

SECRETARY OF LABOR,

Complainant,

v.

DOVER ELEVATOR COMPANY,

Respondent.

OSHRC DOCKET NO. 98-0149

APPEARANCES:

For the Complainant:

Ernest A. Burford, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

W. Scott Railton, Esq., Reed, Smith, Shaw & McClay, LLP, McLean, Virginia

Before: Administrative Law Judge: James H. Barkley

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, Dover Elevator Company (Dover), at all times relevant to this action maintained a place of business at 312 South Main, Victoria, Texas, where it was engaged in elevator installation. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 19, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Dover’s Victoria work site. As a result of that inspection, Dover was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Dover brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 12, 1998, a hearing was held in Corpus Christi, Texas. Prior to the start of the hearing Complainant withdrew citation 1, items 2c and item 3 (Tr. 8). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Facts

On November 19, 1997, Compliance Officer (CO) Guadalupe Ozuna, Jr., arrived at the U.S. Post Office and Courthouse in Victoria, Texas, where Dover was installing elevators in an addition to the existing building (Tr. 12-15). Ozuna testified that two Dover employees were on the site, Clinton Kaiser and Earl Cradoct (Tr. 18-19).

Alleged Violation of §1926.501(b)(4)

Citation 1, item 1 alleges:

29 CFR 1926.501(b)(4): Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.6m) above lower levels, by personal fall arrest systems, covers, or guardrails systems erected around holes:

- a. At the construction site, in the penthouse on top of the elevator shaft with an opening of 14 x 14 inches.
- b. Ground floor going to the basement had openings of 14 x 14 inches and 14 x 25 inches on the ladderway entry, exposing the employees to a 14 foot fall hazard.

Facts

CO Ozuna testified that a hole, approximately 14" x 14," was cut in the 6th, or penthouse level floor (Tr. 2, 281; Exh. C-8). Ozuna did not measure the floor hole (Tr. 117). Ozuna testified that, based on the presence of Dover's equipment in the area, he determined that Dover employees had been exposed to the floor hole, which was open and unguarded (Tr. 26, 29). Ozuna testified that a worker falling approximately 14 feet through the floor hole to the 5th floor level would probably suffer broken bones, internal injuries and/or death (Tr. 30).

Bill Braselton, president of Braselton Construction Co., the general contractor on the Victoria site, testified that he believed all the contractors accessed the penthouse the same way, *i.e.* through the ladders in the elevator shaft (Tr. 62). Braselton stated that on the penthouse level, however; the elevator shaft was solidly decked; the only access to the floor was via a single ladder through the hole pictured in Complainant's exhibit C-8 (Tr. 62, 78-79, 85). Braselton believed that the hole had been cut that day to allow Dover to pass its rails through; Braselton did not know whether there had ever been a cover over the floor hole (Tr. 79, 85, 103).

Earl Cradoct admitted that he had worked in the penthouse, accessing the area through the floor hole pictured in Complainant's Exhibit C-8. Cradoct maintained that the hole was guarded with a board whenever he worked in the area (Tr. 157, 188). Cradoct stated, however, that neither he nor Clinton Kaiser

were in the penthouse on the day of the OSHA inspection; both men had been occupied in the ground floor lobby unloading and cleaning counterweight rails (Tr. 177, 193).

CO Ozuna verified that Cradoct and Kaiser were working with the rails on the ground floor when he was on site (Tr. 114).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that employees had access to the violative condition. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). In this case, because the citation and complaint allege violations occurring only on the inspection date (Tr. 207), Complainant must show that Dover employees had access to the cited conditions on that date, November 19, 1997. This Complainant has failed to do. Although Earl Cradoct admitted he worked in the area of the floor hole cited at subparagraph (a), Complainant failed to show that either he or Clinton Kaiser were in the area on November 19, 1997. There was no evidence that Dover employees were exposed to the floor hole on the day of the inspection, in the condition it was observed by CO Ozuna.

Respondent's evidence pertaining to this and other items is confused and less than credible. Nonetheless, because the violation is not alleged to have occurred at any times other than the inspection date, and because Complainant failed to carry her burden of proof in regard to that date, the violation alleged at citation 1, item 1, subparagraph (a) must be vacated.

The record is silent on the item set forth at subparagraph (b). That item is also vacated.

Alleged Violation of §1926.502(b) et seq.

Citation 1, item 2 alleges:

29 CFR 1926.502(b)(1): Top edge height of top rails, or equivalent guardrail system members, were not 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking working level.

At the construction site, the guardrail system next to the ladderway in the elevator shaft had the top rail 31 inches above the floor, exposing the employees to a fall hazard.

Citation 1, item 2b alleges:

29 CFR 1926.502(b)(2)(i): Guardrail System was not provided with midrails:

At the construction site, in the elevator shaft going to the basement, midrails were not provided on the guardrail system, exposing the employees to a 14-foot fall hazard.

