

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Evergreen Construction Company,

Respondent.

OSHRC Docket No. **12-2385**

Appearances:

Sophia Haynes, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

Andrew N. Gross, General Counsel, H B Training & Consulting, LLC, Lawrenceville, Georgia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651 *et seq.* Evergreen Construction Company (Evergreen), is a construction company located in Atlanta, Georgia. On June 12, 2012, Occupational Safety and Health Administration (OSHA) compliance officer Charles Johnson conducted an inspection of Evergreen at a jobsite located at 3200 Cobb Galleria Parkway, Atlanta, Georgia, where Evergreen was the general contractor on a project to build a Hyatt House hotel. Based upon Johnson's inspection, the Secretary of Labor (Secretary) on October 1, 2012, issued a Citation and Notification of Penalty (Citation) with one item to Evergreen alleging a serious violation of 29 C. F. R. § 1926.501(b)(1), for failing to provide fall protection for employees. The Secretary proposed a penalty of \$4,410.00 for the Citation. Evergreen timely contested the Citation and proposed penalty.

The undersigned held a hearing in this matter on January 23, 2014, in Atlanta, Georgia. The parties filed post-hearing briefs on April 25, 2014. For the reasons discussed more fully below, the undersigned affirms the Citation and assesses a penalty in the amount of \$4,410.00.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act (Tr.7). The parties also stipulated that at all times relevant to this action, Evergreen was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8).

Background

OSHA initiated an inspection of Evergreen's jobsite as a result of an anonymous complaint regarding conditions at the jobsite located at 3200 Cobb Galleria Parkway near Interstate 75 in Atlanta, Georgia (Tr. 16). The building under construction was a Hyatt House hotel, a six story building on three acres of land (Tr. 43; Exhs. C-2, C-3). Evergreen was the general contractor for the jobsite, and there were approximately 20 subcontractors and 40 workers onsite (Tr. 33, 37, 67). As a result of the anonymous complaint, OSHA Compliance Officer Charles Johnson was assigned to conduct an inspection of the jobsite. As Johnson approached the jobsite in his vehicle from the southwest interstate side of the building, he observed employees located next to an unprotected edge of the building, not wearing fall protection (Tr. 17; Exhs. C-4, pp.1-3, 6-11). Johnson circled the entire facility, and saw work was being performed on the building's exterior walls. He observed fall hazards on every corner, on every side of the facility, and that there were no guardrails (Tr. 17). As he circled the facility, Johnson saw a job trailer located on the east side, approximately 25 feet from the front of the building under construction. In an open area nearby, there were materials being staged, a latrine, and a parking lot (Tr. 8). Johnson also observed the building construction manager's trailer was located on the west side, about 25 feet on the northwest side of the building in front of the building (Tr. 18).

The employees Johnson observed when he arrived were working on the fourth floor of the building, which was the top of the building at that time. Johnson estimated the top of the building was approximately 30 feet from the ground floor. The plans reflect the distance was 31 feet (Tr. 23-24). The fourth floor was partially built. There were no walls and there were no

guardrails or safety nets around the edges on the fourth floor (Tr. 26-27). Johnson observed employees working from all edges (Tr. 24, 25; Exh. C-4). All of the edges on the southwest and northeast were unprotected (Tr. 24).

After circling the building, Johnson went into the trailer to conduct an opening conference. He met with Donald DiRenno, onsite construction supervisor, safety manager and superintendent for Evergreen. DiRenno was in a meeting in the conference room at the time Johnson entered the trailer. Johnson explained why he was there (Tr. 34 76-78). Afterwards, he and DiRenno left the conference room and went to DiRenno's office to conduct the opening conference (Tr. 34). While in DiRenno's office, Johnson showed DiRenno, through the office window, the fall protection violations occurring on the jobsite (Tr. 34). DiRenno told Johnson that those employees were employees of Nunez Construction, masonry subcontractor on the jobsite (Tr. 24, 25, 34-35; Exh. R-3). The employees were installing concrete masonry units to construct the walls for the building (Tr. 25).

Once the opening conference was completed, Johnson conducted a walk around inspection accompanied by DiRenno (Tr. 35). While on the fourth floor of the building, Johnson observed there was no personal fall arrest system for the workers on the fourth floor, with the exception of rails near the elevator shaft (Tr. 27; Exh. C-4, pp. 13-14). There also was no place to tie off, in the area on the fourth floor where the employees were working (Tr. 27; Exhs. C-4, pp. 13-14, C-9). Johnson observed an employee without fall protection leaning over the side of the building (Tr. 29). He saw an employee standing on a scaffold on the fourth floor (Tr. 30; Exh. C-4, p. 10). Johnson also observed Mr. Nunez walking approximately two feet from an opening on the fourth floor, where he could fall 31 feet (Tr. 36). DiRenno approached Mr. Nunez, owner of Nunez Construction, and said to him, "Didn't I tell you to get some fall protection on?" (Tr. 37, 39). An Evergreen engineer on the fourth floor was observed marking lines (Tr. 38). This employee acknowledged to Johnson there was no fall protection on the fourth floor, but he did not know why (Tr. 38-39). Nunez Construction employees told Johnson they had been on the fourth floor for three days, and they had never installed fall protection (Tr. 38).

Although there was no fall protection on the fourth floor, fall protection was present on the third floor of the building. The fall protection on the third floor included rails, wire rope and anchorage points against the walls (Tr. 36).

As a result of the fall protection violations observed by Johnson during the inspection, the Secretary issued the Citation at issue in this matter to Evergreen due to its authority as controlling employer on the jobsite (Tr. 41).

Discussion

The Secretary alleges Evergreen violated OSHA's fall protection standard found in Subpart M of Part 1926.

The Citation Alleged Serious Violation of § 1926.501(b)(1)

The Secretary charges Evergreen with a violation of § 1926.501(b)(1) of the fall protection standard and alleges in Citation 1, Item 1:

Employees were exposed to fall hazards of 30 feet 8 inches to the ground below while working within 1 foot of the unprotected edge of the 4th floor with no fall protection.

Section 1926.501(b)(1) provides:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) 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.

Multi-Employer Worksite Policy

The Secretary issued the instant Citation pursuant to his Multi-Employer Worksite Policy. The Multi-Employer Worksite Policy is the guidance used by the Secretary for issuing citations to the creating, exposing and controlling employers on a jobsite (CPL 02-00-142). Evergreen does not dispute it was the general contractor on the jobsite with supervisory authority and control over the subcontractors, including Nunez Construction, working on the jobsite (Tr. 33, 41, 53-55, 92). The Secretary contends that as general contractor on the jobsite, Evergreen is responsible for the cited violation due to its position as controlling employer.

None of Evergreen's employees was exposed to the conditions cited by OSHA. Only employees of subcontractor Nunez Construction were exposed. Recent Commission case law provides that the Secretary may cite a non-exposing, controlling employer under the Multi-Employer Worksite Policy. In *Summit Contractors*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the seminal case on the Commission's current position regarding the policy, the Commission held:

“[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees but those of other employers engaged in a common undertaking.” *McDevitt Street Bovis*, 19 BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability “an employer may be held responsible for the violations of other employers where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.” *Id.* (citation omitted); *Grossman Steel*, 4 BNA OSHC 1188, 1975-1976 CCH OSHD at p. 24, 791.

The Secretary asserts the instant Citation was issued to Evergreen because it was the controlling employer on the jobsite (Secretary’s brief, p. 15; Tr. 33, 41). Evergreen does not dispute that it was the general contractor with supervisory authority and control over the jobsite. Therefore, as required by *Summit, id.*, Evergreen must exercise reasonable care to prevent and detect violations that may occur on the jobsite.

Elements of the Secretary’s Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The first three elements of the Secretary’s case are undisputed. Evergreen concedes the standard is applicable, the terms of the standard were violated, and employees were exposed to the fall hazard (Evergreen’s brief, p. 7). Therefore, the only element for determination is whether Evergreen knew or could have known with the exercise of reasonable diligence of the violative condition.

Employer Knowledge

The Secretary must establish actual or constructive knowledge of the violative conditions by Evergreen in order to prove a violation of the standard. It is the Secretary’s burden to adduce sufficient evidence to establish the knowledge element of his case. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form*

Co., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of, or was responsible for, the violation. *Todd Shipyards Corp.* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

The Secretary contends that Evergreen had both actual and constructive knowledge of the fall protection violations (Secretary's brief, pp. 9-13). The undersigned disagrees with the Secretary that Evergreen had actual knowledge of the violative conditions on the day of the inspection.

The Court of Appeals for the Eleventh Circuit recently discussed the Secretary's knowledge element in the *ComTran Group, Inc.* decision:

As for the knowledge element [], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977)(holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.*, 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

ComTran Group Inc., 722 F.3d 1304, 1307-1308 (11th Cir. 2013).

Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). Although the violative conditions were in plain view, there is no evidence in the record to show that Evergreen

was aware on the day of the inspection that Nunez Construction employees were working without fall protection.

The Secretary argues that actual knowledge is established by the fact that Nunez Construction employees working without fall protection could be seen from the window in DiRenno's office (Secretary's brief, p. 10). There is no evidence, however, that DiRenno saw the employees from his office at the time the employees were working without fall protection. Instead, the evidence shows that on the day of the inspection, DiRenno was conducting a meeting in a conference room in the trailer at the time Johnson approached the trailer between 10:00 a.m. and 11:00 a.m. (Tr. 35, 76). The meeting began at approximately 8:00 a.m. (Tr. 77). Nunez Construction typically began work between 8:00 a.m. and 9:00 a.m. (Tr. 72). When Johnson entered the trailer, he first met DiRenno in the conference room, at which time DiRenno took him to his office (Tr. 34). While they were in DiRenno's office, Johnson showed DiRenno the employees could be seen from his office window working without fall protection. DiRenno responded the employees were Nunez Construction employees. Other than when Johnson directed DiRenno to look out of his office window at the employees, there is no evidence that DiRenno actually saw the employees working without fall protection, or even that DiRenno was in his office at the time they were working unprotected. There was no evidence adduced at the hearing that he or any other Evergreen employee, through whom knowledge could be imputed, was aware that Nunez employees had begun working that morning or were seen working without fall protection.

The Secretary also asserts that actual knowledge is established by the admissions of DiRenno and Will Goodwin, Evergreen's Senior Project Manager (Secretary's brief, p. 10). Both DiRenno and Goodwin testified they knew Nunez Construction did not use fall protection prior to the date of the inspection. Neither, however, testified to being aware Nunez Construction failed to use fall protection on the day of the inspection. If the Citation had alleged violations for any of the days referred to by DiRenno and Goodwin, actual knowledge could be established based on their testimony. The Citation issued in this matter, however, alleges the violation occurred only on June 12, 2012, the day of the inspection. DiRenno's and Goodwin's knowledge do not establish actual knowledge on the date cited.

The Secretary further argues that actual knowledge is established by Evergreen's admissions that there were no guardrails or attachment points on the fourth floor of the building

(Secretary's brief, p. 10). The Secretary's argument is two-fold: (1) Evergreen created the conditions and therefore was aware of the lack of fall protection; and (2) because Evergreen knew there were no guardrails or attachment points for employees, it was aware Nunez Construction employees were working without fall protection. This argument fails to establish actual knowledge. It is essentially a reasonable diligence argument for constructive knowledge, the "could have known" portion of the knowledge element.

Constructive knowledge depends on "whether, with the exercise of reasonable diligence, [the employer] could have discovered the [violative condition]." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1348-49 (No. 99-0191, 2003). "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, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, id at 1349. Here, the undersigned finds Evergreen could have discovered the violative condition.

As argued by the Secretary, Evergreen was aware that there were no physical barriers or safety nets to protect employees from falling, and no tie off points for employees. Therefore, Evergreen "could have known" employees working near the edge on the fourth floor of the building would be unprotected from falls of 31 feet. Further, Evergreen had prior knowledge Nunez employees did not use fall protection as required on the jobsite. DiRenno testified that prior to the OSHA inspection, he warned Nunez employees about not using fall protection; took them off the job until they acquired fall protection; and sent them home for not utilizing fall protection. DiRenno testified he even sometimes provided fall protection equipment for the Nunez employees (Tr. 71). He testified he observed safety violations by Nunez Construction several times:

Q: Now, do you recall how many occasions did you have to observe safety violations by Nunez Construction?

A: Several.

Q: And, could you walk us through each of them to the extent of your recollection?

A: Yes. You know, as I was doing my inspections, several things. Nunez's safety harnesses, people not even dressed properly, not wearing the proper safety equipment, such as hard hats, work boots, not only safety harnesses and lanyards and tie-offs, I stop the work, we stopped these employees from working, I brought him over or his foreman who wasn't always on site.

I brought his foreman over, explained to him that we needed to stop the work, needed a get proper dress, proper harnesses, proper lanyards, whatever the situation might be, and stopped the work until they got them.

And then, eventually, just remove them from the job after I've talked to them, after I stopped the work, I said "You guys need to go home. Come back tomorrow. Come back when you have the proper equipment."

(Tr. 69-70).

...

Q: And, you said there were several instances that you had addressed safety problems with Mr. Nunez or his foreman?

A: Yes.

Q: Now, I believe you stated that you sent some of them home. Why would you sometimes send them home on some occasions and not send them home on other occasions?

A: Well, some things, like I said, were just a hard hat or work boots which they had in their truck. They went down and got the hard hat and got the work boots, came and showed it to me and I let them go back to work.

Q: And, what about safety violations that involved fall protection?

A: Fall protection violations, I sent them home. I stopped the work, brought them all down to the ground, lectured them and sent them home.

Q: Can you recall - -

A: Well, I sent them off the job. I don't know if they went home, but I sent them off the site.

(Tr. 70-71). According to DiRenno, he probably provided Nunez Construction employees with fall protection equipment such as harnesses, rails, lanyards, personal fall protection, enough for one or two people, maybe two or three times (Tr. 71).

The evidence also reveals that DiRenno knew the Nunez Construction employees did not wear fall protection the morning and afternoon of the day before the OSHA inspection (Tr. 35, 63). In addition, on the day of the OSHA inspection, after the opening conference, DiRenno told Mr. Nunez, "Didn't I tell you to get some fall protection on?" (Tr. 37, 39).

Although Nunez Construction had been on the jobsite only a few weeks, its reputation for not wearing fall protection was well known by DiRenno. Further, DiRenno testified they were not very reliable regarding "man power, safety, showing up to the job at the proper time; pretty much everything in general" (Tr. 74). In light of DiRenno's awareness of Nunez Construction's propensity to work without the necessary fall protection, if Evergreen had exercised reasonable diligence and inspected the area of the worksite where Nunez Construction was working when they began work on the jobsite on the day of the inspection, it would have discovered the employees were working without fall protection. The evidence reveals a two to three hour time

period between 8:00 a.m. or 9:00 a.m. when Nunez Construction began work on the building, to 10:00 a.m. or 11:00 a.m. when Johnson arrived at the conference room, during which an inspection could have been conducted to determine whether Nunez Construction's employees were protected from fall hazards. The violative conditions were not discreet. They were in plain view, and with the exercise of reasonable diligence, Evergreen could have known they existed.

The record is clear that Evergreen had a superintendent in charge of safety on the jobsite, had a safety program in place, conducted safety meetings, trained employees, sent emails regarding fall protection and inspected the jobsite regularly (Tr. 67, 72, 83, 84; Exhs. C-6, C-7, C-8). This is commendable. If those measures had been implemented effectively with respect to Nunez Construction, its employees may not have been exposed to fall hazards. As set forth above, the record evidence reveals that Evergreen took some steps to get Nunez Construction to comply with the fall protection requirements. Many of those steps, however, did not comply with the requirements of its safety program which required written warnings and termination from the jobsite (Tr.; Exh. C-6, p. 4-11).¹ Evergreen's Site Specific Safety Plan specifically makes Section 4 of Evergreen's Safety Plan addressing enforcement and its progressive discipline policy effective to subcontractors on the jobsite (Exhs. C-6, p. 4-11, C-7, p.3). The measures actually implemented at the jobsite were not effective in securing the compliance of Nunez Construction with the fall protection requirements of the cited standard on the jobsite, specifically on the day of the inspection. The undersigned finds Evergreen had constructive knowledge of the violative conditions. The Secretary has established a violation of § 1926.501(b)(1).

The Secretary issued the Citation as a serious violation. Under § 17(k) of the Act, a serious violation exists if there is a "substantial probability that death or serious physical harm could result" from the violation. A fall from 30 feet to the ground would likely result in serious physical harm. Johnson testified it could result in death (Tr. 27). The violation is properly classified as serious.

¹ Evergreen terminated its contract with Nunez Construction in August 2012, however the record fails to substantiate the termination was due to its failure to use fall protection (Tr. 101-102). DiRenno testified "I think it was a combination of everything: schedules, performance, manpower, safety and a combination of other things is why they were terminated" (Tr. 89).

Penalty Determination

The Commission “is the final arbiter of penalties” *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff’d*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits.”), *aff’d*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff’d*, 34 F. App’x 152 (5th Cir. 2002) (unpublished). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer’s size, history of violation, and good faith.” *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

Evergreen had thirty employees under its control, however, only three were employed by the establishment and covered by the inspection (Exh. C-1). Due to its small size a 30% reduction in penalty was applied. In addition, a 10% reduction was allowed since Evergreen had been inspected within the previous five years, with no history of serious OSHA violations (Exh. C-1). No reduction in the penalty for good faith was permitted because there were deficiencies in the implementation of Evergreen’s safety program (Exh. C-1).

The undersigned agrees with the Secretary’s assessment as to the gravity of the violation, which was rated a high due to the high possibility of permanent disability or death should an employee fall, and the greater probability of an injury occurring because employees worked within one foot of the edge (Exh. C-1). Three employees were exposed to the fall hazard. Accordingly, it is determined that the proposed penalty of \$4,410.00 is appropriate for the Citation.

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 hereby ORDERED that Item 1 of the Citation, alleging a serious violation of § 1926.501(b)(1), is AFFIRMED and a penalty of \$4,410.00 is assessed.

SO ORDERED.

/s/

SHARON D. CALHOUN

Judge

Date: July 8, 2014
Atlanta, Georgia