United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

A. HANSEN MASONRY, INC., and its successors,

Respondent.

OSHRC DOCKET NO. 99-1359

APPEARANCES:

For the Complainant:
Richard Munoz, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Allen Hansen, A. Hansen Masonry, Inc., San Antonio, Texas

Before:
Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, A. Hansen Masonry, Inc., and its successors (Hansen)[*see;* Tr. 35], at all times relevant to this action maintained a place of business at 8150 Interchange Parkway, San Antonio, Texas, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 3, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Hansen's San Antonio work site. As a result of that inspection, Hansen was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Hansen brought this proceeding before the Occupational Safety and Health Review

Commission (Commission).

On February 1, 2000, a hearing was held in San Antonio. The parties have briefed the issues and this matter is ready for disposition.

Alleged Violation of § 1926.451(g)(4)(I)

Repeat citation 1, item 1 alleges:

29 CFR 1926.451(g)(4)(I): Guardrail systems were not installed along all open sides and ends on scaffolds more than 10 feet above the ground or floor:

> (a) The employer did not ensure that employees were protected from falls while working on a scaffold.

HANSON MASONRY INC. was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard 29 CFR 1926.451(g)(1) which was contained in OSHA Inspection Number 300436797, Citation Number 01, Item Number 002, issued on 6/25/98, and became a final order on 1/27/99.

The Violation. Hansen does not dispute the existence of the cited conditions (Tr. 27, 55), but argues that it had no knowledge of the violation.

Facts

OSHA Compliance Officer (CO) Antonio Sanchez testified that when he arrived at Hansen's jobsite at approximately 10:00 a.m. the morning of the inspection, he observed a Hansen employee, Albert Leal, working on a 12 foot scaffold at the southwest corner of the building under construction (Tr. 42, 124; C-2, C-3, C-4). The southwest corner of the scaffold was unguarded, and the employee used no other means of fall protection (Tr. 41; Exh. C-1 through C-4). Upon interviewing workers on the site, Sanchez learned that Hansen had earlier removed the guardrails from the south side of the scaffold to use the area as a loading platform (Tr. 68, 78, 120). The general superintendent and owner, however, complained about oil leaking from Hansen's forklift onto the concrete drive on the south side of the building. Hansen was directed to load from the grass on the west side (Tr. 68, 120). The guardrailing was not replaced on the south side before Leal began working in the area (Tr. 68, 78). Sanchez testified that Leal, a mason tender, told him he made approximately four trips to the southwest corner that morning to get bricks (Tr. 83, 121; Exh. C-8).

Sanchez testified that although Hansen's foreman, Richard Oviedo (Tr. 93), had left the site immediately prior to the OSHA inspection, he had assigned Leal to work in the unguarded area, and knew that the guardrails were missing (Tr. 67-68, 118).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with

the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Hansen admits the first three elements of the violation, arguing only that it was without knowledge. CO Sanchez, however, testified that Hansen's foreman, Richard Oviedo, was aware of the cited hazard. Oviedo did not testify, and Hansen, introduced no other witnesses with first hand knowledge of the work site conditions. CO Sanchez testimony is, therefore, credited. The knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Ormet Corp*., 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991).

Employee Misconduct. In its defense, Hansen maintains that the violation was an isolated incident of employee misconduct.

<u>Facts</u>

Hansen selects and hires its own employees; Summit Professional Employer Organization, an employee leasing service, administers the payroll, conducts jobsite inspections, and provides safety training as requested by the employers that retain its services (Tr. 89, 110). Hansen's "Safety Manual and Accident Prevention Program" is provided by Summit (Tr. 89). Michael McGee, the director of loss control for Summit, testified that in January 1998, Hansen's foreman, Richard Oviedo, participated in a half day safety workshop on masonry construction hazards that Summit and Hansen put on for Hansen's employees (Tr. 101). McGee testified that Summit was not requested to provide any other training for Hansen (Tr. 104, 110). Summit does not administer Hansen's safety program on site and makes no disciplinary decisions (Tr. 110). McGee testified that Hansen is responsible for the safety program's enforcement (Tr. 111).

McGee testified that Summit had conducted 13 jobsite safety inspections for Hansen in the 22 months Hansen has been a client (Tr. 98). McGee met with Oviedo during every jobsite inspection to discuss safety conditions (Tr. 101). Summit did not inspect the jobsite at issue, but McGee testified that Hansen is one of Summit's most safety conscious employers (Tr. 99, 112). McGee testified that he found no guardrail infractions during his job site inspections (Tr. 113).

In Summit's program, Tubular Steel Scaffold General Safety Requirements rule 11 states: "GUARDRAILS AND TOEBOARDS REQUIRED IF ABOVE 10' HIGH" (Tr. 90; Exh. R-1, orange tab).

Antonio Sanchez stated that Albert Leal was employed as a scaffold builder, as well as a mason tender, and that it was his primary responsibility to ensure that the scaffold complied with guardrail requirements (Tr. 92). McGee had neither first hand knowledge nor records indicating whether Leal had been formally trained in scaffold safety (Tr. 110-11). Leal told Sanchez that he had received on the job training about the hazards of working on scaffolds, stating that "[y]ou pick up on it as they tell you what not & what to do" (Tr. 56, 75; Exh. C-8).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶ (91-2897, 1995).

Hansen's evidence falls short of establishing the affirmative defense. Hansen established that it had a work rule designed to prevent the violation, but the evidence did not establish whether that rule was adequately communicated to Leal. Hansen introduced no evidence that Leal had any formal training. Leal told CO Sanchez only that he "picked up" his knowledge of scaffold hazards as he worked. The scope of his acquired knowledge was never made clear. Moreover, Hansen failed to introduce any evidence of a disciplinary system or to otherwise demonstrate that its safety program was enforced.

Hansen failed to establish the affirmative defense of unpreventable employee misconduct. The violation has been established.

Repeat. A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch _Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). CO Sanchez conducted an inspection of a Hansen work site in May of 1998, after which Hansen was cited for a violation of §1926.451(g)(1), which requires that employees working on a scaffold more than 10 feet above a lower level be protected from falling (Tr. 59). That citation was settled; the settlement was approved by the undersigned judge and was adopted as a final order of the Commission (Tr. 63; Exh. C-9). Sanchez testified that though the standard cited in the earlier citation is not identical to the one cited in this action, the May 1998 violation was substantially similar to the current citation. Both violations involved a failure to provide adequate fall protection for employees working on scaffolds

higher than 10 feet (Tr. 59). Though the scaffold cited in the May inspection was 30 feet high, it too was only partially guarded, and was missing guardrails on the sides (Tr. 60). The hazard, falls from a height, were the same in both instances (Tr. 61).

Because the May citation involved incomplete guardrailing on scaffolds, and created the same hazard, *i.e.,* falls from a height, it should have placed Hansen on notice of the need to take steps to ensure that its scaffolding was fully protected. This judge finds that the violation cited here is "substantially similar" to the earlier violation and so was correctly classified as "repeat." *See, Caterpillar, Inc. v. Herman*, 154 F.3d 400 (7th Cir. 1998).

Penalty. The cited violation is classified as "repeat," and a penalty of $2,800.00 is proposed.

<u>Facts</u>

CO Sanchez testified that a fall from a height of 12 feet could result in fractures or death (Tr. 42). One employee, Leal, was exposed for a total of 20 to 30 minutes, during four trips to the unguarded section of scaffolding (Tr. 83). CO Sanchez testified that the probability of a fall was enhanced because Leal was pushing a wheelbarrow, which could have caused him to fall (Tr. 45).

Sanchez testified that under OSHA guidelines, a 15% reduction in the penalty is available for good faith, but that it was not applied in this case because Hansen had been cited for a similar violation after a May OSHA inspection, as discussed above (Tr. 64-65). Because Hansen had a prior citation, no reduction was made for history (Tr. 65).

<u>Discussion</u>

Taking into account the relevant factors, I find that the penalty proposed by the Secretary is appropriate, and will be assessed.

<u>Alleged Violation of §1926.601(b)(14)</u>

Other citation 2, item 1 alleges:

29 CFR 1926.601(b)(14): All defects were not corrected before motor vehicle(s) were placed in service:

> (a) The Lull forklift, used to lift the mortar and other materials to the 2nd level scaffold platform, was leaking fluid and not taken out of service until the defect was corrected.

<u>Facts</u>

CO Sanchez testified that he observed a Hansen employee operating a Lull forklift from which some kind of fluid was leaking (Tr. 47-48; Exh. C-6). Both Hansen's leadman, and the forklift operator told Sanchez that a mechanic had been called the preceding day, but that they continued to use

the fork-lift while they waited for him to arrive (Tr. 49-50). Sanchez testified that he touched and smelled the leaking fluid, and believed that it was diesel fuel, which could, under the right conditions, ignite and/or explode (Tr. 52, 70, 73, 82). Sanchez admitted that he could not find the source of the leak, and never ascertained where the fluid was coming from (Tr. 73, 82).

Hansen maintains that a mechanic found that the leaking fluid was coolant from a radiator leak. Sanchez stated that it wouldn't surprise him to find that the fluid was coolant, because "it could have been any fluid from anywhere" (Tr. 76).

Discussion

The cited standard states:

> (14) All vehicles in use shall be checked at the beginning of each shift to assure that the following parts equipment, and accessories are in safe operating condition and free of apparent damage that could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brakes); tires; horn; steering mechanism; coupling devices; seat belts; operating controls; and safety devices. All defects shall be corrected before the vehicle is placed in service. These requirements also apply to equipment such as lights, reflectors, windshield wipers, defrosters, fire extinguishers, etc., where such equipment is necessary.

Complainant cites a single case, *Mayo Homes Co.,* 1989 OSHRC LEXIS 179 (No. 89-0355, 1989)(ALJ), in which a cited violation involved a vehicle defect not specifically listed in the cited standard. In that case, the evidence established that the defect (broken glass in the right side door window), could cause accidents. Here, however, the CO did not know what the leaking fluid was, and only assumed the fluid was diesel fuel. The CO admitted that it was just as likely that the fluid was coolant, as claimed by Hansen. The Secretary presented evidence of hazards associated with leaking diesel fuel, but failed to demonstrate that leaking coolant posed a hazard to employee safety and/or health.

The Secretary failed to establish that the cited condition prevented the cited forklift from operating safely. Citation 2, item 1 is, therefore, VACATED.

ORDER

1. Citation 1, item 1, alleging violation of §1926.451(g)(4)(I) is AFFIRMED as a "repeat" violation, and a penalty of $2,800.00 is assessed.

2. Other citation 2, item 1, alleging violation of §1926.601(b)(14) is VACATED.

James H. Barkley
Judge, OSHRC

Dated: