project is not shown sufficient to anticipate unsafe conditions when its eight employees were performing demolition work (Tr. 39).

When a supervisory employee has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer. *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Thus, WBC had knowledge of the uncovered floor holes for the purposes of establishing a violation.

Also, the record establishes employee exposure. Employees were observed walking within three feet of the cluster of floor holes. The holes were located in a main walkway used to access WBC's office. In addition to employees of other contractors, WBC concedes that its own employees walked in close proximity of the floor holes (Tr. 56-57). The area was not well lighted. The floor holes, approximately 4 inches wide and up to 18 inches long, were tripping hazards.

The test for determining an employee's exposure to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). To be "reasonably predictable," there must be a showing that either by operational necessity or otherwise, including inadvertence, employees have been or will be in the zone of danger. The inquiry is not whether the exposure is theoretically possible. *See Fabricated Metal Products, Inc*., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

At the library project, employees, including WBC's employees, were in the zone of danger in walking or working in close proximity of the floor holes. The employees were observed passing within three feet of the uncovered holes. The holes were located along a main employee walkway which was used to access WBC's office.

A violation of § 1926.501(b)(4)(ii) is established.

WBC's Multi-Employer Defense

WBC argues that it did not create the floor holes and did not have control over the contractors whose demolition work did cause the holes. It is undisputed that the floor holes were caused by the plumbing and electrical contractors. At least two of the holes were caused by the removal of the sink and toilet from a former bathroom (Exh. J-1). According to WBC, the electrical and plumbing contractors were responsible for their own demolition work. Although WBC put covers over the holes, WBC denies that it was its responsibility (Tr. 44). WBC asserts that it was only the coordinating contractor, not the general contractor, and it did not have authority or responsibility over other contractors or their employees. WBC merely coordinated other contractors' work schedules (Tr. 53-54, 60-61).

To prove the multi-employer worksite defense, an employer must show by a preponderance of evidence that it (1) did not create the hazardous condition, (2) did not control the hazardous condition such that it could have realistically abated the condition in the manner required by the standard, and (3) took reasonable alternative steps to protect its employees or did not have, with the exercise of reasonable diligence, notice that the violative condition was hazardous. *Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994).

Under its contract with CDB, WBC was designated the coordinating contractor (Exh. R-1). It is undisputed that WBC's demolition work did not cause the floor holes. WBC's control of other contractors was limited to scheduling their work activities. According to WBC, it lacked direct contractual control over other contractors. The other contractors were paid by CDB.

However, the record shows that WBC did have the ability to abate the hazard. It covered the floor holes by the next day of OSHA's inspection (Exh. J-2). Also, WBC acknowledges that it had the responsibility to cement in two of the holes (Tr. 55).

More importantly, the record also shows that WBC's own employees were exposed to the uncovered floor holes. As discussed, WBC, with the exercise of reasonable diligence, should have known of the floor holes. WBC concedes that its employees walked in close proximity of the floor holes. The holes were in the main walkway which accessed WBC's office. WBC made no showing that it took reasonable measures to protect its employees from the hazard. WBC had 8 laborers and carpenters working on the project. There were no warning signs and the area was

not well lighted. An employer on a multi-employer worksite has the responsibility to protect its own employees from unsafe conditions regardless of who created or controlled the hazard.

WBC's violation of § 1926.501(b)(4)(ii) is established.

"Other" Than Serious Classification

The Secretary has classified the violation of § 1926.501(b)(4)(ii) as "other" than serious. WBC argues that the violation should be reclassified as *de minimis*.

To be classified as "other" than serious, the violation must have a direct and immediate relationship between the violative condition and employee safety but not to the extent that a resultant injury or illness is death or serious physical harm. Unlike a serious violation, the probability of death or serious physical injury does not exist.

A *de minimis* violation, on the other hand, involves technical non-compliance with a standard and the non-compliance bears such a negligible relationship to employee safety as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Keco Industries, Inc.*, 11 BNA OSHC 1832, 1834 (No. 81-1976, 1984). Also *see Otis Elevator Co.*, 17 BNA OSHC 1166, 1168 (No. 90-2046, 1995) (a *de minimis* violation is one where the deviation from the cited standard "increase(s) the risk of injury so slightly that the relationship of the violation to safety and health was not direct or immediate").

The record in this case shows that the five uncovered floor holes were in a cluster along a main walkway. The holes were approximately 4 inches wide and up to 18 inches long. The holes were in an area that was not well lighted and there was no warning signs. Based on these circumstances, there was an increased risk of injury to employees caused by a tripping hazard. The standard's prohibition against uncovered floor holes presumes a hazard. The risk of injury was slight. The issue is not whether an accident is likely to occur; it is rather, whether the result would likely cause employee injury. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989). As identified by CO Hancock, the expected injury from tripping and falling because of the uncovered floor holes was minor cuts and bruises (Tr. 14).

WBC's violation of § 1926.501(b)(4)(ii) was properly classified as "other" than serious.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation No. 1, Item 1, alleging "other" than serious violation of § 1926.501(b)(4)(ii), is affirmed and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: April 2, 2001