



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
TEXAS A.C.A., INC.,
Respondent.

OSHRC DOCKET
NO. 91-3467

**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 September 8, 1995. The decision of the Judge will become a final order of the Commission on October 10, 1995 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 28, 1995 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:

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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

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: September 8, 1995

DOCKET NO. 91-3467

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
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matter under the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504, and the Secretary has filed a response in opposition.

Whether Texas A.C.A. is Entitled to an EAJA Award

It is undisputed that Texas A.C.A. is statutorily eligible for an EAJA award and that it was the prevailing party in this matter. The company’s entitlement to an award depends on whether the Secretary’s position as to the citation items was substantially justified, and the Secretary has the burden of proof in this regard. *See* Commission Rules 2204.104 and 2204.106(a). The test is one of reasonableness in law and fact; stated another way, the Secretary’s position must have been “justified to a degree that could satisfy a reasonable person.” *See Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1002, 1991-93 CCH OSHD ¶ 29,992, p. 41,072 (No. 89-2839, 1993); *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009, 1991-93 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993); and cases cited therein. A discussion as to the citation items follows.

Items 1 and 2

These items alleged that Texas A.C.A. did not have material safety data sheets (“MSDS’s”) for plaster and paint used at the site in violation of 1926.59(e)(1) and 1926.59(g)(8). Charles Moore, the OSHA compliance officer (“CO”) who inspected the site, gave each contractor a form to fill out; R-1, the form completed by Michael Bilodeau, Texas A.C.A.’s jobsite foreman, reflected that the company had a hazard communication (“HAZCOM”) program, that employees were trained in it, and that MSDS’s were kept “in office.” According to Moore, when he further questioned Bilodeau he was told the program and MSDS’s were at the company’s office and not on the job. (Tr. 14-19; 66-68). However, Bilodeau testified that the HAZCOM program and pertinent MSDS’s were in the general superintendent’s trailer and that he was present when Bear Allen, the general superintendent, told Moore this was the case and offered to show him the MSDS’s. (Tr. 93-97). George Adams, Texas A.C.A.’s president, testified he himself delivered R-2 to Allen before the job began and that Allen kept it in his office; R-2 contains a HAZCOM program and various MSDS’s. (Tr. 121-22).

Upon observing Adams and Bilodeau at the hearing and finding their testimony credible, it was the conclusion of the undersigned that Texas A.C.A. had not violated the cited standards. Based on the record, it would appear that Moore misinterpreted what Bilodeau and Allen told him and that further inspection would have revealed the HAZCOM program and MSDS's were, in fact, in Allen's trailer. It would also appear there was no basis for originally citing these items as serious, as Moore himself testified he did not consider either substance a serious hazard. (Tr. 18; 71-72). For these reasons, I conclude the Secretary was not substantially justified with respect to these two items.

Item 3

This item alleged that two employees were standing on the edge of the roof of the four-story building under construction without fall protection in violation of 29 C.F.R. § 1926.105(a). The basis of this item was CO Moore's seeing one worker using a winch on the edge of the roof and another on a scaffolding platform adjacent to the roof. Moore took C-1-2, which show the workers, upon arriving; later that day he took C-3 and C-5.² Moore concluded the employees worked for Texas A.C.A. because Bilodeau told him that the winch belonged to the company and that workers used it to haul up buckets of plaster and because Moore thought he saw the same person on the roof twice more that day; on the last occasion Bilodeau identified the worker as Manuel Estrada and called him down so the CO could talk to him. Moore believed Estrada was the same person due to his clothing but admitted he was not sure. (Tr. 12; 19-33; 66; 69; 72-80). Moreover, the testimony of Bilodeau and Adams convinced the undersigned of the lack of proof with respect to this item.

