

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

Complainant,

v.

HENSEL PHELPS CONSTRUCTION CO., and
its successors,

Respondent.

OSHRC DOCKET NO. 01-2028

APPEARANCES:

For the Complainant:

Jason Vorderstrasse, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Robert R. Miller, Esq., Stettner, Miller and Cohn, PC, Denver, Colorado

Before: Administrative Law Judge: Benjamin R. Loye

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, Hensel Phelps Construction Co., and its successors (Hensel Phelps), at all times relevant to this action maintained a place of business at the Barona Indian Reservation, Lakeside, California, 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 7-8, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Hensel Phelps' work site on the Barona Indian Reservation. As a result of that inspection, Hensel Phelps was issued a citation alleging violations of §1926.501(b)(1) of the Act together with a proposed penalty. By filing a timely notice of contest Hensel Phelps brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 7-8, 2002, a hearing was held in San Diego, California. On May 16, 2002, the Secretary withdrew citation 1, item 1(b). The parties have submitted briefs on the remaining issue, *i.e.*, citation 1, item 1(a), and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1(a) alleges:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

On the second level of the hotel structure, there was no fall protection along the south side as there was only one guardrail at 42-inches, exposing employees to the hazard of falling from an elevation of 8-feet to the ground and debris below.

Facts

On the afternoon of August 7, 2001, OSHA Compliance Officer (CO) Daniel Mooney visited the Respondent's work site at the Barona Indian Reservation (Tr. Vol. I, p.19). Mooney testified that, from his car, which was in a parking lot next to a golf course, he saw and photographed workers on the second story of a hotel structure. Mooney determined the second story floor was 9'8" above ground level (Tr. Vol. I, pp. 61-64; C-18 through C-23). A single guardrail, approximately 42" high, had been installed on the edge of the floor (Tr. Vol. I, pp. 61, 95). Mooney testified that, because it was late in the day, and the work site was a large multi-contractor site, he would return the following day to conduct his inspection (Tr. Vol. I, p. 72).

Mooney returned on August 8, 2001, at which time he held an opening conference with the employers on the site (Tr. Vol. I, p. 75). Mooney did not observe any OSHA violations on August 8, 2001 (Tr. Vol. I, p. 77). Nonetheless, Mooney spoke with Hensel Phelps' project superintendent, Tony Fombon, and with the on-site foreman, Bruce Lambert, showing them his photographs from the preceding day (Tr. Vol. I, pp. 76, 78-79). According to Mooney, Fombon and Lambert provided Mooney with the names of Hensel Phelps' employees on the site but were unable to identify any of the employees pictured working on the hotel structure (Tr. Vol. I, pp. 78-79). Mooney testified that he pointed out that one of the laborers pictured was a woman. Hensel Phelps had only one female employee working on the site, Vicky Seidler, a field engineer. According to Mooney, they deduced, therefore, that the pictured laborer was Ms. Seidler (Tr. Vol. I, pp. 66, 79, 93, 95; Vol. II, p. 51; Exh. C-21, C-22).

At the hearing, Tony Fombon testified that, to his knowledge, neither he nor anyone else identified the laborer in Complainant's Exhs. C-21 and C-22 as Ms. Seidler (Tr. Vol. II, pp. 158, 164-65). According to Fombon, he did not instruct, or have anyone else instruct Ms. Seidler to work on the second floor of the hotel structure on August 7, 2001 (Tr. Vol. II, p. 160). Furthermore, Fombon stated, field engineers wear red hats; the laborer pictured in Exhs. C-21 and C-22 is wearing a white

hard hat (Tr. Vol. II, p. 159). Fombon noted that there were approximately 140 other subcontractor employees on the site, many of whom did wear white hard hats (Tr. Vol II, pp. 159-60). Finally, Fombon testified, it was unlikely that a field engineer would be performing manual labor such as sweeping up (Tr. Vol. II, p. 169).

Mr. William Fritz, another Hensel Phelps superintendent, testified that he participated in the August 8, 2001 OSHA inspection (Tr. Vol. II, p. 104). Mr. Fritz stated that he was unable to identify any of the workers on the second floor for CO Mooney (Tr. Vol. II, p. 110). Mr. Fritz further stated that on August 7 there would have been no work for Hensel Phelps employees on the second floor because the concrete floor above had not yet been poured (Tr. Vol II, p. 111).

Discussion

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). **IN THIS CASE, THE SECRETARY HAS FAILED TO SHOW THE THIRD ELEMENT, ACCESS.**

In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the job site, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Carpenter Contracting Corp.* 11 BNA OSHC 2027, 1984 CCH OSHD ¶29,950 (No. 81-838, 1984). Complainant introduced no evidence establishing that Hensel Phelps employees had any assigned work activities, or any other reason to be on the second floor of the hotel structure on August 7, 2001. Hensel Phelps' superintendent Fritz testified that, to the contrary, there was *no* reason for any Hensel Phelps employee to be on the second floor. Neither CO Mooney, nor any of Hensel Phelps' witnesses were able to identify workers photographed on the second floor as Hensel Phelps employees. The sole basis for the citation in the above captioned action is Mooney's inference that, because Hensel Phelps had only one woman working on the site, Vicky Seidler, and because one of the workers on the second floor was a woman, that woman must be Vicky Seidler. Said inference is not logically sound. The face of the pictured employee is not shown. Both CO Mooney and Mr. Fombon testified that there were a number of subcontractors on the site, any of whom could have employed female laborers. That the pictured employee was *not* Vicky Seidler is supported by Fombon's testimony that Seidler would have been wearing a red hard hat, and would not have been doing broom

work. Complainant's identification of the worker in Exh. C-21 and C-22 as Vicky Seidler is pure speculation, and does not establish the element of employee exposure by a preponderance of the evidence. The sole citation is, therefore, vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1926.501(b)(1) is VACATED.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: July 25, 2002