



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Summit Contractors, Inc.,

Respondent.

OSHRC Docket No. **04-0492**

Appearances:

Leslie Paul Brody, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, GA
For Complainant

Robert E. Rader, JR., Esquire
Rader and Campbell
Dallas, TX
For Respondent

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

DECISION AND ORDER

Summit Contractors, Inc., was the general contractor for the construction of the Tuscany Lakes Apartments in Ellenton, Florida. On October 27, 2003, a worker at the construction site fell to his death from an unguarded stairway landing. Occupational Safety and Health Administration (OSHA) compliance officer Nancy Hodensius began an investigation of the fatality on October 28, 2003. As a result of her investigation, the Secretary issued a one-item citation to Summit on May 15, 2004.

Item 1 of the citation alleges a serious violation of 29 CFR § 1926.1052(c)(12), for failing to provide a guardrail system for the unprotected sides and edges of a stairway landing. Summit timely contested the citation.

A hearing was held in this matter on November 9 and 10, 2004, in Sarasota, Florida. Summit concedes jurisdiction and coverage. Summit argues that the Secretary failed to establish that it had either actual or constructive knowledge that workers would enter the building in which the fatality occurred or that the guardrail on the stairway landing at issue had been removed.

For the reasons discussed below, it is determined that Summit was not in violation of 29 CFR § 1926.1052(c)(12). The citation is vacated and no penalty is assessed.

Background

Tuscany Lakes Apartments comprises 14 three-story apartment buildings, plus a clubhouse, maintenance building, and laundry building. The construction project covered a ½ mile by ½ mile area.

As the general contractor, Summit had four full-time employees on the job: general superintendent Patrick White, and assistant superintendents Michael White, Kevin Bass, and Vincent Reali. None of these Summit employees performed physical labor on the project.

Subcontractors performed the actual physical construction of the buildings. Each subcontractor was responsible for cleaning up after itself when its work was finished. When a subcontractor did not clean up its worksite, Summit arranged for temporary laborers to come in and do the cleaning. Summit would then charge the subcontractor for the cost of the laborers.

For the Tuscany Lakes project, Summit contracted with Workers Temporary Staffing, Inc. (WTS), to send out a crew of day laborers as needed. The temporary laborers were not skilled workmen.

On October 27, 2003, per Summit's request, WTS sent out a crew of four laborers. The crew's driver was George Province. The other three laborers were Antonio Chevre, Kevin Isom, and Gordon Beyette. When the crew arrived at the construction site, driver Province took the work order into Summit superintendent Patrick White's trailer. White issued the specific work instructions for the day. He told Province that he and his crew needed to clean up trash around the lake shore, the clubhouse, and the buildings around the lake near Building 1. The WTS crew proceeded to the assigned area.

Shortly before noon, laborer Isom told assistant superintendent Bass that the WTS crew had finished with its assigned task and asked, "Do you want us to go around Building 2?" Bass replied, "Yes" (Tr. 389). Building 2, like all of the apartment buildings at the Tuscany Lakes project, is three stories high and contains stairways, sixteen balconies, four mid-landings, and eight breeze ways, all equipped with railings. In all, 124 rails of some type are used in each apartment building.

Summit had hired a framing subcontractor to install the railings. The framing subcontractor

installed temporary guardrails in areas where the rails needed to be removed to deliver loads of materials and equipment. For these guardrails, the subcontractor installed brackets into which the temporary rails could be easily placed, removed, and replaced as needed. Brackets were not installed at the mid-landings. Instead, the guardrails were nailed into place in these areas.

The WTS laborers proceeded inside Building 2 and began cleaning. They followed their normal procedure, which was to start at the top of the three-story building and work down. Beyette was sweeping the stairway clear of debris. As he was sweeping the mid-landing between the second and third floors, he apparently backed up and stepped off the mid-landing, falling 15 feet to the floor below. Beyette died at the scene. The guardrail that had been nailed in place at the mid-landing had been removed. Beyette was not using any other form of fall protection.

Item 1 of the Citation

The Secretary alleges that Summit committed a serious violation of 29 CFR § 1926.1052(c)(12). The citation states:

29 CFR 1926.1052(c)(12): Unprotected sides and edges of stairway landings were not provided with guardrail systems which met the criteria contained in Subpart M of 29 CFR 1926:

a) Building 2—There were no guardrails on the landing at the stairs from the second floor to the third floor where employees were doing clean-up, on or about 10/27/03.

The standard at 29 CFR §1926.1052(c)(12) provides:

Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail systems criteria are contained in subplot M of this part.

The Secretary must prove her case by a preponderance of the evidence.

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 knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Summit does not dispute that the cited standard applies to the stairway mid-landing at issue and that the terms of the standard were not met. Summit also does not dispute that Beyette, although a temporary laborer supplied by WTS, was Summit's employee under the Occupational Safety and Health Act of 1970 (Act) at the time of his death, or that Beyette was exposed to the hazardous condition of an unguarded landing.

What Summit does dispute is that it had actual or constructive knowledge that (1) the temporary employees would go inside Building 2, or that (2) the guardrail for the stairway landing had been removed.

Knowledge of Employees' Presence in Building 2

Summit argues that none of its four supervisors at the worksite instructed the temporary laborers to enter Building 2, and had no reason to believe that they would enter the building. The Secretary argues that one of Summit's supervisors did, in fact, instruct the employees to enter Building 2.

Kevin Bass was Summit's assistant superintendent responsible for writing up the punch lists for the various subcontractors. His routine responsibilities did not include supervising the WTS employees. Bass stated, "If I saw something that they needed to do, I could tell them to do it, but I normally didn't get involved in giving them their marching orders for the day" (Tr. 387).

Bass had arrived 10 to 15 minutes late on October 27, and was not present in Summit's trailer when superintendent Patrick White issued the WTS laborers work assignment to Province. Bass was unaware of what the assignment was. At some point that morning, Bass was standing in front of Building 1 when one of the WTS crew came up to him and asked, "Is there anything else we need to do around the building?" He replied, "Yes, there is a piece of scaffolding on the third floor that needs to be carried out and some 2x4s on the second floor that need to be carried out" (Tr. 389).

Bass testified that later that morning, a little before noon, WTS laborer Kevin Isom approached him as he was engaged in a personal call on his cell phone. Isom told him, "We're done here. Do you want me to go around Building 2?" Bass stated that he took the phone away from his ear, glanced over at Building 2 where he saw trash and debris on the ground, and said, "Yes" to Isom (Tr. 389). He then returned to his phone conversation. He estimated that his entire exchange with Isom lasted about 10 seconds. Bass further testified that he did not observe the WTS laborers enter

Building 2. Approximately 10 to 15 minutes after the exchange between Isom and Bass, Beyette fell to his death inside the building.

Based upon the exchange between Bass and Isom, the Secretary alleges that Summit, through Bass, knew that the WTS laborers were going to be inside Building 2, yet failed to inspect the building to ensure that all guardrails were in place. It is Summit's policy to inspect any building for guardrail protection when it knows workers will be entering it to perform assigned work. The Secretary argues that Summit failed to follow its own policy, resulting in the fall hazard to which Beyette was exposed.

The evidence in the record establishes that neither Bass nor Summit had actual knowledge that the WTS laborers had entered Building 2 on October 27. Patrick White had assigned them to clean up around the lakeshore, an assignment that he believed would take them all day. At the hearing Bass testified that Isom asked him if he wanted the WTS laborers to clean up "around" Building 2. Seeing the trash and debris lying on the ground outside the building, he believed "[i]t was pretty obvious" that Isom was referring to picking up the trash when he asked if the crew should go around the building (Tr. 403). Bass stated that he did not see the laborers enter the building.

The Secretary argues that the WTS crew members would not have been in Building 2 unless they had been assigned to clean inside it. However, when Isom was on the stand, the Secretary failed to ask him about the conversation in which Bass purportedly gave the WTS laborers this assignment. In fact, Isom stated that "George [Province] was running the show" and that Province told the crew members where they were supposed to work (Tr. 15). He did not refer to his conversation with Bass or Bass's supposed assignment. The only assignment issued to Province mentioned in the record is the one Patrick White gave to him when the WTS crew arrived that morning. Assistant superintendent Michael White testified that he witnessed Patrick White giving the instructions to Province, and that he then followed Province out to the van to emphasize the importance of cleaning up the lakeshore. Nowhere in the record is there any evidence that a Summit supervisor instructed any of the WTS employees to enter Building 2. The Secretary seeks to interpret Bass's assent to Isom's suggestion that he go "around" Building 2 as tantamount to an instruction to enter Building 2. But "around" is generally understood to mean "surrounding" or "on the periphery." The Secretary points out that previously when one of the WTS laborers asked Bass if there was anything the crew

“needed to do around this building,” Bass instructed the crew to enter Building 1 and take out trash and a piece of scaffolding. This does not establish, however, that Bass interpreted “around” to mean “inside.” He responded to the laborer’s open-ended inquiry with specific instructions to go inside Building 1 in order to accomplish a specific task. With Isom, Bass was only assenting to Isom’s suggestion that the crew go around Building 2. Isom’s question would not create the impression in the mind of a reasonable person that the WTS laborers planned to work inside Building 2. The Secretary has failed to establish that anyone at Summit had actual knowledge that the WTS laborers would enter Building 2.

Neither did the Secretary establish that Summit had constructive knowledge that the WTS crew would enter Building 2. Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of the violation. *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992).

The only assignment issued to the WTS crew on October 27 was Patrick White’s instruction to clean up the lakeshore. Patrick White testified that he observed the crew working on this assignment twice that morning: once at about 8:15 and again at 9:00 or 10:00. An employer is not required to supervise employees on a continual basis. In this case, the WTS crew was assigned to a low-risk, routine task that required no specialized skill. There was no reason to anticipate that the crew would abandon its assigned task and enter Building 2. The evidence presented at hearing establishes that the crew was only in the building 10 or 15 minutes before Beyette fell. Constructive knowledge has been found where the violative condition is in a conspicuous location that is readily observable. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996). In the instant case, the evidence presented at the hearing shows the WTS crew was inside a building for a short period of time where no one was scheduled to be working. Reasonable diligence did not require Summit’s supervisors to anticipate that the WTS laborers would enter the building.

Knowledge of Missing Guardrail

The Secretary concedes that there is no evidence that Summit had actual knowledge that the mid-landing guardrail in Building 2 was missing. There is no evidence to indicate when the guardrail was removed. Patrick White and Michael White both testified they observed the guardrail in place during the previous week (October 27, the day of the fatality, was on a Monday). All of the other guardrails in Building 2 were up. The mid-landing guardrail had been in place on the previous Friday, October 24. No one had worked inside the building over the weekend, and no one was scheduled to be in the building on Monday morning. Isom testified that there were no guardrails up in Building 2 on October 27. This testimony is contradicted by the testimony of every other witness who was in Building 2 on that day. The Secretary does not contend that any guardrails other than the mid-landing guardrail at issue were missing. Isom's demeanor ranged from nervous to combative, and his testimony was at times confusing or self-contradictory. His testimony that there were no guardrails installed in Building 2 is not credible and is rejected.

The Secretary contends that with the exercise of reasonable diligence, Summit could have known that the guardrail was missing. In her post-hearing brief, the Secretary repeatedly asserts that Bass instructed the WTS crew to enter Building 2. She argues that once Bass issued this instruction, it was his responsibility to inspect the building to ensure that all required guardrails were in place. As noted in the previous section, however, there is no evidence that Bass intended that the WTS crew enters the building, that the WTS crew had completed its original assignment, or that Isom understood Bass's assent as an instruction to enter Building 2. An employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their *scheduled work*." *Automatic Sprinkler Corp. Of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (emphasis added).

The Secretary did not present sufficient evidence to prove that Summit anticipated the WTS laborers, or any other employees, would be in Building 2 that morning. Summit had instructed the WTS laborers that, if they were ever working in a building where the guardrails had been removed, they were to replace the guardrails in the brackets or to get someone from Summit to do it. Isom testified that Bass had told them previously that they were to replace any guardrails that had been

removed. Summit had taken steps to prevent the employees from being exposed to fall hazards should they observe a missing guardrail before Summit did.

Summit's superintendent and assistant superintendents monitored the guardrails on a regular basis. Because so many different subcontractors removed guardrails to bring in loads of materials and equipment, Summit constantly inspected to see that the guardrails had been replaced. Jerry Ward was the assistant superintendent for the framing subcontractor. He testified that Summit's superintendents walked the site every evening and met with him every morning to tell him what guardrails needed to be replaced (Tr. 347):

Every morning, I would always meet with Vincent [Reali] and at that time we would go over that prior to the day. We would always go over the handrails because every evening they had a walk-through, and we needed to get with the crew. Every morning, that's what they did. They went through the project putting up handrails.

“[T]he employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard.” *Texas A. C. A., Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) (emphasis in original).

The Secretary has failed to establish that Summit had constructive knowledge of the missing guardrail. Summit had a monitoring program in place to detect missing guardrails. Summit presented uncontroverted evidence that it did not anticipate employees being in Building 2 the morning of October 27. The WTS employees had been instructed to replace missing guardrails or to notify Summit that guardrails needed replacing. The missing guardrail was not plainly visible to Summit's supervisory personnel, who were outside where the WTS laborers were assigned to work. Summit has shown that it had no actual knowledge that the WTS crew was in Building 2 before Beyette fell or that the guardrail for the mid-landing was missing. The Secretary has failed to make her case that Summit had constructive knowledge of these facts. Accordingly, item 1 of the citation is vacated.

**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:

Item 1 of the citation, alleging a serious violation of 29 CFR § 1926.1052(c)(12), is vacated, and no penalty is assessed.

_____/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: April 1, 2005