Taken together, the testimony of Bilodeau and Adams was that Texas A.C.A. employees were not using the winch at the time of the inspection as plaster was being pumped up through a hose that day, the excess was put into buckets for later use, and employees had no reason to be on the roof; the company did not put up the winch when it did not use it but did take it down at the end of the day if one of the other contractors put

²C-3 shows the same area from a different vantage point, while C-5, taken from the roof, is a close-up of the area; however, neither depicts the employees as in C-1-2. (Tr. 21; 28-31).

it up, and nearly all the contractors at the site used the winch. The only work done on the scaffold platform was when Estrada went up to take down the winch when they were preparing to quit work that day. Bilodeau could not remember if Estrada tied off but noted safety belts were always available and workers were told to use them and were disciplined if they did not. He also noted Estrada could not have been the person on the roof in C-1-2 as his job that morning was to cut mesh, a job he would have done on the ground.³ Both Adams and Bilodeau testified that there was a place on the winch for a guardrail that would go across the end of the scaffold and the company practice was to put it in place when installing the winch; Adams believed the guardrail had been swung back and attached to the scaffold, and Bilodeau noted C-5 showed both of the pulley ropes outside the scaffold whereas his employees used the winch from the scaffold with one of the ropes inside. (Tr. 97-106; 110-12; 115-20; 123-25).

Based on the foregoing it was found that the record failed to show the employees in C-1-2 were those of Texas A.C.A. There was no evidence the employee on the platform worked for the company, and Moore acknowledged he was not sure the worker on the roof was Estrada. There was likewise no conclusive evidence Estrada was not tied off when he was taking down the winch, and the testimony of Bilodeau tended to show he probably was. In view of the record, I conclude there was an insufficient basis for the issuance of this item. Moore testified no one indicated anyone else used the winch but conceded this was very likely due to the other contractors at the site. (Tr. 70; 74). It was incumbent upon the CO to determine with more certainty the identity of the employees and he could have asked Estrada if he was on the roof earlier. The Secretary should have known of this lack of proof before the hearing; accordingly, his position as to this item was not substantially justified.

Item 4

This item alleged that employees were working on scaffolding with unguarded open ends and no toeboards in violation of 29 C.F.R. § 1926.451(a)(4). The basis of this item was

³While the CO believed he arrived about 12:40 p.m., Bilodeau testified C-1-2 had to have been taken earlier due to the amount of fresh plastering shown in the photos. (Tr. 23; 65-66; 100-02). Based on Bilodeau's testimony, and Adams' agreement with it, I concluded the CO arrived earlier than he thought. (Tr. 121-23).

CO Moore's observing that there were unguarded openings and no toeboards in two areas of the scaffolding. These areas were the platform in C-5, which was open on the ends and had no guardrails, and the planking shown in C-6, which did not extend all the way to the end or the side of the scaffold; Moore took C-7, a close-up of the end of the scaffold in C-6, and the Texas A.C.A. employee in C-6 measured the gap at his request and found it to be 21 inches. Moore testified that these conditions were hazardous; the lack of toeboards could have caused materials to fall off the scaffolding and strike employees below, and employees working near the open areas could have fallen off the scaffolding. Moore said these conditions were visible from the ground and that Bilodeau told him he had been working on the scaffolding. (Tr. 35-58; 62-65; 80-83).

I concluded in my decision on the merits that the Secretary had not shown a violation with respect to the C-5 area; as noted in the preceding discussion, there was no evidence that Texas A.C.A. employees were working on the platform that day and no conclusive evidence Estrada was not tied off when he was removing the winch. I further concluded that the Secretary had shown a violation with respect to the scaffolding conditions in the C-6-7 area; it was clear employees were working in that area and were exposed to a fall hazard, and while there was credible evidence there was yellow caution tape around the bottom of the scaffolding it was found that it was reasonably predictable employees on the ground below could have been struck by materials falling off the scaffolding. This item was nevertheless vacated due to my finding that the employer did not have the requisite knowledge of the violation based on the credible testimony of Bilodeau and Adams about the circumstances at the site that day.

Their testimony established that the day of the inspection was Bilodeau's first day as foreman on the job; Bilodeau had been a foreman on other jobs but was a plasterer at this site, and Adams notified him of his new assignment the evening before due to the previous foreman's going to a new job. The normal procedure was to check the scaffolding the first thing in the morning, and while Bilodeau got to the job before 7:00 a.m. and employees started work between 9:30 and 10:00 he had not had time to check it before the inspection began around noon as he had been busy lining up workers and materials. Bilodeau had been on the scaffold the day before and had not noticed anything wrong, but both he and

Adams testified that Texas A.C.A. was having to repair the scaffolding constantly as other contractors at the site were also using it and had been borrowing boards and/or pushing them out of the way to do their work; corrections were begun after Moore pointed out the problems and were completed the next day. (Tr. 91-93; 106-15; 126-29).

Based on the foregoing, it was concluded that Texas A.C.A. had used reasonable diligence under the circumstances to discover the cited conditions and that it was therefore not in violation of the standard. Texas A.C.A. now urges in its EAJA application that the Secretary was not substantially justified in his position as to this item. I disagree. Unlike items 1 and 2, where it was found the Secretary had not established the violation, and item 3, where it was found the Secretary failed to show employee exposure, the Secretary in this item clearly met his burden of proving both the violation and employee exposure. While it was my conclusion the company lacked the requisite knowledge of the condition OSHA was nonetheless fully justified in citing this item. Moreover, the Secretary is not required to anticipate every argument that might be advanced by an employer before deciding to issue and pursue a citation. Texas A.C.A. is consequently not entitled to its fees and expenses with respect to this item.

Item 5

This item alleged scaffold planking did not extend far enough over end supports in violation of 29 C.F.R. § 1926.451(a)(14). The basis of this item was Moore's observing that the planking on which the employee in C-6 was working overlapped insufficiently over its end supports; the employee measured the overlap for Moore and found it to be about 2 inches. Moore testified that the condition was hazardous because the scaffolding could have moved and caused the planking to slip and the employee to fall. He also testified the condition was not visible from the ground. (Tr. 58-62; 83-86).

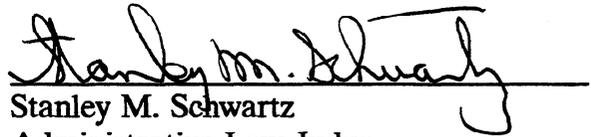
I concluded in my decision on the merits that the record demonstrated the alleged violation but that the employer, for the same reasons *supra*, did not have the requisite knowledge of the condition. This item was therefore vacated, and Texas A.C.A., as in the preceding discussion, urges that the Secretary's position was not substantially justified. On

the same basis as noted above, I find that Texas A.C.A. is not entitled to its legal fees and expenses relating to this item.

The Amount of the Award to which Texas A.C.A. is Entitled

Based on the foregoing, Texas A.C.A. is entitled only to the legal fees and expenses that relate to items 1-3, the items in which it was found that the position of the Secretary was not substantially justified. The EAJA application filed by Texas A.C.A. includes all of the legal fees and expenses incurred by the company in its defense of this matter. Consequently, in an order dated July 21, 1995, it was requested that the company submit an amended application apportioning where applicable a reasonable amount of hours and expenses relating to each of the citation items, pursuant to the Commission's guidance in *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1987-90, CCH OSHD ¶ 29,144 (Nos. 86-978 & 87-1610), 1990) and *Ruhlin Co.*, 17 BNA OSHC 1068, 1995 CCH OSHD ¶ 30,678 (No. 93-1507, 1995).

Texas A.C.A. has now submitted an amended application in compliance with my order. Upon reviewing the amended application and the explanations therefor, it is the conclusion of the undersigned that the hours and expenses claimed for items 1-3 are reasonable under the circumstances of this case. The amended EAJA application of Texas A.C.A. is accordingly GRANTED in the amount of \$3,737.85; this amount includes 48.12 hours of attorney time multiplied by the allowable rate of \$75.00 per hour, or \$3,609.00, plus \$128.85 of expenses. So ORDERED.


