

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.

Southern Masonry Construction, LLC,

Respondent.

OSHRC Docket No. **06-1792**

Appearances:

MaryBeth Zamer Bernui, Esq., U. S. Department of Labor, Office of the Solicitor, Nashville,
Tennessee
For Complainant

Brett Adair, Esq., Carlson & Adair, LLC, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Southern Masonry Construction, LLC (SMC) is a residential and commercial masonry contractor operating out of Huntsville, Alabama. On June 29, 2006, on his way to another inspection, Occupational Safety and Health Administration (OSHA) assistant area director Harold Ciancio drove past the construction site of the future Huntsville Emergency Medical System (HEMS) building on Church Street in Huntsville, Alabama (T. 10). He observed a worker of another subcontractor on the roof, apparently exposed to a fall hazard. Ciancio conducted an inspection of the fall hazard. During the course of that inspection, he observed other hazards and investigated those as well. As a result of Ciancio's inspection, the Secretary issued a one-item citation to SMC on September 29, 2006. The Secretary alleges a violation of § 1926.501(b)(1) for failing to provide fall protection to employees as they accessed the second floor of the building under construction. SMC contested the item and the proposed penalty. The Commission assigned this case to be heard under simplified proceedings. The case went to hearing on February 21, 2007, in Huntsville,

Alabama. SMC contends its employees were not exposed to the hazard, which it neither created nor controlled on the multi-employer worksite. The parties presented their arguments on the record at the close of the hearing. For the reasons discussed below, item 1 is affirmed.

Item 1: Alleged Serious Violation of § 1926.501(b)(1)

The Secretary alleges SMC violated § 1926.501(b)(1) by failing to provide fall protection for employees who passed near the unguarded open-sided floor at the east perimeter of the building.

The standard provides:

Unprotected sides and edges. 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 shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Facts

SMC has been a masonry contractor in the Huntsville, Alabama, area for 4 years. It specializes in commercial and industrial masonry work. The HEMS building was one of its commercial projects.

On June 29, 2006, General Contractor Pearce Construction Company (Pearce) and various subcontractors worked on the first and second floors and on the roof of the HEMS building. When completed, the building would be at least 200 feet long and 150 feet wide and have a roof height of 30 feet (Tr. 37). SMC employees worked on the second floor pouring concrete into the block wall they were constructing (Tr. 52). The building contained two sets of stairs (an interior set of stairs and one near the east perimeter). While the interior stairs may have presented interior fall hazards, Ciancio did not observe anyone use it. Ciancio did observe employees regularly using the east stairway. The east stairs exited onto an open-sided portion of the second floor (Tr. 33-34).

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwest Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The cited standard applies.

The cited § 1926 construction standard governs employees on a walking or working surface. SMC was engaged in construction activities while working on the second floor of the HEMS building. The standard applies to the conditions cited.

Non-compliance with the standard

Section 1926.501(b)(1) requires employers to protect employees from fall hazards by choosing from various options, such as guardrails. Pearce was responsible for installing guardrails for the HEMS building. Pearce installed guardrails at other locations on the second floor, including further back at the interior (west) side of the east stairwell. However, Pearce had not installed guardrails along approximately 19 feet of the east perimeter of the second (mezzanine) floor. The absence of guardrails at that point meant employees accessing or exiting the second floor via the stairs could fall 11 to 12 feet to the ground (Tr. 17, 71). The existence of the fall hazard constituted a failure to comply with the standard.

Exposure

SMC primarily argues its employees were not exposed to the hazard. “Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *A.E. Staley Manufacturing Co.*, 19 BNA OSHC 1190, 1207 (Nos. 91-0637, 91-0638, 2000). The evidence establishes SMC’s employees had actual exposure to the hazard. Further, SMC could reasonably anticipate its employees’ exposure.

Along with other contractors, SMC used the east stairs to access the second floor. Its employees, including foremen, worked at another area of the second floor to pump concrete into a block wall (Tr. 20 - 21). While on the ground Ciancio saw workers he would later identify as SMC employees walk close to the east edge of the building as they exited the stairwell (Exh. Tr. 12, 15, 23). Ciancio interviewed five SMC employees who were on the second floor. Although most of the SMC employees were on the scaffold, Messrs. Cortez and Hereta were assisting from the second floor. They primarily spoke Spanish, and Ciancio communicated with them using basic English and hand gestures. They advised Ciancio they reached the second floor via the east stairs. Ciancio recognized some of the employees on the scaffold as the ones who earlier used the east stairs. Cortez and Hereta assisted Ciancio with the names, addresses and telephone numbers of SMC employees

Sanchez and Gonzales (Tr. 22-23, 28). SMC foremen Gregory and Rice were also on the second floor working from the scaffold (Tr. 20-24).

Ciancio estimated the closest point of the stairwell wall was approximately 6 to 8 inches from the unguarded edge (Tr. 57). SMC's general superintendent Jeffrey Posey recalled the block wall was 12 inches wide, making 12 inches the closest point to the stairwell from the edge. According to the witnesses, the stair width ranged from 36 to 48 inches (Tr. 44, 69). An employee arriving at or leaving the second floor landing would likely place his body within some mid point along the stairs. Using these dimensions, employees were approximately 2 to 3 feet from the unguarded edge of the building. Employees would step up or down and slightly turn as they proceeded over towards the scaffold or down to the ground floor. Under these facts SMC employees were in close proximity and within the zone of danger of an 11 to 12 foot fall.

SMC argues the Secretary failed to prove the requisite exposure because its employees only passed by the open-sided floor on their way to their workstation at an adjacent side of the building. It suggests mere ingress or egress to the assigned area could not constitute a violation. SMC is mistaken. A brief duration of an exposure does not negate exposure. *See A. J. McNulty Co.*, 283 F.3d 328 (D.C. Cir., 2002) (an employer must implement the compliance method required by a standard before putting employees to work); *N & N Contractors, Inc.*, 19 BNA OSHC 1401, 1403 (4th Cir., 2001) (unpublished) (presence in zone of danger was reasonably predictable "by operational necessity or otherwise (including inadvertence)"); *Falcon Steel*, 16 BNA OSHC 1179, 1183-84 (No. 89-2883, 89-3444, 1993) (installation of fall protection required when employees were expected to pass near the edge in the course of their duties); *Lancaster Entp.*, 19 BNA OSHC 1033, 1037 (No. 97-0771, 2000) (unobstructed access to "closely adjacent" hazard during ingress and egress). The Secretary established the element of exposure.

Knowledge

SMC superintendent Sylvester was in charge of the site. Sylvester knew his employees were on the second floor pumping concrete (Tr. 20). The fall hazard at the second floor access point was in plain site from either the ground or the second floor. Two foreman worked on the second floor. Even if the foremen used another means of access (something which SMC does not suggest), they would have become aware the crew walked close to the unguarded edge as they accessed their

workstation via the east stairs. *See Lancaster Entp., supra*, 19 BNA OSHC 1037. The Secretary established SMC knew or with the exercise of reasonable diligence could have known of the violation.

Multi-employer worksite defense

The HEMS building was a multi-employer worksite. SMC, other subcontractors, and the general contractor worked together on various aspects of the construction. Under the long-standing principles set out in *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (No. 3794, 1976) and *Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976) a subcontractor that neither creates¹ nor controls a hazardous condition may defend against a citation by showing that its employees were protected by some realistic measure taken as an alternative to literal compliance with the standard or that it could not reasonably have known of the hazardous condition. *E.g. Capform Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994).

SMC was an “exposing” employer. It had the expectation Pearce would install fall protection in the form of guardrails. Yet, the open-sided second floor at the exit point of the east stairs was in plain sight. The fact that many individuals used the east stairs was equally obvious. Although it was reasonably predictable SMC employees would move quite close to the open-sided edge while accessing the second floor, SMC did not take reasonable steps to lessen the hazard. There is no evidence that it advised or sought the assistance of the general contractor to secure the guardrails; that it warned employees; that it utilized some other feasible method of fall protection, such as a life line and lanyard; or that it implemented any other realistic, non-literal measures to protect its employees. SMC failed to meet its obligations with respect to the OSHA requirements for a multi-employer worksite.

According to Ciancio, SMC employees could fall going down the stairs and even more likely, could fall coming up the stairs, tripping and falling off the edge (Tr. 39). The likely result would be a serious injury such as broken bones, internal injuries, or even death. The Secretary established the elements of her case and that the violation should be affirmed as serious.

Penalty Determination

SMC contends that even if a violation is shown, the Secretary’s proposed penalty is excessive. The Commission is the final arbiter of penalties in all contested cases. In determining an

¹ Although SMC was the masonry contractor, the Secretary does not argue SMC created the hazard.

appropriate penalty, the Commission is required to consider the size of the employer's business, its history of previous violations, the employer's good faith, and the gravity of the violation.

At the time of the inspection SMC employed 100 employees. It is entitled to a credit as a small to medium-sized employer. SMC had no previous violations and is entitled to a credit for that favorable past history. SMC presented testimony that safety is a concern in its commercial projects, but in commercial projects safety issues need not be as extensively detailed as it is for industrial projects. Industrial projects set high standards for safety and require detailed layouts and testing for employees. SMC seeks to follow the higher safety requirements for both commercial and industrial projects (Tr. 63, 67). SMC had a safety program, conducted tool box meetings, had fall protection equipment available on the site, participated with the general contractor in safety meetings, and cooperated with the inspection (Tr. 27, 42-43). The undersigned credits the company's good faith to a greater degree than proposed in the Secretary's formula.

Considerations of gravity include such factors as the number of employees exposed, the duration of exposure, precautions taken against injury, and the degree of probability that an accident would occur. *E.g. Caterpillar 15 BNA OSHC 2153, 2178 (No. 87-0922, 1993)*. At least five employees were briefly exposed to the fall hazard as they walked quite close to the unguarded open-sided floor. The fact that employees stepped up or down at the building's edge increases the likelihood of an accident, while the existence of structures to grab may lessen its likelihood. The probable injury resulting from an 11- to-12 foot fall would be serious, but not necessary life threatening (Tr. 25, 28). It is determined that a penalty of \$1,200.00 is appropriate.

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 that:

Item 1 of the citation, alleging a violation of § 1926.501(b)(1) is affirmed and a total penalty of \$1,200.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: April 3, 2007