



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR
Complainant,
v.
SUMMIT CONTRACTORS, INC.
Respondent.

Phone: (202) 606-5400
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OSHRC DOCKET
NO. 96-0055

**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 May 16, 1996. The decision of the Judge will become a final order of the Commission on June 17, 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 June 5, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

FOR THE COMMISSION

A handwritten signature in black ink, appearing to read "Ray H. Darling, Jr.", written over the typed name.
Ray H. Darling, Jr.
Executive Secretary

Date: May 16, 1996

DOCKET NO. 96-0055

NOTICE IS GIVEN TO THE FOLLOWING:

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Office of the Solicitor, U.S. DOL
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citation proposed a penalty of \$15,000. Summit timely contested the citation and requested E-Z trial proceedings pursuant to Commission Rule 200-211, 29 C.F.R. §§2200.200-211. E-Z trial is a pilot program designed to provide simplified proceedings to certain cases and resolve contested cases expeditiously.

The prehearing conference order entered on March 21, 1996, set forth the parties' agreed statement of facts and issues. Summit stipulated that it was an employer engaged in a business affecting commerce within the meaning of §3(5) of the Occupational Safety and Health Act (Act) and is, thus, under the jurisdiction of the Review Commission. A hearing was held on April 16, 1996, in Jacksonville, Florida.

The Accident

In January 1995, Summit, as general contractor, subcontracted with East Coast Concrete, Inc. (E. C. Concrete), to provide all concrete work to Summit's Hallmark condominium project at 1001 Spinnakers Beach Road, Ponte Vedra, Florida (Exh. C-2; Tr. 46). The subcontract required E. C. Concrete to furnish all labor, formwork material, other materials, equipment and supervision necessary to accomplish all the concrete work on the project. Article 4.3 of the subcontract also required E. C. Concrete to comply with all safety measures and applicable laws, rules and regulations. In paragraph 29 of Attachment C, "Miscellaneous Provisions," to the subcontract, E. C. Concrete agreed to provide:

... all necessary flagmen, barricades, safety equipment, etc., necessary to install this scope of work is included in this Subcontract Agreement. Handrails are for the working floor only (not decks below).

The last sentence was specifically added to the subcontract and initialed by the parties. Also, it is noted that paragraph 8 in Attachment "C," a hold harmless clause obligating E. C. Concrete to pay any OSHA penalties received by Summit for violations caused by E. C. Concrete, was deleted from the subcontract (Exh. C-2).

The Hallmark condominium project was a five-story post-tension, prestressed concrete building with a ground level parking garage and four floors of condominiums (Tr. 36, 52, 97). The building contained approximately 77,000 square feet of space (Tr. 191). Two of Summit's

employees worked at the project--Bruce Moody, project superintendent, and his assistant, John Merrilees. They were responsible for procuring materials, scheduling subcontractors, and doing layout work which accounted for approximately ninety percent of Moody's time (Tr. 35, 147, 149). Layout work was described as diagraming or marking on the pre-poured floor the wall lines, penetrations for plumbing and electric sleeves, and floor slabs (Tr. 96-97). As a post-tension building, the layout work was done before the concrete was poured. The tension cables embedded in the concrete slab prevented holes from being drilled into the concrete after hardening (Tr. 43). The tension cables were used instead of rebar to provide strength to the floor.

To construct each floor or level, E. C. Concrete erected large tables (forms) supported by trusses and framework. The tables with plywood and edge forms were placed between columns (Tr. 47). The concrete was poured on top of the tables which, when hardened, became the next level (Exh. R-1; Tr. 98, 102). In areas such as chutes and elevators where tables could not be used, handsets or post shores were erected to support the newly poured level (Tr. 106, 173). Once the concrete hardened to seventy percent of strength, which generally took one to five days depending on the concrete mix and temperature, the post tension cables embedded in the concrete were tightened (Tr. 103-104, 178). After tightening the cables, the tables were replaced by post shores which acted as temporary columns. The tables were moved to the next location or level (Tr. 103, 178). The post shores remained until the concrete reached full strength (Tr. 178). After the columns for the next level were erected, the process was repeated (Tr. 46). To erect each level, there were three separate pours starting at the north side of the building and ending on the south side. The pour on the south side was identified in the daily report as "pour #3" (Exh. C-7; Tr. 47). While the tables or post shores were in place, other subcontractors were not able to work in the area because of the dense pattern created by the cross members and structural work supporting the tables (Tr. 101, 104, 108, 143).

In August 1995, the concrete for the roof or final level was poured. On the fourth floor (the fifth level if the parking garage is considered the first level), the tables were in place to support the new roof. In the southwest corner of the fourth floor, there was a lobby area for an elevator and stairway (Exh. R-2). Several weeks prior to the accident, Quality Masonry, the block mason, removed a handrail at the elevator opening to do the block work for the elevator shaft (Exh. C-4; Tr.

44, 68). After Quality Masonry completed its block work, it did not notify Summit to replace the handrail as Quality had done at the lower levels (Tr. 69, 71, 73, 80). Instead, E. C. Concrete, in preparing for the roof pour, erected a cantilevered platform across the elevator shaft to hold the shoring used to support the form work for the roof area above the elevator shaft (Tr 112, 119). With the cantilevered platform completely covering the elevator shaft, there was no fall hazard (Tr. 114).

By August 15, 1995, the concrete for the roof reached seventy percent of strength. The post tension cables embedded in the concrete were tightened (Tr. 132, 144). After tightening the cables, E. C. Concrete started breaking down the tables and formwork from the fourth floor and moving them to the ground. The concrete work was done (Exh. C-7; Tr. 48). On August 16, E. C. Concrete continued removing the tables and shoring.

At some point after tightening the cables on August 15, and prior to the accident on August 17, the cantilevered platform was removed from the elevator shaft. A handrail was not erected at the elevator opening, and Summit was not notified of the unguarded opening (Tr. 37, 80). Also, during this period, Summit's project superintendent Moody was working on the roof.² Moody reached the roof by using the stairway on the north side of the building. While climbing the stairway through the fourth floor, Moody could not see the elevator area in the southwest corner. It was approximately 80 feet away (Tr. 39-40, 155). Neither Moody nor Merrilees was in the area of the elevator lobby during this period (Exh. C-8; Tr. 79).

On August 17, the day of the accident, E. C. Concrete's employees were stripping forms from the elevator lobby on the fourth floor (Exh. C-7; Tr. 67, 174). Greg Schwartzenberger, owner of E. C. Concrete, described the work as clean-up around the elevator area, including picking up loose forms and busting nails (Tr. 49). The work had started at 7:00 a.m. (Tr. 44). E. C. Concrete's foreman Anderson and an employee Williams hired by E. C. Concrete from a temporary service were doing the work (Tr. 28, 49). At approximately 11:15 a.m., Williams fell approximately 40 feet through the unguarded elevator opening and died (Exh. C-7; Tr. 44, 73). Anderson told Compliance

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The record is unclear as to when Moody was on the roof. At one point, he testifies that it was the day before the accident (Tr. 39-40). This is supported by his written statement to McGowen (Exh. C-8). However, Moody also testifies that it was on the day of the accident (Tr. 155).

Officer McGowen that he knew the elevator opening was unguarded, but he thought the job would take a short time (Tr. 79). Schwartzenberger testified that Anderson, who had fall protection training, was an experienced crew leader. He should have contacted Summit about the unguarded opening or remove the employee from the floor (Tr. 52-53, 55). After the accident, the project was immediately shut down and E. C. Concrete's carpenters installed a handrail across the elevator opening (Exh. C-7, C-8).

The Citation

Alleged Violation of §1926.501(b)(1)

The citation issued to Summit, which was the same citation issued to E. C. Concrete,³ alleges that:

On the 4th floor, south elevator shaft: On or about August 17, 1995, there was no guardrail at the five feet four-inch wide elevator door opening exposing employees to a forty-foot fall to ground.

The standard allegedly violated, §1926.501(b)(1), requires 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 shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

There is no dispute that the requirements of §1926.501(b) were applicable to the fourth floor elevator opening; that the failure to have a handrail (guardrail) or other means of fall protection at the elevator opening violated the standard; and, that employees were exposed to a fall hazard that was likely to cause death or serious physical harm. Summit stipulates that the elevator door opening was "an open sided floor area 6 feet or more above the adjacent floor or ground level" within the meaning of §1926.501(b)(1). Summit, also, stipulates that on August 17, 1995, the elevator door opening was not guarded and that an employee of E.C. Concrete fell through the opening and died

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The court takes judicial notice that E. C. Concrete Inc., was also cited for serious violation of §1926.500(d)(1) with a proposed penalty of \$3,000. E. C. Concrete contested the citation and the case was settled with a reduction in penalty to \$2,300. The order approving settlement was entered on April 15, 1996 (Docket No. 96-193).

(E-Z Trial Prehearing Conference Order; Tr. 28-29). Summit agrees that it was feasible to install a handrail across the opening (Tr. 13, 127). Further, there is no dispute that the fourth floor elevator area was a working surface, and no safety net system or personal fall arrest system was in place as permitted by the standard. The Secretary acknowledges that there was no evidence that Summit created the hazard, had employees exposed, or had actual knowledge of the unguarded opening (Tr. 81-82, 193).

Issues

The parties agree that the issues remaining to be resolved involve Summit's responsibility as a general contractor and whether Summit should have known of the unguarded elevator opening (Tr. 29-30).

Summit argues that as a general contractor at a multi-employer worksite, it did not know nor should have known of the unguarded fourth floor elevator opening. There was no basis shown for Summit to reasonably have detected the unguarded opening. Summit asserts that it was E. C. Concrete's responsibility to install the handrail.

The Secretary argues that Summit as general contractor was responsible for installing the handrail after E. C. Concrete removed the tables and that Summit should have known of the unguarded opening (Tr. 29-30, 193). Summit's project superintendent was at the project, and the unguarded opening was in plain view.

Discussion

1. Summit's Responsibility as General Contractor

An employer engaged in construction activities on a multi-employer construction work site is responsible under the Act for those hazardous conditions to which its own employees at the site are exposed subject to certain defenses, and those hazardous conditions to which it either creates or controls and to which employees of other contractors are exposed. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055, 1991-93 CCH OSHD ¶ 29,923, p.40,853 (No. 90-2873, 1992). In addressing a general contractor's responsibility, the Review Commission has long recognized that:

The general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which effect the entire site. The 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. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus we will hold the general contractors for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Grossman Steel & Aluminum Corp., 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976).

Responsibility for compliance does not depend on whether the general contractor actually created the hazard or has the manpower or expertise to abate the hazard. *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,635 (No. 76-4754, 1980). Responsibility for correcting hazardous conditions is based on the customary supervisory authority exercised by a general contractor having overall control over conditions at the jobsite. *Lewis & Lambert Metal Contract, Inc.*, 12 BNA OSHC 1026, 1030, 1984-85 CCH OSHD ¶ 27,073, p. 34,899 (No. 80-5295S, 1984). A general contractor's responsibility is predicated on the presumption that "by virtue of its supervisory capacity over the entire worksite, the general contractor on the site has sufficient control over its subcontractors to require them to comply with occupational safety and health standards and to abate violations." *Gil Haugan d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006, 1979 CCH OSHD ¶ 24,105, p. 29,290 (Nos. 76-1512 & 76-1513, 1979).

In this case, the record establishes that Summit maintained sufficient control over the worksite to require compliance with the Act. Summit's contract with E. C. Concrete required the subcontractor to comply with safety laws (Exh. C-2). Moody's duties included overseeing the project and coordinating the activities of subcontractors (Tr. 37, 137). Also, he made sure the work area was safe (Tr. 137, 149, 192). He kept a daily report on what each subcontractor was doing (Exh. C-7; Tr. 38). Moody acknowledged that Summit had the authority to remove a subcontractor who was not complying (Tr. 180). Although Summit may be reluctant to terminate a subcontractor because of the costs and delay to the project, it retained the authority (Exh. C-2). Summit exercises

its control over subcontractors through safety meetings, walking the worksite, and encouraging subcontractors to operate safely (Tr. 182, 187-188, 190-191).

Therefore, Summit's control over the condominium project was sufficient to hold it responsible for violative conditions which were created by a subcontractor if it is shown that Summit knew or should have known of the violative condition.

2. Summit Lacked Knowledge

Although Summit had the overall responsibility for safety at the worksite, the record fails to establish that Summit, with the exercise of reasonable diligence, should have known of the unguarded elevator opening on the fourth floor. Although the unguarded opening was in plain view, it was not shown to have existed for a significant period of time prior to the accident for Summit to have ascertained its existence.

To hold a general contractor liable for violations created by its subcontractor, the Secretary must show that the general contractor, due to its supervisory authority and control over the worksite, could have reasonably been expected to prevent or detect and abate a violation created by a subcontractor. The duty imposed upon a general contractor who does not have employees exposed is a reasonable one. *Knutson Constr. Co.*, 4 BNA OSHC 1759, 1761, 1976-77 CCH OSHD ¶ 21,185, p.25,481 (No. 765, 1976), *aff'd*, 566 F.2d 596 (8th Cir. 1977). In its exercise of reasonable diligence, a general contractor may rely in part upon the assurances of subcontractors, so long as it has no reason to believe that the work is being performed unsafely. *See Blount International Ltd.*, 15 BNA OSHC 1897, 1899, 1992 CCH OSHD ¶ 29,854, p. 40,750 (No 89-1394, 1992); *Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133, 1984 CCH OSHD ¶ 26,982 (No. 82-178, 1984).

Therefore, the issue in this case is whether Summit should have reasonably been expected to prevent or detect the unguarded elevator opening on the fourth floor. The Review Commission has long recognized that an employer has an obligation to inspect the work area, to anticipate hazards which employees may be exposed, and to take measures to prevent the occurrence of a hazardous condition. *Automatic Sprinkler Corp.*, 8 BNA OSHC 1385, 1980 CCH OSHD ¶ 24,495 (No. 76-5089, 1980).

The record establishes that the unguarded elevator opening existed for no more than a day prior to the accident. The earliest the cantilevered platform could have been removed from the elevator shaft was after August 15 when the post tension cables were tightened (Exh. C-7). On the other hand, the cantilevered platform could have been removed on the day of the accident. Within that period, the record fails to establish when the platform was removed. Thus, the duration the unguarded opening existed is not known. Without knowing how long the unguarded opening existed other than sometime within a twenty-four hour period prior to the accident, the record fails to show that Summit did not exercise reasonable diligence.

During whatever period the elevator opening was unguarded, there is insufficient evidence showing that Summit should have reasonably been expected to prevent or detect the unguarded opening. The elevator openings at other levels were properly guarded (Tr. 80). Also, although the unguarded opening on the fourth floor was in plain view, it could be seen only if in the area of the elevator lobby. It was not observable from any other parts of the project, including the fourth floor stairway on the north side or from the ground (Tr. 81, 156). There is no evidence that Summit during the existence of the fall hazard had any reason to be in the area of the elevator lobby, or had any reason to believe that the elevator opening was unguarded (Tr. 134, 166). There is no showing that Summit could not have reasonably relied on E. C. Concrete to erect a handrail on its "working floor." E. C. Concrete's crew leader was experienced and had fall protection training. Also, at no time was Summit notified of the opening. Schwartzenger acknowledged that Summit should have been notified of the opening.

Further, the subcontract required E. C. Concrete to erect handrails on its "working floors only (not decks below)" (Exh. C-2). Schwartzenger acknowledged that E. C. Concrete was responsible for all handrails on the working deck, including the perimeter and any opening in the interior. Also, E. C. Concrete was to replace any handrail it took down (Tr. 50, 56). He defined "a working deck" as the actual formed deck that is being prepared for concrete (Tr. 55-56). Schwartzenger testified that it was not Summit's responsibility to erect handrails after the tables were removed (Tr. 50-51, 57). On the day of the accident, it was his understanding that the tables had been removed. However, prior to the accident, E. C. Concrete was still removing its form work from the fourth floor (Exh. C-7).

According to Cindy Krause, an electrician for Allstate Electric, there was a disagreement between Schwartzberger and Moody at a safety meeting in May 1995 about the responsibility for installing and maintaining handrails (Tr. 142). Krause testified that Schwartzberger was upset because E. C. Concrete were erecting handrails and other subcontractors were taking them down (Tr. 142). At the meeting, Moody told the subcontractors that if they took down a handrail, the subcontractor would have to put it back up, or they could contact Summit who would see that the handrail was erected (Tr. 142). Krause testified that Schwartzberger agreed to be responsible for the handrails in E. C. Concrete's working area and not merely the level above the tables (Tr. 143). Schwartzberger did not testify about his discussion with Moody at the safety meeting. Moody's testimony was similar to Krause (Tr. 119, 161). In his written statement to McGowen, Moody stated that the responsibility for handrails belonged to E. C. Concrete until the tables "are flown out & set on next level - Summit was to maintain" (Exh. C-8). Subcontractors were instructed to notify Moody if a handrail needed to be erected in their area (Tr. 131).

Based on the subcontract agreement and the testimony of Krause, the record supports a finding that E. C. Concrete was responsible for erecting a handrail at the fourth floor elevator opening after it had removed its cantilevered platform covering the elevator shaft. E. C. Concrete was the only subcontractor working in the fourth floor's elevator area. Although a handrail had been taken down earlier by Quality Masonry to do the block work, E. C. Concrete assumed responsibility over the elevator shaft when it erected its cantilevered platform. The cantilevered platform was necessary for E. C. Concrete to complete its concrete work. There was no fall hazard at the elevator opening as long as the cantilevered platform was in place. When E. C. Concrete removed the platform, the opening became a fall hazard. However, E. C. Concrete continued to work in the elevator area without guarding the opening. According to the project's daily report (Exh. C-7), E. C. Concrete on the morning of the accident was stripping forms in the southwest elevator lobby, forming stairs, and flying material to the ground. Similarly, on the day prior to the accident, E. C. Concrete was removing shoring, flying handsets down from the fourth floor, stripping plywood from the fourth floor, cleaning up, and breaking down tables for shipping (Exh. C-7). During this period, E. C. Concrete was the only subcontractor working in the elevator area on the fourth floor.

As an indication of Summit's exercise of reasonable diligence, McGowen testified being told by an unidentified source that Summit "walked the site every day or tried to and that they tried to stay on top of all at handrails or at all parts of the job site" (Tr. 87). Moody testified that he walked the site during the removal of forms (Tr. 39). However, he could not walk the site every day because ninety percent of his time was spent doing layout work (Tr. 38-39, 149). Also, in May 1995 Summit hired a consultant to provide extensive fall protection training to all subcontractor employees (Exh. R-3). Both Schwartzberger and Anderson attended the training (Tr. 53, 142).

Accordingly, the record fails to show that Summit was responsible for erecting the handrail at the fourth floor elevator opening and that it was reasonable to expect Summit to prevent or detect the unguarded elevator opening during the short period it was unguarded. The alleged violation of §1926.501(b)(1) is vacated.

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 hereby ORDERED:

Citation No. 1, item 1, alleging a repeat violation of §1926.501(b)(1), is vacated.

/S/ KEN S. WELSCH

KEN S. WELSCH
Judge

Date: May 8, 1996