

SECRETARY OF LABOR,

Complainant,

v.

OLYMPIA DRYWALL COMPANY,

Respondent.

OSHRC DOCKET NO. 97-0428

APPEARANCES:

For the Complainant:

Mary Schopmeyer, Esq., Suzanne Dunne, Esq., Office of the Solicitor, Department of Labor, Dallas, Texas

For the Respondent:

Israel Flores, Olympia Drywall Company, Houston, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

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, Olympia Drywall Company (Olympia), at all times relevant to this action maintained a place of business at 4424 Gaines Ranch Loop, Austin, Texas, 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 October 29, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Olympia's Austin work site. As a result of that inspection, Olympia was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Olympia brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 30, 1997, a hearing was held in Austin, Texas. The time allotted for the submission of briefs has passed, and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1a alleges:

29 CFR 1926.1052(c)(1): Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, were not equipped with one handrail and one stairrail system along each unprotected side or edge:

(a) Building 16, employees accessed second and third floors using open side stairways without stairrails on one or both sides.

The cited standard provides:

Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with: (i) at least one handrail; and (ii) One stairrail system¹ along each unprotected side or edge.

Citation 1, item 1b alleges:

29 CFR 1926.1052(c)(12): Unprotected sides and edges of stairway landings were not provided with guardrail systems which met the criteria contained in Subpart M of 29 CFR 1926:

(a) Building 16, employees accessed second and third floors using open side stairways without guardrails on the landing platforms.

The cited standard states:

Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part.

Facts

Olympia admits that on October 29, two of its employees, Ricardo Gomez and Leonardo Hernandez, were hanging sheetrock on the second floor of Building 16 at the Austin site (Tr. 13-15, 19, 45, 89; Exh. C-2). The stairs accessing the second floor of Building 16 were guarded on one side only; the landings were completely unguarded (Tr. 16, 24, 73-74; Exh. C-2). The affected employees admitted using the stair approximately four times a day (Tr. 26).

Olympia's contract with the general contractor, Larry Peel (Peel), did not specifically assign responsibility for the erection of guardrails (Tr. 35). Peel's project superintendent, Dwain Burrows, stated that all subcontractor's are responsible for their own compliance with OSHA safety policies under the terms

¹ *Stairrail system* means a vertical barrier erected along the unprotected sides and edges of a stairway to prevent employees from falling to lower levels. The top surface of a stairrail system may also be a "handrail."

of their contract with Peel (Tr. 50). However, Peel notified its subcontractors that it would assist in eliminating unsafe conditions when notified (Tr. 51).²

Olympia made no efforts to erect guard rails, nor was the general contractor asked to erect the required guarding (Tr. 30).³ Israel Flores, Olympia's representative, testified that they believed that it was safe to use the stairs (Tr. 74, 83). Flores stated that they would have reported the missing rails and/or stopped work, if they had actually been working on the stairs or landings rather than just using them for access (Tr. 88).

Discussion

The existence of the cited violations are not disputed. Respondent objects to the citations, however, suggesting that the ultimate responsibility for providing the guardrails lay with the general contractor. Respondent also maintains that the violative conditions did not pose a hazard to its employees, and that the proposed penalties are excessive.

Multi-employer work sites. It is well settled that a subcontractor must take reasonable steps to detect and correct any safety violations to which its employees are exposed. *Grossman Steel & Aluminum Corporation*, 4 BNA OSHC 1185, 1995-96 CCH OSHD ¶20,691 (No. 12775, 1975). Olympia is charged with primary responsibility for the safety of its own employees; under Commission precedent, it must abate any known violative conditions itself, persuade the general contractor to do so, or provide alternative protection for employees with access to the hazard. *Id.* Olympia admits that it took none of the prescribed courses, because it did not believe the cited conditions were hazardous.

Olympia's failure to perceive the violative conditions as hazardous is not a defense to the citation. When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978). The violations are, therefore, established.

Penalty. Olympia has 83 employees (Tr. 32). The Secretary introduced no evidence of prior citations.

Olympia has a safety program, and conducts regular safety meetings (Tr. 77, 85; Safety Meeting Reports rec'd 10/07/97). The missing handrails were discussed during the October 28, 1996 meeting (Tr.

² Olympia notified Peel of a missing step, which caused a minor injury to one of its employees. That step was replaced by Peel (Tr. 54-57).

³ Julian Montoya testified that he did complain about missing railings on some of the project's breezeways, but never about the cited landings or stair ways (Tr. 122-23).

78, 94). Pete Perez, Olympia's superintendent, testified that he warned employees that there was only railing on one side of the stairs, and told them to be careful (Tr. 100).

Compliance Officer (CO) Liz Slatten testified that the probability of an accident was greater because at least twice a day the workers were carrying tools as they ascended and descended the stairs and because there was debris left on the stairs by the rock contractor (Tr. 21, 96-97). Slatten stated that broken bones, strains, lacerations and skull fractures would be the probable result of a fall from the stairs or landings, which were 13, 19, and 25 feet above the ground, respectively (Tr. 21, 28). Julian Montoya, an Olympia employee, testified that the side of the stair without railings was partially guarded by the structural columns of the building, making it unlikely that anyone would fall from the stair (Tr. 112; Exh. C-2). Montoya further stated that the debris on the landings would actually act to keep people away from the edge (Tr. 114).

The violation was correctly characterized as "serious" because a fall from the stairs or landing would likely result in serious injuries. The probability of an accident occurring, however, is low.

Olympia's employees were aware that the subject railings were missing, and had been specifically told by management to be careful when using the stairs. In addition, the record establishes that the employees had no reason to approach the edge of the landings while performing their normal duties at the construction site. The subject stairs were also partially protected, as noted above, by the building's structural columns in the cited area. The record also establishes that Olympia had a clear concern for the safety of its employees. Finally, there is an absence of prior violations of the Act by Olympia.

In light of the above factors, I find that a penalty of \$400.00 is appropriate for these two items of the citation under the circumstances of this case.

ORDER

1. Citation 1, items 1 and 2, alleging violations of §1926.1052(c)(1) and (c)(12) are AFFIRMED, and a penalty of \$400.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: