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SECRETARY OF LABOR,  
Complainant,

v.

JHL CONSTRUCTORS, INC.,

Respondent.

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OSHRC DOCKET  
NO. 98-0573

APPEARANCES:

Elizabeth C. Lawrence, Esq., Office of the Solicitor, U.S. Department of Labor,  
Kansas City, Missouri

Kenneth R. Stettner, Esq., Stettner, Miller and Cohn, Denver, Colorado

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

In this action the Secretary of Labor seeks to enforce a citation issued by the Occupational Safety and Health Administration to JHL Constructors, Inc. for the alleged violation of a regulation relating the construction industry. The matter arose after a compliance officer for the Agency inspected a worksite of the Company, concluded that it was in violation of the standard and recommended that the citation be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

The citation charged that:

Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8m) or more above a lower level, was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

a) JHL Constructors, Inc., as the controlling contractor, did not ensure that employees of Central Masonry Corporation erecting a block wall at 1731 Wildcat Reserve Parkway in Highlands Ranch, CO were protected from falling in excess of 6 feet from the edge of the pre-cast concrete deck to the lower level.

in violation of the regulation found at 29 C.F.R. §1926.501(b)(1) which reads as follows:

(b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The material facts are not in substantial dispute and may be briefly summarized. JHL Constructors, Inc. was the general contractor in the construction of a middle school. It subcontracted masonry work to Central Masonry Corporation with the stipulation that the latter would comply with Respondent's safety rules and OSHA safety regulations. Respondent itself had a safety program, including safety manuals, programs, meetings and scheduled and unscheduled daily site inspections. The company also reviewed Central's safety rules. Respondent's assistant superintendent and safety representative monitored the middle school project at least twice daily, including subcontractor activity. There were also daily discussions with subcontractor employees relating to safety requirements. When necessary, Respondent disciplined subcontractor employees if safety violations were observed.

At approximately 10:30 a.m. on February 26, 1998, Respondent's officers began an unscheduled safety inspection when they were informed that a compliance officer from OSHA was on the worksite to conduct a safety inspection. During the course of the inspection, they observed an employee of the masonry subcontractor erecting a block wall while he was within approximately two feet of a leading edge which was about fourteen feet above ground level. No Respondent employee was on the scene.

Earlier that morning stanchions and warning tape were located about six feet from the edge, a situation observed by company inspectors during their routine inspection. It was not until they

accompanied the compliance officer that they learned a subcontractor mason was working in an unsafe manner. Respondent's Vice President and Superintendent immediately ordered him to halt work. At first the subcontractor's employee refused to stop, but, after some indelicate words, the mason departed the premises.

The compliance officer videotaped the Central Masonry employee working within three feet of the unprotected edge of the wall. He worked in this area for about one-half hour. Other subcontractor workers also were near the unprotected edge. The tapes confirmed that there were no guard rails, safety nets or other personal fall protection to keep employees from the fall hazard.

Respondent's supervisors were unaware that stanchions and caution tape were removed and that the mason was working too close to the edge of the wall.

JCL Constructors, Inc. has rule which requires that platforms above six feet must be guarded by a standard railing or its equivalent. As previously noted, the company had no employees in the area of the violation. Other subcontractors, including electricians and plumbers, were also informed that a safety line was required if they were closer than six feet from an edge.

Respondent's assistant superintendent and safety representative conducted inspections at 7:00 a.m. and 3:30 p.m. daily. When they checked the construction site on the morning of the infraction, everything seemed in order.

On the basis of the record in this case, the Secretary's position is that the standard in issue applies; that the terms of the standard were not met; that the hazard

was accessible to employees (of Central Masonry); and that the employer had knowledge of the hazards.

The Respondent points out that the Complainant does not dispute the company's extensive safety program, including safety audits, on site daily inspections as well as unscheduled safety inspections and twice daily scheduled safety walk-throughs. The company adds that it also had daily discussions with subcontractor employees and foremen relating to leading edge and outer edge safety requirements. Further, the company took corrective action when safety violations or hazardous conditions were observed.

Both parties agree that the Secretary has the burden of proof that the Respondent violated

the standard, and that the Secretary must show that:

(1) The standard applies to the cited condition; (2) the terms of the cited standard were not met; (3) one or more employees had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known, of the violative condition.

It is undisputed that the Secretary established that items 1, 2 and 3 were met. The fourth requirement is troublesome. The record discloses that the Respondent did not have actual knowledge that an employee of a subcontractor was working within two feet of an unguarded edge in contravention of instructions and safety rules. Indeed, when Mr. Hearn saw a mason too close to the fourteen foot wall, he immediately ordered the employee off the premises. When the mason balked at leaving, he resorted to harsh language, and the worker left.

Since the Respondent made frequent inspections of the worksite, and since it made immediate corrections when it observed infractions of safety rules; since it adequately trained, supervised and disciplined employees for safety violations, it could not with reasonable diligence have knowledge of the violations. The Secretary thus

failed to prove that the Respondent knew or should have known that violations of the OSHA standards took place.

The citation is VACATED.

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Sidney J. Goldstein  
Judge, OSHRC

Dated: