
SECRETARY OF LABOR,

Complainant,

v.

FOIT-ALBERT ASSOCIATES,
ARCHITECTS & ENGINEERS, P.C.,

Respondent.

OSHRC Docket No. 92-654

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

On July 29, 1991, concrete collapsed from the fourth floor onto the third floor of a building under construction for the State University of New York (“SUNY”) in Amherst, New York. Respondent, Foit-Albert Associates, Architects & Engineers, P.C. (“Foit-Albert”), an engineering company having a contract with an architect to provide inspection services at the project, was charged with two alleged serious violations of 29 C.F.R. § 1926.703, which governs cast-in-place concrete construction. Administrative Law Judge Robert A. Yetman vacated the citations on the ground that Foit-Albert was not performing construction work within the scope of the Secretary’s construction standards. We affirm.

This case involves the circumstances under which employers that provide professional services for construction projects but not construction trade labor, such as engineers, architects, and consultants, are subject to the Secretary’s construction standards set forth in Part 1926 of Title 29, C.F.R. In *CH2M Hill Central, Inc.*, No. 89-1712 (April 21, 1997) (“*CH2M*”), issued this day,¹ we found that the construction standards apply to an engineering

¹This case and *CH2M* were consolidated for oral argument.

firm which the project owner hired to provide a broad range of managerial services and which exercised authority to direct and control the trade contractors with respect to safety issues. The case now before us involves an engineering company whose contractual authority is limited to inspecting the work for conformity with contract specifications and which, unlike the employer in *CH2M*, has no authority itself to give any direction or instruction to the trade contractors. We hold that this company is not subject to the construction standards even though its inspection activities may unavoidably address safety issues and require its employees to perform some incidental physical labor.

I. FACTS

Foit-Albert contracted with the building architect, Davis, Brody & Associates (“Davis, Brody”), to review contract documents and drawings, to review and prepare any necessary changes for approval by SUNY as the project owner, and to inspect the work of the various trade contractors to ensure that it conformed to the contract specifications.² The contract, which is based on a form published by the American Institute of Architects, AIA Document C727, *Standard Form of Agreement Between Architect and Consultant for Special Services*, stated that “the Consultant [Foit-Albert] shall provide prompt written notice of any defect in the work to the Architect and the Owner.” Article 2.5. It also provided that “the Consultant shall not be responsible for the acts or omissions of the Architect, the Architect’s other consultants, the Contractor(s), any Subcontractors, any of their agents or employees, or any other persons performing any of the work.” Article 2.6. Also admitted into the record is AIA Document B352, entitled *Duties, Responsibilities and Limitations of Authority of the Architect’s Project Representative*, which states in pertinent part as follows:

3. LIMITATIONS OF AUTHORITY

The Project Representative shall NOT:

²This description summarizes the scope of Foit-Albert’s contractual responsibility. It also contracted to provide other incidental tasks such as preparing bulletins and field sketches and signing contractor requisitions on behalf of Davis, Brody.

3.1 Authorize deviations from the Contract Documents.

.....

3.6 Advise on, or issue directions concerning, aspects of construction means, methods, techniques, sequences or procedures, or safety precautions and programs in connection with the Work.

.....

3.10 Reject Work or require special inspection or testing except as authorized in writing by the Architect.

3.11 Order the Contractor to stop the Work or any portion thereof.

William Henderson, one of Foit-Albert's two inspectors, testified that representatives of both Davis, Brody and SUNY gave him a copy of AIA Document B352 and that these representatives as well as Warren Wittek, Foit-Albert's vice-president, also advised him that he could not order work to be stopped.³

In the cast-in-place concrete process, a system of scaffolding referred to as "shoring" was erected on each floor to support formwork, that is, the molds into which the concrete would be poured to create the floor above. After the concrete had cured, both the shoring and the formwork were removed. In the exercise of its inspection function, Foit-Albert found that this process had two major deficiencies: the concrete was not being poured at the proper time, and the shoring appeared inadequate to support the formwork.

Henderson notified Wittek in writing that the contractor had begun the pour prematurely in an area known as 4A. Henderson's chief problem with the scheduling of the pour was that other trades were still placing rebar and completing the electrical and plumbing installation. In Henderson's view, this activity not only presented a hazard because workmen

³Since AIA Document B352 was not shown to be part of the formal contract between Foit-Albert and Davis, Brody, Judge Yetman concluded that it was probative only to the extent that it reflects Henderson's understanding of Foit-Albert's role at the site. We agree that the document is entitled to weight regarding Foit-Albert's contractual authority. We also note that, consistent with the terms of that document, the Secretary conceded at the outset of the hearing that Foit-Albert did not have authority for safety at the worksite.

unfamiliar with concrete placement were in close proximity to the concrete bucket as it moved around the floor, but it also precluded Foit-Albert from properly inspecting the rebar and electrical and plumbing connections. Wittek in turn relayed these concerns to Stanley Galindo, project manager for the general contractor, Ciminelli/Walbridge, Joint Venture (“Ciminelli”).

Thereafter, Jeffrey Kohler, Foit-Albert’s structural inspector, wrote to Galindo that “this office remains on record as having noted several deviations from the approved shoring details on this project.” Kohler urged Galindo to “review the configuration of approved shoring details and the conditions on this site with your personnel without delay.”⁴ Two or three days prior to the collapse, Kohler pointed out deficiencies in the shoring when he went through the site with the president of the shoring subcontractor. Specifically, Kohler did not think there was sufficient structural support for a horizontal “spandrel” beam because the

⁴The parties agree that Foit-Albert was contractually obligated to inspect the formwork. There is a dispute in the record, however, as to whether Foit-Albert had contractual responsibility to inspect shoring. The shoring specifications were not prepared by Davis, Brody but by a different engineer hired by the shoring subcontractor. Judge Yetman found that Foit-Albert’s contractual obligation was limited to inspecting for conformity to specifications prepared by Davis, Brody. We conclude that the judge properly resolved this factual issue.

Although Foit-Albert was not mandated by contract to inspect shoring, the record demonstrates that Foit-Albert did in fact address shoring in its inspections and reports and comments resulting from those inspections. However, for the reasons set forth in the text of this decision, we conclude that inspection activity alone is not a sufficient basis on which to subject a non-trade employer to the construction standards.

scaffolding did not match the drawings of the shoring contractor's engineer.⁵ Subsequently, Henderson observed the pour in area 4A as it occurred, although he denied that any deflection appeared in the shoring during the pour. Henderson also testified that he had consistently felt that the shoring was unstable because the ground on which it was placed was too soft, that the shoring joints appeared "shabby," and that the shoring deviated from the specifications in other respects in addition to those identified by Kohler. Ciminelli corrected all of these conditions after Henderson brought them to Ciminelli's attention.

However, Foit-Albert was not able to exercise any inspection function with respect to the next pour, in area 4B, the pour that collapsed. Ciminelli failed to notify Foit-Albert that shoring had been installed over the weekend and that the 4B pour was going to commence immediately when work started on the following Monday. As a result, Foit-Albert was engaged in other tasks—inspecting electrical conduits, outlets, piping, duct work, rebar, and other materials on the floor—on that Monday, and it did not have an opportunity to view the shoring during the 4B pour.

In addition to inspecting and noting some deficiencies in the shoring process, there is one instance in which Foit-Albert would not accept certain work because it did not conform to contract specifications, specifically an occasion when Foit-Albert refused to allow a concrete truck to make a delivery because Henderson observed water in the concrete. Foit-Albert's representatives had personally pulled debris out of the formwork during their inspections for the purpose of directing Ciminelli's attention to the presence of debris. In order to protect the visual appearance of the building and prevent ultimate structural damage, Foit-Albert personnel also tied rebar and installed metal brackets known as "chairs" to raise the rebar off the formwork.

⁵After Kohler participated in the walkaround with the shoring contractor, he told Henderson that the shoring was being realigned and that a revised shoring specification would be provided to Foit-Albert. Henderson testified that a revised plan showing the supports for the spandrel beam had not been provided by the time the collapse occurred.

II. DISCUSSION AND ANALYSIS

In determining whether employers who are not construction trade contractors are subject to the construction standards, we do not rely merely on the terminology generally used to describe their business, such as “engineer” or “architect.” Rather, we focus specifically on each employer’s relationship to the construction work, including its contractual responsibilities and the nature of the activities which it actually performs at the site. The distinction between those covered by the standards and those not within the purview of the standards may be a matter of the degree rather than the kind of control over construction activities. Here, Foit-Albert had no contractual or actual authority to direct the activities of the trade contractors although during the course of its assigned work duties it notified them of safety hazards of which it became aware.

The facts of this case, therefore, contrast sharply with those of *CH2M*. Foit-Albert’s contractual role was to review the contract documents and project specifications, to prepare change orders as necessary, and to inspect the work of the trade contractors to ensure that it conformed to the contracts and specifications. Foit-Albert was not engaged in an extensive range of activities as was CH2M and unlike CH2M it did not have overall managerial or administrative responsibility for the building project. Rather, Foit-Albert’s contract with Davis, Brody specifically provided that “the Architect [Davis, Brody] shall be the general administrator of contractual [sic] services . . . for the project.”

Indeed, in terms of Foit-Albert’s contractual responsibility, this case is indistinguishable from *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1991-93 CCH OSHD ¶ 29,828 (No. 89-1300, 1992), *aff’d*, 3 F.3d 1 (1st Cir. 1993) (“*SGH*”),⁶ in which the Commission concluded that the construction standards do not apply to an entity

⁶AIA Document C727, which formed the foundation for Foit-Albert’s contract, states that portions of it “are derived from” AIA Document C141, *Standard Form of Agreement Between Architect and Engineer*. The latter is same form on which the contract in *SGH* was based. See 15 BNA OSHC at 1853, 1991-93 CCH OSHD at p. 40,665.

which contracts to perform inspection services at a construction worksite and has no contractual responsibility over safety means and measures.⁷

As our decision in *SGH* also indicates, a non-trade employer whose contractual authority is limited to inspection for conformity to contract specifications may nevertheless be held subject to the construction standards if, notwithstanding the restrictions of its contract, it in fact exercises control over safety programs or safety precautions. 15 BNA OSHC at 1867, 1991-93 CCH OSHD at p. 40,680. See also *CH2M*, slip op. at 25-27 (discussion of *de facto* assumption of safety authority). In this case, the pour that collapsed, 4B, was commenced without Foit-Albert's knowledge and at a time when Foit-Albert was occupied in other inspection activities. The fact that in the normal course of work on the project, Foit-Albert did not have the opportunity to observe a critical aspect of the work is consistent with the contractual evidence that Foit-Albert's role in the project included little if any actual responsibility to control or direct the manner of performance of that work.

On the other hand, we recognize, as the Secretary emphasizes in her brief, that notwithstanding the limited scope of its contractual responsibilities, Foit-Albert did warn the trade contractors of safety hazards in the shoring and of hazards in the manner in which the concrete pour was being conducted in area 4A. However, we conclude that these activities fail to demonstrate a control over safety issues sufficient to bring Foit-Albert within the scope of the construction standards.

⁷The Oregon Court of Appeals reached a similar conclusion in its decision holding that a municipality which inspected work for compliance with contract terms and municipal codes but which had no authority to review the adequacy of contractor's safety measures was not engaged in construction work under the state's occupational safety and health regulations. *City of Portland v. Accident Prevention Div.*, 49 Ore. App. 1091, 621 P.2d 665 (Ct. App. 1980).

At least to some extent Foit-Albert's concerns were based on discrepancies between the shoring as installed by the shoring subcontractor and the engineer's drawings.⁸ To the extent that Foit-Albert raised safety issues beyond mere compliance with design specifications, we cannot conclude on these facts that by so doing Foit-Albert exercised substantial supervision over construction work within the meaning of *SGH* and *CH2M*. The inspection of work being performed on a jobsite may implicate matters relating to safety, and our decision here is not to be interpreted as a finding that no such relationship exists on the facts of this case. In a case such as this where an accident occurred and injuries resulted, it is reasonable to assume that a competent inspection would detect hazardous working conditions or potential safety hazards. Our decision holds that by merely making known its concerns about safety Foit-Albert did not manifest the ability to control or direct matters of safety. We therefore concur with Judge Yetman's findings that Foit-Albert's warnings about the shoring and the conduct of the 4A pour were an incidence of Foit-Albert's inspection responsibility and did not arise to the level of supervisory responsibility for the implementation of safety measures and safety precautions at the site.

⁸The same is true of Foit-Albert's rejection of concrete deliveries and performance of certain physical labor at the site: Foit-Albert took these measures in order to implement and complete its contractual inspection obligation rather than as an attempt to control or direct the work. Moreover, there is no evidence from which we could conclude that these actions represented a substantial rather than an incidental portion of Foit-Albert's overall activities at the site.

For these reasons, we conclude that Judge Yetman properly concluded that the construction standards prescribed in Part 1926 do not apply to Foit-Albert. The judge's decision is affirmed.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: April 21, 1997

MONTOYA, Commissioner, concurring:

For the reasons set forth in my separate opinion in *CH2M Hill Central, Inc.*, No. 89-1712 (April 21, 1997) (“*CH2M*”), I do not find this case to be distinguishable from *CH2M* in any substantive respect. Moreover, as the majority itself indicates, this case is controlled in any event by the Commission’s prior precedent in *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1867, 1991-93 CCH OSHD ¶ 29,828, p. 40,680 (No. 89-1300, 1992), *aff’d*, 3 F.3d 1 (1st Cir. 1993). I therefore join in the result.

/s/

Velma Montoya
Commissioner

Dated: April 21, 1997