

SECRETARY OF LABOR,

Complainant,

v.

BLACK CONSTRUCTION CORP.,

Respondent.

OSHRC DOCKET NO. 96-1791

APPEARANCES:

For the Complainant:

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

For the Respondent:

Thomas E. Moody, Esq., Klem, Blair, Sterling & Johnson, Agana, 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, Black Construction Corporation (Black), at all times relevant to this action maintained a place of business at the Naval Hospital renovation project in Agana Heights, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 14, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Black's Naval Hospital work site. As a result of that inspection, Black was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Black brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 31, 1997, a hearing was held in Agana, Guam. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1926.102(a)(1): Eye and face protective equipment was not used when machines or operations presented potential eye or face injury:

- a) Naval Hospital Renovation Project: An employee was observed drilling holes on metal frames without wearing any eye protection: exposing employee to eye injuries.

Citation 1, item 2 alleges:

29 CFR 1926.451(b)(15): Standard guardrails and toeboards were not installed at all open sides and ends on wood pole scaffolds more than 10 feet above the ground or floor:

- a) Naval Hospital Renovation Project: Employees were atop wood pole scaffolds which were not provided with standard guardrails on either end of the scaffolds; exposing employees to fall 18 feet to the ground below.

Facts

OSHA Compliance Officer (CO) Johnny Cruz testified that on November 14, 1996 he observed two Black employees working on an 18 foot scaffold which was open on two sides (Tr. 10, 12, 30-31, 36). One, a Mr. Macasaquitt, was holding a metal frame that the other, Rodrigo David, was drilling (Tr. 14, 34-35). A third employee was standing off to the side (Tr. 12). Cruz stated that the employee who was drilling was not wearing eye protection (Tr. 17, 27, 54). Cruz testified that all three wore safety harnesses, but were not tied off to the anchor point, or static line (Tr. 10, 12, 31-33, 51).

Cruz contacted the supervisor on the site, Junior Annos, who was 20 or 30 feet away, under an awning, taking a smoke break (Tr. 14). Mr. Annos told Cruz that he always tells his crew to wear safety harnesses (Tr. 13). Cruz testified that when Annos called up to the crew in Filipino, they hooked up to the anchoring point (Tr. 16).

Cruz testified that he returned to the site approximately 45 minutes later, at which time the alleged violations had been abated (Tr. 18). Cruz interviewed the employees involved, all of whom claimed to have been tied off the whole time (Tr. 19).

Noel Mallari, a Black employee, testified that he was the third man on the scaffolding on November 14, 1996 (Tr. 61-63). Mallari testified that he came through an open window from the interior, out onto the scaffolding as Cruz was calling up to the other two Black employees, David and Macasaquitt (Tr. 62-63). Mallari stated that he told Cruz he just got there, and tied off right away (Tr. 63). Mallari stated that

David and Macasaquitt were both tied off to the static line (Tr. 65). Mallari testified that only one end of the scaffolding was unguarded, and that side was left open for the ladder (Tr. 64).

Rodrigo David testified that when CO Cruz called up to the scaffold on November 14, 1996, he was already tied off to the static line (Tr. 79-80). David testified that he held the line over his head to show Cruz (Tr. 81).

David admitted that he was drilling metal frames at the Naval Hospital site without the benefit of his safety goggles (Tr. 76). David testified that he was provided with safety glasses when he was hired, and warned to wear them (Tr. 74-77). David stated that he had taken the goggles off to rest his eyes and placed them in his hard hat approximately 10 minutes before CO Cruz arrived on the site (Tr. 77-78, 84). David stated that he had not been in trouble before for failing to use safety goggles (Tr. 77).

Both Mallari and David testified that Black conducts safety meetings every Monday, during which its employees are instructed in the use of body harnesses, safety goggles, ear plugs, dust masks and gloves (Tr. 58, 73-74). Employees are told that their failure to follow Black's safety policies will result in a verbal warning; employees will receive a week's suspension for a second violation; the third violation will result in termination (Tr. 59-60, 75).

Silvester DeGuzman, Black's safety director, testified that the men are tested on the safety information imparted at the Monday meetings to assure that they understand it (Tr. 90). Ms. DeGuzman testified that Black's safety policy is enforced, and that employees have been suspended and/or fired for violating safety rules (Tr. 94-95). Ms. DeGuzman stated that the weekly safety meetings included information on the use of eye protection (Tr. 90). Abelardo DeGuzman, Black's project manager, testified that Macasaquitt, David and Mallari had, in fact, attended the Monday safety meetings (Tr. 98). Mr. DeGuzman testified that David received a verbal warning for failing to utilize his eye protection on November 14; DeGuzman stated that the offense was David's first (Tr. 101).

Discussion

Citation 1, item 1. It is admitted that employee David was not using protective eyewear when CO Cruz arrived on the Black work site. Black maintains, however, that it had no knowledge of the cited violation.

In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). Reasonable diligence includes adequate supervision of employees and the formulation and implementation of training

programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991).

In this case the Secretary failed to show, by a preponderance of the evidence that Black had either actual or constructive knowledge of the cited condition. David's supervisor, Junior Annos, was taking a break when the alleged violation occurred; the evidence fails to establish that he should have seen David from his vantage point, or that his supervision of the crew was otherwise inadequate. Black had a safety program specifically addressing the cited hazard. David had attended Black's safety training. David had not been in trouble before for failing to follow safety rules.

The record does not establish that Black knew, or should have known, of the cited violation, and this item will be vacated.

Citation 1, item 2. It is admitted that at least one open side of the cited scaffolding was unguarded. Respondent maintains that the cited violation should be reclassified at *de minimis*, however, because the workers on the scaffold tied off while they worked.

This judge agrees. Having observed the demeanor of the witnesses on the stand, this judge found the testimony of Black's employees to be credible. David stated that he was tied off when Cruz first called up to him; Mallari confirmed that David was tied off when he returned to the scaffold through an open window. Mallari himself tied off prior to beginning any work. Because the employees utilized alternative protection while working from the partially guarded scaffolding, I find that the cited failure to guard bears a negligible relationship to employee safety or health. *See, Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987).

The cited violation will be affirmed and reclassified as *de minimis*; the assessment of a penalty or the entry of an abatement order would be inappropriate.

ORDER

1. Citation 1, item 1, alleging violation of §1926.102(a)(1) is VACATED.
2. Citation 2, item 2, alleging violation of §1926.451(b)(15) is AFFIRMED as a *de minimis* violation, without penalty.

Benjamin R. Loye
Judge, OSHRC

Dated: