



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

Complainant,

v.

THOS S. BYRNE, LTD., and its successors,

Respondent.

OSHRC DOCKET NO. 05-1152

APPEARANCES:

For the Complainant:

Brian Duncan, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Mark Briggs, Esq., Stephens & Briggs, El Paso, Texas

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 651-678; hereafter called the "Act").

Respondent, Thomas S. Byrne, Ltd. (Byrne), at all times relevant to this action maintained a place of business at the El Paso Plaza Theatre in El Paso, Texas, where it was engaged in the restoration of the theater (Tr. 38; Exh. C-1). Byrne is an employer engaged in construction, a business affecting commerce (Tr. 338-340), and is subject to the requirements of the Act. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983).

On April 14, 2005, the Occupational Safety and Health Administration (OSHA) responded to an accident report originating at the El Paso Plaza Theatre worksite (Tr. 88-89). Between April 14 and April 18, 2005, OSHA conducted an inspection at the El Paso Plaza Theatre, which encompassed Byrne's work site (Tr. 89-90). As a result of that inspection, OSHA issued a citation alleging violations of OSHA fall protection standards at 29 CFR §§1926.501 and 1926.502. By filing a timely notice of contest Byrne brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On February 9, 2005, a hearing was held in El Paso, Texas. Respondent asked that no briefs be filed on the issues; this matter is ready for disposition.

Alleged Violation of §1926.501(b)(4)(i)

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes:

- a) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that standard guardrails or other suitable fall protection were provided for a ladderway hole that was 33" wide by 48" long. Employees working on the rooftop of a three story building were exposed to the hazard of falling approximately 13.5' to the concrete floor below.
- b) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that standard guardrails or other suitable fall protection were provided for a ladderway hole that was 33" wide by 48" long. Employees working on the third floor of a three story building were exposed to the hazard of falling approximately 13.5' to the concrete floor below.
- c) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that standard guardrails or other suitable fall protection were provided for hole varying from 4" to 24" in diameter. Employees working on the first floor level platform of a three story building were exposed to the hazard of falling approximately 6 feet or more to the concrete floor below.

Facts

OSHA Compliance Officer (CO) Gabriel Acosta photographed unguarded ladder ways on the rooftop and the third floor of the El Paso Plaza Theatre (Tr. 166-72; Exh. C-12, C-13, photo 3; C-14). The ladder way holes were approximately 3' x 3' in size and were 13'6" above the level below (Tr. 126, 168, 176). Byrne stipulates that Byrne crews built the cited ladder ways (Tr. 61).¹

Angel Fiero, a construction foreman with Texas Far West Construction and Engineering, was on the El Paso Plaza Theatre site on February 14, 2005 (Tr. 29, 63). Fiero's crew was setting rebar for the second concrete pour on the roof level (Tr. 36). Fiero testified that approximately six Byrne employees were working on the roof on the day of the OSHA inspection, including Kyle Dies, a field engineer and supervisor for Byrne (Tr. 46-48, 81; Stipulation No. 3). The Byrne crew was erecting guardrails on the south side of the rooftop platform (Tr. 66, 69, 79, 82, 296, 315). Both Fiero and the Byrne employees used the unguarded ladder way from the third floor to access and exit the roof level (Tr. 56, 82, 318-20; Exh. C-12, C-13). Prior to the day of the inspection, employees used a guarded ladder on the opposite side of

¹ Witnesses disagreed on the designation of the building levels on the worksite. For instance, Respondent included a mezzanine level. For purposes of clarity, the CO's designations are used here.

the building to access the roof level from the third floor (Tr. 67-68, 83-84, 299-300, 318). On February 14, 2005, Byrne cut a new ladder way to the rooftop, which the crews then began to use for roof access (Tr. 52, 56, 67, 173; Exh. C-14). Only after CO Acosta arrived on the site did Byrne employees install guardrails around the ladder way (Tr. 79, 297).

