

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
30 RIVER COURT EAST :
CONSTRUCTION CORP., :
 :
Respondent. :

OSHRC DOCKET NO. 99-1085

APPEARANCES:

John S. Ho, Esquire
New York, New York
For the Complainant.

James S. Richter, Esquire
Newark, New Jersey
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding 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 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s work site, a construction project in Jersey City, New Jersey, on January 8, 1999. As a result of the inspection, OSHA issued Respondent a serious citation alleging a violation of 29 C.F.R. 1926.501(b)(1). Respondent contested the citation, and this matter was designated for E-Z Trial pursuant to Commission Rule 203(a). The hearing in this matter was held in New York City on September 28, 1999. Both parties have submitted post-hearing briefs.

The OSHA Inspection

The project was a high-rise structure being built by the steel-reinforced concrete method. Respondent, the general contractor, had about ten employees at the site in January of 1999; half of these were supervisors and the other half were laborers who did cleanup work and put up plastic along the open sides of the building to serve as “winter protection” for the poured concrete so that

it would cure properly. OSHA began an inspection of the project in November 1998, and the focus of the inspection was fall hazards that had been identified at the site. On January 8, 1999, a cold, windy and snowy day, Edward Norton, an OSHA compliance officer (“CO”), arrived at the site just before 11 a.m., at which time he saw an employee who appeared to be installing plastic at the perimeter of the 27th floor without fall protection.¹ The CO videoed a small segment of the work and watched the employee for 10 or 15 minutes, after which he went to the job site trailer and met with Kenneth Nelson, Respondent’s superintendent. The CO told Nelson what he had seen, and Nelson said that his employees were supposed to wear fall protection when installing the plastic. CO Norton asked Nelson if they could go to the 27th floor, and when they went outside the employee was no longer there; they then learned that the elevator was not working, and when Nelson said that they could climb the stairs but that he would have to take it easy due to a medical condition, the CO decided to forego a visit to the 27th floor. Nelson stated he would take care of the problem, and he proceeded to radio personnel in that regard. Norton then continued his inspection on some of the lower floors, and Nelson accompanied him for a time. Norton never interviewed the employee he had seen, and he left about two hours after his arrival because of worsening weather conditions.

Discussion

The cited standard provides as follows:

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 record in this case establishes that an employee at the site was working near the perimeter of the 27th floor at the time of the CO’s arrival. The Secretary contends that she has shown a violation of the standard because the employee was installing plastic and because both Kenneth Nelson and David Jenkins, Respondent’s general projects lieutenant at the site, acknowledged that if the employee was installing plastic, he was one of their laborers. (Tr. 101; 121). Respondent, on the other hand, contends that the Secretary has failed to demonstrate that the employee was one of its laborers. The evidence in this regard follows.

¹Although the citation alleges that the employee was installing plastic on the southwest side of the 26th floor, the record establishes that the cited work was taking place on the 27th floor.

The CO testified he believed the employee was one of Respondent's laborers due to the work he was doing and what Nelson told him. The CO further testified that he did not go to the 27th floor to speak with the employee because of Nelson's medical condition, that he did not video more of the employee's work as he was more concerned about the fall hazards on the top deck, which involved employees of one of the subcontractors, and that when he videoed the employee he thought he worked for the subcontractor. The CO said that Nelson never told him during any later visits that the employee had not been his; however, the CO never confirmed the identity of the employee, and he agreed his inspection would have been more effective had he interviewed the employee. (Tr. 17-58).

David Jenkins testified that he oversaw the work on the project and was familiar with the concrete pouring and plastic installation procedures used on the job. He explained that normally, the pouring of the deck would start between 7 and 8 a.m. on the east end of the building and progress to the west end, being finished around 5:30 or 6 p.m. He also explained that when winter protection was required, the building was divided into three sections, east, center and west, and that plastic was installed along the open sides of each section, beginning with the east section, in a counterclockwise direction. Specifically, plastic was put along the south side of the east section and then along the east, north and west sides, which would separate the east section from the center section. Respondent's laborers would next place heaters in the east section as the concrete was poured on the deck above that section; the laborers would then proceed to the next section and follow the same process, with the west face of the building the last to be covered with plastic. Jenkins drew R-3, a diagram of this process, at the hearing, and he noted that the "curtain work" on the three sections usually took place from about 7 to 11 a.m., 11 a.m. to 2 p.m. and 2 to 5:30 p.m., respectively. (Tr. 66-73; 76-80; 93).

Jenkins further testified that there had been problems with the equipment that pumped the concrete up to the top deck on January 7 and 8, 1999, and that the concrete had to be poured "by the bucket," which took much longer; there also had been problems with the crane, and, as a result, only about 100 yards of concrete were poured on the 28th floor on January 7, leaving another 330 yards to be poured.² Jenkins said that due to these problems and the weather, and to best utilize his laborers, he probably would have had them put up the plastic on the 27th floor as far as they could

²Jenkins derived this information, and the other details of the work at the site during this period, from R-2, the daily reports for the project from January 1 to 11, 1999. (Tr. 74).

on January 7 without closing off the center and west sections, which would have been left open so that carpenters could “jack up” the deck to the engineer’s specifications before the concrete was poured; the carpenters did this by adjusting the wedges under the posts that were spaced every 4 feet to help support the deck.³ Based on his knowledge of the work, Jenkens thought it very unlikely that one of his laborers was on the west side of the building installing plastic at 11 a.m. on January 8. He indicated that concrete had been poured on about half the deck over the center section and that the laborers would have been performing heating duties; he further indicated there would have been eight or nine carpenters jacking up the deck in the west section and that the worker in C-2 could have been picking up plastic and moving it out of the way in order to jack up the deck.⁴ (Tr. 72-76; 80-96).

Kenneth Nelson testified he had assumed the employee was his based on what the CO had said; he agreed with Jenkens that no plastic was being installed that day, but he explained that the weather could have caused a “blowout” that the employees might have had to repair and that he did not know what was going on until he checked with them. Nelson further testified he had not been able to reach anybody on the 27th floor by radio and that after accompanying the CO for a while he went to that floor. Once there, he noted plastic had been installed on the south, east and north sides of the building but that the west side was open; only the east section was closed off, and personnel for other trades were working in the other two sections. He also noted that two laborers were moving heaters from the east section, and when he asked if they had been installing plastic they said they had not. The CO was no longer on the site when Nelson went back down, and while he was not sure, he thought he had told the CO at a later date that the employee had not been one of his. (Tr. 109-30).

Based on the above, I conclude the Secretary has not shown that the employee was one of Respondent’s laborers. First, the CO never interviewed or confirmed the identity of the employee, and he conceded that interviewing employees was an essential part of an inspection and that his

³Jenkens indicated that the jacking-up work occurred in each section about an hour before the concrete was poured on the deck above that section. (Tr. 90-91).

⁴Jenkens said there could have been up to 80 employees on the 27th and 28th floors that day, including masons, carpenters, laborers, plumbers and other trades. He also said the plastic in C-2 could have been there from the installation work the day before and that the plastic was also used as rain protection for materials, equipment and even employees. (Tr. 88-92; 102).

inspection would have been more effective if he had done so. (Tr. 33; 38; 43). Second, the CO indicated that a video is a vital part of an inspection if it will be relied upon to establish a violation, and he testified that he watched the employee installing plastic for 10 to 15 minutes; however, in spite of this testimony, C-2 depicts a few seconds of a barely discernible scene, and the CO himself acknowledged it was difficult to tell from C-2 what the employee was doing. (Tr. 18-22; 34; 37). These circumstances, together with the testimony of Jenkins and Nelson, render the CO's testimony about what the employee was doing significantly less cogent than it might otherwise have been. Third, even assuming *arguendo* that the CO's testimony constituted a prima facie showing that the employee was one of Respondent's laborers, I find that the testimony of Jenkins and Nelson rebutted that of the CO. I observed the demeanors of these two witnesses as they testified and found their statements consistent, convincing and credible; their testimony was also supported by R-2, the daily reports of the work taking place at that time. While the CO was no doubt sincere in his belief that the employee was installing plastic, I note that he first visited the site on January 7, 1999, that his main focus was on the fall hazards to which employees of the subcontractor were exposed, and that he was simply not as familiar with the work on the project as were Respondent's witnesses. (Tr. 8; 19-20; 37; 44-47). I also note that the Secretary did not put the CO back on the stand after Jenkins and Nelson testified, which further persuades me of Respondent's position. In view of the evidence of record, I conclude the CO was mistaken in his belief that the employee was one of Respondent's laborers and that that individual was employed by one of the subcontractors at the site. The Secretary has failed to meet her burden of proof in this case, and the citation is accordingly VACATED.

So ORDERED.

Irving Sommer
Chief Judge

Date: