

SECRETARY OF LABOR,

Complainant,

v.

THOMAS SLINGLUFF, a/k/a STUCK IN THE
MUD,

Respondent.

OSHRC DOCKET NO. 03-1371

APPEARANCES:

For the Complainant:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado

For the Respondent:

Thomas Slingluff, Stuck in the Mud, *pro se*, La Jara, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Thomas Slingluff, d/b/a Stuck in the Mud (Slingluff), at all times relevant to this action maintained a place of business at 518 Main Street, Alamosa, Colorado (Tr. 6-8), where he was engaged in stucco work (Tr. 9). On June 2, 2003 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Slingluff's work site on Main street (Tr. 108). As a result of that inspection, Slingluff was issued a citation alleging three violations of the scaffolding regulations at 29 CFR §1926.451 of the Act.

Respondent does not contest the cited violations (Tr. 5), but denies he is an employer engaged in a business affecting commerce and argues he is not subject to the requirements of the Act. By filing a timely notice of contest Slingluff brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 2, 2003 a hearing on the jurisdictional issue was held in Alamosa, Colorado. The parties have submitted briefs on that issue and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1a alleges:

29 CFR 1926.451(g)(1)(vii): For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee was not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls of 18 feet 9 inches while working on a scaffold where the top rail was away from the scaffold planking and the mid-rail was missing.

Serious citation 1, item 1b alleges:

29 CFR 1926.451(b)(1): Each platform on all working levels of the scaffold were not fully planked or decked between uprights and guardrail supports:

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls in excess of 18 feet 9 inches while working on a scaffold that was not fully planked or decked between the uprights.

Serious citation 1, item 1c alleges:

29 CFR 1926.451(f)(7): Scaffolds were not erected, moved, dismantled, or altered under the direct supervision of a competent person.

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls of 18 feet 9 inches while working on a scaffold that had not been erected under the direct supervision of a competent person.

Serious citation 1, item 2a alleges:

29 CFR 1926.451(c)(s): Supported scaffold poles, legs, posts frames and uprights did not bear on baseplates and mud sills or other adequate firm foundation:

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls in excess of 18 feet 9 inches while working from a scaffold that was missing all of its baseplates.

Serious citation 1, item 2b alleges:

29 CFR 1926.451(c)(2): Frames and panels were not braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together lateral (sic):

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls of 18 feet 9 inches while working on scaffolds, in that the scaffold was not adequately braced.

Serious citation 1, item 3 alleges:

29 CFR 1926.451(e)(1): Scaffold platforms in excess of 2 feet (90.6m) above or below a point of

access were not provided with a portable ladders, hook-on ladders, stair rowers, ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

(a) On or about June 3, 2003, and at time prior, employees were exposed to falls of 18 feet 9 inches while working on scaffolds where a safe means of access was not provided.

Facts

OSHA Compliance Officer (CO) Mike J. McWilliams testified that in June, 2003, he noted Mr. Slingluff and another man, Ben Jaramillo, standing on a scaffold readying some foam board for installation (Tr. 42, 48). McWilliams asked them to step down, and asked Slingluff to fill out an employer questionnaire (Tr. 43). On the form, Slingluff stated that he had one employee (Tr. 49, 59; Exh. C-5). At the hearing Slingluff denied that Jaramillo was his employee, but admitted that he was referring to Ben Jaramillo when he filled out the OSHA questionnaire (Tr. 37-39; Exh. C-5). McWilliams testified that Jaramillo told him that he had been employed by Stuck in the Mud for approximately four months, and that he was being paid \$8.00 an hour for this job (Tr. 45-46, 59). Jaramillo filled out an employee interview form for McWilliams, on which he provided the same information he gave the CO (Tr. 63; Exh. C-6). At the hearing Jaramillo claimed not to have intended that his representation of employment be taken as a statement of fact (Tr. 65). This judge notes, however, that Jaramillo was an attorney, and practiced law in Denver, Colorado until 2001 (Tr. 70, 73).

At hearing, Mr. Slingluff testified that he was hired by the city of Alamosa to stucco the outside wall of 518 Main street for \$16,820.00 (Tr. 14-16; Exh. C-1). Jaramillo was color coating the wall with Slingluff, in furtherance of Slingluff's contract with the city of Alamosa (Tr. 35, 40). Jaramillo testified at the hearing that although he does his own jobs, he has worked for Slingluff on occasion over the past two years (Tr. 64-65). Jaramillo testified that he and Slingluff had not settled on an hourly rate for this job; however, he thought they had probably discussed the terms of his employment at some point (Tr. 69). Jaramillo stated that he might have "deduced" the amount he would be paid based on the amount of time he had been working, and the rate at which he had been paid in the past (Tr. 70-71).

Slingluff admitted that he used a 1984 Dodge truck to haul materials and to pull a trailer loaded with scaffolding for use in the course of his work (Tr. 22-25, 49-50; Exh. 3). Slingluff

has a liability insurance policy for the truck issued by Allied Insurance Company (Tr. 32).

Discussion

Slingluff admits the existence of the conditions cited, but argues that OSHA is without jurisdiction over its activities as, 1) OSHA's enforcement of the Act is an improper exercise of Congress' power under the Commerce Clause; 2) the Secretary failed to establish that Slingluff operates a business affecting interstate commerce; and 3) Slingluff is not an employer under the Act.

Slingluff also objects to the citation on procedural grounds, noting that the inspection date on the citation, June 3, 2003 was inaccurate. Slingluff questions the authority of the OSHA CO, and notes that the Complaint was untimely filed.

Procedural matters. The enumerated procedural issues have been adequately addressed. Complainant filed for and received an extension of time in which to file the Complaint. Slingluff was not prejudiced by the late filing. Nor was Slingluff prejudiced by the incorrect dating of the citation. Slingluff was aware of the correct inspection date, and had the record corrected at the hearing. CO McWilliams testified to his employment by OSHA under oath at the hearing, and is unquestionably a duly authorized agent of the agency. This judge cannot find that any of the procedural inadequacies pointed out by Respondent justify the relief requested.

Jurisdictional matters. First, this judge notes that the Commission lacks authority to rule on the constitutionality of the Act, *per se*; the Commission can do no more than apply judicial precedent concerning constitutional issues on which the courts have already ruled. *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶27,815, p. 36,403 (No. 77-3804, 1987). It is well settled, however, that Congress intended to exercise the full extent of the authority granted by the commerce clause of the Constitution in enacting the Occupational Safety and Health Act, and that an employer will come under the aegis of the Act if it is engaged in a business affecting interstate commerce. *Id.* (and cases cited therein); *Austin Road Company*, 10 BNA OSHC 1944 (No. 78-2986 and 81-4050, 1982); *Vak-Pak, Inc.*, 11 BNA OSHC 2095 (No. 79-1569, 1984). In addition, the Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Slingluff, a stucco contractor, is engaged in construction. Moreover, in this case, the Secretary showed that

Respondent uses a Dodge truck manufactured out of state in the course of its work. Complainant has adequately established that Slingluff operates a business affecting interstate commerce.

Finally, this judge finds that Slingluff was an employer and so is subject to the Act. The city of Alamosa's stuccoing contract was with Mr. Slingluff, who was in the stucco business. Slingluff hired Jaramillo for the duration of the project, or until such time as he no longer needed Jaramillo's services. Jaramillo and Slingluff both understood that Jaramillo worked for Slingluff. Slingluff provided the materials with which Jaramillo worked, including the cited scaffolding. Slingluff was to pay Jaramillo an hourly wage.

Because Respondent is a person engaged in a business affecting commerce who has employees, he is an "employer" as defined by Section 3(5) of the Act, and is subject to its provisions. As Respondent has admitted the citations, subject to a showing of jurisdiction, the citations shall be affirmed in their entirety.

ORDER

1. Citation 1, items 1a, 1b, and 1c, alleging violations of 29 CFR 1926.451(g)(1)(vii), (b)(1) and (f)(7) are AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.
2. Citation 1, items 2a and 2b, alleging violations of 29 CFR 1926.451(c)(2) are AFFIRMED, and a penalty of \$375.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of 29 CFR 1926.452(c)(2) is AFFIRMED, and a penalty of \$225.00 is ASSESSED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: January 26, 2004