SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 96-0925
	:	
L.M.A. CONSTRUCTION CORP.,	:	
	:	
Respondent.	:	

APPEARANCES:

Luis A. Micheli, Esquire New York, New York For the Complainant.	Theodore H. Rosenblatt, Esquire New York, New York For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a construction site in Manhattan, New York, after a fire at the site on December 8, 1995, caused the death of seven individuals. As a result of the inspection, Respondent L.M.A. Construction ("LMA") was issued a two-item serious citation alleging violations of the fire protection and prevention standard; items 1a and 1c allege violations of 29 C.F.R. §§ 1926.150(a)(1) and 1926.150(d)(1)(ii), respectively, while item 2 alleges a violation of 29 C.F.R. 1926.150(d)(2), or, in the alternative, 29 C.F.R. 1926.150(a)(2).[1] LMA contested the citation, and a hearing was held on May 13 and 14, 1997. Both parties have submitted post-hearing briefs.

Background

The construction project was the renovation of a church building owned by the United House of Prayer (UHOP); the building also housed several retail spaces, but at the time of the fire there were only two tenants, a clothing store called Freddy's Fashion Mart ("Freddy's") and an adjacent record

[1]The Secretary's Complaint withdrew item 1b, which alleged a violation of 29 C.F.R. 1926.150(a)(4), and amended item 2 to allege the alternative violation noted above.

store; Freddy's, which was about 50 by 100 feet in size, was a first floor and basement space. Among other things, the project involved the renovation of the sprinkler system, much of which was located throughout the basement of the building. LMA, the general contractor, subcontracted the construction work to various other companies, and one of these, Sunset Plumbing & Fire Protection ("Sunset"), was responsible for the sprinkler system renovation.[2] LMA also subcontracted the supervision of the project to a company named Belize New York ("BNY"), whose owner, Cecil Usher, the project superintendent, was at the site every day. Usher reported to a Mr. Ciccione, the project manager, an LMA employee who was also at the site daily, and to James Farrell, LMA's president; in addition, LMA had about 12 employees on the job who did labor and clean-up work.

The fatalities on December 8 occurred when an arsonist set fire to Freddy's and then blocked the exit to the store by shooting at people as they tried to get out. The police arrived at the scene first and would not let the New York City Fire Department ("NYFD") begin putting the fire out until the arsonist was subdued, and, as a result of the fire, seven employees of Freddy's died from smoke inhalation; there were also two carpenters doing some repair work in the basement of Freddy's, but these workers escaped from the store despite the blocked exit. The NYFD surveyed the store's premises on December 11, 1995, and found that the water main going to the building's sprinkler system was shut off, that the "Siamese connection" outside the store that could have been used to pump water into the sprinkler system was obstructed by a plywood shed and that the connection also had some cement around its swivel, making it unusable, and that about 20 percent of the sprinkler piping in the basement was capped off or located above the dropped ceiling. Peter Steinke, the OSHA compliance officer ("CO") who inspected the site, initiated his inspection on December 13, 1995; over the course of the inspection he spoke to Usher, Ciccione, Farrell, and employees of Sunset, and to the architect of the project, the engineer who designed the sprinkler system, the individual who tested Freddy's sprinkler system several months before the fire, and officials of the NYFD and the New York City Building Department ("NYBD"). Based on the inspection, OSHA cited LMA for not having a fire protection program for the job, for not keeping the existing sprinkler system in service, and for obstructing the Siamese connection located outside the store.

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[2]Although the original contract for the project had been between UHOP and The Lema Organization, LMA took over the contract in August 1995. *See* R-9.

The Relevant Testimony

Peter Steinke testified that while the renovation project largely excluded Freddy's he learned pursuant to his inspection that there was some minor alteration to the sprinkler pipes in the basement of the store; he additionally learned the carpenters doing the repairs were employed by a company named Landmark, a subcontractor of LMA, and that the repairs were being done due to a sprinkler system pipe that had been run up to the cited Siamese connection. Steinke said he obtained copies of the project plans from the architect, that C-1, R-1 and R-2 were part of the plans, and that the plans showed the sprinkler system pipe that was put in Freddy's. He identified C-2 as photos of the plywood shed covering the Siamese connection, noting the shed was to keep people from entering the building through an opening next to the door in C-2 where a hallway and staircase were going in and that the failure to post a sign denoting the connection was the problem, not the shed; he also noted that LMA had to know where the connection was due to the work at the site and its location outside the building. (Tr. 7-10; 15-24; 37-41; 47-50; 58-76; 86-89; 102-03; 107; 123-24; 128).

