

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.
Fastrack Erectors,
Respondent.

OSHRC Docket No. 04-0780

Appearances:

Leigh Burleson, Esq., U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri
For Complainant

Donald W. Jones, Esq., Hulston, Jones & Marsh , Springfield, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Fastrack Erectors (Fastrack) was responsible for the steel erection and the installation of metal decking on an addition to a bank building in Troy, Missouri, on February 25, 2004, when the worksite was inspected by the Occupational Safety and Health Administration (OSHA). As a result of OSHA's inspection, Fastrack received serious and other-than-serious citations on March 4, 2004. Fastrack timely contested the citations.

The serious citation alleges that Fastrack violated 29 C.F.R. § 1926.760(a)(1) by failing to protect employees engaged in steel erection activities who were on a walking/working surface more than 15 feet above a lower level without fall protection. The serious citation proposes a penalty of \$2,500.00.

The other-than-serious citation alleges that Fastrack violated 29 C.F.R. § 1904.40(a) by failing to provide copies of OSHA Forms 300 and 300-A for calendar year 2003 within four hours when asked by an authorized government representative. The citation proposes a penalty of \$500.00.

The hearing was held in St. Louis, Missouri, on September 3, 2004. The parties stipulated coverage and jurisdiction (Tr. 4-5). The parties filed post hearing briefs.

Fastrack denies the alleged violations and argues that the employees were not engaged in steel erection activities and were not exposed to a fall hazard in excess of 15 feet. Fastrack withdrew its affirmative defense of unpreventable employee misconduct defense (Tr. 5).¹

For the reasons discussed, the alleged violation of § 1926.760(a)(1) is vacated. The violation of § 1904.40(a) is affirmed with a penalty of \$300.00.

Background

Fastrack, an employer engaged in steel erection, has been in business in Missouri at least since 1981. Clayton Bragg, the current president and owner who has worked for Fastrack since 1981, purchased the company in March 1999. In February 2004, Fastrack employed approximately 26 employees (Tr. 85, 125).

In early February 2004, Fastrack began performing steel erection activities for an addition on a bank in Troy, Missouri (Tr. 146). The general contractor of the project was Cannon General Contracting (Tr. 75). The bank project involved adding a second floor and new roof level to the existing one-story bank with a basement (Tr. 71, 80, 101, 138). Fastrack's steel work included installing the second floor beams and bar joist approximately 2 feet above the bank's existing roof; erecting the steel columns for the second floor walls; installing the beams and bar joists for the new roof, and installing metal decking for the second floor and new roof (Tr. 127, 142-143).

By February 25, 2004, Fastrack had completed installing the beams, bar joists and columns for the second level, second floor walls, and roof. It was in the process of preparing for the installation of the metal decking for the new second floor and roof (Tr. 127). A bundle of metal

¹ Fastrack's motion to suppress the evidence from the inspection based on an unreasonable inspection argument is deemed abandoned because of its failure to brief the issue. *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991). (Tr. 5, 7, 14). Even if not abandoned, Fastrack's motion to suppress is denied. There is no dispute that Davidson's initial observations and his videotape were made from a public parking lot across the street from the bank project (Tr. 11-12). This was the sole basis for the alleged violation (Tr. 69). The Commission has long held that pursuant to the "open fields" doctrine, there is no constitutional violation where an inspector makes observations from areas on commercial premises that are out-of-doors and not closed off to the public, even if the inspector entered the premises without permission. *Concrete Construction Co.*, 15 BNA OSHC 1614, 1617 (No. 89-2019, 1992). When Davidson entered the worksite, he met with general contractor's representative who gave him permission to inspect the worksite (Tr. 46). There is no showing that Fastrack's foreman Strayhorn, who participated throughout the inspection, denied access to Davidson (Tr. 43).

decking, which was 3 feet by 20 feet, had been placed across the bar joists on the roof approximately 6 feet from the roof's edge (Exh. R-2; Tr. 129, 151, 162). Fastrack's crew consisted of foreman Robert Strayhorn and ironworkers' Ed Sneed and Gary Feld (Tr. 77, 97). Foreman Strayhorn was preparing the new second floor for decking (Tr. 97-98, 127). Sneed and Feld were preparing the new roof for decking (Tr. 97-98, 127).

At approximately 1:00 p.m., safety compliance officer Larry Davidson was driving by the bank project and observed employees of another contractor on a scaffold without fall protection (Tr. 72). Davidson parked his car in a public parking lot across the street and began videotaping the worksite (Exh. C-1; Tr. 12, 40). While videotaping, he observed two employees who he believed were walking on steel beams at the roof level, without fall protection (Exh. C-2; Tr. 72). He estimated that the employees were 2 to 3 feet from the edge (Tr. 16). The two employees were Gary Feld and Ed Sneed (Tr. 103). After videotaping the worksite, Davidson entered the property and initiated an inspection of the other contractor (Tr. 73).² Upon completing that inspection, Davidson met the general contractor's representative who identified the steel erection contractor as Fastrack and its as foreman Robert Strayhorn (Tr. 73-75, 76). Davidson initiated the Fastrack inspection at approximately 3:11 p.m. (Tr. 77). While on the worksite, Davidson made no additional observations regarding Fastrack's employees on the roof level (Tr. 69). He did not see the employees on the roof nor did he go onto the roof (Tr. 81). Although Davidson believed that the employees were welding when he was videotaping the worksite, the employees told him that they were taking measurements for the placement of the metal decking (Tr. 78-79). Davidson concluded his on-site inspection at approximately 4:00 p.m. (Tr. 39).

On February 26, 2004, Davidson telephoned Fastrack's office to request copies of the company's OSHA Forms 300 and 300-A and to request a closing conference (Tr. 33, 39, 90). He was told to contact Fastrack's safety consultant, who in turn referred him back to Fastrack. Davidson then called owner Clayton Bragg of Fastrack and requested the forms. Bragg told him that the safety consultant would handle it. Davidson again telephoned the safety consultant who

² The other contractor was Martin C. Heck Brick Contracting Co. who received a serious citation for lack of guardrails for employees on the scaffold. Heck contested the citation and the hearing was held September 2, 2004 (Docket No. 04-0781).

stated that the forms would be faxed (Tr. 34). The forms were not faxed. Davidson made no further attempts to obtain the information and Fastrack did not provide the forms until sometime after the citations were issued on March 4, 2004 (Tr. 34, 37).

Discussion

Alleged Violation of 29 C.F.R. § 1926.760(a)(1)³

The citation alleges that Fastrack failed to protect employees who were on the roof level along an unprotected edge at approximately 38 feet above the ground level by utilizing appropriate fall protection. Section 1926.760(a)(1) provides that:

Except as provided by paragraph (a)(3) of this section, each employee engaged a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

There is no dispute that the Part 1926 construction standards apply to Fastrack's steel erection activities on the bank project. There is also no dispute that the employees on the roof level were not protected from a fall hazard by any means of fall protection (Exhs. C-1, C-2; Tr. 29-30, 135-136).

Fastrack argues that its employees were more than 6 feet from the unprotected edge and they were not engaged in steel erection because the employees were taking measurements for the installation of the roof decking.

Fastrack's argument that its work in preparing for the installation of the metal decking was not steel erection activity is rejected. Section 1926.750(b)(2) identifies steel erection activities to include, among other activities, laying out, placing, connecting and all related activities for the construction, alteration and/or repair of materials and assemblies such as metal decking and metal

³ The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

roofing. Measuring for the placement of roof decking is part of the laying out activity within steel erection.

Also, the exception in paragraph (a)(3) referenced in §1926.760(a)(1) does not apply. The exception involves connectors and employees working in a controlled decking zone. The employees in this case were taking measurements. They were not engaged as connectors nor working in a controlled decking zone.⁴ Owner Bragg testified that the employees were using a black magic marker and a measuring tape to mark every 3 feet on the bar joists to establish where to install the metal decking (Tr. 151-152). During his inspection, no one told Davidson that there was a controlled decking zone and no metal decking was actually being installed (Tr. 86, 98-99).

The record shows that the terms of §1926.760(a)(1) were not met. The parties agree that a fall to the outside of the roof at the unprotected edge was approximately 30 feet to the ground level (Tr. 84, 102, 145). The standard requires a fall hazard of more than 15 feet. Because the distance between the existing roof and the new roof level was less than 15 feet, Davidson did not consider a fall hazard to the inside of the building (Tr. 53, 63, 83). Also, there is no dispute that the employees were not utilizing fall protection.

There is no dispute that Fastrack had actual or constructive knowledge the employees were not utilizing fall protection. Foreman Strayhorn knew where the employees were working and had full view of their work on the roof (Tr. 97, 99, 103). The foreman's knowledge of the condition is imputed to Fastrack. *Dover Elevator Co.* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The record, however, fails to show that the employees were exposed to a fall hazard more than 15 feet. When Davidson observed the employees prior to entering the worksite, he believed that they were near the roof level's unprotected edge (Exhs. C-1, C-2). He estimated that the employees were 24 to 36 inches from the edge (Tr. 16, 30). This was based upon how much of the employees' bodies could be seen from his vantage across the street. He testified that the employees were exposed twice during the two minute period (Tr. 30-31).

⁴ Section 1926.751, *Definitions*, defines a "connector" to mean "an employee who, working with hoisting equipment, is placing and connecting structural members and/or components." A "controlled decking zone" is defined as "an area in which certain work (for example, initial installation and placement of metal decking) may take place without the use of guardrail systems, personal fall arrest systems, fall restraint systems, or safety net systems and where access to the zone is controlled."

Despite the videotape, the record fails to establish that the employees were exposed to a fall hazard from the unprotected edge or that their entry into the zone of danger was reasonably predictable. Davidson's observations of employees' exposure and his videotape were made from across the street, approximately 75 yards from the bank's roof (Tr. 40, 49). Davidson was standing at ground level and the employees were working approximately 30 feet above the ground. Davidson did not observe the employees on the roof while on the worksite. He also did not go to the roof level or observe the location of the bundle of decking (Exh. R-2; Tr. 53, 69, 81).

When Davidson initiated his on-site inspection, the two employees denied working at the roof's edge (Tr. 41). The employees did not testify nor was it shown that Davidson asked them how far from the edge they were working or what they were doing at the time of his observations. Foreman Strayhorn, who was working immediately below the employees on the bank's existing roof, testified that the employees were not working at the edge but were standing on the bundle of roof decking previously placed on the roof (Tr. 109). The bundle of decking was always placed on the roof 6 or 9 feet from the edge (Exh. R-2; Tr. 129, 157). The decking was 3 feet wide and 22 feet long (Tr. 162). Bragg testified that the employees were taking measurements for the installation of the decking when Davidson observed them and that they were never closer than 6 feet from the edge. He further testified that there was no reason for them to be closer than 6 feet (Tr. 135, 151). Davidson agreed that the issuance of the citation might have been affected if he knew the employees were at least 6 feet away from the unprotected edge (Tr. 54).

Since witnesses' testimony places the employees at least 6 feet from the edge, and the videotape may be misleading because of the distance and angle, the Secretary by a preponderance of the evidence failed to establish a fall hazard from the unprotected edge. The violation of § 1926.760(a)(1) is vacated.

Alleged Violation of 29 C.F.R. § 1904.40(a)

_____ The citation alleges that Fastrack failed to provide OSHA Form 300 and 300-A within four hours after requested by the OSHA compliance officer. Section 1904.40(a) provides that:

When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours.

An authorized government representative includes the compliance officer who conducted the inspection. *See* § 1904.40(b)(1)(I). Pursuant to § 1904.29, an employer is required to maintain OSHA 300 and 300-A forms or equivalent forms. The OSHA 300 form is entitled “Log of Work-Related Injuries and Illnesses,” and the OSHA 300-A form is entitled “Summary of Work-Related Injuries and Illnesses.”

Davidson made several attempts by telephone on February 26, 2004, to obtain the OSHA 300 Forms and information without results. He spoke with Fastrack’s owner Bragg and its safety consultant who promised the information (Tr. 33-34). Fastrack did not furnish the appropriate forms until after the citation was issued on March 4, 2004 (Tr. 34). It is noted that when he reviewed Fastrack’s 300 Forms, Davidson found them to be in proper form (Tr. 38). Fastrack offered no explanation for its failure to provide the requested forms within four business hours. Fastrack’s argument that the request for the records was made after the inspection is not accurate. Davidson’s inspection continued until February 26, 2004, when he held his closing conference with Bragg (Tr. 90). The violation of § 1904.40(a) is affirmed.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Fastrack has 26 employees and is given credit for size as a small employer (Tr. 85). Fastrack has no history of prior OSHA violations within the proceeding three years (Tr. 86). Fastrack is given credit for good faith because it has a written steel erection program and utilizes a safety consultant (Exh. R-1; Tr. 88, 136-137).

A \$300.00 penalty for violation of § 1904.40(a) is reasonable. This is a record keeping violation and no excuse was presented justifying why the records were not provided timely. There is no evidence that Fastrack failed to maintain the appropriate forms or that the forms were inadequate.

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 ORDERED:

1. Citation No. 1, item 1, alleged serious violation of 29 C.F.R. § 1926.760(a)(1), is vacated and no penalty is assessed.
2. Citation No. 2, item 1, alleged other-than-serious violation of 29 C.F.R. § 1904.40(a), is affirmed and a penalty of \$300.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: November 19, 2004