

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. :
 :
TURNER CONSTRUCTION COMPANY, :
 :
Respondent. :

OSHRC DOCKET NO. 96-1712

APPEARANCES:

Mark A. Holbert, Esquire
New York, New York
For the Complainant.

Anthony J. Merisola
Staten Island, New York
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is 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 construction project in New York City on October 18 and 21, 1996; as a result, Respondent Turner Construction (“Turner”) was issued a serious citation alleging violations of 29 C.F.R. 1926.405(b)(1) and 29 C.F.R. 1926.501(c). Turner contested the citation, and a hearing was held on July 9, 1997, and on November 18 and 19, 1997. Only the Secretary has submitted a post-hearing brief.

Background

The record shows that Turner was the general contractor of the project, that all of the actual construction work was subcontracted to other companies, and that Turner’s responsibility was to supervise and coordinate the work and to provide for job site safety and cleanup. The project involved the construction of a 23-story building in between two already-existing buildings, one with 5 stories and the other with 16 stories, that faced First Avenue; the new building also faced First Avenue but was set further back than the adjacent buildings due to its front plaza which measured

10 feet by 50 feet. Peter Steinke, the OSHA compliance officer (“CO”) who conducted the inspection, went to the site on October 18, 1996, when the building was eight levels high; he met with Thomas Moran, Turner’s job site superintendent and site safety coordinator, after which he and Moran entered the building and went up a ramp going to the mezzanine level. Steinke noted a broken metal conduit in the middle of the ramp; the conduit had been run up through the ramp but had separated, exposing the electrical wiring inside, and the CO pointed the condition out to Moran. Steinke and Moran then proceeded to the upper floors, where the CO saw workers performing duties near the edges of those floors that he determined could have resulted in materials falling to the front plaza area below. Steinke returned to the site on Monday, October 21, 1996, to finish his inspection, and the citation in this case was issued on November 15, 1996.

Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.405(b)(1), which states as follows:

Conductors entering boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed.

CO Steinke testified that when he saw the broken metal conduit, Moran told him that it was providing temporary power for the building’s upper floors. Steinke further testified that he pointed out to Moran how the exposed wiring was stretched over the ramp’s edge such that it was subject to abrasion and that he told Moran the condition was an electrical shock hazard; the power passing through the wiring was 120 volts, the conduit went through the middle of the ramp, and workers used the ramp to get to the mezzanine and upper levels. The CO said Moran agreed with him and called the electrician on his radio to have the conduit fixed; the CO also said that he himself talked to the electrician, and that the conduit was repaired that same day. (Tr. 115-24; 171-79; 191-94; C-3).

Thomas Moran testified that the conduit provided power for the stairways and that he did not tell the CO it provided power for the upper floors; he further testified that he did not know if the wiring in the conduit was live, that he did not tell the CO that it was, and that he did not remember if the lighting was on in the stairways that day. Moran said he had inspected the site himself earlier that day but could have overlooked the conduit as he did not recall seeing it; he also said that Turner had seven employees on the job that day but that only he and a laborer would have had any reason to go to the upper levels. (Tr. 34-35; 43-45; 55-58; 77-78; 87-88; 217-18; 230-31; 235).

Based on the record, it is my conclusion Turner violated the cited standard. I observed the CO's demeanor at the hearing and found his testimony to be candid and convincing. The testimony of Moran, on the other hand, in addition to often being contrary to that of the CO, was evasive as to many details regarding the subject site, and his response to numerous questions was that he did not remember. (Tr. 43; 46; 53-55; 60-62; 65-73; 88; 95; 225; 229-31; 234). CO Steinke's testimony is accordingly credited as the more reliable account of the events during the inspection, and I find as fact that the cited condition presented a hazard to the employees at the site. I also find that Turner, based on its responsibility for safety at the site, should have discovered the condition. Commission precedent is well settled that an employer must exercise reasonable diligence to detect safety hazards to which employees are exposed, and Moran's own testimony indicates he overlooked the conduit during his inspection prior to the CO's arrival. (Tr. 77-78; 87). Moreover, CO Steinke testified that Moran should have been aware of the conduit due to its proximity to Turner's office at the site; he also testified that he was following Moran up the ramp and that Moran did not notice the conduit until it was pointed out to him. (Tr. 115-19; 123; 177). Finally, Moran's testimony shows that he and a Turner laborer would have been exposed to the condition when going to the upper levels, and while the CO said that Moran was the only person he saw using the ramp on October 18, he also said he saw other workers using it when he went back to the site on October 21. (Tr. 44-45; 178-79; 191-93). This item is affirmed as a serious violation. The penalty assessment for both of the citation items in this case is set out following item 2, *infra*.

Citation 1 - Item 2

This item alleges a violation of 29 C.F.R. 1926.501(c), which provides as follows:

When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:

(1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or,

(2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or,

(3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

CO Steinke testified that when he arrived at the site on October 18 the gate in front of the plaza area of the building was open, there was no caution tape in the area, and there were no signs indicating where he should enter. A construction worker told him to go to Turner's office on the 49th Street side of building, and after meeting with Moran and observing the conduit on the ramp, the CO and Moran proceeded to the upper floors; an employee on the third level was pulling nails from wood near the front edge of the building, and three employees on the fourth level were installing shoring on the front edge of the building. The CO said that the four employees were using hammers, that the fourth level, shown in C-5, was cluttered with materials, and that there was nothing to keep the tools or materials from falling to the plaza area below; the CO also said that the employees were those of another contractor, and that he discussed the lack of fall protection with their supervisor and with Moran.¹ C-6 is the CO's sketch of the building that day. (Tr. 108-16; 124-40).

The CO further testified that he returned to the site on October 21, and that he saw debris netting on the fourth level, as shown in C-7, but nothing on the other levels to keep objects from falling off the building. After completing his inspection, the CO met with Moran in front of his office on 49th Street for a closing conference, and he discussed the hazard of falling objects in the plaza area of the building on First Avenue, which they could see from their vantage point. Moran noted the yellow caution tape strung in front of the plaza between two columns, which he said had been used while the waterproofer had been there on October 16; he also said they were going to put in more overhead protection. The CO replied that caution tape did not prevent employees from being in the area, at which point two workers walked out of the building and then went under the tape and out the front gate; Steinke and Moran discussed the event, but Moran said nothing to the employees. C-9 is the CO's sketch depicting the building and plaza area. (Tr. 140-55; 189; 193).

Thomas Moran testified that there was no overhead protection in place before October 18, and that he was concerned about the hazard of employees being struck by falling objects; the plaza was consequently closed off about a week before the OSHA inspection by putting up yellow caution tape, keeping the front gate shut and posting signs indicating that the entrance was closed and to use the one on 49th Street. Moran further testified that there was no overhead work that would have

¹The CO stated that netting or the toe board component of a guardrail system would prevent objects from falling from the building. (Tr. 134-35).

resulted in objects falling to the plaza area on October 16, the day two workers were waterproofing the front of the building, but that the waterproofing had to be done before overhead protection could be put up and there was no other way to do the job. Moran denied the CO returned to the site on October 21, saying he was told of the violations over the phone; he also said that the two employees walked under the tape on October 18 and that he did not have the chance to say anything to them as he was on the 49th Street side of the building. (Tr. 51-53; 62-77; 80-81; 204; 210; 218-19; 233-34).

In light of the record, Turner was in violation of the cited standard. First, the CO's testimony is credited over that of Moran for the reasons given above, and I find as fact that no caution tape was up and no signs were posted in front of the plaza on October 18; I also find that the workers the CO and Moran observed walked under the tape on October 21, and not, as Moran indicated, on October 18. Second, despite Moran's statement that no overhead work was taking place on October 16 that would have caused objects to fall to the plaza area, his testimony about R-3, his own report of the work done at the site that day, persuades me that overhead work at or near the front perimeter of the building was occurring such that the waterproofing employees were exposed to the cited hazard; in addition, C-7, taken by CO Steinke on October 21, shows two employees, one on the seventh level and one on the eighth level, working near the front perimeter of building.² (Tr. 88-95). Third, although Turner's pre-hearing submissions indicated that it would be asserting the affirmative defenses of unpreventable employee misconduct, greater hazard and infeasibility of compliance, the evidence of record clearly demonstrates that Turner has neither undertaken nor fulfilled its burden of proof with respect to these defenses. *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225-28 (No. 88-821, 1991). This item is therefore affirmed as a serious violation.

Penalty Assessment

The Secretary has proposed a penalty of \$2,125.00 for each of the above citation items. CO Steinke testified that the initial penalty for each item was \$5,000.00, because the cited conditions could have resulted in serious injury or death, and that this amount was reduced to \$2,500.00 based on his determination that the probability as to these items was lesser rather than greater; the CO

²The Secretary's motion to amend the citation and complaint to reflect that the alleged violation occurred on October 16 and 18, rather than just October 18, was granted. (Tr. 236-37).

further testified that a 15 percent reduction for good faith was given because Turner had a safety program, and that no reductions for size or history were given due to the company's large number of employees and the fact that it had been cited within the previous year, resulting in a final proposed penalty of \$2,125.00 for each item. (Tr. 157-63). On the basis of this evidence, I conclude that the proposed penalties are appropriate. A penalty of \$2,125.00 for each item is accordingly assessed.

Conclusions of Law

1. Respondent, Turner Construction Company, 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 in serious violation of 29 C.F.R. §§ 1926.405(b)(1) and 1926.501(c).

Order

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

1. Items 1 and 2 of citation 1 are affirmed as serious violations, and a penalty of \$2,125.00 is assessed for each item.

Irving Sommer
Chief Judge

Date: