

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.

Chenal Valley Construction, Inc.,

Respondent.

OSHRC Docket No. 11-1353

Appearances:

Lindsay Wofford, Esq., Office of the Solicitor, U. S. Department of Labor,
Dallas, Texas
For the Complainant

W. D. Walker, Walker Companies
Little Rock, Arkansas
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Chenal Valley Construction, Inc. (Chenal Valley), is a construction company which engages exclusively in residential construction activities. It functions as a general contractor on residential construction sites. On February 17, 2011, Chenal Valley was engaged as a general contractor at a construction site located at 13410 Fox Field Lane, Little Rock, Arkansas, in a residential area known as the Woodlands Edge subdivision. That day, Occupational Safety and Health Administration (OSHA) Compliance Officer Michelle Martin initiated an inspection of the construction site. As a result of Martin's inspection, on April 8, 2011, the Secretary issued a Citation and Notification of Penalty to Chenal Valley for five serious items alleging violations of the Occupational Safety and Health Act of 1970 (Act), and proposing penalties in the amount of \$19,800.00. Chenal Valley denies it violated the cited standards and contests the citation and proposed penalties. Thereafter, this case was designated for the Commission's Simplified

Proceedings. A hearing was held before the undersigned on August 2, 2011. The parties have filed post-hearing briefs.

For the reasons that follow, items 1, 2, 3, 4 and 5 of the citation are vacated.

Jurisdiction

Chenal Valley denies that at all times relevant to this action it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). The evidence shows Chenal Valley engages in construction work and has three employees who are officers of the corporation (Tr. 230; Exh. C-2). It uses vehicles which were not made in the state of Arkansas, as there are no truck manufacturers in the state of Arkansas (Tr. 18). It also has a web page on the internet (Tr. 19-21; Exh. C-2). These facts show that Chenal Valley is in a business affecting interstate commerce. Moreover, construction work is within the class of activities Congress intended to regulate, and thus, an employer engaged in construction activities is in a business affecting commerce. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983). Construction work *per se* affects interstate commerce because there is an interstate market in construction materials and services. *Clarence M. Jones d/b/a C. Jones Co.*, *id.* Also see *Eric Ho*, 20 BNA OSHC 1361 (Nos. 98-1645, 98-1646, 2003).

The Act applies to a “person engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5), *see Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). Section 3(4) defines “person” as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” Chenal Valley is a corporation. All employees are covered under the Act, including a company’s president and vice president when they are performing work for the employer. *D & H Pump Service, Inc.*, 5 BNA OSHC 1485 (No. 16246, 1977); *Hydraform Products Corp.*, 7 BNA OSHC 1995 (No. 78-527, 1979). Chenal Valley’s president and vice president both performed work for the company as evidenced by their site visits (Tr. 230). The undersigned finds Chenal Valley is an employer with employees in a business affecting interstate commerce. Therefore, jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act.

Discussion

Employer

Chenal Valley is a family-owned corporation and has been in existence since 1991, engaging exclusively in residential construction activities. According to the company's webpage, "Their goal is to build high quality, energy-efficient homes that are both beautiful and livable." (Exh. C-2). Jim Miles is the owner and President of the company, which has two other officers (Tr. 230; Exh. C-2). Chenal Valley functions as a general contractor, hiring subcontractors, such as Red Construction, LLC (Red Construction). Chenal Valley hired Red Construction to perform masonry work on the jobsite at issue located at 13410 Fox Field Lane, Little Rock, Arkansas (Tr. 196, 236). Chenal Valley owned that site (Tr. 231-232).

Inspection

OSHA Compliance Officer Michelle Martin, accompanied by Assistant Area Director William "Monty" Cole, initiated an inspection of the Fox Field Lane construction site on February 17, 2011, because of fall hazards they observed while driving by the site (Tr. 26, 28, 32). The inspection was conducted pursuant to OSHA's Regional Emphasis Program. The site was selected for inspection as a result of plain view hazards observed on the site in which construction activity was occurring (Tr. 15-17, 28, 32, 132; Exhs. C-1, R-1). A residential home was under construction on the jobsite. No employees of Chenal Valley were onsite at the time of the inspection, and OSHA did not speak with Chenal Valley about the alleged violations until a conference held on February 22, 2011, at the OSHA Area Office (Tr. 90-92). Martin did not speak to any employees of the subcontractor on the site because some employees left the site, and there was a language barrier with those who remained (Tr. 86-89). Therefore, the inspection consisted of Martin's photographs and observations.

On the day of the inspection, subcontractor Red Construction was performing masonry work on the home under construction at the jobsite (Tr. 33, 196). Red Construction was under contract with Chenal Valley and had been onsite for 2 days (Tr. 102, 196). At least three employees of Red Construction were engaged in masonry work from scaffolds and from the roof of the home under construction (Tr. 99; Exhs. C-3, C-4, C-5, C-7, C-8, C-9, C-10, C-11, C-12). Multiple problems with the scaffolds were

found during the inspection. Bundles of bricks were tied to the scaffold frames, compromising the scaffolds' stability (Tr. 42: Exhs. C-4, C-5, C-9). A cantilevered portion of the scaffold, from which employees worked, was not secured to the house (Tr. 98; Exhs. C-4, C-5, C-7, C-9, C-10, C-11 and C-12). Also, the footings of the scaffold, were elevated with concrete blocks supported by boards and bricks and other materials causing the footing not to be level (Tr. 42, 72, 75, 105; Exhs. C-4, C-9, C-10, C-11). Owner Miles testified the scaffold was level and stable based on what he observed in the photographs (Tr. 211, 212, 215). Owner Miles also admitted the mudsills were not anchored to the base plates of the scaffolds (Tr. 244-245).

During the inspection, Martin observed an employee climb down the cross bracing on the scaffold (Tr. 56, 78, 110; Exhs. C-3, C-8). There were no ladders or other method for employees to get down from the scaffold (Tr. 111). Owner Miles admits this is a violation (Tr. 217). Martin also observed an employee sitting with his legs dangling on a scaffold platform approximately 12 feet above the lower level without any fall protection (Tr. 37, 114-115; Exh. C-3). There were no guard rails on the scaffold (Tr. 42; Exhs. C-3, C-4). Owner Miles admitted this too was a violation, although he did not feel it was serious (Tr. 219). In addition to the fall hazards from the scaffold, Martin observed an employee sitting on a roof incline approximately 13 feet from the ground, without any fall protection (Tr. 37-38, 116, 160-161, 191; Exh. C-3). As a result of the aforementioned conditions, OSHA issued a citation to Chenal Valley holding it responsible as the controlling employer.

Controlling Employer

The Citation was issued to Chenal Valley pursuant to OSHA's Multi-Employer Citation Policy. The Secretary contends Chenal Valley was the general contractor on the jobsite and was responsible for the violations due to its capacity as controlling employer. Chenal Valley asserts that it was not a controlling employer. The Commission recently reversed its previous position on this issue, now holding that the Secretary may cite a non-exposing, controlling employer under this policy. In *Summit Contractors*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the Commission held:

“[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees but those of other employers engaged in a common undertaking.” *McDevitt*

Street Bovis, 19 BNA OSHC at 1109, 2000 CCH OSHD at p. 48,780 (citation omitted). With respect to controlling employer liability “an employer may be held responsible for the violations of other employers where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.” *Id.* (citation omitted); *Grossman Steel*, 4 BNA OSHC 1188, 1975-1976 CCH OSHD at p. 24,791.

Chenal Valley does not dispute that it hires subcontractors to perform work on residential construction sites or that it hired Red Construction to conduct masonry work for the jobsite at issue (Tr. 196, 200). It contends, however, it is not a general contractor; it is not responsible because it had no employees on the jobsite, and it relied on Red Construction to work safely. A preponderance of the evidence shows Chenal Valley had supervisory authority and control over the jobsite. Owner Miles testified that he expected Red Construction to follow Chenal Valley’s instructions (Tr. 233, 236). In addition, Chenal Valley had the authority to hire and fire Red Construction (Tr. 236). Further, owner Miles testified he would ensure that any safety problems on the jobsite were corrected, and if he observed an employee working unsafely he would contact that particular individual’s foreman. If the foreman was not available, Chenal Valley had the authority to terminate that particular individual or to stop work on the jobsite (Tr. 93-94, 158, 199, 237). Chenal Valley also supplies the materials for the jobsite; requires its project manager to visit the site on a daily basis and its owner to visit the jobsite at least 3 times per week; coordinates the scheduling of the work on the jobsite; and work on the site is conducted only with the permission of Chenal Valley (Tr. 91, 230, 231). Based on the foregoing, the undersigned finds Chenal Valley had supervisory authority and control over the jobsite.

The Citation

The Secretary cited Chenal Valley with five items alleging instances where employees of Red Construction were exposed to fall and scaffold hazards. The cited standards, along with the citation description of the alleged violations, are as follows:

Item 1

The cited standard, § 1926.451(c)(1)(iii), provides:

(c) *Criteria for supported scaffolds.*

(1) Supported scaffolds with a height to base width (including outrigger

supports, if used) ratio of more than four to one (4:1) shall be restrained from tipping by guying, tying, bracing, or equivalent means, as follows:
(iii) Guys, ties, braces, or outriggers shall be used to prevent the tipping of supported scaffolds in all circumstances where an eccentric load, such as a cantilevered work platform, is applied or is transmitted to the scaffold.

The citation alleges two instances for item 1 as follows:

- (a) On or about February 17, 2011, at the front of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, bundles of bricks were used to weight scaffold. The scaffold was equipped with a cantilevered platform and was not restrained from tipping. This condition exposed employees of Red Construction, LLC to a scaffold collapse and/or falls from elevation.
- (b) On or about February 17, 2011 on the north side of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, concrete blocks were used to weight scaffold. The scaffold was equipped with a cantilevered platform and was not restrained from tipping. This condition exposed employees of Red Construction, LLC to a scaffold collapse and/or falls from elevation.

Item 2

The cited standard, § 1926.451(c)(2)(i), provides:

(c) Criteria for supported scaffolds

- (2) Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.
 - (i) Footings shall be level, sound, rigid, and capable of supporting the loaded scaffold without settling or displacement.

The citation for item 2 alleges “ On or about February 17, 2011, at the front of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, unstable pieces of lumber and brick were placed beneath the concrete blocks supporting scaffold. This condition exposed employees of Red Construction, LLC to a scaffold collapse and/or falls from elevation.” (Citation and Notification of Penalty).

Item 3

The cited standard, § 1926.451(e)(1), provides in pertinent part:

When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated 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.

The citation for item 3 alleges:

- (a) On or about February 17, 2011, at the front of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, an employee of Red Construction, LLC dismantled scaffold platform at the approximately 9 ft. level and climbed down the crossbraces to ground level. This condition exposed employees to a scaffold collapse and/or falls from elevation.
- (b) On or about February 17, 2011, on the north side of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, an employee of Red Construction, LLC dismantled from roof and climbed down scaffold crossbraces to ground level. This condition exposed employees to a scaffold collapse and/or falls from elevation.

Item 4

The cited standard, § 1926.451(g)(1), provides in pertinent part:

Each employee on a scaffold more than 10 feet (3.1m) above a lower level shall be protected from falling to that lower level.

The citation for item 4 alleges “On or about February 17, 2011, on the north side of the house being constructed at 13410 Fox Field Lane in Little Rock, Arkansas, an employee of Red Construction, LLC was observed sitting on an unguarded scaffold platform at the approximately 12 ft. level. This condition exposed employee to falls from elevation.” (Citation and Notification of Penalty).

Item 5

The cited standard, § 1926.501(b)(13), provides in pertinent part:

Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

The citation alleges “[o]n or about February 17, 2011, on the north side of the house being constructed at 13410 Fern Valley in Little Rock Arkansas, an employee of Red Construction, LLC working on a pitched roof performing masonry activities was not

protected from falling. Employee was exposed to an approximately 13 ft. fall from elevation.” (Citation and Notification of Penalty).

Secretary’s Burden

The citation issued on April 8, 2011, alleges that Chenal Valley violated OSHA’s standards found in Subpart L-Scaffolds and Subpart M-Fall Protection. 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. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Chenal Valley does not dispute that the cited standards were violated by its subcontractor, Red Construction. Nor does it dispute that the employees of Red Construction were exposed to the violative conditions. Chenal Valley also does not take issue with the applicability of the standards. The evidence shows employees of Red Construction used a scaffold to perform masonry work on the home under construction, and that employees worked from the roof without fall protection (Tr. 37-38, 98-99, 116, 160-161, 191; Exhs. C-3, C-4, C-5, C-7, C-8, C-9, C-10, C-11, C-12). Chenal Valley argues, however, that it had no knowledge of the cited conditions.¹

Employer Knowledge

It is the Secretary’s burden to adduce sufficient evidence to establish this element of her case. The Secretary must establish actual or constructive knowledge of the violative conditions by Chenal Valley in order to prove a violation of the standard. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). “Because corporate employers can only obtain

¹ Chenal Valley also argues the Secretary failed to follow her own administrative procedures in selecting Chenal Valley for inspection and in conducting the inspection in this case, in violation of the Administrative Procedures Act. In addition, Chenal Valley argues the Secretary failed to notify it that it was conducting an inspection. The undersigned has considered Chenal Valley’s arguments and finds they have no merit and are not supported by a preponderance of the evidence.

knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of, or was responsible for, the violation.” *Todd Shipyards Corp.* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

When a general contractor’s supervisory authority and control over the worksite gives rise to safety responsibilities for its subcontractors, the test of knowledge is one of reasonableness. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 1275, 1976); *Summit Contractors, Inc.*, 17 BNA OSHC 1854 (No. 96-0055, 1996)(ALJ). Reasonableness is fact based and takes into consideration the relative responsibility of the various actors on the multi-employer worksite. *See, Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2054-56 (No. 90-2873, 1992) (distinguishing responsibility of an employer which created and controlled the specific hazard from a non-creating/controlling employer).

Chenal Valley did not create the hazards, expose its employees to the hazards, or control the specific hazards. It controlled the overall worksite by reason of its supervisory authority. Chenal Valley had an obligation to inspect the work area, to anticipate hazards, and to take measures to prevent the occurrence of hazardous conditions. Despite owner Miles’s testimony that he left safety up to the subcontractors, the evidence shows Chenal Valley fulfilled the required responsibilities, albeit minimally. It had a safety program, required its subcontractors to comply with all safety rules, inspected the jobsite daily, and, when it discovered safety violations, it either brought them to the attention of the subcontractor or took other measures to correct the conditions.

Chenal Valley contends it had no knowledge of the violative conditions because it had no employees on the site. The Secretary does not dispute that Chenal Valley had no employees at the jobsite during its inspection on February 17, 2011. Project Manager Joe Miles did not get to the site until after OSHA had completed its inspection and owner Miles did not get there until the following day (Tr. 203). Actual knowledge is not established.

The Secretary contends, however, that Chenal Valley had constructive knowledge of the alleged violations. First, the Secretary argues that because Chenal Valley claims it

inspected its worksites daily, an adequate inspection would have revealed the deficiencies in the scaffold (Secretary's Brief, p. 15). The Secretary's argument fails. She has adduced insufficient evidence to establish that the conditions found during the inspection on February 17, 2011, also existed the day before when Chenal Valley allegedly inspected the site. Martin testified that in her opinion the conditions she found during her inspection were present for two days or longer (Tr. 107). The undersigned observed Martin during her testimony. On this point, she seemed unsure and it appeared to the undersigned that she was merely speculating as to the length of time the conditions existed. Contrary to Martin, owner Miles, who has been in the construction business for approximately twenty years, testified confidently regarding how rapidly the conditions changed when doing masonry work (Tr. 217-218, 245). Specifically, he testified, "These guys are going to be there less than an hour and this scaffold's going to be moved again . . . that's obvious how fast the work moves and advances . . ." (Tr. 217-218). The undersigned finds owner Miles more credible regarding this issue. The Secretary produced no witnesses from Red Construction to testify that the conditions Martin observed were present on the day before, and that someone from Chenal Valley had been at the site that day. The Secretary has not established by a preponderance of the evidence that Chenal Valley was onsite the day before, at a time when the violative conditions existed, to establish that it reasonably could have detected the violative conditions.

Second, the Secretary contends constructive knowledge is established because Chenal Valley was aware that its other subcontractor was working unsafely. Therefore, it should have inspected the Fox Field Lane site to see if Red Construction was working safely. By not doing so, the Secretary argues, Chenal Valley failed to exercise reasonable diligence. The undersigned disagrees. The evidence shows that Chenal Valley had three houses under construction at the Woodlands Edge subdivision, and all three sites were inspected by OSHA on February 17, 2011. The first inspection was conducted at Hoggard's Ridge where Daniels Framing was performing roofing work as a subcontractor for Chenal Valley (Tr. 22-23, 143-144; Exh. C-2). The second inspection was conducted at 13900 Fern Valley Road, again where Daniels Framing was performing roofing work (Tr. 23-24, 28, 144, 146; Exh. C-2). The third inspection was the instant

site located at 13410 Fox Field Lane, where Red Construction was performing masonry work.

The Secretary relies on Chenal Valley's presence at the prior two inspection sites in the Woodlands Edge subdivision to establish constructive knowledge, arguing in her brief "Chenal was on notice that its subcontractors were conducting their work activities unsafely at OSHA's first inspection at Hoggard's Ridge. Chenal failed to exercise reasonable diligence to ensure that employees were protected at its other two worksites . . ." (Secretary's Brief, p.16). Essentially, the Secretary seeks to have the undersigned find constructive knowledge based on Chenal Valley's knowledge of alleged unsafe conditions of another subcontractor. The undersigned declines to do so. The purported unsafe conditions of Daniels Framing on the other jobsites is insufficient to provide notice to Chenal Valley that Red Construction was working unsafely. Further, the Secretary adduced no evidence to show any connection between the two companies. They were not even engaged in the same type of work activity. Daniels Roofing was installing roofs and Red Construction was installing bricks. The Secretary failed to show the activities relating to the prior inspections of Daniels Framing put Chenal Valley on notice of the conditions found by the Secretary relating to Red Construction. The prior inspections do not provide sufficient notice to Chenal Valley to establish constructive knowledge.

The Secretary has failed to establish that Chenal Valley reasonably could have known of the violative conditions associated with Red Construction on February 17, 2011. Items 1, 2, 3, 4 and 5 are vacated.

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:

Items 1, 2, 3, 4 and 5 of Citation 1 are vacated, and no penalties are assessed.

SO ORDERED.

/s/ Sharon D. Calhoun

SHARON D. CALHOUN

Judge

Date: September 23, 2011
Atlanta, Georgia