Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **97-1356**
	:	
Cleveland Construction, Inc.,	:	
Respondent.	:	

Appearances:

Janice Thompson, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Douglas Bricker, Esquire
Arter & Hadden
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Cleveland Construction, Inc. (Cleveland), is a general contractor with a construction jobsite at the William Mason High School in Mason, Ohio. The Occupational Safety and Health Administration (OSHA) conducted an inspection of this jobsite from March 26, 1997, through April 11, 1997. As a result of this inspection, a citation was issued to the respondent on August 6, 1997. A hearing was held in this matter in Cincinnati, Ohio, on March 17 through March 19, 1998. At the hearing, the Secretary withdrew items 1, 2 and 3 of Citation No. 1.

Background

Respondent is a general construction contractor with 1,000 to 1,200 employees and revenues in excess of $210,000,000. It currently has fifty to seventy jobsites. As general contractor, Cleveland has overall responsibility for scheduling work on this jobsite, including work of other contractors. It also self-performed work on this job.

On March 24, 1997, pursuant to an employee complaint, Steve Brunette, an OSHA compliance officer, arrived at the jobsite and initially observed workplace conditions from the public road. He also observed another job across the road. Upon instruction from his supervisor, he first inspected the other worksite before attempting to inspect the Mason High School site. During the afternoon of March 24, 1997, Mr. Brunette attempted to begin his inspection of this job. Mr. Fulks, Cleveland=s project superintendent, gave Mr. Brunette a copy of Cleveland=s company policy stating that OSHA was not allowed to enter the site unless accompanied by a vice-president or safety coordinator. The policy stated that Cleveland would attempt with reasonable diligence to have a vice-president or safety coordinator on site within two hours. Mr. Walsh, respondent=s safety director, was in Mentor, Ohio, two hours by plane and four hours by car from this jobsite. Representatives of both parties engaged in several conversations at the site and by telephone. Mr. Brunette was instructed by his supervisor not to delay the inspection by two hours, to treat this delay as a denial of entry and to leave the worksite. OSHA subsequently obtained an inspection warrant. Pursuant to that warrant, Mr. Brunette and his supervisor, Mr. Gilchrist, returned to this jobsite on March 26, 1998, and conducted an inspection of respondent=s operations.

Vindictive Prosecution

Respondent raised the affirmative defense that this proceeding constitutes vindictive prosecution on the part of the Secretary.

In a recent decision, the Review Commission addressed the defense of vindictive prosecution as follows:

> Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right. If governmental misconduct is found, the court can dismiss the vindictively motivated charge or the entire action. *United States v. Meyer*, 810 F.2d 1242, 1249 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

Secretary v. National Engineering & Contracting Co., 18 BNA OSHC 1075 at 1077 (No. 94-2787, 1997).

Section 8(a) of the Occupational Safety and Health Act of 1970 (the Act) authorizes inspections of workplaces as follows:

> SEC. 8. (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized--
>
> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

29 U.S.C. ' 657

Respondent=s company policy of requesting two-hour delays of OSHA inspections to allow its designated representative to be present before the inspection could begin is unreasonable in this situation. By waiting two hours, the compliance officer would have begun his inspection when the workday was ending. Working conditions, operations, and employee exposure could not be adequately assessed after normal working hours when no work was being performed.

Respondent relies on the Secretary=s *Field Inspection Reference Manual* (*FIRM*) (Exh. C-20). This manual provides guidance regarding internal operations of OSHA. It clearly states that it creates no rights and that Athe contents of this manual are not enforceable by any person or entity against the Department of Labor or the United States@ (Exh. C-20).

The *FIRM*, Chapter II, page 1, relates to inspection procedures and provides in part as follows:

2. Conduct of the Inspection.

a. Time of Inspection. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise. The Assistant Area Director and CSHO shall confer with regard to entry during other than normal working hours.

b. Presenting Credentials.

(1) At the beginning of the inspection the CSHO shall locate the owner representative, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

(2) When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

Section 2(b)(2) applies only when neither the person in charge nor a management official is present. This section of the *FIRM* provides little guidance for the situation encountered by the compliance officer. Mr. Tim Fulks, the respondent=s project superintendent, was on site when the OSHA inspector arrived. He could have accompanied Mr. Brunette during his inspection. Refusal to delay the inspection until the corporate safety director arrived was not unreasonable.

There was testimony by Mark Small, respondent=s senior vice-president and treasurer, that the OSHA area director used foul and vulgar language during their telephone conversation relating to entry on this jobsite on March 24, 1998. If such language was in fact used, this is inappropriate. He also testified about disagreements between the two on previous occasions. These alone are

insufficient to establish animus on the part of OSHA personnel in pursuing this inspection or in issuing subsequent citations. Respondent made no showing that the language or past history was in any way influential in the conduct of the inspection or in the issuance of citations or penalties.

Respondent further argues that evidence of retaliatory motive or activity is shown by alleged misrepresentations in the warrant application. After review of the record, as well as the warrant application, I find no material misrepresentation or embellishment of facts which might be the basis for retaliatory motive or activity.

The actions allegedly taken by the Secretary=s representative relating to this inspection, even if true, are insufficient to support a finding of vindictive prosecution. I find that these actions do not show animus toward the respondent. After hearing testimony, observing the witnesses, and reviewing all documentary evidence, I conclude that the inspection was conducted in a reasonable manner and that the subsequent citations were reasonable based on the evidence that OSHA had at the time of issuance. Respondent=s safety director and project superintendent gave little information to the compliance officer during the inspection.

Dismissal of three items of the citation prior to hearing shows no evidence of animus. In these proceedings, alleged violations are routinely dropped or amended by the Secretary for various reasons after prehearing development has been completed. No conclusions as to motivation for such actions will be made.

Even if the alleged statements and actions of the Secretary=s representatives demonstrated animus, they are not sufficient, standing alone, to justify a finding of vindictive prosecution. AIn addition to evidence of animus or retaliatory motive,@ Cleveland Amust produce evidence tending to show that it would not have been cited absent that motive.@ *Secretary v. National Engineering & Contracting Co.*, 18 BNA OSHC, *supra*, at 1078. It has made no such showing. Respondent has shown no protected right that it exercised, and has failed to show any animus in the motivation regarding statements or actions of the OSHA representatives in this matter. The Secretary=s decisions to inspect and, subsequently, issue citations in this case appear to be based on the factors normally considered in these proceedings. The inspection resulted from an employee complaint and the observations of the compliance officer prior to entry on the jobsite. The alleged violations

and proposed penalties were based on the evidence OSHA developed during its inspection. I find no evidence of vindictive prosecution.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer=s noncompliance with the standard=s terms, (c) employee access to the violative conditions, and (d) the employer=s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 4
Alleged Serious Violation of 29 C.F.R. ' 1926.451(g)(1)

The Secretary in Citation No. 1, item 4, alleges that:

> Each employee on a scaffold more than 10 feet (3.1m) above a lower level was not protected from falling to that lower level:
>
> On March 26, 1997, located along the south side of the new gym in the green space area, there was an employee observed working from the tubular welded frame scaffold who was not protected by standard guardrailing or personal fall arrest system exposing the employee to a fall potential in excess of 13 feet off the open end of the scaffold.

Uncontroverted testimony of the OSHA compliance officer established that respondent=s employee was observed working 13 feet above the ground on a tubular welded scaffold with no guardrail at one end during the OSHA inspection on March 26, 1997. He observed end rails on the opposite end and on the rear of the platform. Respondent=s employee was observed working between 4 and 10 feet from the open end of the platform with no personal fall arrest system or other means of fall protection. This employee had access to this open platform end. Lumber and buckets were seen on the ground below the scaffold. One employee told the compliance officer that earlier on the morning of the inspection, there was a guardrail across the open scaffold platform end. He

said it was taken down because it got in the way. Mr. Fulks, respondent=s project superintendent, told the inspector that he last saw a guardrail across that opening on the day before the inspection.

Mr. Fulks testified that at the time of the inspection, there was no ladder at the open end of the scaffold platform. He further testified that just prior to the inspection, an access ladder was in place at that location, and that it had just been removed by some unknown person. This person was never identified as an employee of the respondent or any other contractor. During the inspection, neither Mr. Fulks nor Mr. Walsh, Cleveland=s safety director, mentioned the access ladder or that it had been in place and removed. Respondent=s employee continued to work on the open-ended scaffold platform without fall protection for several hours after this condition was brought to respondent=s attention.

Respondent has not established unpreventable employee misconduct. The above-described behavior of respondent=s managers during the inspection is inconsistent with any subsequent claims of unpreventable employee misconduct. In light of the above, I do not find the testimony of Mr. Walsh or Mr. Fulks credible regarding the existence, location, or removal of the access ladder on the day of the inspection.

The Secretary has established a serious violation of 29 C.F.R. ' 1926.451(g)(1). Respondent=s employee was exposed to a fall of 13 feet to the ground covered with lumber and other debris. A fall from that height could result in death or serious physical injury. One employee was exposed to this condition for a period of several hours after Cleveland=s management was informed of this hazard by the OSHA compliance officer. After due consideration, I find that a penalty of $3,000 is appropriate for this violation.

Citation No. 1, Item 5
Alleged Serious Violation of 29 C.F.R. ' 1926.451(h))2)

The Secretary in Citation No. 1, item 5, alleges that:

> Where there was a danger of tools, materials, or equipment falling from a scaffold and striking employees below, the employer did not follow the provisions of (i) or (ii) of this subparagraph:

> There was no falling object protection on the scaffold located along the south side of the new gym in the green space area as the area on the east end of the scaffold was not barricaded nor was there a toeboard on the scaffold to prevent tools, materials or equipment from falling to a lower level.

This alleged violation relates to the same scaffold described above, The compliance officer observed two Cleveland employees working on the ground level in the area below the employee working on the scaffold platform 13 feet above the ground. One employee was directly below the employee on the platform, and another employee was outside a yellow tape barrier. This scaffold had no toeboards. The employee on the upper level platform was using tools, including a utility knife, that could fall on employees below. The scaffolding was 6 to 8 inches from the site of the building. Both employees on the ground wore hardhats.

In addition to hardhats, this standard requires additional protection from falling objects for employees working at lower levels. Respondent argues that the scaffold planks provide sufficient protection to prevent objects from falling on ground level employees. After careful review of the videotape, photographs and testimony, I conclude that the tools used at the upper level could fall between the scaffold and the building wall onto the employee on the ground. The scaffold planks offer no protection that would prevent or deflect tools falling through the opening. The respondent admitted that the employee on the scaffold was using a utility knife to cut the side of the building adjacent to the scaffolding. This resulted in the knife being in constant use in the area between the scaffold and the building wall directly above at least one employee on the ground.

While the area was marked off with yellow tape, one Cleveland employee worked inside the marked-off area. Another employee worked immediately outside the marked-off area at the end of the scaffold with access to the area. If a tool, such as the utility knife, dropped from the upper level, lacerations could result. The Secretary has established a serious violation. Respondent knew its employees worked in this area and admitted the scaffold had no toeboards. The argument that the scaffold planking provided overheard protection is rejected. After due consideration, I find a penalty of $1,000 to be appropriate.

Citation No. 1, Items 6a and 6b
Alleged Serious Violations of 29 C.F.R. '' 1926.454(a) and (b)

The Secretary in Citation No. 1, item 6a, alleges that:

> The employer did not have each employee who performed work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards:
>
> Employee(s) who performed work while on the tubular welded frame scaffold located on the south side of the new gum, were not trained to recognize scaffold hazards and to understand the procedures to control or minimize the hazards.

In Citation No. 1, item 6b, the Secretary alleges that:

> 29 CFR 1926.454(b): The employer did not have each employee who was involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question:
>
> a) The employees involved with the erecting, disassembling, moving, and maintaining of the tubular welded frame scaffold located on the south side of the new gym were not trained to recognize any hazards associated with erecting, disassembling, and moving the scaffold.

The alleged violations in items 6a and 6b relate to training of employees by a person qualified in the subject matter to recognize hazards associated with the scaffold used or work performed. Item 6a concerns training of employees who work on scaffolds. Item 6b concerns training of employees who erect, move, disassemble, operate, repair, maintain, or inspect scaffolds.

The provisions of 29 C.F.R. '' 1926.454(a) and (b) relate to the hazards of work on scaffolds. Mr. Rhett Stayer, Cleveland=s regional field superintendent, trained all affected employees on scaffold erection and work hazards in March 1997. I find that Mr. Stayer is qualified through experience and training to train employees to recognize hazards associated with the type scaffold used and the work in question. After careful review of all evidence relating to the training provided, I find that respondent provided the training required by 29 C.F.R. '' 1926.454(a) and (b).

Mr. Stayer has eighteen years of scaffold building experience. The affected employees were experienced scaffold builders and plasterers familiar with scaffold hazards. Prior to the OSHA inspection, Mr. Stayer trained these employees in recognition of scaffold hazards. Mr. Stayer worked with all these employees, except one, since April 1995. He knew their experience and competency levels. He did not retrain these employees on the new scaffolding standard. This is not required by the standards. Retraining is required in certain situations by 29 C.F.R. ' 1926.454(c). That standard was not cited and is not before me for consideration. I find that Cleveland provided training of its employees as required by 29 C.F.R. '' 1926.454(a) and (b). Items 6a and 6b of Citation No. 1 are vacated.

Citation No. 1, Item 7
Alleged Serious Violation of 29 C.F.R. ' 1926.501(b)(1)

The Secretary in Citation No. 1, item 7, alleges that:

> 29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet or more above a tower level was not protected from falling by use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> There was an opening which measured 20 1/2 inches wide in the guardrail system near the stairs in the new gum on the northside, mezzanine area, with a fall potential in excess of 8 1/2 feet.

During the second week of March 1997, Tim Fulkes, Cleveland=s project superintendent, supervised the construction of a guardrail on the northside mezzanine area of the new gym. The guardrail was 24 inches from the edge of the mezzanine. An opening 20.5 inches wide in the guardrail remained unguarded near the stairs. Subcontractor employees passed this opening when using the stairs walking to and from their work.

Jason Judd, an employee of another contractor that specializes in concrete sawing, arrived at the jobsite during the OSHA inspection at the request of respondent. He was preparing to cut the edge of the mezzanine. The line to be cut had already been chalked prior to his arrival. He walked through the guardrail opening and stood on the unprotected edge of the mezzanine 8.5 feet

above the next floor. When he determined that the area was too narrow for his machine, he withdrew from the area to call his boss for further instructions. The compliance officer observed Judd=s exposure.

Respondent argues that Judd performed an inspection and assessment during his exposure, and that his activities fall within the exception in 29 C.F.R. ' 1926.500(a)(1) which provides:

' 1926.500 Scope, application, and definitions applicable to this subpart.

> (a) *Scope and application.* (1) This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926. Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

Statutory construction requires that exceptions or exemptions from general rules be narrowly construed. Applicability of general standards, on the other hand, is broadly construed. A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erectors, Inc.*, 1995 CCH OSHD & 30,909, p. 43,031 (No. 92-262, 1995).

Respondent did not plead applicability of this exception as an affirmative defense. The issue was not tried by consent of the parties. This issue cannot be raised at this time. Furthermore, even if raising this issue is timely, the exception clearly does not apply here. The exception applies to inspections prior to the actual start of construction work and after all construction work has been completed. Here the inspection by Judd was an integral part of his main activity, cutting the mezzanine floor edge. The line for the cut had been chalked. Construction work in this area was ongoing. Respondent failed to prove that the applicability of this exception.

Prior to the OSHA inspection, respondent was advised by its consultant to erect a guardrail along the edge of the mezzanine level. Respondent installed the guardrail and left an opening near the stairway. While its employees were not shown to be exposed, employees of subcontractors using the stairway passed the opening. They were exposed or had access to this condition. Judd was exposed to the hazardous condition when he actually passed through the opening and stood outside the guardrail on the edge of the mezzanine, 8.5 feet above the floor below.

The Secretary has established a serious violation of 29 C.F.R. ' 1926.501(b)(1). Respondent created and controlled the defective guardrail system. Employees of subcontractors were exposed or had access to the hazardous conditions. A fall from the mezzanine to the floor below could result in death or serious physical injury. The standard applies to this condition, and respondent knew of the violative condition. After due consideration, I find a penalty of $2,000 to be appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, items 1, 2 and 3, were withdrawn by the Secretary and are therefore vacated.
2. Citation No. 1, item 4, is affirmed and a penalty of $3,000 is assessed.
3. Citation No. 1, item 5, is affirmed and a penalty of $1,000 is assessed.
4. Citation No. 1, items 6a and 6b, are vacated.
5. Citation No. 1, item 7, is affirmed and a penalty of $2,000 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: September 28, 1998