SECRETARY OF LABOR,
Complainant,

v. : OSHRC Docket No. 96-588
:
ALAN GREGOR, d/b/a :
GREGOR CONSTRUCTION COMPANY, :
Respondent. :
:

APPEARANCES

Kathleen G. Henderson, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Mr. Alan Gregor
Gregor Construction Company
Fort Walton Beach, Florida
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Alan Gregor, doing business as Gregor Construction Company, contests a citation issued by the Secretary on April 12, 1996. On October 24, 1995, a worker fell 85 feet to his death from a scaffold at a construction site in Niceville, Florida. The scaffold from which the worker fell was erected alongside the north exterior wall of a building that was under construction. The building was to be the Arts and Music Building at Okaloosa Walton Community College (Tr. 67-68). Gregor was the metal framing subcontractor on the project (Tr. 22). Occupational Safety and Health Administration (OSHA) compliance officer Edgar McGowan inspected the construction site on October 26, 1995. As a result of McGowan's inspection, the Secretary cited Gregor for serious violations of three construction standards. The worker whose death prompted the OSHA inspection did not work for Gregor.

A hearing was held in this matter on November 20, 1996. The Secretary and Gregor litigated the three items contained in the citation. Subsequent to the hearing, on December 6, 1996, the Secretary withdrew items 2 and 3 of the citation, pursuant to Commission Rule 102, alleging violations of §§ 1926.20(b) and 1926.451(d)(10) respectively. The Secretary stated that the evidence developed at the hearing failed to support the violations as alleged in items 2 and 3.

Therefore, the only item left for consideration is item 1, which alleges a serious violation of §1926.20(b)(1).

Section 1926.20(b)(1) provides:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Sharp Construction Company was the general contractor on the Arts and Music Building project (Tr. 14, 66). Bouma Corporation was a subcontractor on the project. It was Bouma who contracted with Gregor t o perform the metal framing for the building (Tr. 13). Gregor Construction Company consisted of Alan Gregor and two employees, Don Soulier, Sr., and Don Soulier, Jr. (Tr. 13, 61-63).[1]

At the hearing, Alan Gregor, who represented himself, seemed to deny at times that he was an employer of the Souliers. When asked if he had a construction company at the time of the accident, Gregor responded, "Not a company *per se*. I mean I use contracted labor. . . . I contracted myself. . . .[Bouma was] just contracting my labor only" (Tr. 19). Later, Gregor contradicted his earlier statements that the Souliers were his employees (Tr. 20-21), stating, "[The Souliers] did not work for me. They were contracted to me as I was to Bouma" (Tr. 51).

Gregor admitted, however, that he supervised the Souliers' work and that he paid them (Tr. 20, 51). Gregor identified himself in his notice of contest as "President and Foreman" of Gregor Construction Company. Gregor signed his answer to the Secretary's complaint "Gregor Construction Company by Alan Gregor Its Owner." The record establishes that Alan Gregor was an employer within the meaning of the Occupational Safety and Health Act of 1970 (Act).

The evidence of record also establishes that Gregor violated §1926.20(b)(1). The standard requires the employer to have a safety program. Gregor admitted that he did not have one (Tr. 14). Gregor asserts that he and his employees attended the safety meetings put on by

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[1] At the hearing, Alan Gregor stated he had one employee (Don Soulier, Sr.) at the time of the accident (Tr. 20). Gregor stated that Don Soulier, Jr., did not work for him until after the accident (Tr. 20). Don Soulier, Jr., testified that he worked on the project both before and after the accident (Tr. 62).

Sharp and Bouma, and that attendance at those meetings is sufficient to meet the requirements of §1926.20(b)(1). Gregor is incorrect.

Section 1926.20(b)(1) states, "It shall be the responsibility *of the employer* to initiate and maintain" a safety program. Gregor cannot abdicate his responsibility and rely on the safety programs of other employers to protect his employees. Although they were required to work on scaffolds as high as 85 feet, neither Gregor, nor Don Soulier, Sr., nor Don Soulier, Jr., was familiar with OSHA's standards regarding scaffolds (Tr. 34, 59, 63). When Gregor, who supervised the Souliers, was asked if he inspected scaffolding before he began work to ensure that it conformed with the safety standards, Gregor responded, "Well, I don't know what the safety standards are, first. I have, from my construction experience, I knew that it was safe" (Tr. 34). Gregor also stated that before he and his employees got on a scaffold, they did not make "an inspection *per se*," but that they all used "good common sense" (Tr. 36).

Don Soulier, Sr., did not know the required height for safety rails on scaffolding (Tr. 60). He stated that, although he tried to work safely, there were times when he believed doing so would cost him his job: "I know that OSHA has got their rules and stuff, but if you try to tell somebody, you are not going to work there for a certain reason. I mean, if it's real unsafe I won't do it. But there's some things you do that you shouldn't do, you know, but you do them just to keep your job" (Tr. 59).

Gregor admits that he had no safety program and that he was unfamiliar with OSHA's safety standards. His employees also stated that they were unfamiliar with the safety standards, and Don Soulier, Sr., testified that he sometimes worked in an unsafe manner rather than raise a safety concern. The Secretary has established that Gregor was in violation of §1926.20(b)(1).

The Secretary alleges that the violation is serious. A violation is serious under section 17(k) of the Act if "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp*., 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). Gregor's failure to have a safety program exposed his employees to the hazard of falls from scaffolding, which could result in death or serious injuries. The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under §17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Gregor employed three employees (Tr. 88). Gregor had no history of previous violations. No evidence of bad faith was adduced (Tr. 89). The gravity of the violation is high. Without a safety program, Gregor's employees were more susceptible to engage in unsafe conduct that could lead to accidents. It is determined that an appropriate penalty is $2,500.00.

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 that:

Item 1 of the citation, alleging a violation of §1926.20(b)(1), is affirmed, and a penalty in the amount of $2,500.00 is hereby assessed.

PAUL L. BRADY
Judge

Date: January 31, 1997