

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,
v.
CARETTI, INC.,
Respondent.

OSHRC DOCKET NO. 04-0918

APPEARANCES:

Theresa C. Timlin, Esq.
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Thomas S. Beckley, Esq.
Beckley & Madden
Harrisburg, Pennsylvania
For the Respondent.

BEFORE: Administrative Law Judge William C. Cregar

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). Caretti, Inc. (“Caretti”) is a masonry contractor. On April 20, 2004, a compliance officer (“CO”) of the U.S. Occupational Safety and Health Administration (“OSHA”) inspected Caretti’s work site, the Centre County Prison in Bellefonte, Pennsylvania. As a result of the inspection, OSHA issued a citation alleging a serious violation of a construction safety standard, 29 C.F.R. § 1926.250(b)(7), and proposing a penalty of \$1,275.00.¹ Caretti timely contested the citation, and a hearing was held in Harrisburg, Pennsylvania on November 30, 2004. The parties

¹As issued, the citation also alleged a violation of 29 C.F.R. § 1926.501(b)(1) and proposed a penalty of \$2,975.00. This item, Item 2, was vacated in the parties’ joint pre-hearing statement. As to Item 1, it initially alleged a violation of 29 C.F.R. § 1926.250(a)(7). There is no such standard. I determined the mistake resulted from a typographical error, denied Respondent’s Motion to Dismiss the Complaint, and permitted Complainant to amend the citation and complaint. *See* discussion, *infra*.

submitted post-hearing briefs. No affected employees sought party status. For the reasons below, I dismiss the citation.

Motion to Dismiss

At the hearing, Respondent moved to dismiss Item 1 of the citation, which alleged a violation of 29 C.F.R. § 1926.250(a)(7). There is no such standard. At the hearing, I denied Respondent's motion to dismiss the citation and complaint and granted the Secretary's motion to amend to charge a violation of the standard found at 29 C.F.R. § 1926.250(b)(7). Respondent has renewed its motion. For the following reasons, I affirm the rulings I made at the hearing.

Rule 15(a) of the Federal Rules of Civil Procedure allows amendments to pleadings by leave of court, as follows: "...leave shall be freely given when justice so requires."² The Commission has permitted amendments to citations and complaints where the amendment merely changes the citation 1) to reflect the true situation; and 2) the amendment does not prejudice the employer by changing the factual bases for the citation. *Secretary v. Arco Chemical Co.*, 921 F.2d 484, 488 (3rd Cir. 1990); *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1112-14 (No. 88-572, 1993).

First, the underlying factual basis for the citation is unchanged by the amendment. The citation reads as follows: "When masonry blocks were stacked higher than 6 feet, the stack was not tapered back one-half block per tier above 6-foot level: (a) South side of Centre County Prison, 700 Rishel Hill Road, Bellefonte, Pennsylvania - Eight inch concrete blocks were not properly stacked to 11 feet 6 inches, on or about April 20, 2004." The standard describing this situation is found at 29 C.F.R. § 1926.250(b)(7). It provides: "When masonry blocks are stacked higher than 6 feet, the stack shall be tapered back one-half bock per tier above the 6-foot level." The similarity of the language in the citation and the correct standard establish that the citation contained a typographical error. Accordingly, the amendment merely changes the citation to reflect the correct applicable standard.

²The Federal Rules of Civil Procedure are applicable to Commission proceedings pursuant to 29 C.F.R. § 2200.2(b).

Second, Counsel for Respondent admitted that Respondent had notice of what violation it was charged with, despite the incorrect citation. (Tr. 9). Accordingly, I conclude that Respondent suffered no prejudice as a result of the typographical error.

Jurisdiction

Respondent is a masonry contractor with its principal place of business in Camp Hill, Pennsylvania. (Tr. 64). At all relevant times herein, Respondent engaged in interstate commerce. I conclude that Respondent is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Statement of Facts

In April 2004, Caretti was the masonry contractor on the Centre County Prison site (“site”) located in Delfon, Centre County, Pennsylvania. It contracted with York Building Products (“York”) to supply and deliver masonry blocks to the project. Respondent’s foreman, Chris Spease, would call York to place an order and York would deliver the blocks to the project at night or very early in the morning prior to the arrival of Respondent’s employees at the site. York normally delivered the blocks to Area “C” or “D” of the project and stacked the blocks itself. Caretti employees would use the blocks usually within four to five hours after delivery. (Tr. 71-72, 80-83).

On April 20, 2004, Thomas Neff, an OSHA CO, arrived at the site at approximately 9:00 a.m. He met with Mark Stone, a representative of the general contractor, R.H. Reynolds. After a brief opening conference, they conducted a walk-around inspection of the site. At 9:15 a.m., CO Neff observed a masonry block stacked above 6 feet that was not “tapered back.” The block was located in Area A, where no one was working; Caretti’s employees were working in Areas C and D. The stack in which the block had been placed was located 100 yards from the road leading from the employee parking lot to the job site and 30 to 40 yards from the employee parking lot itself. Mr. Stone called Mr. Spease, who at that time was working in Respondent’s trailer. The stack could not be observed from the Caretti trailer or from Areas C and D. After leaving the trailer to meet CO Neff and Mr. Stone, Mr. Spease ordered Caretti employees to remove the block. The employees, using a forklift, removed the block 15 to 20 minutes later. (Tr. 5, 20-24, 29, 89-90, 93-96; Exhs. G-1, R-1).

CO Neff measured the block with a 25-foot pocket tape measure and found it to be 11 feet high. Mr. Spease admitted that the block was stacked about 12 feet high. CO Neff also made a videotape of the block. (Tr. 27; Exh. G-1).

Discussion

The cited standard, 29 C.F.R. § 1926.250 (b)(7), provides as follows:

When masonry blocks are stacked higher than 6 feet, the stack shall be tapered back one-half per tier above the 6-foot level.

To establish a violation of a standard, the Secretary must show by a preponderance of evidence that: 1) the cited standard applies; 2) the standard was not met; 3) employees had access to the violative condition; and 4) the employer had actual knowledge of the violative condition or could have known of the violative condition with the exercise of due diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982).

The Secretary has demonstrated that the cited standard applies to the cited block, in that it was stacked higher than 6 feet and was not tapered back as required. That the standard was not met is demonstrated by the testimony of CO Neff, the admission by Mr. Spease, and the videotape of the stacked block.

However, Complainant has not demonstrated that Caretti employees had access to the violative condition. Under the circumstances of this case, Complainant must demonstrate that it was “reasonably predictable” that Caretti employees would have been within the “zone of danger.” *See Gilles and Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Work had been completed in Area A, and there is no evidence that any Caretti employee worked in that area, took a break in that area, or used it for ingress and egress.³

In addition, the Secretary has failed to demonstrate actual or constructive knowledge of the violation. The normal practice was for Caretti employees, within four five hours of the delivery of a stack of blocks, to remove the blocks from the stack by using a forklift truck and to then place them

³Complainant asserts that three Caretti employees were exposed to the hazard, that is, Chris Spease, Rick Gaisior, and Ron Hoover. However, the record, including the videotape, fails to demonstrate that any of these three individuals was actually near the stack when the inspection occurred. (Tr. 24, 28, 33, 97-98; Exh. G-1).

on a scaffold. The subject stack was delivered by York sometime before Caretti employees, including Caretti's foreman, arrived on the scene. The stack was not placed in Area C or Area D, where employees were working, but in Area A; as noted above, Caretti had finished working in Area A, and it was accordingly a location where a Caretti supervisor would not have expected the stack to be placed. The stack was not visible either from the Caretti trailer or from the areas where Caretti employees were working. Generally, four or five hours elapsed from the time a stack was delivered until the time Caretti employees would visit the stack. The 9:15 inspection by CO Neff fell within this four-to-five hour time frame. Thus, Caretti had only about two hours to conduct an inspection of an area where none of its employees was working and to discover the violation. Under these circumstances, it is unreasonable to expect Caretti to have been aware of the existence of the improperly-stacked blocks. Therefore, there is no evidence that any Caretti supervisors were aware, or in the normal course of work should have been aware, that the masonry blocks were improperly stacked. This item is consequently vacated.

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.250(b)(7), is VACATED.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is VACATED.

/s/
William C. Cregar
Judge, OSHRC

Dated: June 30, 2005
Washington, D.C.