CO Steinke further testified that he obtained C-4, the NYFD survey done after the fire, C-5, a June 1995 letter written by the person who tested the sprinkler system, and C-6, a May 1995 NYFD report, all of which stated that the water main to the system was shut off; moreover, Anthony St. Lucas, an employee of Sunset, told the CO he had turned off the water main several times in the weeks preceding the fire as well as on December 8, and although Russell Alexander, Sunset's owner, told the CO that the NYFD had been notified Steinke learned from the NYFD that no notification had occurred.[3] Steinke said turning off the water main to do the necessary work was reasonable as long as it was turned back on at the end of the day and the occupants and the NYFD were given the 72-hour notice set out in C-1; he also said the work could have been done by isolating the affected part of the system and then reconnecting it, and noted that St. Lucas was not even aware that the system went into Freddy's. The CO pointed out that C-1 additionally required the old system to be maintained until the new one was operational, and that Farrell told him he had informed "everyone" in a job site meeting early on that the water main was to be kept open and the system maintained. The

[3]Alexander also produced a handwritten note dated five months earlier which stated that Sunset had notified the NYFD it would be shutting off the water main; however, Alexander would not give Steinke the name of the person who wrote the note. (Tr. 97-100).

CO further pointed out that Freddy's did not have a certificate of occupancy, that LMA did not have a permit for the project, and that although he asked Usher, Ciccione and LMA's prior attorney for a site safety plan he never got one. (Tr. 15-16; 24-40; 50-57; 89-102; 107-23; 129-30; 134-35).

Michael Salamone, an engineer with the firm that the architect of the project hired to provide mechanical and electrical design services, testified that his firm had prepared C-1, the written specifications for the sprinkler system for the project, and R-1 and R-2, the sprinkler system drawings for the building's basement. He said the written specifications took into account the fact that the building was partly occupied and required that the work be done in accordance with the National Fire Code and the New York City Building Code; specifically, the existing sprinkler system was to be kept operational until the replacement system was operational, shut-downs of the system required written 72-hour notice to the NYFD and NYBD, and the contractor was to protect the existing service in the occupied outlets and to repair any damage caused by the construction work.[4] Salamone also said that the sprinkler system design specifications involved the whole building to some extent or another, that it included installing new piping as well as tying into existing piping, and that the left sides of R-1 and R-2 differed in that R-1 showed the existing sprinklers with some modifications while R-2 showed the existing piping with minor modifications; he noted that Freddy's was in the lower left corner of the drawings, both of which showed a pipe at about the middle of the building that led up to an existing first-floor fire department connection. (Tr. 136-56).

Louis Cendagorta, the NYFD's deputy chief inspector, testified that he had performed the December 11, 1995, survey of the store's sprinkler system, that he had found it unserviceable, and that C-4 was his report of the survey. He also testified that NYFD inspectors had made three prior visits to the store and found violations; visits in late 1994 and early 1995 revealed a problem with the check valve behind the Siamese connection, such that the required five-year test of the system could not be done, and a visit on May 12, 1995, revealed that the system was out of service because the water main was closed. Cendagorta said the May 12 visit further revealed that 70 percent of the building was under renovation and that this visit resulted in a violation to provide documentation showing that an NYBD permit had been secured for the project. (Tr. 157-88; C-6; R-4-5).

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[4]Salamone stated that the purpose of the notice was to provide for other fire protection, such as a fire watch, as well as a specific time frame for the system to be off. (Tr. 144).

George Prodromakis, the contractor UHOP's property management plumber hired to test the sprinkler system in Freddy's in April 1995, testified he made three visits to the site. On his first visit he checked the system and noted the work he needed to do before he could test it; he also noted the water main to the system was shut off and told Cecil Usher, the job site superintendent, that it had to be kept open as the store was occupied. On his second visit he did the required work, which included fixing the check valve; he again noted the water main was shut off and again told Usher it had to be kept open. On his third visit on May 12, 1995, Prodromakis tested the system in the presence of NYFD officials; however, while the system passed the test, the NYFD would not sign off on it due to the water main being continually shut off and the fact that there was a construction project and no permit had been issued. Prodromakis said that C-5 was his letter in this regard to the property management plumber, that a copy of C-5 went to Usher, and that although a sprinkler system in an occupied building can be turned off during construction if done by a licensed contractor after notice to the NYFD it must be turned back on at the end of the day. Prodromakis also said the Siamese connection outside Freddy's was not covered up when he was there and that one of the items he corrected was to put up a sign above the connection indicating its presence. (Tr. 188-211).

James Farrell testified that LMA was provided the project drawings and specifications upon taking over the job but that C-1 and R-1 had not been among those documents. He said that LMA had received R-2, that the work in R-2 involved turning the existing sprinkler heads from an up to a down position in the basement of that part of the building used by UHOP, and that no such work took place in the retail spaces; he also said that the only work LMA did in Freddy's was to run a pipe across and up through the store's basement ceiling to the first floor to a new staircase next to Freddy's that exited to the street, that the shed was erected to keep people from coming onto the site while the staircase was being built, and that that work was completed before the fire, after which he had asked Usher more than once to remove the shed. Farrell did not know who had erected the shed, although he believed one of his subcontractors had, and he recalled no sign on the shed to denote the connection behind it. He indicated that LMA was doing no work at the time of the fire that would have required the shed to remain in place, that the carpenters in Freddy's on December 8 had been hired by BNY independently of its agreement with LMA, and that he had heard of Landmark but had not authorized it to do any work for LMA at the site. (Tr. 212-19; 229-33; 237-38; 252-57).

Farrell testified that R-3 was the site safety program, that R-3 was given to Usher and the subcontractors at the first job site meeting, and that everyone was told to follow it; he further testified that he became aware prior to December 1995 that the existing sprinkler system in Freddy's was not being maintained, and that the violations were such that the store should not have been occupied. Farrell said he brought the violations to the attention of the owners' representatives at the weekly meetings held at the site and was told they would be taken care of; when this did not happen he advised the representatives that he would take care of the matter if they could not, and the fire took place before the violations were resolved. Farrell also said he did not know who had installed the sprinkler system in Freddy's but that that entity had not filed for a permit, that turning the water main off and on was not a reasonable way to do the job as only the owner had such authority, and that he had raised this issue at job site meetings. However, Farrell then went on to state that Sunset's owner Russell Alexander had told him that he had informed the NYFD that the water main to the sprinkler system would be turned off on certain days, that the NYFD had advised Alexander to ensure the system was on at night, and that Alexander had a letter to this effect. (Tr. 226-29; 235-40; 250-51).

Jurisdiction

As a preliminary matter, LMA contends that the Secretary failed to show that it is engaged in a business affecting commerce. However, Commission precedent is well settled that there is an interstate market in construction materials and services and that construction work therefore affects interstate commerce, even if the project is small and the company's activities and purchases are purely local. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983), and cases cited therein. It is clear from the record that LMA is a New York corporation engaged in construction. *See* Complaint and Answer. It is also clear that LMA entered into a contract with UHOP with respect to the subject project, and that while LMA hired subcontractors to perform the actual construction work it oversaw the project, had ultimate responsibility for the job, and had a clean-up crew at the site. Finally, it is clear that LMA has an office staff and that it uses materials, supplies and the U.S. Postal Service to carry out its work. (Tr. 213-15; 220-25; 234; 242-46; 249-50; R-9). I find, accordingly, that LMA is engaged in a business affecting commerce.

In a related argument, LMA contends that it was not an employer within the meaning of the Act because the space Freddy's occupied was not part of the job and there was no relationship

between LMA and the employees in the store when the fire occurred. I disagree. First, the testimony set out above, including that of Farrell, shows that there was some minor piping work performed in the store's basement pursuant to the contract. Second, the CO's testimony that the carpenters in the basement on December 8 were making repairs because of that piping work is supported by C-1, the written job specifications, in view of specification 45, which states as follows:

> Work in cellar and ground floor will take place in occupied retail outlets. Contractor is to protect existing service, products and conditions. Remove debris caused by construction. Remove and replace ceiling pads as necessary. Patch damaged walls, floors and ceilings to match existing. Pay for any damaged products.

Although Farrell testified that LMA had never received C-1, CO Steinke testified that the architect of the project told him LMA had received the project plans, including C-1. (Tr. 86-88). The CO's testimony is bolstered by a memo attached to the end of R-9, LMA's contract with UHOP; the memo, which is signed by Farrell and dated August 7, 1995, advises the subcontractors that all contracts related to the job have been assigned to LMA and that "[t]here are no changes in payments or scope of work." Moreover, the CO's testimony that the carpenters doing the repair work on December 8 were those of Landmark, a subcontractor of LMA, was credible, convincing and based on what he learned during his inspection. (Tr. 69-75). It is therefore credited over Farrell's testimony that LMA had not authorized Landmark to perform any work at the site.

In addition to the above, LMA was required by specification 41 on C-1 to "[m]aintain existing [fire protection] systems in operation until replacement systems are installed and operational." Based on this specification and number 45 above, and the fact that it was the general contractor of the project, LMA was responsible for ensuring that the sprinkler system in Freddy's remained operational for the protection of the occupants of the store as well as the project employees. *See Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976); *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976). I conclude that LMA was an employer at the site within the meaning of the Act and that the Commission has jurisdiction in this matter.