Facts

CO Ozuna testified that the guardrail system to a ladderway in the ground floor elevator shaft was inadequate, in that the guardrail system was only 31" above the floor, and had no midrail (Tr. 35-36; Exh. C-3). Ozuna testified that the ladderway led to the basement, 14 feet below (Tr. 37). Ozuna testified that Clinton Kaiser told him he had been working in the elevator shaft. Ozuna stated that the ladderway was his only means of accessing Dover's equipment in the basement, where he believed Kaiser had been working (Tr. 37-38, 46).

Bill Braselton testified that his company installed the cited guard rails (Tr. 66). Braselton believed that Dover was installing the vertical rails for the elevator at the time of the OSHA inspection, and pointed out what appeared to be rails, elevator beams and some blue motors that were installed by Dover on the basement level (Tr. 93). Braselton believed that the ladderway pictured in Complainant's Exhibit C-3 was only means of access to the area where Dover was working in the basement (Tr. 63, 92-93).

Earl Cradoct testified that neither he, nor Mr. Kaiser used the cited ladderway (Tr. 155-57). Cradoct testified that when Dover first arrived on the jobsite, they set up a work jack, a temporary work platform which Dover employees used to access the elevator shaft (Tr. 162; *also see* testimony of Clinton Kaiser, at 195-98). While Dover used a ladderway to initially install its equipment, including the work jack, they have not used the ladderway since (Tr. 160-63).

Discussion

As noted in the preceding item, it is undisputed that both Cradoct and Kaiser were occupied in the ground floor lobby cleaning rails on the day of the inspection. Complainant failed to prove that either of the Dover employees worked in the basement area, or that they used or had any reason to be near the inadequately guarded ladderway cited at item 2 on November 19, 1997. This item is vacated.

Alleged Violation of §1926.1051(a)

Citation 1, item 4 alleges:

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

At the construction site, a pallet was used to get from the existing roof up 40 inches to get in the penthouse.

Facts

CO Ozuna testified that a pallet, leaning against a concrete wall was used to access the machine room portion of the penthouse, which was more than 19 inches above the rest of the rooftop (Tr. 43-44; Exh. C-6). Ozuna admitted that he did not know when or by whom the pallet was placed against the wall (Tr. 128). Ozuna stated that Dover employees had been working in the elevated penthouse area, and that the pallet was placed there for use (Tr. 44, 129).

Earl Cradock testified that he did not use the pallet to get onto the raised penthouse area, where the machine room was (Tr. 167). Cradock stated that the last time he had been in the machine room was two weeks prior to the inspection, at which time there was a ladder in place (Tr. 168).

Discussion

As noted in my discussion of item 1, there is no evidence in the record that any of Dover's employees were in the penthouse area, or that they used the cited pallet on November 19, 1997. This item is vacated.

Alleged Violation of §1926.1053(b)(1)

Citation 1, item 5 alleges:

29 CFR 1926.1053(b)(1): Because of the portable ladder's length, the ladder side rails did not extend to at least 3 feet (.9m) above the upper landing surface to which the ladder was used to gain access and the ladder was not secured at its top to a rigid support, and a grasping device, such as a grabrail, was not provided to assist the employees in mounting and dismounting the ladder:

In the following locations, the ladder did not extend 36 inches above landing and was not secured, exposing the employee to a fall hazard:

- a. In elevator shaft 16-foot aluminum ladder coming from ground floor to the basement.
- b. In the penthouse floor a 16-foot aluminum ladder coming from the third floor.
- c. On top of penthouse roof a 16 foot wooden ladder was used.

Facts

CO Ozuna testified that he observed two portable ladders on which the side rails did not extend at least 3 feet above the landing, at the penthouse level and on the ground floor (Tr. 53; Exh. C-3, C-8). There was no grabrail at the top of either ladder (Tr. 54). In addition, Ozuna testified that the ladder at the penthouse level was not secured to a rigid support at the top (Tr. 53-54). Ozuna believed that Clinton Kaiser had to have used the ladder to access the elevator shaft in the basement (Tr. 54).

Discussion

As in the other citation items, nothing in the record establishes that Dover employees used, or had any reason to use the ladders cited in subparagraph (a) or (c) of this item on November 19, 1997. Those items are vacated.

No evidence was introduced concerning subparagraph (b). That item is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(4) is VACATED.
2. Citation 1, item 2 and 2b alleging violations of §1926.502(b)(1) and (b)(2)(i) are VACATED.
3. Citation 1, item 4, alleging violation of §1926.1051(a) is VACATED.
4. Citation 1, item 5, alleging violation of §1926.1053(b)(1) is VACATED.

James H. Barkley
Judge, OSHRC

Dated: