

SECRETARY OF LABOR,

Complainant,

v.

The Haskell Company,

Respondent.

OSHRC Docket No. 99-2191

APPEARANCES:

Frances B. Schleicher, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia
For the Complainant

J. Larry Stine, Esq.
Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.
Atlanta, Georgia
For the Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

The Haskell Company (THC), a design and construction company, contracted to expand two existing buildings for a pilot training center in Savannah, Georgia. On October 22, 1999, Occupational Safety and Health Compliance Officer Luis Ramirez inspected the project. As a result of the inspection, on November 3, 1999, THC received a serious citation for alleged scaffolding violations. THC timely contested the citation.

The citation alleges serious violations of 29 C.F.R. § 1926.451(b)(1) (item 1) for failing to fully plank the tubular-frame scaffold¹ and the mobile scaffold; 29 C.F.R. § 1926.451(e)(1) (item

¹ Also referred to as a prefabricated steel exterior scaffolding (Tr. 36, 52).

2) for failing to have an access ladder to the tubular-frame scaffold; and 29 C.F.R. § 1926.451(g)(1) (item 3) for failing to have adequate guardrails on the tubular-frame scaffold² and the mobile scaffolds. Each alleged violation proposes a penalty of \$4,500.

The hearing was held March 9, 2000, in Savannah, Georgia. The parties stipulated jurisdiction and coverage (Tr. 5). The parties filed post-hearing briefs.

THC denies the violations. THC argues that its superintendent did not know and could not have known of the scaffolding violations involving its employee on the tubular-frame scaffold and a subcontractor's employee on the mobile scaffold.

THC's argument regarding its employee is rejected. THC should have known of the scaffolding violations on the tubular-frame scaffold which exposed its employee to a fall hazard, but not the subcontractor's employee, on the mobile scaffold.

The Inspection

THC is in the business of designing and constructing buildings (Tr. 31). Its corporate office is in Jacksonville, Florida (Tr. 175). THC employs in excess of 250 employees (Tr. 85).

In March, 1999, THC, as general contractor, was engaged by Gulfstream Aerospace to expand its training center for pilots in Savannah, Georgia (Tr. 31-32, 48). THC's work involved two buildings (Tr. 137, 175). Forrest Foster was THC's construction superintendent in charge of the project (Tr. 13, 16). At the time of OSHA's inspection in October, 1999, THC had five employees working at the project including Superintendent Foster (Tr. 33, 50). Also, THC contracted work to subcontractors (Tr. 33-34).

Culver Masonry was contracted by THC to construct the exterior block walls (Tr. 34). To construct the block walls, Culver erected tubular-frame scaffolding around the exterior (Exhs. C-1, C-3; Tr. 11, 34-35, 52, 64, 78). After Culver erected the block wall, two of THC's employees did touch-up finishing work on the wall (Tr. 33, 35-36).

² Secretary's motion to amend the description of the tubular-form scaffold in the northeast corner of the pool area to more accurately identify to location of the missing guardrails, is granted. The motion conforms to the record and the issue was tried by implied consent (Tr. 80, 116, 120-121). Respondent did not oppose the motion.

THC also engaged Center Brothers to do the interior framing and sheet rock work (Tr. 50). Center Brothers used a mobile scaffold (Tr. 14, 83).

On October 22, 1999, OSHA Compliance Officer (CO) Luis Ramirez initiated a programmed inspection of THC's project (Tr. 47-48). CO Ramirez arrived at approximately 8:00 a.m. and met with Gulfstream (Tr. 48). He was then taken to the construction site at approximately 10:30 a.m. When he arrived, CO Ramirez observed THC's employee, Willie Schofield, on the tubular-frame scaffold on the exterior of Building D, northeast corner of the pool building. Schofield was touching up and cleaning the exterior concrete block wall (Tr. 12, 40, 135). He was approximately 12 feet above ground level without any fall protection (Exhs. C-1, C-3; Tr. 49, 77-78, 120). CO Ramirez observed that the scaffold was not fully planked with openings between planks greater than one inch, two sections of guardrails were missing and there was no access ladder (Tr. 54, 66, 74-75, 78, 80, 120).

CO Ramirez then proceeded with Superintendent Foster to a storage room inside Building D, where he observed a mobile scaffold used by an employee of Center Brothers (Exh. C-4; Tr. 14, 68-69). The Center Brothers' employee was working approximately 14 feet above ground level without fall protection (Tr. 67, 69, 83). CO Ramirez observed that the mobile scaffold was not fully planked and lacked guardrails (Exh. C-4; Tr. 15, 70, 72, 83).

As a result of the inspection, a serious citation was issued to THC for the alleged scaffolding violations involving the exterior tubular-frame scaffold at the pool building and the mobile scaffold in the storage room.

Item 1 - Alleged Violation of § 1926.451(b)(1)

The citation alleges that the tubular-frame scaffold at the northeast corner of the pool building and the mobile scaffold in the storage room were not fully planked. Section 1926.451(b)(1) provides:

Each platform on all working levels of scaffolding shall be fully planked or decked between the front uprights and the guardrail supports . . .

Subsection (i) requires that each plank in the platform be “installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide.”

CO Ramirez testified that the space between the wooden planks on the tubular-frame scaffold at the pool building was greater than one inch. His determination was based on measuring a comparable distance on the ground. He did not climb onto the scaffold. Ramirez could not recall the exact distance or the number of spaces that exceeded one inch (Tr. 66, 118-120). The exposed THC employee, Willie Schofield, testified that the space between planks was 6-8 inches (Tr. 182). Schofield was working on the platform, 12 feet above ground level (Tr. 54).

The mobile scaffold used by Center Brothers in the storage room was also not fully planked. The planking was less than half the width of the scaffold (Exh. C-4; Tr. 69-70). The Center Brothers’ employee was standing on a 24-inch wide platform which did not cover the width of the scaffold at the level where the employee was standing (Tr. 70, 72). The employee was installing metal studs and was 14 feet above ground level (Tr. 14-15, 69).

Item 2 - Alleged Violation of § 1926.451(e)(1)

The citation alleges that the exterior tubular-frame scaffold at the northeast corner of the pool building did not have an access ladder. Section 1926.451(e)(1) provides, in part:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, stair towers . . . shall be used. Cross braces shall not be used as a means of access.

The scaffold platform in the northeast corner of the pool building was 12-feet above ground level. THC’s employee, Willie Schofield, was working on the scaffold (Exh. C-1; Tr. 53, 120). At the time of OSHA’s inspection, there was no ladder to access the scaffold platform (Tr. 7).

According to CO Ramirez, Schofield stated during the inspection that he climbed the scaffold frame to access the platform (Tr. 98, 104).

Schofield denied making the statement to CO Ramirez. He testified that he used a ladder in the morning to access the scaffold but the ladder was removed at the time of OSHA's inspection. He did not see it removed and did not see it on the ground (Tr. 179-180, 199).

There is no dispute that Schofield climbed down the scaffold's frame during OSHA's inspection (Tr. 74, 95, 195). Schofield was requested to come down the scaffold by Superintendent Foster (Tr. 182).

Item 3 - Alleged Violation of § 1926.451(g)(1)

The citation alleges that the tubular-frame scaffold and mobile scaffold lacked adequate guardrails. Section 1926.451(g)(1) provides:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

THC's employee, Willie Schofield, was working 12 feet above ground level at the second and third sections of the tubular-frame scaffold at the pool building. The second and third sections of the scaffold were missing guardrails (Exh. C-3; Tr. 80, 116). Willie Schofield worked in the area where there was no guardrail (Tr. 199). Schofield was not wearing fall protection (Tr. 15, 49).

The mobile scaffold used by Center Brothers in the storage room of Building D was 14 feet above ground level (Exh. C-4; Tr. 68-69, 109). Superintendent Foster acknowledges that the scaffold did not have guardrails and the employee was not wearing fall protection (Tr. 15, 111-112, 136).

Discussion

The Secretary has the burden of proving a 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 OSHA 2131, 2138 (No. 90-1747, 1994).

THC does not dispute the application of the scaffolding standards to the tubular-frame scaffold at the pool building and mobile scaffolds in the storage room; the lack of adequate planking, guardrails and access ladder on the scaffolds; and that the employees were exposed to fall hazards from the scaffolds (Tr. 7-8; THC's Post-Trial Brief).

The sole issue raised by THC is whether it had actual or constructive knowledge of the violative conditions. THC asserts that it lacked knowledge of the conditions because the scaffolding belonged to subcontractors and THC's superintendent was not present at the locations when the violations occurred.

Knowledge of Violative Conditions

In order to establish 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 Engineered Form Co.*, 12 BNA OSHA 1962, 1965-1966 (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. *Mosser Construction Co.*, 15 BNA OSHA 1408, 1414 (No. 89-1027, 1991).

When a supervisory employee has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHA 1281, 1286 (91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHA 2177, 2179 (No. 77-1598, 1984).

Tubular-Frame Scaffold at Pool Building

The record establishes THC's constructive knowledge of the exterior scaffold at the pool building. The touch-up work by THC employee, Willie Schofield, on the scaffold was in the open and in plain view. The scaffold was on the exterior of the building. The scaffold was

located adjacent to a road which was used to enter and exit the project. It was also in view of the superintendent's trailer, which was approximately 100 feet away (Exhs. C-1, C-3; Tr. 55, 76).

Superintendent Foster assigned Schofield to do the touch-up work on the scaffold (Tr. 99, 178, 188-190). Foster was present at the job site. On the day of OSHA's inspection, Schofield had been on the scaffold for approximately three hours; from 7:00 a.m. until 10:00 a.m., when CO Ramirez arrived (Tr. 48, 178). Schofield saw Superintendent Foster when he came to work in the morning (Tr. 43, 178, 188, 191). Schofield indicated that he had been doing touch-up work for two days (Tr. 178).

Superintendent Foster testified that he had not inspected the scaffold at the pool building in the morning because he was inside the building where they were preparing to pour a concrete slab (Tr. 22, 126). There is no evidence that Foster saw the exterior scaffold while Schofield was working.

However, with reasonable diligence, Foster should have known the unsafe condition of the scaffold. According to Schofield, the brick mason contractor, Culver Masonry, was dismantling the scaffold while he was doing the touch-up work (Tr. 180). He stated that the contractor removed the guardrail, braces and planking from areas where he was not working (Tr. 179-180, 183-184). The contractor also removed the ladder (Tr. 179, 194-196). Superintendent Foster was aware that Culver Masonry was dismantling the scaffold while Schofield was working on it (Tr. 22-23).

There is no showing that Foster took any action to ensure that his employee's safety was not affected by the dismantling. THC, as general contractor, has an obligation to protect the safety of its employees from unsafe conditions although created by a subcontractor. Foster told CO Ramirez that the scaffold was in the same condition as when he assigned Schofield to work on it (Tr. 82, 99). Also, the record indicates that the guardrail may have been removed the day before OSHA's inspection (Tr. 29-30).

Except for the morning of OSHA's inspection, Superintendent Foster inspected the project daily and had the authority to stop any unsafe work practice that he observed (Tr. 193-194). He was in a position to ensure that the subcontractor's dismantling of the scaffold would not affect the safety of his employee. He should have known where the dismantling was taking place and where his employee was working on the scaffold. He was the person ultimately

responsible for safety on the entire job site, particularly with regard to THC's own employees, such as Willie Schofield (Tr. 13, 51, 138-139, 173). Foster has 30 years of construction experience (Tr. 16).

Despite a safety program with weekly safety meetings, daily worksite inspections and a safety manual, the record indicates that THC's safety training for its employees was inadequate (Exh. R-4; Tr. 28, 160). THC employee, Willie Schofield, was on a scaffold with inadequate planking and guardrails. Schofield had been employed by THC as a cement mason for 19 years and had received its safety training (Tr. 177, 184). Even with THC's safety training, Schofield climbed down the frame of the scaffold without a ladder in front of Superintendent Foster and the OSHA compliance officer. There is no showing that Schofield complained or was aware of the unsafe scaffolding. Also, the record does not show that Schofield was warned or disciplined for violating any THC's safety rules.

According to CO Ramirez, Superintendent Foster stated that he had completed an inspection of the entire job site that morning (Tr. 89-90). Foster was coming from the storage room when he arrived (Exh. C-2; Tr. 55-57). Although Foster denies inspecting the scaffold that morning, Foster was aware that his employee had started to work on the scaffold.

The scaffolding violations involving the tubular-frame scaffold at the pool building are affirmed.

Scaffold at Storage Room

In the storage room, an employee of Center Brothers used a mobile scaffold to install metal studs (Tr. 14, 83-84). The Center Brothers' employee was the only employee exposed to the alleged scaffolding violations. There is no showing that THC's employees ever used the mobile scaffold. The scaffold apparently belonged to Center Brothers and Center Brothers was responsible for the lack of planking and guardrail.

With regard to the exposure of a subcontractor's employee to an unsafe condition, THC's responsibility, as general contractor, differs from its own employees. An employer may be in violation of a §5(a)(2) standard, such as scaffolding, even if none of its own employees are exposed. *Flint Engineering & Construction Co.*, 15 BNA OSHA 2052, 2055 (No. 90-2873, 1992). The Commission recognizes that an employer is responsible for violations of other

employers to which the other employer's employees alone are exposed where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. *Red Lobster Inns of America, Inc.*, 8 BNA OSHA 1762, 1763 (No. 76-4754, 1980). The key is the recognition that "safety of all employees can best be achieved if each employer at multi-employer worksite . . . abate hazardous conditions under its control." *Harvey Workover, Inc.*, 7 BNA OSHA 1687, 1689 (No. 76-1408, 1979).

A subcontractor such as Center Brothers was required by its contract with THC to abide by OSHA's safety rules, and there was a protocol for dealing with violations (Exh. R-7; Tr. 162-163). Foster conducted safety meetings every Tuesday, which all subcontractors and their employees were invited to attend (Tr. 28). THC required subcontractors such as Center Brothers to hold their own safety meetings and provide written evidence of its meeting if the subcontractor did not attend THC's weekly safety meeting, (Tr. 28).

Superintendent Foster inspected the worksite daily and had the authority to stop any unsafe work practice that he observed (Tr. 17, 193-194). He was the person ultimately responsible for safety on the entire job site (Tr. 51, 171-173). His inspections were done at varying times to prevent contractors from anticipating his arrival (Tr. 150).

Foster testified that he had not inspected the mobile scaffold in the storage room that morning because he was in the interior of the building where they were preparing to pour a concrete slab (Tr. 22, 126). There was a wall between the area where Foster was observing the concrete pour and the storage room where the mobile scaffold was located. It was impossible for him to see inside the storage room (Exh. C-2; Tr. 140-141). Also, the record does not establish how long the Center Brothers' employee was on the mobile scaffold prior to OSHA's inspection. The employee's work on the scaffold may have just started.

Superintendent Foster testified that he had not observed any prior scaffolding violations by Center Brothers (Tr. 24-25, 170). When Foster had inspected the mobile scaffold previously, the scaffold was fully planked and guarded or when pipes and ducts in the structure made such protection impossible, the employees wore safety harnesses and were tied-off (Tr. 24-25).

There is no showing that THC should have detected the scaffolding violations created by Center Brothers. The mobile scaffold was not in plain view. Superintendent Foster had not previously observed the scaffold unsafe and failed to require compliance.

The alleged violations involving the mobile scaffold in the storage room are vacated as to THC.

Serious Classification

Section 17(k) of the Occupational Safety and Health Act, in pertinent part, provides:

[A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

In determining whether a violation is serious, the issue is not whether an accident is likely to occur, but whether the result of an accident would likely cause death or serious harm.

Whiting-Turner Contracting Co., 13 BNA OSHA 2155, 2157 (No. 87-1238, 1989).

On the tubular-frame scaffold at the pool building, THC's employee Schofield was working 12 feet above ground level. A fall from that height because of the lack of planking, access ladder or guardrail would cause serious injury or possible death. THC should have known of the violative conditions as to its employee. The violative conditions were in plain view and observable. Also, THC assigned the employee to work on a scaffold being dismantled. The scaffolding violations are serious.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

THC is a large employer with in excess of 250 employees (Tr. 85). It performs work throughout the nation. One employee was exposed to the scaffolding violations. THC is entitled to credit for history in that there were no prior serious citations (Tr. 85).

A penalty of \$2,500 is reasonable for violation of §1926.451(b)(1). One employee was exposed to a fall hazard of 12 feet due to the lack of full planking. The plank spacing was 6-8 inches.

A penalty of \$2,500 is reasonable for violation of § 1926.451(e)(1). One employee was exposed to a fall hazard of 12 feet due to the lack of an access ladder. The employee's failure to understand the hazard is demonstrated by his climbing down the scaffold frame in front of THC's superintendent. Although he was directed to exit the platform, there is no showing that he requested a ladder.

A penalty of \$2,500 is reasonable for violation of § 1926.451(g)(1). One employee was exposed to a fall hazard of 12 feet due the lack of guardrails. The employee was within 5 feet of the exposed edge of the platform.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED that serious Citation 1:

1. Item 1, alleged violation of § 1926.451(b)(1), is affirmed and a penalty of \$2,500 is assessed.
2. Item 2, alleged violation of § 1926.451(e)(1), is affirmed and a penalty of \$2,500 is assessed.
3. Item 3, alleged violation of § 1926.451(g)(1), is affirmed and a penalty of \$2,500 is assessed.

/s/
KEN S. WELSCH
Judge

Date: August 14, 2000