

SECRETARY OF LABOR,

Complainant,

v.

MILO CONSTRUCTION CORPORATION,

Respondent.

OSHRC DOCKET NO. 95-0591

APPEARANCES:

For the Complainant:

J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Moo Il Suk, Milo Construction Corp., Tamuning, Guam

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 *et seq.*; hereafter called the "Act").

Respondent, Milo Construction Corporation (Milo), at all times relevant to this action maintained a place of business at M/M Takano Residence, Lot No. 5142-1-1-R1, Tumon, Guam, where it was engaged in construction. Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 15-16, 1994 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Milo's Tumon work site. As a result of that inspection, Milo was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Milo brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing, Complainant moved to dismiss Milo's Notice of Contest, based on Milo's failure to defend this action, and/or to deem Complainant's Requests for Admissions admitted due to Milo's failure to comply with discovery orders entered by this judge. Pursuant to this judge's October 14, 1997 Order, the cited violations were deemed admitted. On October 31, 1997, a hearing was held in Agana, Guam for the purpose of determining whether the matter should be dismissed and to determine the appropriate penalties to be assessed. Final arguments were made at the hearing, and this matter is ready for disposition.

Complainant's Motion to Dismiss

I find that dismissal of the notice of contest is too drastic a remedy in this case. Continuances were sought by both parties in this case, and imposed by the court on its own motion. Milo has been sanctioned for its failure to respond to discovery and/or court orders in a timely fashion, in that it may not contest any of the underlying violations in this matter, all of which were deemed admitted.

Because further sanctions would not be constructive; Complainant's motion is DENIED.

Penalties

Serious citation 1, item 1. A penalty of \$600.00 was proposed for citation 1, item 1, which alleges:

29 CFR 1926.25(a): During the course of construction, form or scrap lumber with protruding nails was not kept clear:

- a) Takano Residence Project - Aisle way, first floor, scrap lumber with protruding nails were not kept clear of active employee's passageway, exposing employees to foot puncture or tripping hazards.

Facts

Johnny Cruz, OSHA Compliance Officer (CO), testified that employees traveling between work sites on the project were exposed to trip and fall, and puncture hazards as they used the passageway. Cruz testified that Milo employees were exposed to the cited hazard (Tr. 30).

Moo Il Suk, Milo's president, stated that Milo has had trouble with OSHA since 1982 (Tr. 43). In order to avoid more OSHA problems, he subcontracts all his work to other contractors (Tr. 44). Mr. Suk testified that Milo's subcontractor, Kay Mammoth Construction, was responsible for all the lumber, and for the cited hazard (Tr. 45, 49). Suk stated that Mammoth was also cited for the fall hazards at issue here, and has since settled their citations and paid the OSHA fines (Tr. 55). Suk admitted that it was the prime contractor on the site, and had employees on the site, including a project engineer, who handled all the materials, and an electrician hired by his project engineer (Tr. 46, 56, 63).

The existence of the violation and the exposure of Milo employees, as well as Milo's ability to control the work site conditions were deemed admitted. Milo's failure to take reasonable measures to protect its employees is deemed admitted. (Request for Admissions Nos. 1 through 6).

Discussion

As discussed above, the violations cited in this matter are deemed admitted. Milo's liability for the cited violations, therefore, is not at issue.

For Respondent's benefit, however, this judge reiterates the Commission position, *i.e.*, that on a multi-employer site, the general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. The general contractor is, therefore, responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity. *IBP Inc.*, 17 BNA OSHC 2073, 1997 CCH OSHD ¶31,296 (No. 93-3059, 1997). Milo was the prime contractor on site. As such it was responsible for exercising its supervisory authority to insure that its subcontractors abate discoverable safety hazards on the work site.

The CO's testimony as to the serious nature of the hazard was unrebutted. The proposed penalty of \$600.00 will be assessed.

Serious citation 1, item 2. A penalty of \$2,000.00 was proposed for citation 1, item 2, which alleges:

29 CFR 1926.404(b)(1)(i): Employer did not use either ground-fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:

- a) Takano Residence Project - Ground-fault circuit interrupter (GFCI) or assured grounding was not provided at the "construction site." Employees were using defective electrical extension cords and were working in a wet environment, exposing employees to electrical shock or electrocution.

Facts

CO Cruz testified that one employee was exposed to the cited hazard (Tr. 31). Cruz stated that Milo's project manager identified the exposed worker as a Milo employee, as did the exposed employee himself (Tr. 59). The danger of electrocution was aggravated by the employee's use of an unprotected saw in a wet area (Tr. 31). Cruz testified that Milo had no written safety program dealing with electrical hazards (Tr. 32).

Moo Il Suk testified that the employee using the saw was not a Milo employee, but worked for the subcontractor (Tr. 51).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 7, 8).

The CO's assessment as to the severity of the violation was un rebutted. The proposed penalty of \$2,000.00 will be assessed.

Serious citation 1, item 3. A penalty of \$2,000.00 was proposed for this violation, which alleges:

29 CFR 1926.404(f)(6): The path to ground from circuits, equipment, or enclosures was not permanent and continuous:

- a) Takano Residence Project - First Floor Near Water Faucet - Employee using Skil saw plugged into 50 foot electrical extension cord with ground prong missing. Employees were exposed to electrical shock or electrocution.

Facts

Cruz testified that a Milo employee was exposed to the cited electrical shock, or electrocution hazard while using the Skil saw (Tr. 32-33). Suk did not believe the worker was employed by Milo (Tr. 51).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 9, 10).

The CO's assessment as to the severity of the violation (*See*, item 2) was un rebutted. The proposed penalty of \$2,000.00 will be assessed.

Serious citation 1, item 4. A penalty of \$600.00 was proposed for this item, which alleges:

29 CFR 1926.405(a)(2)(ii)(I): Flexible cords and cables used for temporary wiring were not protected from damage:

- a) Takano Residence Project - Electrical extension cord was strung across active parking lot or asphalt pavement without any protection from damage. GFCI was not provided, exposing employees to electrical shock.

Facts

Cruz testified that Milo employees were exposed to the cited hazard, which could result in electrical shock and/or electrocution (Tr. 34). Suk admitted that his electrician was responsible for the cited hazard (Tr. 51-52).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 11, 12).

The CO's assessment as to the severity of the violation was unrebutted. The proposed penalty of \$600.00 will be assessed.

Serious citation 1, item 5. A penalty of \$2,000.00 was proposed for this item, which alleges:
29 CFR 1926.405(g)(2)(iii): Flexible cords were not used only in continuous lengths without splice or tap:

- a) Takano Residence Project - Three-wire electrical extension cord was spliced with a two-wire flat household extension cord. Employees were exposed to electrical shock or electrocution.

Facts

CO Cruz testified that Milo employees were exposed to shock and electrocution hazards resulting from the cited violation (Tr. 35). Suk admitted that his electrician was responsible for the cited hazard (Tr. 51-52).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 13, 14).

The CO's assessment as to the severity of the violation was unrebutted. The proposed penalty of \$2,000.00 will be assessed.

Serious citation 1, item 6. A penalty of \$1,000.00 was proposed for this item, which alleges:
29 CFR 1926.451(a)(13): An access ladder or equivalent safe access to scaffold(s) was not provided:

- a) Takano Residence Project - Employees were using tubular welded frame scaffold to plaster wall and ceiling without an access ladder provided. Employees were using the scaffold side rungs, exposing them to falls which could result in broken bones.
 - 1) Living room area; and
 - 2) Outside building on scaffold.

Facts

Cruz testified that plasterers were exposed to a fall hazard, which would likely result in broken bones (Tr. 36-37). Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 52).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 15, 16).

The CO's assessment as to the severity of the violation was un rebutted. The proposed penalty of \$1,000.00 will be assessed.

Serious citation 1, item 7. A penalty of \$1,000.00 was proposed for this item, which alleges:

29 CFR 1926.451(d)(3): Tubular welded frame scaffold(s) were not properly braced by cross-bracing or diagonal braces, or both, to secure vertical members laterally and to align them so that the erected scaffold was plumb, square, and rigid:

- a) Takano Residence Project - Tubular welded frame scaffolds erected had numerous diagonal braces missing.
 - 1) Center of living room area; and
 - 2) Scaffold outside building.

Employees were exposed to falls in the event of a scaffold collapse.

Facts

Cruz testified that employees working from the cited scaffold told him they were assigned to Milo (Tr. 38). The improperly braced scaffold exposed the employees to a possible fall to the ground (Tr. 38). Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 52).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 17, 18).

The CO's assessment as to the severity of the violation was un rebutted (*See*, item 6). The proposed penalty of \$1,000.00 will be assessed.

Serious citation 1, item 8. A penalty of \$1,000.00 was proposed for this item, which alleges:

29 CFR 1926.500(d)(2): Open side(s) of runways, 4 feet or more above floor or ground level, were not guarded by a standard railing, or the equivalent.

- a) Takano Residence Project - Runway to roof top were not provided with adequate guardrails. Some had railings outside post; post were not anchored and 2x2 wood were used (sic). Active passage of employees to roof top, exposing employees to falls from 10-14 feet.

Facts

Cruz testified that the workers exposed to the cited fall hazard were employed by Milo (Tr. 39). Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 53).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 19, 20).

I find that a fall from heights from 10 to 14 feet could result in serious bodily harm. The proposed penalty of \$1,000.00 will be assessed.

Serious citation 1, item 9. A penalty of \$2,000.00 was assessed for this item, which alleges:

29 CFR 1926.701(b): All protruding reinforcing steel, onto and/or into which employees could fall or come against, was not guarded to the hazard of impalement:

- a) Takano Residence Project - Protruding rebars were not protected by guards or caps. Employees were working overhead on open sided floors without any guardrails. Employees were exposed to impalement.
 - 1) First Floor; and
 - 2) Second Floor.

Facts

Cruz testified that employees of Milo would have been impaled on the protruding uncapped rebar in the event they had fallen from the scaffolds, or tripped from the floor area (Tr. 39-40). Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 53).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 21, 22).

The CO's assessment as to the severity of the violation was un rebutted. The proposed penalty of \$2,000.00 will be assessed.

Serious citation 1, item 10. A penalty of \$1,400.00 was proposed for this item, which alleges:

29 CFR 1926.1052(b)(3): Treads for temporary stairway service were not installed the full width and depth of the stair:

- a) Takano Residence Project - Treads for stairway to roof top were not installed the full width and depth of the stairs, exposing employees to tripping and fall hazards.

Facts

Cruz testified that Milo employees were exposed to the cited hazard (Tr. 40). Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 54).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 23, 24).

According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. The CO made no assessment of the severity of this violation. In the absence of any evidence, I cannot find that the trip and fall hazard cited in relation to this violation was "serious" in nature. The violation will be affirmed as an "other than serious" violation, without penalty.

Willful citation 2, item 1. A penalty of \$70,000.00 was assessed for this item, which alleges:

29 CFR 1926.451(d)(10): Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor:

- a) Takano Residence Project - Employees were plastering wall on tubular welded frame scaffold without guardrails provided, exposing employees to falls from 18-20 feet which could result in broken bones or death.

Facts

Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 54). CO Cruz testified that Milo had been cited for fall protection hazards before (Tr. 41). Cruz stated that Milo knew the cited hazard existed and did not take steps to correct it (Tr. 41).

Leonardo Limtiaco, OSHA's director of enforcement and investigation, verified that Milo had been cited, on numerous occasions, for violations of OSHA regulations, and that it was currently on a payment plan covering previously assessed fines (Tr. 68).

Discussion

The cited violation, the exposure of Milo's employees to the violation, and Milo's failure to take reasonable measures to abate it, were deemed admitted (Request for Admissions 1 through 4, 25, 26). It is not admitted, however, that the cited violations were "willful."

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference. An employer's mere familiarity with an applicable standard does not establish willfulness. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980).

CO Cruz's conclusory testimony that Milo knew of the cited hazard fails to address the distinction between actual and constructive knowledge, and so does not establish that Milo had the requisite state of mind necessary to support a finding that the cited violation was willful. The mere fact that Milo had been cited before under the fall protection standards is, in itself, insufficient to establish willfulness.

The cited violation was alleged, in the alternative, as a "serious" violation. Because a fall from 18 to 20 feet would result in serious harm, the violation will be affirmed as serious, and a penalty of \$7,000.00 will be assessed.

Willful citation 2, item 2. A penalty of \$70,000.00 was proposed for this item, which alleges:
29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

- a) Takano Residence Project - Open-sided floors were not provided with guardrails.
 - 1) Second floor, center balcony; and
 - 2) Second floor, north side.

Employees were exposed to falls which could result in broken bones or death.

Facts

Suk testified that the exposed workers were employees of Kay Mammoth (Tr. 54). Cruz stated that Milo employees were exposed to the cited hazard. Cruz recommended that this item be characterized as "willful," because Milo had been cited under this or a similar standard, and "it met the willful criteria."

Discussion

For the reasons discussed above, the citation will be affirmed as a serious violation and a penalty of \$7,000.00 will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.25(a) is AFFIRMED, and a penalty of \$600.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.404(b)(1)(i) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1926.404(f)(6) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
4. Serious citation 1, item 4, alleging violation of §1926.405(a)(2)(ii)(I) is AFFIRMED, and a penalty of \$600.00 is ASSESSED.

5. Serious citation 1, item 5, alleging violation of §1926.(g)(2)(iii) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
6. Serious citation 1, item 6, alleging violation of §1926.451(a)(13) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
7. Serious citation 1, item 7, alleging violation of §1926.451(d)(3) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
8. Serious citation 1, item 8, alleging violation of §1926.500(d)(2) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
9. Serious citation 1, item 9, alleging violation of §1926.701(b) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
10. Citation 1, item 10, alleging violation of §1926.1052(b)(3) is AFFIRMED as an “other than serious” violation, without penalty.
11. Citation 2, item 1, alleging violation of §1926.451(d)(10) is AFFIRMED as a “serious” violation, and a penalty of \$7,000.00 is ASSESSED.
12. Citation 2, item 2, alleging violation of §1926.500(d)(1) is AFFIRMED as a “serious” violation, and a penalty of \$7,000.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: