United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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Office of
Executive Secretary

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SECRETARY OF LABOR,

Complainant,

v.

EMPIRE STEEL, INC.,

Respondent.

Docket No. 93-3285

ORDER

On September 27, 1995, the Secretary and Empire Steel, Inc., (Empire) filed a joint motion to withdraw direction for review. In the motion, the Secretary and Empire state that the Secretary has decided not to pursue this case with respect to the issue of whether Empire is a responsible employer. The Secretary and Empire also state that Empire does not object to a withdrawal of the direction for review with respect to that issue.

The Commission acknowledges receipt of the joint motion to withdraw direction for review. There being no matters remaining before the Commission requiring further consideration, the Commission orders the above-captioned case dismissed.

BY DIRECTION OF THE COMMISSION

Date: October 6, 1995

Ray H. Darling, Jr.
Executive Secretary

1995 OSHRC No. 49

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. EMPIRE STEEL, INC. Respondent.	OSHRC Docket No. 93-3285

JOINT MOTION TO WITHDRAW DIRECTION FOR REVIEW

Complainant, Robert Reich, Secretary of Labor, United States Department of Labor, and Respondent, Empire Steel, Inc., respectfully request that the Occupational Safety and Health Review Commission withdraw its Direction for Review in this case.

In support of this motion, the parties state as follows:

1. The Secretary has decided not to pursue this case with respect to the issue of whether Empire Steel, Inc. is a responsible employer.

2. Respondent does not object to a withdrawal of the Direction for Review with respect to that issue.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
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SECRETARY OF LABOR
Complainant,
v.
EMPIRE STEEL, INC.
Respondent.

OSHRC DOCKET
NO. 93-3285

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 10, 1994. The decision of the Judge will become a final order of the Commission on September 9, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 30, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: August 10, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3285

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. CORPORATE COMPENSATION AND SAFETY, INC., Respondent.[1]	OSHRC DOCKET NO. 93-3285

APPEARANCES:

Robert A. Fitz, Esquire Dallas, Texas For the Complainant.	Curtis Harvey The Woodlands, Texas For the Respondent, *pro se*.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a school re-roofing project in Spring, Texas, after an accident on June 14, 1993; the accident occurred when an employee fell through an opening in the roof and suffered fatal injuries. As a result of the inspection, OSHA issued a serious

[1]Empire Steel, Inc. ("Empire") was the employer originally cited in this case; however, at the hearing the Secretary moved to include Corporate Compensation and Safety, Inc. ("CCSI") as a joint Respondent based on the evidence of record. For the reasons set out below, CCSI has been substituted as the sole Respondent in this matter.

citation with two items.[2] The citation was contested, and a hearing was held May 13, 1994. The Secretary and Respondent have filed briefs in this matter, and the arguments of both parties have been thoroughly considered.

The Secretary's Motion to Amend

As noted *supra*, the Secretary moved at the hearing to amend the citation to include CCSI as a joint Respondent along with Empire, the employer originally cited; the basis of the motion was the testimony of Frank Gunnels, Empire's president. (Tr. 9-10; 20-21). The undersigned reserved ruling on the motion but advised Curtis Harvey, who appeared on behalf of Empire and identified himself as a safety professional with both Empire and CCSI, an employee leasing firm, that he should clarify the matter during the hearing because a determination of which company was the employer was an issue to be resolved. (Tr. 4-5; 21-23). After the hearing, the Secretary submitted a written motion to conform the pleadings to the evidence pursuant to Commission Rule 2200.2(b) and Federal Rule of Civil Procedure 15(b). CCSI's corporate counsel has filed an objection to the motion. The essence of the objection is that CCSI was not represented at the hearing, and that naming it as a joint Respondent would violate due process as CCSI had no notice it was required to appear and present evidence in its defense.

Rule 15(b) provides for amendments to conform to the evidence, and Rule 15(c) provides for the relation back of amendments to the date of the original pleading if the conditions of the rule are met. It is well settled Rule 15 applies to Commission proceedings, and that a party may be substituted for the originally-named party pursuant to Rule 15(c) as long as the party (1) has received such notice of the institution of the action that it will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would

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[2]As issued, item one alleged a violation of section 5(a)(1) and item 2 alleged a violation of 1926.850(i). The Secretary's complaint amended item 1 to allege a violation of 1926.105(a), and his withdrawal of item 2 was granted at the hearing. (Tr. 5-6). The Secretary's complaint also states that the citation's designation as citation number 2 was erroneous; accordingly, the citation is hereinafter referred to as citation number 1.

have been brought against it. *See CMH Company, Inc.*, 9 BNA OSHC 1048, 1052-53, 1980 CCH OSHD ¶ 24,967, pp. 30,824-25 (No. 78-5954, 1980).

Commission precedent is also well settled that the "economic realities" test is to be used to determine which employer was responsible for the safety of workers under the circumstances of a particular case. The five factors to be considered are:

(1) Whom the employee considers to be his or her employer;

(2) Who pays the employee's wages;

(3) Who is responsible for controlling the employee's activities;

(4) Who has the power as opposed to the responsibility to control the employee; and

(5) Who has the power to fire the employee or to modify the employee's employment conditions.

MLB Industries, Inc., 12 BNA OSHC 1525, 1526-27, 1985 CCH OSHD ¶ 27,408, p. 35,509 (No. 83-231, 1985). Factors (3) through (5) should be given more emphasis since they effectuate the remedial purpose of the Act. *Id.* at 1528 and p. 35,510.

Turning to the evidence of record, Harold Dark, the OSHA compliance officer ("CO") who inspected the site, testified that Curtis Harvey, CCSI's corporate safety coordinator, reported the accident and told OSHA that Empire was the employer on the project. Dark further testified he called Empire the afternoon of June 14 and asked that their safety coordinator meet him at the site the next day and that employees be available for his inspection; he met with Frank Gunnels and Steve Weisinger, another representative of Empire, on the morning of June 15, and although Curtis Harvey was also there during part of the inspection Dark believed Empire was the only employer on the job.[3] (Tr. 47-49; 59-61; 74-75; 101-02).

Based on the foregoing, it is understandable that OSHA cited Empire and that the Secretary was not aware until the hearing of CCSI's role at the site. However, Frank Gunnels testified that Moore and Moore, the general contractor, awarded his company the subcontract to replace the roof on the school, and that he then coordinated with Larry

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[3]At some point, Dark also spoke with a representative of Moore and Moore, the general contractor of the project. (Tr. 61).

Sowell, an employee of CCSI, to provide the workers, equipment and scheduling needed for the job. He explained that Empire has only three employees, himself and two clerks, and that all field workers needed for its jobs are leased from CCSI or another concern. He further explained that all the CCSI employees Empire uses are paid by CCSI, and that while Empire and CCSI have an ongoing relationship they are not affiliated. Gunnels said CCSI schedules and oversees the work, employees and safety of all of the jobs it does for Empire, including the subject project, and that after initial instructions he communicates with Sowell only if a problem arises; Gunnels also said that Empire had probably five other jobs going on at the time of the subject job, and that he viewed CCSI as essentially another subcontractor. (Tr. 9-20; G-3).

In addition to the above, David Livingston and Darvin Scott, two employees on the job the day of the accident, testified consistently with Gunnels. (Tr. 30-33; 37-39). Moreover, the only safety materials presented at the hearing were those of CCSI, and Empire evidently has no such materials of its own. (Tr. 10-15; 25-28; G-1-2). Finally, Curtis Harvey made no attempt to rebut the testimony of Gunnels, even after being advised he should clarify this matter. (Tr. 21-23). Accordingly, upon applying the economic realities test to this case, it is concluded CCSI was the employer at the site. This conclusion is not changed by Gunnels' apparent belief Empire was liable for any OSHA violations on the job, or by Empire's settlement of a 1991 citation relating to a job under the same arrangement, since it is clear that CCSI was responsible for worker safety at the subject site. (Tr. 24; 49-56; G-4-14).

Turning to the Secretary's motion, the undersigned has considered the arguments of CCSI noted above and finds them unpersuasive. Curtis Harvey, CCSI's safety coordinator, told OSHA Empire was the employer at the site; he also participated in the inspection and then presented himself as Empire's representative at the hearing. After Gunnels testified, Harvey was advised he should clarify who was the actual employer as this had become an issue. Based on Harvey's failure to offer anything on the issue, it can only be concluded that Gunnels' testimony represents the true relationship between Empire and CCSI and that CCSI was the employer at the site. Moreover, due to the evidence as to the violation of 1926.105(a), *infra*, the undersigned is unable to fathom anything more CCSI might have

presented in its defense. Consequently, CCSI had the notice required by Rule 15(c), and it is appropriate to substitute CCSI as the Respondent; in this regard, I note Harvey's statement that CCSI had two other cases in which it had been cited pending before the undersigned.[4] (Tr. 24-25). The Secretary's motion is granted, the citation is vacated as to Empire, and CCSI is the sole Respondent in this matter.

29 C.F.R. § 1926.105(a)

The subject standard provides as follows:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts is impractical.

The record shows that the job at the site involved removing the old metal sheeting making up the roof of the school, as well as the insulation underneath, and then installing new sheeting; the roofing was removed two to four sheets at a time, and the openings created by this process were then covered with new sheeting. The accident occurred when CCSI employee Clarence Hubbard fell through one of the openings; the area he was working was above the school cafeteria, and while there was a ceiling grid below the roof he went through it and fell to the cafeteria floor below. (Tr. 33-36; 39-46; 61-75; 84-102; G-15-21; R-1).

Harold Dark, the CO, testified he measured the distance from the roof to the cafeteria floor with a surveyor's rod and found it to be 27 feet, and although Curtis Harvey questioned Dark in this regard he himself essentially acknowledged the distance from the roof to the cafeteria floor was greater than 25 feet.[5] (Tr. 73; 102-05). Dark further testified he saw employees working on the roof when he was at the site, and that while they were in another area then there were no nets or other means being used to protect against falls through the roof openings; to his knowledge, this was also the case the day of the accident.

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[4]These cases have since settled.

[5]Dark measured the distance by extending the rod its full 25-foot length through the hole to the floor, and the roof was about 2 feet higher than the top of the rod; he also dropped a line through the hole to get a more accurate measurement. (Tr. 73; 102-05).

(Tr. 61-75; 80-81; 100-02). Harvey presented nothing to show CCSI had complied with the standard the day of the accident; he was also unable to point to anything in CCSI's safety manual that addressed fall protection within the context of the standard. (Tr. 25-28; G-1).

Based on the foregoing, the Secretary has shown a violation of 1926.105(a) unless CCSI is able to prove one of the affirmative defenses recognized by the Commission. In light of the closing argument of Curtis Harvey, CCSI is contending it was infeasible to use nets or other fall protection at the site. (Tr. 108-10).

The elements an employer must demonstrate to establish the affirmative defense of infeasibility of compliance were settled by the Commission in 1991 in *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991). In that decision, the Commission held the employer must show not only that the abatement methods prescribed by the standard were infeasible under the circumstances at the site, but also that an alternative protective measure was used or there was no feasible alternative measure. *Id.* at 1226-28 and pp. 39,682-85.

In view of the record, CCSI has not met its burden of proving that the use safety nets or other fall protection at the site was infeasible. The only testimony in this regard was that of Darvin Scott, one of the employees, who indicated that the workers had to be mobile due to the nature of the work and that it would have been necessary to remove the ceiling grid throughout the facility to have put scaffolding or landings under the roof. (Tr. 94-98). This testimony does not establish the components of infeasibility set out above. Moreover, while it is evident Curtis Harvey believed that using a safety net or other fall protection at the site was infeasible, his closing argument was not testimony; even if it had been, it likewise does not demonstrate infeasibility of compliance. (Tr. 108-10). CCSI was accordingly in violation of the standard, this item is affirmed as a serious violation, and the Secretary's proposed penalty of $2,000.00 is assessed.

Conclusions of Law

1. Respondent, Corporate Compensation & Safety, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. § 1926.105(a).
3. Respondent was not in violation of 29 C.F.R. § 1926.850(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of citation 1 is AFFIRMED, and a penalty of $2,000.00 is assessed.
2. Item 2 of citation 1 is VACATED.

Stanley M. Schwartz
Administrative law Judge

Date: AUG - 1 1994