

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

STEVENS CONSTRUCTION CORP.,

Respondent.

OSHRC DOCKET NO. 00-1827

APPEARANCES:

For the Complainant:

Helen Schuitmaker, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Gerald L. Henrich, P.E., President, Stevens Construction Corp., Madison, Wisconsin

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Stevens Construction Corp. (Stevens), at all times relevant to this action maintained a place of business at Hwy. 32 and Douglas Avenue, Racine, Wisconsin, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 1-2, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Stevens' Racine work site. As a result of that inspection, Stevens was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Stevens brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 12, 2000, an E-Z hearing was held in Milwaukee, Wisconsin. At the hearing, the Secretary moved to amend citation 1, item 1 to allege, in the alternative, a violation of §1926.501(b)(2)(ii) (Tr. 6). This judge reserved ruling on that motion (Tr. 10). No briefs are required in E-Z proceedings; this matter is, therefore, ready for disposition.

Background

George Petaway, a Compliance Officer (CO) with OSHA, testified that as he drove by Stevens' Racine work site on August 1, 2000, he noticed employees working on top of a building without the benefit of any kind of fall protection (Tr. 12-13, 17). Petaway stopped and videotaped a number of employees on the peak of a building. Those workers were installing wood trusses while standing on previously installed plywood roof sheathing (Tr. 16, 19-20, 28; Exh. C-2). In addition, Petaway observed employees working near a tar papered portion of the roof near the eaves (Tr. 46). A "slide guard" had been placed immediately below the tar papered area (Tr. 47-48). Although he saw someone working in the vicinity of the tar papered portion of the roof, Petaway did not see anyone actually applying tar paper during his inspection (Tr. 55-57).

Alleged Violation of §1926.501(b)(13)

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(13): Roofing Work on Residential Construction. Each employee engaged in residential roofing activities 6-feet (1.8m) or more above lower levels were not protected from falling by guardrail system(s), safety nets system(s), or personal fall arrest system(s).

(a) Employees engaged in roofing activities at a residential housing project located on Douglas Ave.; Racine, Wisconsin, were not protected from falling (25-ft. to 35-ft.) to the ground below by conventional fall protection such as; a guardrail system or personal fall arrest system.

The cited standard provides:

Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

Facts

Although he saw someone working in the vicinity of the tar papered portion of the roof, Petaway admitted he did not see anyone actually applying tar paper during his inspection (Tr. 55-57). Hauke testified that a roofing subcontractor tar papered one portion of the roof the previous Saturday, so that the electrician could work below (Tr. 125). Nothing in the record indicates whether fall protection was used during the installation of the tar paper.

Discussion

The CO did not observe the performance of any work other than Stevens' installation of roof trusses, governed by §1926.502, and discussed above. Because there is no evidence that the cited roofing work was performed by Stevens, or was performed in an unsafe manner, citation 1, item 1 is vacated. Because the Secretary's motion to amend would not affect the disposition of this item, it is deemed moot.

Alleged Violation of §1926.502(k)(4)

Serious citation 1, item 2 alleges:

29 CFR 1926.502(k)(4): Fall Protection Plan. The implementation of the fall protection plan was not under the supervision of a competent person.

(a) During the implementation of the employers fall protection plan, the competent person and/or a designated safety monitor was not within verbal and visual proximity on top of a roof, to supervise and monitor the employees engaged [in] roofing activities at a residential housing project located on Douglas Ave.; Racine, Wisconsin.

The cited standard provides:

(k) *Fall protection plan.* This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See §1926.501(b)(2), (b)(12), and (b)(13) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.

* * *

(4) The implementation of the fall protection plan shall be under the supervision of a competent person.

Applicability

Facts

Section 1926.502(k), cited above, allows an employer engaged in residential construction work, which is normally governed by §1926.501(b)(13) [cited below] to implement a fall protection plan in lieu of using conventional fall protection, if the employer can demonstrate that it is infeasible or it creates a greater hazard to use conventional equipment. OSHA issued Directive STD3-0.1A (Exh. C-3) on June 6, 1999, to provide compliance officers and employers with plain language guidance as to the means of complying with OSHA regulations for residential construction. The directive states:

VIII. AVAILABILITY OF ALTERNATIVE PROCEDURES. Alternative procedures are available to employers who are (1) engaged in residential construction, and (2) doing one of the listed activities.

A. Definition of "residential construction."

1. For purposes of this instruction, an employer is engaged in residential construction where the working environment, materials, methods and procedures are essentially the same as those used in building a typical single-family home or townhouse.
2. Residential construction is characterized by:
Materials: Wood framing (not steel or concrete); wooden floor joists and roof structures.
Methods: Traditional wood frame construction techniques.
* * *

B. Listed Activities and Alternative Procedures. There are four groups of residential construction activities for which alternative fall protection plans are available. Each group has its own set of alternative procedures and will be discussed in Sections IX through XII. The groups are:

1. GROUP 1. Installation of floor joists, floor sheathing, and roof sheathing; erecting exterior walls; setting and bracing roof trusses and rafters.

* * *

IX. ALTERNATIVE PROCEDURES FOR GROUP 1: INSTALLATION OF FLOOR JOISTS, FLOOR SHEATHING, AND ROOF SHEATHING; ERECTING EXTERIOR WALLS; SETTING AND BRACING ROOF TRUSSES AND RAFTERS.

The alternative measures for this group are set out in Appendix E to Subpart M. Appendix E requires the employer to implement a Fall Protection Plan. Such a plan must lay out the safest procedures to be followed at the work site to prevent falls. Although the plan need not be in writing, it must be communicated to all employees on site who might be subject to fall hazards.

NOTE: Height Limitation: The Appendix E plan may only be used on structures up to three and a half stories or 48 feet (including basement, two finished levels, attic). The 48' measure is from the base of the building, at the lowest ground level (including any excavation), to the point of greatest height.

The building under construction on Stevens' Racine site was an apartment complex for senior citizens (Tr. 92). It is not disputed that Stevens was engaged in the installation of roof sheathing, and setting and bracing roof trusses, a Group 1 activity (Tr. 19-20, 139; Exh. C-2). Scott Brooks, a senior CO with OSHA, testified that the work Stevens was doing appeared to be residential construction (Tr. 93). CO Petaway cited the alleged violations under two separate standards dealing with residential construction (Tr. 106-109). CO Petaway did not measure the height of the building, or of the individual floors; he stated that it was hard to tell whether the distance from the foundation to the peak of the building was greater than 48 feet (Tr. 25, 34, 75).

Stevens' safety director, John Hauke, did not know the exact dimensions of the building, but testified that he spoke with Stevens' superintendent, Bill Quade, who told him that the structure was less than 48 feet high (Tr. 128). Hauke estimated that the facility's underground parking is between 9 and 9-1/2 feet high; each of the three stories measures approximately 8 feet; the joists between the floors are between 12 and 18 inches (Tr. 133). Hauke stated that the roof trusses sit on the top plate of the third floor; from the top plate to the peak of the roof is no more than 11 feet, 6 inches (Tr. 134-35).

Discussion

This judge held during the hearing, and now reaffirms that, as a matter of fact, Stevens' construction project was wood frame residential construction work falling under OSHA Directive STD 3-0.1A. The directive presumes that it is infeasible, or creates a greater hazard to use conventional fall protection during performance of the identified work, *i.e.*, installation of roof sheathing and bracing of roof trusses. Accordingly, Stevens was entitled to implement a fall protection plan in lieu of requiring conventional fall protection while performing such work. The question presented by the citation is whether the fall protection plan was properly implemented on August 1-2, 2000.

The Violation

Facts

John Hauke stated that Stevens used STD 3-0.1A as its fall protection plan (Tr. 7-8, 122). Hauke followed the program set forth in the STD when training Stevens' employees; each employee signed off on the back of a copy of the STD, indicating that they had received the required training (Tr. 122, Exh. R-1).

Hauke testified that, pursuant to its fall protection plan, Stevens established a controlled access zone, restricting access to the roof where Group 1 activities were taking place, by eliminating all means of access other than by ladder (Tr. 129-30).

CO Petaway testified that the Stevens' foreman, Kevin Rogan, was the competent person on site. Hauke testified that Bill Quade, a superintendent, was the competent person; Kevin Rogan was the crew supervisor, or foreman (Tr. 123-24, 128-29). Hauke testified that Quade was not on the site when Petaway arrived on August 1, and confirmed that Rogan was designated the competent person in Quade's absence (Tr. 131-32). It is undisputed that Kevin Rogan was not assisting with the trusses on August 1, but was "snapping lines" on the concrete slab some distance away (Tr. 32-33, 41, 129). Petaway stated that Rogan was not adequately monitoring the fall protection plan, because he was primarily engaged in an activity other than monitoring the workers on the roof (Tr. 42). Petaway testified that although Rogan could probably see the employees installing the trusses from his position,

he could not give any verbal instructions or warnings, because of his distance from the employees and the noise in the area (Tr. 33, 41, 51).

CO Petaway stated that he returned to the site on August 2 (Tr. 27). Employees were still working on the peaked roof without fall protection (Tr. 27-31). Bill Quade was on the site on August 2 (Tr. 132). The Secretary introduced no evidence about either Quade or Rogan's whereabouts on August 2, 2000.

Discussion

Stevens maintains that it implemented a fall protection plan pursuant to §1926.502(k), using OSHA's STD 3-0.1A as its blueprint. The sufficiency of Stevens' plan was not raised by the Secretary, and for purposes of this litigation, this judge will assume that Stevens' plan *was* sufficient.

The evidence establishes that Stevens' plan included the designation of a Controlled Access Zone (CAZ), restricting access to the roof. Stevens did not introduce any evidence regarding a safety monitoring program; however, in the Secretary's interpretation of the standard, set forth in the Preamble to the Final Rule, 59 Fed. Reg. 40672, 40719 (Aug. 9, 1994), she states that, in order to comply with §1926.502(k), "[a]t the very minimum, [a] safety monitoring system [see paragraph (k)(8)] must be employed and all of the criteria in paragraph (h) of this section followed." Paragraph (k)(8), to which the preamble refers, states that "[w]here no other alternative measure¹ has been implemented, the employer shall implement a safety monitoring system in conformance with §1926.502(h)." STD 3-0.1A ¶ IX.A.3.b requires that the crew supervisor/foreman monitor the workers in the CAZ to ensure that they do not engage in unsafe practices. Section 1926.502(h) *Safety monitoring systems.*, states at subparagraph (iv) that "[t]he safety monitor shall be close enough to communicate orally with the employee." At subsection (v) the standard states that "[t]he safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function." Because an adequate fall protection program *must* include a safety monitoring system in conformance with §1926.502(h), this judge assumes that Stevens' plan included such a safety monitoring system.

The cited standard requires that the implementation of the safety monitoring system, as well as the other aspects of the fall protection plan be under the supervision of a competent person. The required supervision must be effective. Moreover, it must be continual, to ensure that any deviations from the plan are corrected immediately. *See*, Appendix E to Subpart M, *Sample Fall Protection Plan*

¹ Such as scaffolds, ladders, or vehicle mounted work platforms, *see* §1926.503(k)(6).

for Residential Construction. See also, OSHA's STD 3-0.1A which states, at Implementation/Supervision ¶IX.A.2.a:

Competent Person. The employer must designate a Competent Person, who will be charged with implementing the Plan. The Competent Person must continually monitor compliance with the Plan, including the provision of training and the proper use of Controlled Access Zones.

On August 1, 2000, Kevin Rogan was acting both as the competent person and the crew foreman. In addition, Rogan was "snapping lines" on a concrete slab below. While snapping lines, Rogan was unable to devote his full attention to his duty, as crew foreman, to act as safety monitor for the employees working in the CAZ.

For the same reason, Rogan could not fulfill his duty, as the competent person on site, to continually supervise the implementation of the fall protection plan.

The evidence establishes that, at the time of the August 1, 2000, OSHA inspection, Stevens was in violation of §1926.502(k)(4). The implementation of Stevens' fall protection plan was inadequately supervised here, where the role of competent person was passed on to a crew foreman who was engaged in other tasks.

Penalty

CO Petaway testified that should an employee engaged in installing trusses fall to the ground, the probable outcome would be that employee's death (Tr. 52). Petaway testified that he considered Steven's size, history and good faith in proposing a penalty of \$3,000.00. Stevens introduced no evidence on this issue. The proposed penalty will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR 1926.501(b)(13) is VACATED.
2. Serious citation 1, item 2, alleging violation of 29 CFR 1926.502(k)(4) is AFFIRMED, and a penalty of \$3,000.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: February 1, 2001

