

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

METAL BUILDINGS OF WISCONSIN, INC.,

Respondent.

OSHRC DOCKET NO. 00-2211

APPEARANCES:

For the Complainant:

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

For the Respondent:

Daniel P. Fay, Esq., Oakton Avenue Law Offices, S.C., Pewaukee, Wisconsin

Before: Administrative Law Judge: James H. Barkley

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, Metal Buildings of Wisconsin, Inc. (Metal Buildings), at all times relevant to this action maintained a place of business at the WCTC Technology Center in Pewaukee, Wisconsin, where it was engaged in steel erection. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 12, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's WCTC work site. As a result of that inspection, Metal Buildings was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Metal Buildings brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 27, 2001, a hearing was held in Milwaukee, Wisconsin. Complainant declined to file a brief (Tr. 167). Respondent has submitted its brief on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.750(b)(2)(i): During skeleton steel erection, a tightly planked and substantial floor was not maintained within 2 stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which work was being performed:

(a) Waukesha County Technical College, Pewaukee, WI:

Employees were working without fall protection on a tiered building which had an interior fall or 30 feet 2 inches. This condition exposed employees to a potential fall hazard.

Facts

OSHA Compliance Officer (CO) Scott Brooks testified that he arrived at the WCTC work site on September 12, 2000 (Tr. 15). Brooks testified that, upon his arrival on the site, he noted and videotaped approximately four welders gathered together on the second floor of a tiered building. The welders stood talking for a moment or two before moving apart (Tr. 16-17; Exh. C-1). According to Brooks, the welders appeared to be standing approximately four feet from the atrium or stairwell opening (Tr. 16-17, 44-45). When Brooks accessed the second tier later in the day, he found welding leads and supplies indicating that the workers he saw were Metal Buildings employees who had been tack-welding the decking in that area (Tr. 53, 57).

Brooks stated that the ground in the atrium had been graded and covered with Visqueen, or plastic sheeting (Tr. 25). The decking on the first floor was complete; guardrails had been installed around the open atrium (Tr. 25; Exh. C-1). Brooks stated that the second floor was not completely decked; the leading edge was still approximately four feet back from the stairwell opening (Tr. 26). Nonetheless, Brooks testified that an employee could have fallen over the second floor edge, down the stairwell opening and to the ground below (Tr. 91-92). Brooks measured the distance from the Visqueen on the ground level to the first floor decking at 15 feet 2 inches (Tr. 28). The distance between the first and second floors was 15 feet (Tr. 29). Brooks testified that he took the second measurement approximately 15 to 20 feet back from the atrium's edge because the second floor decking was incomplete (Tr. 30, 91). Brooks calculated that the total distance between the Visqueen in the atrium and the second floor immediately above was 30 feet 2 inches (Tr. 37, 41).

Brian Russell, Metal Buildings' foreman, testified that on September 12, 2000, the only area on the second floor where work was being performed was approximately 25 to 25 feet from the open atrium area (Tr. 120). Russell testified that the concrete foundation walls in the stairwell area had not been completed to the second floor by September 12 (Tr. 110). The decking around the atrium,

therefore, was left unfinished (Tr. 109-10, 114-15). The final two or three sheets of the second floor decking had not been laid down. Consequently, the edge of the first floor decking extended at least six to nine feet beyond the second floor deck (Tr. 122-23). According to Russell, Complainant's Exhibit 5, which shows the first floor decking below the second floor work area, was representative of the conditions on the site on September 12 (Tr. 111). Russell stated that at no time on that date were employees exposed to a fall in excess of 15 feet (Tr. 111).

Jeff Armstrong, a Metal Buildings employee, testified that he worked as a welder on the WCTC site on September 12 (Tr. 93-94). Armstrong testified that he worked approximately 20 to 25 feet away from the atrium opening that morning, and never came closer than 10 feet from the edge of the metal lip of the second floor decking (Tr. 94, 105). Armstrong stated that he did not have to approach the open stairwell either to access or leave his work area or to get welding supplies (Tr. 94-95). Armstrong testified that he worked entirely over the first floor deck, and at no time was he exposed to a fall of more than 15 feet (Tr. 98, 106). Armstrong further testified that he did not see any other Metal Buildings employees within five feet of the edge of the atrium area on September 12 (Tr. 100).

Russell admitted that employees may have been in the cited area during steel erection several days prior to the OSHA inspection (Tr. 120). Armstrong admitted that whoever installed the decking to the atrium's edge would have to come within three feet of the cited fall hazard, and that he and other members of the crew probably approached the interior leading edge of the second level at various times from the second week through the end of September while performing detail work (Tr. 101-02).

Brad Murawsky, project superintendent for Grunau Project Development, the general contractor on the WCTC site, testified that he was in charge of coordinating the activities on the site (Tr. 126-27). Murawsky testified that the stairwell area had been rough graded on September 12, but stated that because of ongoing work on the building's footings, excess soils were frequently moved into and out of the stairwell area (Tr. 127, 129). According to Murawsky, the grade in the atrium area was in a state of flux (Tr. 130). The distance between "ground" level and the second floor level would have changed, perhaps drastically, throughout the day on September 12 (Tr. 133-34). Murawsky confirmed the testimony of Russell and Armstrong, stating that the decking on the second level was incomplete (Tr. 154-55).

Discussion

The cited standard requires:

Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed. . . .

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition and; (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Complainant failed to make out a *prima facie* case in this instance.

Complainant established that, in the spot measured by the CO, at the time the CO measured it, the fall distance from the second floor to the floor of the atrium, or stairwell, was 30 feet or more. The record fails to establish, however, that any welders on the second floor were exposed to the cited fall hazard.

Metal Buildings admits there were welders working on the second floor, but denies they were working near the open atrium. CO Brooks admitted that, from his position while videotaping, he could not accurately estimate how far the welders were from the atrium area (Tr. 61). While the CO maintained that welder's could have fallen from their work areas straight down to the atrium floor, it is not clear from the evidence how this could have happened. Every one of Respondent's witnesses claimed that the first floor deck extended at least six feet further than the second floor deck's leading edge. CO Brooks admitted that Complainant's Exhibit 5 shows the view from the edge of the unfinished second level deck down to the completed first floor decking 15 feet below (Tr. 75).

Brooks admitted that a fall hazard from the second floor decking to the first floor deck would not constitute a violation of the cited standard (Tr. 63).

Complainant attempted to adduce additional evidence showing that Metal Buildings' employees would have been exposed to the cited fall hazard at some point either prior to or following the OSHA inspection. Respondent, however, introduced evidence that the grade of the atrium floor changed throughout the construction project. This judge cannot conclude, therefore, that the fall hazard from the second floor to the atrium floor would have met or exceeded the 30 foot limit allowed by the cited standard at times other than September 12, 2000.

Complainant failed to prove the cited violation by a preponderance of the evidence, and the citation is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 1926.750(b)(2)(i) is VACATED.

/s/

James H. Barkley
Judge, OSHRC

Dated: June 20, 2001