Acosta also photographed numerous holes ranging from 4 inches to 24 inches in width throughout the worksite (Tr. 105, 125; Exh. C-2, C-3, C-7, C-8; *see also*, Tr. 39-42, testimony of Angel Fiero). Specifically, Acosta stated, there was a hole measuring 2' x 10" next to a concrete pillar in the immediate area where three Byrne employees, Fernando Villalobos, Heber Lopez and Luiz Flores, were patching concrete. The employees were working on and around a ladder set up on a platform 20-30 feet above the ground (Tr. 106-10, 127, 130, 133, 136, 152, 154, 272, 324; Exh. C-2, C-5, C-9, C-10; Stipulation Nos. 4, 5, 6). The ladder was set up approximately three feet from the concrete pillar (Tr. 128). Acosta observed one employee standing within a foot of the hole (Tr. 129, 153). A series of similar holes were located between the platform's access area and the work area (Tr. 136, 146). The CO observed the three employees working in the area for approximately five minutes (Tr. 132).

Villalobos testified he was aware of the hole by the column, and deliberately kept the ladder a foot away from it because there was a possibility that the plywood could break (Tr. 273, 278-79). He did not recognize the other holes pictured in Complainant's exhibits, but admitted there could have been other holes in the platform (Tr. 278). Walter Shane Korn, the Byrne superintendent who accompanied CO Acosta on his inspection, testified that there were some holes in the floor that were repaired while Acosta was still on site (Tr. 295).

Members of Byrne management were present at the El Paso work site and would walk the job area nine to ten times a day (Tr. 156, 188). Angel Fiero testified that he had complained to Kyle Dies, a Byrne supervisor and field engineer, about a dangerous hole in the walking surface on the north side of the theater (Tr. 8, 42-44, Stipulation No. 4). The specific hole he complained about was covered, though he continued to see holes throughout the work site (Tr. 45, 58-61).

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).

The cited standard provides:

Each employee on walking/working surfaces shall be protected from falling through holes (including skylights more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

The ladder ways cited at item 1, instances a) and b) are clearly subject to the cited standard. The small, 4" to 24" holes cited at instance c), however, should have been cited under subparagraph (b)(4)(ii), which provides:

Each employee on a walking working surface shall be protected from tripping in or stepping into or through holes (including skylights), by covers.

Because the cited standard is inapplicable to the small holes cited at instance c), and because Complainant made no motion to amend the citation to conform to the evidence, instance c) is dismissed.

The evidence establishes that the hazardous unguarded ladder ways were created by Byrne. That the ladder ways remained unguarded while Byrne employees performed other work on the rooftop was known to Kyle Dies, a Byrne supervisor who was on the roof on the day of the inspection. Byrne employees were in the zone of danger posed by the unguarded ladder ways as they worked, and as they moved along their normal routes of ingress to and egress from their assigned workplaces. *See, Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1993 CCH OSHD ¶30,303 (No. 86-0274, 1993). The Secretary has proven the violation, and citation 1, item 1, instances a) and b) are affirmed.

Penalty

A gravity based penalty of \$2,500.00 was proposed for this violation.

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Gravity factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

CO Acosta testified that the violation was serious, in that an employee accidentally stepping through an open ladder way could fall and suffer serious injuries, including broken bones, head injuries, internal injuries and death (Tr. 157, 175). However, the CO believed that the probability of an accident occurring was small (Tr. 160-61, 166, 177). While there were no alternative means of protection provided, the evidence suggests that the rooftop ladder way had only recently been opened. There was no evidence

that work was ongoing in the area of the third floor ladder way. It was unlikely that employees would unknowingly back into a ladder way that was used only for access. Byrne is a large company; employing 27 employees on this worksite, and over 300 employees total, and so was not entitled to any adjustment for size (Tr. 123-24, 158). Byrne cooperated fully with OSHA during the inspection and immediately abated the violations. As a result the CO included a 25% reduction in the original gravity based penalty (Tr. 159, 176).

Taking into account the low probability of an accident occurring, as well as the dismissal of instance c), a penalty of \$1,250.00 is deemed appropriate and will be assessed.

Alleged Violation of §1926.502(b)(13)

Serious citation 1, item 2a alleges:

29 CFR 1926.502(b)(13): When guardrail systems are used around holes which are used as points of access (such as ladder ways), they shall be provided with a gate, or be so offset that a person cannot walk directly into the hole.

- a) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that an unprotected ladder way access point was provided with a gate or that it was offset to prevent employee(s) from falling into the hole. Employees working on rooftop of a three story building were exposed to the hazard of falling approximately 13.5' to the concrete floor below.
- b) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that an unprotected ladder way access point was provided with a gate or that it was offset to prevent employee(s) from falling into the hole. Employees working on the 3rd floor of a three story building were exposed to the hazard of falling approximately 13.5' to the concrete floor below.
- c) Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that an unprotected ladder way access point was provided with a gate or that it was offset to prevent employee(s) from falling into the hole. Employees working on the 2nd floor of a three story building were exposed to the hazard of falling approximately 13.5' to the concrete floor below.

Discussion

The cited standard provides:

When guardrail systems are used around holes which are used as points of access (such as ladder ways), they shall be provided with a gate, or be so offset that a person cannot walk directly into the hole.

As discussed in item 1, instances a) and b) above, the ladder ways on the rooftop and third floor were unguarded. The resulting hazard was addressed and affirmed as a violation of §1926.501(b)(4)(i) and an appropriate penalty assessed. The Secretary's citation of those same conditions under §1926.502(b)(13) is, therefore, duplicative. Moreover, the provisions of §1926.502, which dictate specifications for guardrails, are inapposite here where no guardrails were installed. Only instance c), therefore, will be addressed here.

The Secretary has established that the second floor ladder way had guardrails on three sides, but did not have a gate or offset on the fourth side to prevent employees from backing or sidestepping into the hole (Tr. 171, 256; Exh. C-13, photo 4). Byrne employees used the inadequately guarded ladder way to the second floor to access and exit the roof level (Tr. 56, 82, 318-20; Exh. C-12, C-13). The violation has been established.

Penalty

The Secretary proposed a single penalty for items 2a and 2b. The determination of what constitutes an appropriate penalty is within the sole discretion of the Review Commission. The grouping of penalties is, likewise, within the Commission's discretion. *See, Halmar Corp. and Defoe Corp., a Joint Venture (Halmar)*, 18 BNA OSHC 1014, 1997 CCH OSHD ¶32,419, (No. 94-2043, 1997), *citing, H.H. Hall Constr. Co. (Hall)*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712 (No. 76-4765, 1981). The violations described at items 2a and 2b are not closely related; a single action would not bring the employer into compliance with the cited standards. There being no apparent reason for the grouping, a separate penalty will be assessed.

For the reasons discussed above, the cited violation is "serious". Only one of the three instances cited is affirmed here. The probability of an accident occurring where a stairwell is guarded on three sides is remote. A penalty of \$500.00 will be assessed.

Alleged Violation of §1926.502(f)(1)(i)

Serious citation 1, item 2b alleges:

29 CFR 1926.502(f)(1)(i): When mechanical equipment is not being used, the warning line shall be erected not less than 6 feet (1.8 m) from the roof edge:

or in the alternative;

29 CFR 1926.501(b)(1): Each employee on walking/working surface with an unprotected side or edge which is 6 feet more above a lower level was not protected by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Thos. S. Byrne General Contractors, LTD @ 125 Pioneer Plaza (Plaza Theater), El Paso, TX; On or about 4-14-05 the employer did not ensure that standard guardrails or other suitable fall protection were provided with and required to use adequate fall protection. A warning line (caution tape) was placed 25"-32" from the leading edge. Employee(s) working on the first floor level platform of a three story building were exposed to the hazard of falling from an elevation of 9.6" - 13.6" to ground level.

Facts

Prior to his entry onto the Byrne worksite, CO Acosta photographed three employees working on a platform 9'6" above the adjacent level (Tr. 90, 94, 106-10, 132, 148, 178). The employees were grouting nail holes in the poured concrete columns (Tr. 262-63). One of the employees was working from a ladder (Tr. 91, 187). There were no guardrails on the edge of the platform, and there was only a strip of yellow caution tape between them and the unguarded edge (Tr. 178, 184; Exh. C-2, C-3, C-9, C-10, C-11). The employees were working between four and six feet from the uneven edge of the platform (Tr. 148, 179-80, 183, 202, 204, 207; Exh. C-6).

Discussion

The three employees grouting columns on the 9'6" work platform were working in a group on a flat surface well away from an edge that was marked with warning tape. It does not appear that there was any likelihood of them approaching the zone of danger posed by the edge of the platform. Item 2b is, therefore, dismissed.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR §1926.501(b)(4)(i) is AFFIRMED, and a penalty of \$1,250.00 is ASSESSED.
2. Serious citation 1, item 2a, alleging violation of 29 CFR §1926.502(b)(13) is AFFIRMED, and a penalty of \$500.00 is ASSESSED.
3. Serious citation 1, item 2b, alleging violation of 29 CFR §1926.502(f)(1)(i) is VACATED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: April 6, 2006