Stanley M. Schwartz
Administrative Law Judge

Date: AUG 2 9 1995



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SECRETARY OF LABOR
Complainant,
v.
COMPASS STEEL ERECTION, INC.
Respondent.

OSHRC DOCKET
NO. 94-0504

**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 September 8, 1995. The decision of the Judge will become a final order of the Commission on October 10, 1995 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 28, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 8, 1995

DOCKET NO. 94-0504

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SECRETARY OF LABOR,

Complainant,

v.

COMPASS STEEL ERECTION, INC.,

Respondent.

OSHRC DOCKET NO. 94-0504-S

APPEARANCES:

Ernest A. Burford, Esquire
 Dallas, Texas
 For the Complainant.

D. W. Durham
 Lewisville, Texas
 For the Respondent, *pro se.*

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a Dallas, Texas worksite of Respondent Compass Steel Erection ("Compass") on November 22, 1993; the job involved putting columns for guardrails along the outside of an upper-level parking garage, and as a result of the inspection, Compass was issued a repeat citation alleging that employees were working approximately 12 feet above ground level without guardrails in violation of 29 C.F.R. § 1926.500(d)(1). Compass contested the citation, and a hearing was held on July 22, 1994. At the hearing, Compass stipulated it was in repeated violation of the standard based on its not having contested a June 18, 1993, citation which alleged a violation of the

same standard at the same site; the company's contention, however, was that the violation was due to unpreventable employee misconduct.¹

The Evidence

Ronald Sarnacki is the OSHA compliance officer ("CO") who recommended both of the citations. He testified that in both instances, Raymond Randerson, a Compass employee, was working on an open-sided floor without fall protection; C-1-4, taken during the second inspection, show Randerson bending over the edge of the floor attaching a column to the structure, and while the worker standing next to him had some protection due to the 42-inch-high guardrail along the floor, a mid-rail or tying off was required to protect Randerson. (Tr. 15-16; 28-35; 44; 48-49).

D. W. Durham, the vice president of Compass, is responsible for field operations. He testified that Compass provides safety belts and lanyards and has a rule requiring workers to be tied off when there are no guardrails, and that employees are aware of the rule due to union training and company safety meetings; Compass employs only journeyman union ironworkers and has safety meetings at sites every Monday at 6:00 a.m. covering tying off and other safety requirements. Durham said Compass had thirty to thirty-five employees in November 1993, and that while it has a nucleus of regular workers others come and go. He also said that Compass had its fall-protection rule and held safety meetings before the first citation, that he began documenting meeting attendance pursuant to OSHA's suggestion after the second citation, and that the company's safety program has no set disciplinary actions other than dismissal for blatant violations. (Tr. 8; 17-27; 34-39; 43-44).

Durham did not dispute the hazard to which Randerson had been exposed but believed Compass should not be held responsible. He explained that Randerson, a journeyman ironworker with 25 years experience, had worked for him for many years and was aware of the need to tie off. He further explained he had orally reprimanded Randerson after the first citation and taken him to the OSHA area office with him; Durham had an informal conference with the area director, who also reprimanded Randerson, and

¹Compass also disputed the proposed penalty; however, my resolution of this case renders a penalty discussion unnecessary.

Randerson saw Durham write OSHA a check for the citation. Durham noted that after this occurred Randerson was off work for about five months because of a shoulder operation, and that his first job upon returning was the subject job. He also noted that while Randerson had always worked as a foreman for the company and was being paid as a foreman at the subject site he was working as a regular ironworker as there was no other job for him at the time; the actual foreman was John Gregory, and he, Randerson and Dan Vinci, a journeyman with 5 to 6 years experience and the other individual shown in C-1-4, were the only Compass employees on the job. (Tr. 8-9; 14-20; 30-43; 52; 56).

Durham said the job at the site was being done in phases and that the November 1993 phase lasted only a few days; he believed the job had begun on Monday, the same day as the inspection, and that Gregory had held the usual Monday a.m. safety meeting before starting the job. Durham again reprimanded Randerson after the second inspection and restricted him on all subsequent jobs to duties where he was not exposed to falls; Randerson was a good worker as well as a personal friend, Durham had not wanted to fire him as he had a family to support, and Randerson quit working for the company three to four months before the hearing. Durham noted that foremen are responsible for ensuring employees tie off, that Compass has had few problems in this regard, and that C-1-4 show both Randerson and Vinci with their belts and lanyards on; the violation was abated by their tying off, as a mid-rail would have kept them from doing their job. He further noted Compass had seven to eight other jobs between the first and second citations and that while it was cited again during that time for not having guardrails the citation was withdrawn; Durham discussed it with the OSHA area director, who agreed his employees had not been exposed to the condition. (Tr. 20-34; 41-47; 51-53).

Discussion

To prove the affirmative defense of unpreventable employee misconduct, an employer must demonstrate it had established work rules designed to prevent the violation, that it had adequately communicated the rules to its employees, and that it had taken steps to detect violations and effectively enforced the rules upon discovering violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979).

The Secretary contends that Compass has not established unpreventable employee misconduct due to the fact that Randerson, a foreman, was aware of the rule and yet failed to follow it, even after having been the subject of a prior citation for the same infraction. The Secretary also contends that Compass has not proved its defense based on the fact that Vinci was also exposed to the hazard. However, it is my conclusion that the company has met its burden of demonstrating unpreventable employee misconduct. My reasons follow.

The record shows Compass had a work rule requiring employees to tie off when exposed to falls, that the rule was communicated at jobsite safety meetings, and that the company used only journeyman ironworkers trained through union apprenticeships. The record further shows that Randerson was a journeyman ironworker with 25 years experience and that he was aware of the work rule. Finally, the record shows jobsite foremen were responsible for ensuring the rule was followed, that with the exception of Randerson the company has had few problems with employees not tying off, and that Randerson was disciplined for violating the rule.

In regard to the Secretary's first contention, Durham testified that both he and the area director reprimanded Randerson after the first citation, that Randerson was off work for five months after that time, and that the subject job was his first upon returning to work. Durham further testified that he reprimanded Randerson again after the second citation and restricted his work such that he was not exposed to fall hazards; he also explained why he did not fire Randerson. Finally, Durham testified the condition at the site was abated and that Randerson has left the company. I observed Durham's demeanor and found his testimony credible. His testimony was not rebutted by the Secretary, and the CO himself conceded he had been unaware of this information. (Tr. 58).

In regard to the Secretary's second contention, the CO himself testified that Vinci, who is shown standing in the photos, was afforded some protection by the guardrail. (Tr. 29-30). Moreover, it is evident from the CO's testimony that he did not observe Vinci bending over the side of the floor and that Randerson was the employee who was the focus of his inspection.

Based on the foregoing, the undersigned is persuaded that the violation in this case was the result of unpreventable employee misconduct. In so finding, I am cognizant of the

fact that under different circumstances a foreman's violation of the same work rule on two different occasions would likely result in the rejection of an employer's claim of unpreventable employee misconduct. However, in my view, Durham's actions after the first citation were a very sensible means of discipline, and, based on those actions, it was reasonable for him to anticipate that Randerson would not violate the work rule again. Durham's actions after the second citation were also reasonable, and his reasons for not firing Randerson were understandable. Under the unique facts of this case, Compass was not in violation of the standard. The citation is vacated.

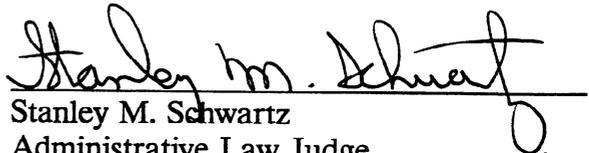
Conclusions of Law

1. Respondent, Compass Steel Erection, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.
2. Respondent was not in violation of 29 C.F.R. § 1926.500(d)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of repeat citation 1 is VACATED.


Stanley M. Schwartz
Administrative Law Judge

Date: AUG 29 1995