



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
:
Complainant, :
:
v. : OSHRC DOCKET NO. 08-1529
:
EUROTECH CONSTRUCTION CORP., :
:
Respondent. :

APPEARANCES:

Donyell Thompson, Esquire
Office of the Solicitor
U. S. Dept of Labor
New York, New York
For the Complainant.

Gerard L. Keogh, Esquire
F.G.H. Keogh & Associates, LLC
New York, New York
For the Respondent.

BEFORE: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s work site on August 25 and 26, 2008. As a result, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on September 12, 2008. On September 29, 2008, Respondent, Eurotech Construction Corporation (“Eurotech” or “Respondent”) filed a timely Notice of Contest pursuant to section 10(a) of the Act, bringing this matter before the Occupational Safety and Health Review Commission (“the Commission”). The Citation alleges four serious violations of the Act and proposes a total penalty of \$20,000.00. The Secretary filed her Complaint in this matter, after which Respondent filed its Answer. The Answer admits the Secretary’s jurisdictional allegations but generally denies the remaining allegations in the Complaint.

The parties have submitted no stipulations of fact. The administrative trial in this case was held on September 1, 2009, in Newark, New Jersey. The parties have submitted post-trial briefs.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Commission pursuant to Section 9(c) of the Act.

The OSHA Inspection

At approximately 3:00 p.m. on August 25, 2008, the Manhattan Area Office of OSHA was notified that a work-related accident with an injury had occurred at a job site located at 200 West Street, New York, New York. The injury involved an employee who had fallen through a floor hole. OSHA Compliance Officer (“CO”) Robert Stewart arrived at the site at 3:30 p.m., and he held an opening conference with Richard Centina, superintendent for Tishman Construction (“Tishman”), the general contractor, and Gerard Sheridan, a foreman for Eurotech. The work site was a high-rise building under construction which, at the time of the accident, was 45th floor at the time of the accident. According to the CO, he and Messrs. Centina and Sheridan proceeded to the 45th floor, where the CO observed and photographed the subject floor hole and surrounding areas. The CO returned to the site the next day to conduct employee interviews. The CO interviewed Messrs. Centina and Sheridan. He also interviewed Jerome Byrne and John O’Shea, two other Eurotech foremen. Mr. O’Shea denied that his crew had installed the faulty floor hole cover through which Eurotech employee Roberto Rodriguez fell. (Tr. 48, 51).

At some point during the inspection, Messrs. Centina and O’Shea told the CO that they believed that Century Maxim (“Century”), another contractor at the site, had installed the faulty floor hole cover.¹ The CO interviewed a “boss” for Century who denied installing the floor cover. The CO could not recall the name of that individual. (Tr. 51-52). However, Mr. O’Shea specifically told him that the piece of plywood the CO identified as the floor hole cover had not been installed by Eurotech’s employees. (Tr.

¹Century Maxim was the concrete subcontractor at the site. Part of its work activity was to place forms around floor holes to facilitate pouring the concrete floor. It is normal practice to install floor hole covers on top of such forms. (Tr. 71-74).

48). In addition, Mr. O'Shea had told the CO that he had inspected the floor hole cover before the accident and that he thought it was "okay." (Tr. 28).

The facts in regard to the accident establish that, at about 1:30 p.m. on August 25, 2008, Roberto Rodriguez, while working at the site, fell through a floor hole on the 45th floor to the 44th floor. His fall was about 17 feet. (Tr. 24-25). Although the employee sustained injuries that required hospitalization, there is no description of his injuries in the record. The CO photographed a sheet of plywood which he believed was the faulty floor cover. I find that it was reasonable for the CO to make that inference.² The CO did not know who had installed the faulty hole cover. He concluded, however, that the violative condition existed at the site for three to four days before the accident. He also concluded that Eurotech's employees were working near that condition during the relevant period and that Eurotech should be held responsible for the condition. (Tr. 15-26, 31-44).

Sequestration of Witnesses

Pursuant to Rule 615 of the Federal Rules of Evidence, applicable to Commission proceedings under Rule 71, 29 C.F.R. 2200.71 of the Commission's Rules of Procedure. "****[t]he practice of sequestering witnesses is twofold. It exercises a restraint on witnesses 'tailoring their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.'" *Genders v. United States*, 96 S.Ct. 1320, 13335 (1976). *See* 1972 advisory note ("The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, or collusion." *See also*, 29 Wright & Gold, *Federal Practice and Procedure: Evidence* 6242, pp. 53-54 (1st ed. ("Wright & Gold").

The Relevant Testimony

CO Robert Stewart

²The CO's photos, CX 1-3, were taken on the 45th floor. Mr. O'Shea, however, testified the cover fell through the hole with Mr. Rodriguez. (Tr. 111). While no witnesses at the trial saw the accident, Mr. O'Shea arrived at the scene shortly after it occurred, and it is reasonable to infer that he saw the cover on the 44th floor. No one knew who had returned the cover to the 45th floor.

CO Stewart was the only witness the Secretary called to testify. As indicated above, he did not witness the accident or have personal knowledge of it. His testimony consisted entirely of information he obtained from persons employed at the site and his personal observations after the accident. The record does not indicate whether he interviewed Mr. Rodriguez or whether any of the workers he interviewed saw the accident. The CO observed the floor hole covering that he believed Mr. Rodriguez fell through, and he concluded it had not been properly secured and was not labeled or color coded as required. The CO testified that Mr. O'Shea "did not do a competent inspection [and] was not looking for the right things." Besides not being labeled or color coded, the cover was not nailed down properly. The CO did not know who installed the hole cover. Because the condition had existed for three or four days, and because Eurotech's employees were working in close proximity to that condition during that time, the CO determined that Eurotech should be held responsible for the alleged violations.³ (Tr. 26-28, 31-44).

With respect to Item 1 of the Citation, the CO concluded that Eurotech "did not do an adequate competent inspection of that floor hole cover." In regard to Items 2 and 3, he concluded that the cover had not been secured as required and also had not been labeled or color coded as required. As to Item 4, he concluded employees had not been retrained as required in fall protection when they had not recognized the hazard of working near an inadequately secured floor hole cover. The CO recommended a \$5,000.00 penalty for each item. (Tr. 26, 32-45).

Jerome Byrne

Jerome Byrne was Eurotech's masonry foreman at site. His duties included weekly safety meetings, and he discussed fall hazards with his crew at those meetings. Mr. Byrne testified that on August 25, 2008, he and his crew were working on the 44th and 45th floors and were preparing to construct a wall on the 45th floor by "getting the floor loaded with block." He further testified that employees of the other subcontractors, including Century, were also working on the 45th floor. Mr. Byrne stated that after his crew member, Mr. Rodriguez, fell through the floor hole, he went to the 44th floor and found him lying on a pile of blocks. He accompanied Mr. Rodriguez to the hospital and stayed there for two or three hours. Mr. Byrne did not testify that he saw Mr. Rodriguez fall

³Although CO Stewart stated that the condition had existed for three to four days before the accident, he failed to provide any support oral or written for his conclusion..

through the floor hole, and he was not asked if he saw the cover before or after the accident. He was also not asked about the injuries Mr. Rodriguez sustained. (Tr. 91-97).

John O'Shea

John O'Shea was Eurotech's carpentry foreman at the site. He has worked as a carpentry foreman for 19 years and has been so employed by Eurotech for nine years. He has received OSHA safety training and has his OSHA ten- and thirty-hour certificates. He was responsible for ensuring that his crew worked in a safe manner. Mr. O'Shea testified that he and his crew were responsible for constructing and maintaining temporary fall protection throughout the site. Their duties included installing perimeter guarding, barriers and floor hole covers. He conducted weekly safety meetings with his crew which included various topics such as fall protection. (Tr. 101-03, 116).

As a subcontractor responsible for fall protection, Mr. O'Shea received direction from Tishman's safety crew as to installation and repair of fall protection. He testified that a major part of his daily activities was inspecting the site to determine whether protective barriers installed by his crew were damaged or removed by other contractors. These inspections were done in the morning and at the end of the day. Mr. O'Shea said that he noticed during the early phases of construction that on numerous occasions the fall protection installed by his crew had been "breached" by other contractors. He reported these breaches to his supervisors, and it was decided to document the conditions with photographs. Eurotech submitted the photographs, RX-5, to Tishman; they depicted broken hand rails and hand rail supports, damaged wood barriers, removed elevator shaft barriers and removed nets and toe boards. Mr. O'Shea also said that he told Tishman's representatives that the damaged and removed barrier protection "was an ongoing problem and it didn't seem to be getting any better and we need to do something about it." (Tr. 103-08, 130, 162 -82).

According to Mr. O'Shea, Tishman instituted a directive which stated that any contractor on the site who removed or breached protection devices was required to immediately notify Tishman, who, in turn, would notify Eurotech to repair or correct the damage. This protocol was put in place during the fall of 2007 and "worked well." Every contractor followed the directive until the incident involving Mr. Rodriguez. At the trial, Mr. O'Shea was asked what was involved in installing a floor hole cover. Mr. O'Shea explained as follows: "You have holes – a flat hole on the floor is normally covered with planks and plywood. A raised up hole can be covered with 2x4's on edge and plywood

on top. It's to support the weight of workers and/or material. It has to be solid, slightly bigger than the opening so it will never go through."⁴ He also explained that to alert workers of the opening, the cover would have "Hole" or "Hole, do not step" written on it. These indicators were written on the covers throughout the project. (Tr. 105, 110-11, 125-28).

At about 7:30 a.m. on August 25, 2008, Mr. O'Shea conducted his usual walk-around to inspect the fall protection at the site, including that on the 45th floor. There were several floor hole covers on that floor which his crew had installed "a few days previously." Mr. O'Shea stated at the trial that the covers on that floor "were all safe and intact." Later that day, at about 1:30 p.m., Mr. O'Shea was notified that a worker had fallen through a floor hole on the 45th floor. He proceeded to that area and observed the floor opening. He also observed the hole cover that had gone through the floor opening with the employee to the floor below. He concluded that cover had not been put in place by him or one of his crew. "[I]t was poorly put together. It was – the piece of wood that was laid on top was smaller than the opening. It went down with him." He also concluded that the original hole cover had been "removed and replaced." Mr. O'Shea testified that while there were other subcontractors working on the 45th floor that day, he had "no doubt" that it was Century's workers who had put the faulty cover over the floor hole. In any case, no one had advised him of the faulty cover, including the Eurotech employees and foremen who were on site. He acknowledged that the faulty cover did not have "hole" or "hole cover" written on it and that Eurotech's employees should have recognized that the cover was not "a good hole cover." He indicated, however, that on a busy work day it was possible that employees simply might not notice that a cover was faulty. As he put it, Eurotech's employees were "used to operating around [his] solid hole covers that [he] had installed and then you have another contractor who comes and removes it and installs something that looks pretty good but, in fact, is not. (Tr. 110-12, 117-18, 120-30).

Brian Murphy

Brian Murphy was Eurotech's project manager at the site. He has worked in that capacity for Eurotech for three years. Mr. Murphy testified that Eurotech had two separate contracts at the site.

⁴Mr. O'Shea indicated the covers his crew installed were solid 3/4 inch plywood with "2x4 strong backs." He also indicated they were "solidly built" and "strapped down." (Tr. 112, 117).

One was to perform masonry work, and the other was to provide temporary fall protection on the job site. Mr. O'Shea and his carpentry crew were responsible for providing the temporary fall protection on the job. Mr. Murphy also testified that early on at the site, Mr. O'Shea brought to his attention that extensive protection installed by his crew was being destroyed or breached by other contractors. (Tr. 132-35). In this regard, he stated as follows:

[W]e felt the need to bring it up to [the general contractor] that other subcontractors of theirs in the building were destroying our material and breaking it in a way that was unsafe to the rest of the subcontractors in the building. (Tr. 135).

Mr. Murphy brought the problem to the attention of Eurotech's upper management and it was decided to photograph the damaged protection and present the photographs to the general contractor. Mr. Murphy stated that "at the time that I shown (sic) the pictures to Tishman they said that from now on there would be no more breaches in our work without us being notified that it was happening." The general contractor informed all of the subcontractors that their contracts required them to notify the general contractor if they breached the barrier protection. At that point, according to Mr. Murphy, the subcontractors "started to do a lot better job" of reporting the need for barrier repair. (Tr. 135, 162-65, 172-83).

Mr. Murphy was present at the site when Mr. Rodriguez fell, and he arrived at the scene of the accident five minutes after it happened. He testified that he had a discussion with Mr. O'Shea every morning and that there were "six to seven" protection men walking the floors "as part of their daily routine to inspect the floors in the morning." Mr. Murphy had not been notified that day of any altered or breached hole covers. He noted, however, that Century had been working on the 45th floor in the relevant area on the day of the accident. (Tr. 184-86).

Credibility of Witnesses

In Commission proceedings, the Judge's findings of fact must resolve the conflicting testimony of witnesses. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978) ("[i]t is the policy of the Commission to ordinarily accept [the Judge's] evaluation of the credibility of witnesses, for it is the Judge who has lived with the case, heard the witnesses, and observed their demeanor.") *Accord, E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2132 (No. 87-0008, 1991). Further, while the Commission has the authority to make factual findings where the Judge has not, it ordinarily will

prefer that the Judge make such determinations. *See, e.g., Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-866, 2000); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1978 (No. 12931, 1977). The Judge has the obligation of fairly considering the entire record and adequately explaining his or her findings. *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1953-1954 (No. 16162, 1978).

In making my credibility determinations in this matter, I have considered the testimony of each witness and the fact that the witnesses were sequestered. While CO Stewart's testimony was credible, I am assigning more weight to the on-site witnesses, that is, Messrs. Byrne, O'Shea and Murphy. In particular, I accord the most weight to Mr. O'Shea's testimony. I observed Mr. O'Shea's demeanor, including his body language and facial expressions, throughout his testimony. Based on his demeanor, and his detailed testimony, I found him to be a very credible and convincing witness. His testimony shows him to be a highly experienced carpentry foreman who holds two OSHA certificates. He also appeared to be a very conscientious individual who took his job seriously. He testified without equivocation about his twice-daily inspections to ensure that proper temporary fall protection was in place at the site. He further testified that any breaches to that protection were reported to his supervisors and to Tishman. Finally, he testified about the hole covers that he and his crew installed. He was emphatic that he had inspected the covers on the 45th floor on the morning of the accident and found them to be "safe and intact." He was also emphatic that he and his crew had not installed the faulty cover and that that cover was likely installed by Century. The testimony of Messrs. Byrne and Murphy supports that of Mr. O'Shea, and even the CO agreed that Messrs. O'Shea and Centina told him during the inspection that they believed Century had installed the faulty cover.⁵ The CO also agreed that Mr. O'Shea had told him that he had inspected the cover the morning of the accident and that it seemed to be "okay." The only significant difference between the testimony of the CO and Mr. O'Shea was the CO's belief that the faulty cover had been in place for three to four days before the accident. As set out in footnote 3, *supra*, the CO never testified where he obtained this information. Based on my finding that Mr. O'Shea was the more credible witness, his testimony about the cited condition is credited over that of the CO.

⁵While I make no specific finding in this regard, the evidence tends to support a conclusion that Century did in fact install the faulty cover.

The Citation Items

Item 1 alleges a violation of 29 C.F.R. 1926.20(b)(2), in that “[f]requent and regular inspections of floor hole covers were not made by competent person designated by the employer, on or about 8/25/08.” Item 2 alleges a violation of 29 C.F.R. 1926.502(i)(3), in that a “[f]loor hole cover was not secured from displacement, on or about 8/25/08.” Item 3 alleges a violation of 29 C.F.R. 1926.502 (i)(4), in that the “[f]loor hole cover was not color coded or labeled “HOLE” or “COVER,” on or about 8/25/08. Item 4 alleges a violation of 29 C.F.R. 1926.503(c)(3), in that the “[e]mployees were not provided retraining when they were not able to recognize that fall protection was required while working right at edge of an inadequately secured floor hole cover, on or about 8/25/08.”

Discussion and Conclusion

To establish a violation of an OSHA standard, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer’s employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870, 1873 (No. 88-1167, 1992); *Ormet Corp.*, 14 BNA OSHC 2135 (No. 85-0531, 1991).

Knowledge is a fundamental element of the Secretary’s burden of proof in establishing a violation of an OSHA regulation. *Trinity Indus. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996). The Secretary may establish the requisite knowledge on the part of the employer through actions of its supervisory employees. *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983). She may also establish knowledge by showing the employer knew of the violative condition or could have known of it with the exercise of reasonable diligence. *New York State Elec. & Gas Co. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Milliken & Co.*, 14 BNA OSHA 2079, 2082 (No. 84-767, 1991). Stated another way, the Secretary must prove that the employer had either actual or constructive knowledge of the violation.

Based upon the record and my credibility findings *supra*, I conclude that the Secretary has not met her burden of proving knowledge with respect to any of the alleged violations.

As to Items 1, 2 and 3, Mr. O'Shea's testimony establishes that he performed twice-daily inspections of the work site to ensure that proper fall protection was in place. His testimony also establishes that at approximately 7:30 a.m. on August 25, 2008, he inspected the floor hole coverings on the 45th floor of the building and determined that they were in compliance; as he put it, they were "safe and intact." Although the subject cover was clearly removed and replaced with a faulty one at some point before the accident, no one at Eurotech was aware this had occurred. Mr. O'Shea admitted that the cover did not have "Hole" or "Cover" written on it and that his employees probably should have recognized it was not a proper cover. He noted, however, that on a busy day the workers simply might not have noticed the cover's condition. He also indicated that Eurotech employees were used to working around the covers that he and his crew installed and that while the replacement cover might have appeared to be all right at first glance it was not, in fact, safe. Further, as there is no evidence in the record as to how long the cited condition existed, the faulty cover could have been in place for a relatively short period of time such that no one from Eurotech had noticed it.

In addition to the foregoing, I have noted the protocol the general contractor established at Eurotech's insistence that had evidently been in place for some time and had resulted in fewer problems with respect to temporary fall protection being removed or destroyed. This fact, together with Mr. O'Shea's inspections to ensure that the temporary fall protection remained in place, persuades me that Respondent acted in a reasonable and diligent manner to discover conditions like the one that occurred on August 25th, 2008. Based on the record, I find that the Secretary has failed to establish that Respondent knew, or with the exercise of reasonable diligence should have known, of the hazardous condition. *See New England Tel. and Tel. Co. v. Secretary of Labor*, 589 F.2d 81 (1st Cir. 1978). In that case, the court stated that anticipating the actions of another contractor "is a burden of care we consider so unrealistic as to be unreasonable as a matter of law." *Id.* at 82. ("If a passageway is properly lighted, a subcontractor does not have to stand around and see that the bulb does not burn out.") *Id.* Based on the facts and circumstances of this case, Respondent exercised reasonable diligence. Accordingly, Items 1, 2 and 3 are vacated.

As to Item 4, Foremen Byrne and O'Shea testified that they provided weekly training sessions for their respective crew members; the sessions included training in fall hazards and fall protection. The Secretary apparently believed that Respondent's employees required retraining as

they had failed to recognize the floor hole cover as a hazard on the day of the accident. As noted above, however, there is no evidence as to how long the condition existed that day, and, as Mr. O'Shea indicated, on a busy workday the employees simply might have failed to notice the cover's condition. The standard, of course, places the burden of proof upon the Secretary to establish that Respondent had "reason to believe" that the employees did "not have the understanding and skill" to recognize a faulty floor hole cover. However, as set out above, there is nothing in this record to show that Eurotech knew or should have known of the cited condition. There is likewise nothing in the record to show that Eurotech knew or should have known that employees required retraining, particularly in view of the evidence that they attended weekly training sessions. The credible evidence of record establishes that Eurotech provided training to employees that addressed the cited hazard. Eurotech thus exercised reasonable diligence. *See, e.g., Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1054-1055, (No. 86-1087, 1991). Because the Secretary has not proved the knowledge element as to this item, Item 4 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. 1926.20(b)(2), is VACATED.
2. Citation 1, Item 2, alleging a violation of 29 C.F.R. 1926.502(i)(3), is VACATED.
3. Citation 1, Item 3, alleging a violation of 29 C.F.R. 1926.502(i)(4), is VACATED.
4. Citation 1, Item 4, alleging a violation of 29 C.F.R. 1926.503(c)(3), is VACATED.

G. Marvin Bober
Administrative Law Judge

Dated: April 15, 2010
Washington, D.C.