

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

CARETTI, INC.,

Respondent.

OSHRC DOCKET NO. 04-0865

APPEARANCES:

Tracy Schwab, 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”) and has been heard and decided pursuant to Subpart M of the Commission’s Rules of Procedure, 29 U.S.C. § 2200.200 *et seq.*

Caretti, Inc. (“Caretti”) is a masonry contractor. On April 19, 2004, a Compliance Officer (“CO”) from the U.S. Occupational Safety and Health Administration (“OSHA”) inspected Caretti’s work site, a school under construction, in New Oxford, Pennsylvania. As a result of the inspection, OSHA issued a citation alleging a serious violation of a construction safety standard, 29 C.F.R. § 1926.501(b)(1). Caretti timely contested the citation, and a hearing was held in Harrisburg, Pennsylvania on December 2, 2004. No affected employees sought party status. For the reasons below, I dismiss the citation.

**Jurisdiction**

At all times relevant to this action, Caretti maintained a principal place of business at 4590 Industrial Park Road, Camp Hill, Pennsylvania, where it was engaged in the business of masonry construction. (Tr. 5). The parties have stipulated that Caretti was engaged in interstate commerce. (Tr. 60). I conclude that Respondent is an employer within the meaning

of section 3(5) of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter.

### **Statement of Facts**

On April 19, 2004, Caretti was the masonry contractor on a multi-employer work site involving the construction of Conawego School in New Oxford, Pennsylvania. Caretti employs at least 200 employees, but, on the day of the inspection approximately 30 employees were working at the Conawego School site. Caretti has a written safety policy that it distributes to employees. *See* Exh. R-1.<sup>1</sup> Paragraph 3.m. of the policy states: “All workmen are required to conform to all safety regulations when working outside the perimeter safety cable or guardrails, including use of a safety belt and harness.” Caretti also has a cumulative disciplinary policy that permits the termination of an employee after the third notification. Supervisors have the authority to terminate an employee on the spot if the violation is sufficiently serious, and this authority includes issuing the employee his final paycheck; in extreme cases, supervisors have shut down an entire operation. Caretti maintains a third-party inspection company, and employees are required to attend safety courses, including courses on fall protection. *See* Exh. R-3. Employees also attend weekly “toolbox talks,” during which a selected safety topic is discussed, and fall protection is among the topics that have been addressed at these sessions. In 2003, Caretti won the Outstanding Safety Award for Contractors. It also has a low MOD score of 0.31.<sup>2</sup> (Tr. 35, 38, 65-73, 83-84, 88-89, 99, 101, 119-21).

At all relevant times, Barton Orndorff was Caretti’s superintendent at the site. His duties included responsibility for the enforcement of safety standards and conducting the weekly toolbox talks. Twice a day, Mr. Orndorff conducted “walkarounds” of the site to check for safety violations; the first walkaround took place at 7.a.m. and the second after lunch. On April 19, 2004, Mr. Orndorff made his usual inspection between 7 and 8 a.m., and he found no safety violations. (Tr. 32, 85-88, 102-03, 114).

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<sup>1</sup>Caretti’s original Exh. R-1 consisted of a pre-revision set of safety rules. After the hearing, Caretti located the 1992 revisions to its rules that had been distributed to employees. These rules contain no changes from the original rules relevant to this case. Thus, Caretti’s request that the 1992 revisions be substituted for its original Exh. R-1 is granted.

<sup>2</sup>The MOD score is used to determine worker compensation insurance rates; an average score is “1.” (Tr. 73-74).

On the morning of April 19, 2004, Mr. Orndorff assigned an apprentice bricklayer, Bruce Claybaugh, to brick over two metal plates welded to I-beams projecting out from a brick wall (the gymnasium wall) on the side of the school building. *See* Exh. R-8. These areas were below a 4-by-8-foot canopy projecting from the brick wall; the canopy was 11 feet above the ground, and it had no guardrails. A third area requiring bricking was located on the wall above the canopy. Mr. Orndorff did not instruct Mr. Claybaugh to brick the third area; he did, however, instruct another crew to construct a second stage to an existing scaffold located below the canopy. Had it been assembled, the second stage would have provided guardrails for the canopy; indeed, fall protection was its purpose. (Tr. 31, 91, 96, 112-14, 122-24, 133).

Mr. Claybaugh was working alone on the morning of April 19, 2004, and the other Caretti employees were working either inside the building or on another side of the building. Mr. Claybaugh's activities could not be observed unless the observer happened to be outside of the gymnasium wall on which Mr. Claybaugh was working. (Tr. 97; Exh. R-8).

Ralph Stoehr is the OSHA CO who conducted the inspection, and on April 19, 2004, he arrived at the Conawego School site sometime between 10 and 11 a.m. for that purpose. He first visited the trailer of J.C. Orr, the contract manager at the site.<sup>3</sup> After discussing the purpose of his visit with J.C. Orr's superintendent, and after being informed about the number and types of prime contractors on the site, the CO began a walkaround inspection in the company of J.C. Orr's superintendent. (Tr. 20-21).

During the course of the inspection, CO Stoehr met Mr. Orndorff, who also joined him in his inspection. While walking with Mr. Orndorff, the CO observed Mr. Claybaugh working on the canopy, laying brick. He asked Mr. Orndorff if he could identify the employee, and Mr. Orndorff replied that he was an apprentice Caretti employee. The CO began videotaping the employee working on the canopy at 11:11 a.m. He pointed out to Mr. Orndorff that no fall protection had been provided for that employee, and, at some point during this exchange, Mr. Orndorff responded that, while he knew it was required for scaffolds, he was unaware that fall protection was required for platforms like the canopy. (Tr. 23-24, 45; Exh C-3).

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<sup>3</sup>J.C. Orr was one of several prime contractors at the site. Caretti was also a prime contractor. (Tr. 6).

Exhibit C-3, the CO's videotape, shows Mr. Claybaugh performing masonry work while standing on the canopy, and no fall protection, such as guardrails or a harness and lanyard, is evident. Exhibit C-3 also shows a scaffold with planks below the canopy, with the planks extending beyond the canopy; further, the parts necessary to raise the scaffold to the level of the canopy are shown propped up next to the building. (Tr. 32, 36, 47, 130).

Mr. Orndorff did not instruct Mr. Claybaugh to get off of the platform; however, he did instruct the crew immediately to erect the second stage of the scaffold. In addition, later that day, Mr. Orndorff gave Mr. Claybaugh a written "First Notice." Exhibit R-2, the notice, states: "Employee, accessed scaffold without proper handrail, toe boards or fall protection, without proper authorization." Mr. Claybaugh did not contest the notice, nor did his union make any effort to contest the disciplinary action. At the hearing, Mr. Claybaugh credibly testified that he "just wasn't thinking." He was aware that he was violating his employer's safety requirements and that, in hindsight, he should have waited for the laborers to complete the second stage of the scaffold before bricking up the hole on the brick wall above the canopy. (Tr. 33, 113-14, 125-28).

On May 3, 2004, OSHA issued to Caretti a Citation and Notification of Penalty; the citation alleged a serious violation of the above-noted construction safety standard and proposed a penalty in the amount of \$2,275.00. *See* Exh. C-2.

### **Discussion**

The cited standard, 29 C.F.R. § 1926.501 (b)(1), provides as follows:

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 citation alleges a violation of the above standard, as follows:

East side of the school - Employer was laying brick from the roof of an entrance way into the school building that was eleven feet above ground with no fall protection, on or about April 19, 2004.

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, with the exercise of due diligence, could have known of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in part*,

*remanded in part*, 681 F2d 69 (1<sup>st</sup> Cir. 1982). The Secretary has demonstrated the first three criteria. The standard applies to the canopy, a walking/working surface with an unprotected side or edge 11 feet above the next level.<sup>4</sup> Further, Mr. Claybaugh's activities satisfy the second and third criteria, in that an employee of Caretti was on the canopy without having any type of fall protection. However, the fourth criteria has not been satisfied.

The Secretary has not established that Caretti had actual knowledge that Mr. Claybaugh was on the canopy. As noted above in the Statement of Facts, the canopy could not be seen either by other employees or by Mr. Orndorff unless they were physically present on the outside of the gymnasium wall, and there is no evidence that Mr. Orndorff or any other Caretti employee was in a position to observe Mr. Claybaugh prior to the CO's inspection. In addition, I credit the testimony of both Mr. Orndorff and Mr. Claybaugh that the latter was not instructed to climb up on the canopy.<sup>5</sup> (Tr. 96, 122, 125-26, 133).

I further conclude that at the time the CO observed him, Caretti could not have reasonably anticipated that Mr. Claybaugh would be working on the canopy without fall protection. Caretti had promulgated written safety rules, and Mr. Orndorff was an experienced supervisor who conducted weekly training programs that included discussions focused on fall protection. He had conducted a walkaround safety inspection earlier that morning and had discovered no safety violations, and it is unreasonable to expect a supervisor to observe every employee every minute of the day. Mr. Orndorff did not tell Mr. Claybaugh to climb up on the canopy, and I credit Mr. Claybaugh's testimony that he knowingly disregarded a safety rule when he climbed up on the canopy without having been instructed to do so. (Tr. 96, 122, 125-26, 133). Moreover, Mr. Orndorff had arranged for other employees to add another level to the existing scaffold. Indeed, the first stage of a

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<sup>4</sup>The record does not demonstrate, nor does Caretti contend, that the scaffold below the canopy constituted a "lower level." (Tr. 55-56).

<sup>5</sup>Evidence in support of this element is provided by Mr. Orndorff's statement to CO Stoerhr that he was unaware the fall protection standard applied to canopies. This statement suggests that Mr. Orndorff permitted Mr. Claybaugh, or even instructed him, to work on the canopy after completing the lower-level brick work. Mr. Orndorff did not recall making this statement. (Tr. 111, 117). I conclude that, even if Mr. Orndorff made the statement, it is outweighed by the fact that a scaffold was in the process of being constructed at that location. Mr. Claybaugh credibly testified that he knew he was violating Caretti's safety rules when he climbed up on the canopy, and he was immediately disciplined by Mr. Orndorff, the same supervisor who allegedly made the statement. (Tr.125-29).

scaffold was in place below the canopy and the necessary parts to erect the second stage were leaning against the gymnasium wall. These facts are strong circumstantial evidence that Caretti was intending to erect a second level on the existing scaffold, and a reason for adding a level to the existing scaffold would have been to provide fall protection for anyone working on the canopy. (Tr. 91, 96, 112-14, 124). Finally, Mr. Orndorff imposed discipline on Mr. Claybaugh later that day. Mr. Claybaugh credibly testified that this “First Notice” was deserved, and the prompt discipline lends additional support to Caretti’s contention that it consistently enforces its safety rules.<sup>6</sup>

Even assuming that the Secretary proved all of the elements of her case, Caretti would nonetheless prevail because it has established the affirmative defense of unpreventable employee misconduct. To demonstrate this defense, the employer must show: 1) that it has established work rules designed to prevent the violation; 2) that it has adequately communicated these rules to its employees; 3) that it has taken steps to discover violations; and 4) that it has effectively enforced the rules when violations have been discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). *See also American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). The record in this case establishes all four elements. As set out in the Statement of Facts, *supra*, Caretti had established written work rules designed to require fall protection, employees attended safety courses, and fall protection was one of the topics discussed at the company’s toolbox talks. In addition, daily inspections were conducted to discover safety violations, and Caretti’s supervisors had the authority to impose discipline for safety violations, as illustrated by the fact that Mr. Claybaugh was promptly disciplined for having climbed up on the canopy without fall protection. Finally, Mr. Claybaugh’s testimony that he was on the canopy without being directed to do so and that he knew that fall protection was required establishes both his misconduct and Caretti’s inability to foresee and to prevent it.

For all of the foregoing reasons, Item 1 of Serious Citation 1 is VACATED.

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<sup>6</sup>The Secretary has raised the possibility that Mr. Claybaugh provided false testimony to keep his job. However, Mr. Claybaugh denied that this was the case, and I found no indication of a lack of credibility in his demeanor as he testified.

**ORDER**

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

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William C. Cregar  
Judge, OSHRC

Dated: February 7, 2005  
Washington, D.C.