Citation 1 - Item 1a

This item alleges a violation of 29 C.F.R. 1926.150(a)(1), which requires the employer to develop a fire protection program to be followed throughout all phases of the construction work.

LMA contends that R-3 was its fire protection program and that it provided R-3 to its subcontractors and told them to follow it. R-3, entitled "LMA Construction Company Site Safety Program," is an undated 11-page document with various attachments. However, CO Steinke noted that the only part of R-3 having to do with fire protection was on page 5, wherein the "site safety manager" was to ensure that certain fire protection measures were in effect. (Tr. 92-93). Further, while Usher told Steinke there was a site safety program, after which the CO asked Usher, Ciccione and LMA's former counsel for a copy, he was never provided one.[5] (Tr. 90-94).

Regardless, the more important issue is what fire protection measures were in effect at the site. The record establishes that the water main going to the sprinkler system for the entire building was shut off the day of the fire, that it had also been turned off several times in the weeks preceding the fire, and that Anthony St. Lucas, a Sunset employee, was the person who had shut off the water main. (Tr. 32-36; 97-98; 118-20). The record also establishes that C-1 required written 72-hour notice to the NYFD before shutting off the water main and that no such notice took place; although Russell Alexander told the CO that Sunset had notified the NYFD that it would be turning the water main off, and Farrell testified that Alexander had told him the same thing, CO Steinke's testimony that he had verified with the NYFD that no notice was provided is credited as being the reliable evidence on this point. (Tr. 97-100). Finally, the record establishes that the Siamese connection outside of Freddy's that could have been used by the NYFD to pump water into the store's sprinkler system was covered up by a shed and that there was no sign to indicate that the connection was behind the shed. (Tr. 22; 37-39; 128; C-4).

Based on the above, the fire protection measures at the site were inadequate. LMA's specific contentions as to the water main and the Siamese connection are set out below in item 1c and item 2 and are rejected for the reasons stated therein. Also rejected is LMA's assertion that it had no knowledge of these conditions because they were due to the actions of other employers. As the Secretary points out, the Commission has held the general contractor liable for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the site. *See Blount Int'l, Ltd.*, 15 BNA OSHC 1897,

[5]LMA did not move to have R-3 received in evidence. (Tr. 104).

1899 (No., 1992). *See also Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976); *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976). LMA, the general contractor, subcontracted with Cecil Usher, the owner of BNY, to be the project superintendent, and Usher's duties included being at the site every day, coordinating the work and supervising the employees, and conducting safety checks. Usher reported to Mr. Ciccione, the project manager, an LMA employee who was also at the site daily, and to James Farrell, LMA's president, and Farrell met with Usher and Ciccione every week for a report on the project's progress. (Tr. 46-47; 224-25; 233-34; 249-50; 254). Under the circumstances of this case, and as more fully discussed *infra*, the water main being turned off without notice and the obstruction of the Siamese connection were conditions LMA could reasonably have prevented or detected and abated due to its supervisory authority and control over the site. LMA was therefore in violation of the cited standard. The characterization of the violation and the penalty for this item are set out following items 1c and 2.

Citation 1 - Item 1c

This item alleges a violation of 29 C.F.R. 1926.150(d)(1)(ii), which requires that existing automatic sprinkler installations be retained in service as long as reasonable and that operation of sprinkler control valves be permitted only by properly authorized persons. LMA contends that turning off the water main during the day and then turning it on again at the end of the day was reasonable. CO Steinke agreed that turning off the water main during the day was reasonable as long as the notice required by C-1 was given.[6] (Tr. 36; 118). However, the record shows, based on my findings *supra*, that the required notice was not provided and that the water main had been turned off without notice on the day of the fire as well as several times in the weeks before the fire. LMA contends that it had no knowledge of these circumstances because Sunset, its subcontractor, advised it the NYFD had been notified. Regardless, LMA was in violation of the standard. As found above, LMA could reasonably have prevented or detected and abated the cited condition due to its supervisory authority and control over the site. Moreover, Cecil Usher knew that the water main was being turned off at the site without the required notice before LMA took over the project, in light of the testimony of George Prodromakis and C-5, and, as LMA's project superintendent, Usher should have known that

[6]Specification 42 of C-1 states that "[w]ritten requests for approval for planned shutdown ... of building ... systems ... shall be made 72 hours prior to start of the requested shutdown period."

the practice was continuing and taken steps to resolve it. Additionally, that Farrell himself knew of the practice is indicated by his own testimony that he was aware of the sprinkler system violations in Freddy's before December of 1995 and that they were discussed in site meetings. (Tr. 226-29; 239-40). LMA's final contention, that only the owner had the authority to turn the water main off and on, is of no avail, as LMA could simply have secured the owner's permission before giving the required 72-hour notice. This item is affirmed.

Citation 1 - Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.150(d)(2), or, in the alternative, 29 C.F.R. 1926.150(a)(2). These standards require, respectively, that Siamese fire department connections be conspicuously marked and that access to all available firefighting equipment be maintained at all times. LMA contends it had no knowledge the connection was behind the shed. This contention is based on the CO's testimony that the connection was inaccurately shown on the plans and that it was actually on the other side of the store; Salamone, on the other hand, indicated his belief the drawings were accurate. (Tr. 62-64; 152-53). Regardless, the CO testified that LMA had to have known the connection's location due to its work at the site, *i.e.*, the pipe Sunset had run up through Freddy's basement ceiling to the connection. (Tr. 47; 60-62; 65-67; 72; 123). CO Steinke's testimony is supported by that of Salamone and of Farrell himself, who both indicated that the pipe that was put in the store's basement went up to the connection. (Tr. 150-51; 229-30). Further, the CO testified, in effect, that the connection's location outside the store was obvious, and I agree with his conclusion that LMA had to have known about the connection's location behind the shed.[7] (Tr. 123).

LMA also contends that the shed was erected in part to protect workers from demonstrators, and that it had attempted to have the shed removed before the fire occurred. Farrell testified there had been violent demonstrations outside the store due to a dispute between Freddy's and the adjacent record store, and that the shed had also served to protect the workers from the demonstrators; he further testified that the stairway work which required the shed to be there was finished before the fire, and that although he told Usher to remove the shed because it was collecting graffiti and

[7]That LMA knew or should have known of the connection is also supported by R-3, which states on page 5 that "Siamese hose connections shall be kept free from obstruction and shall be marked by a sign reading 'Standpipe Siamese Connection' and by a red light."

becoming unsightly Usher had not done so. (Tr. 229-32; 252-57). CO Steinke agreed that there had been demonstrations, but testified that the purpose of the shed was to keep people from entering the building through an opening next to the door in C-2 where a hallway and staircase were going in. (Tr. 37-39; 65-69; 106-07). Farrell's testimony is not credited in light of that of the CO, and LMA's suggestion that Usher's failure to remove the shed was misconduct is rejected. The CO testified that the failure to post a sign indicating the connection was the problem, not the shed, and it is undisputed that no sign was posted. (Tr. 38; 68-69; 128). LMA was therefore in violation of 29 C.F.R. 1926.150(d)(2), which, in my view, is the more applicable standard to the cited condition.

Characterization of the Violations and Penalty Assessment

LMA contends the violations were *de minimis* because even if the water main had been on and the Siamese connection uncovered the sprinkler system in Freddy's would not have worked, based on C-4, the NYFD survey. However, C-4 states only that even if the system had been working it would not have provided "adequate and proper fire protection for the entire basement area because of the ... capped sprinkler piping and sprinkler heads above ceiling," which does not persuade me of LMA's contention. Moreover, CO Steinke and Louis Cendagorta, the NYFD's deputy chief inspector, also disagreed with LMA's contention. (Tr. 110-13; 186-87). In any case, a violation is properly characterized as serious if there is a substantial probability that it could result in death or serious physical harm. *See* section 17(k) of the Act. The violations were therefore serious.

The CO testified that the proposed penalty of $5,000.00 each for citation items 1 and 2 was reduced by 60 percent upon consideration of the employer's small size and lack of history of previous violations. The CO also testified that no further reductions were given because of the high gravity of the violations, that the resulting penalty was $1,500.00 for each item, and that the withdrawal of item 1b did not affect the penalty amount because subitems 1a through 1c had been grouped for penalty purposes. (Tr. 130-33). On the basis of this testimony, a penalty of $1,500.00 each is assessed for item 1 and item 2.

Conclusions of Law

1. Respondent L.M.A. Construction Corporation is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.150(a)(1), 1926.150(d)(1(ii) and 1926.150(d)(2).

3. Respondent was not in violation of 29 C.F.R. §§ 1926.150(a)(2) and 1926.150(a)(4).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1a and 1c are affirmed as serious violations, and a total penalty of $1,500.00 for these items is assessed.

2. Item 1b is vacated.

3. Item 2 is affirmed as a serious violation, and a penalty of $1,500.00 is assessed.

Irving Sommer
Chief Judge

Date: