

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

Complainant,

v.

OSHRC DOCKET NO. 99-1781

DELTA T CONSTRUCTION COMPANY,
INC., and its successors ,

Respondent.

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, Delta T Construction Company, Inc., and its successors (Delta), at all times relevant to this action maintained a place of business at the US Food Service site, 10211 North I-35 Service Road, Oklahoma City, Oklahoma, 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 [Stip. 1-3].

On August 13-16, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Delta's US Food Service work site [Stip. 17]. As a result of that inspection, Delta was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Delta brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

The parties have requested that, in lieu of hearing, this matter be decided based on joint stipulations of fact submitted pursuant to Commission rule §2200.61. The parties have also submitted briefs on the issues, and this matter is ready for disposition.

Stipulated Facts

Delta is an insulation contractor specializing in cold storage insulation [Stip. 3]. Environmental Structures, Inc., was the general contractor at the job site [Stip 4]. Staley Steel, Inc., the steel framing contractor subcontracted steel erection and roof decking work to All Steel Construction, Inc [Stip. 5, 7].

All Steel began the steel erection and roof decking on the cited roof in midJuly, 1999. In the performance of its work, All Steel cut 16 vent holes in the roof decking. The vent holes were approximately 35 X 35 inches, and were covered with job made covers protruding approximately eight inches above the roof surface. [Stip. 7].

During the first week of August, Delta began its work on the roof [Stip. 9]. On August 12, 1999, Delta had a crew of about 24 employees at the work site, 12 of whom were temporary employees from StandBy Personnel, a temporary personnel contracting company located in Oklahoma City, Oklahoma. The 12 temporary employees were supervised and instructed by Delta employees [Stip. 10]. After the temporary employees assisted in laying roof insulation, they were instructed to pick up that day's scrap on the roof [Stip. 10]. Adam W. Burklin, one of the temporary employees, picked up an unsecured roof cover, stepped into the hole, and fell 31 feet to the ground below [Stip. 11, 21].

By August 12, 1999, the hole covers had been in place for a period of several days, during which time Delta employees were working on the roof and had access to the areas where the covers were located [Stip. 32]. Chester Good, Delta's superintendent on the US Food Service job site, stated that Delta had checked to make sure that all of the holes had covers on a walkthrough visual inspection. However, no one from Delta inspected the covers over the holes in the roof decking to ensure that they were secured [Stip. 12-13]. After the accident, Delta secured the cover with seven inch screws [Stip. 14].

Not all the 16 covers over the holes on the roof were marked with the words "HOLE" or "COVER". Rather, some of the covers were marked with a circle and back slash [Stip. 15]. Delta admits that it was possible that an employee could mistake an improperly marked hole cover for a scrap of wood [Stip. 29].

Delta agrees that it controlled the work environment, and therefore, was in a better position than StandBy to direct the activities of the StandBy employees, and to assure the safety and health of those employees while they were on the job site. Delta agrees that the StandBy personnel were Delta's employees for purposes of the Occupational Safety and Health Act [Stip. 41]. Delta did not maintain records, or ensure that there existed written training records for the temporary employees Delta

obtained through StandBy Personnel which reflected that the temporary employees had been trained in fall protection. Delta does maintain a written certification record for all of its direct employees [Stip 16, 36]

Alleged Violation of §1926.502(I)(3)

Citation 1, item 1 alleges:

29 CFR 1926.502(I)(3): All covers were not secured to prevent accidental displacement by the wind, equipment, or employees:

At the US Food Service jobsite, dry food warehouse, NE side, on 081299 an employee engaged in picking up materials, removed an unsecured skylight cover, and inadvertently stepped into the hole, falling to the ground 31 feet below.

29 CFR 1926.502(I)(3) requires the following:

(i) Covers. Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements: (3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.

Discussion

Delta does not contest the existence of the violative conditions, or that its temporary employees were exposed to the hazard created by those conditions. Delta argues, however, that it neither created nor controlled the cited hazard, and was unaware of the existence of the hazardous condition. Delta notes that the Commission has long held that a non-creating, non-controlling employer will not be held liable for its employees' exposure to such conditions if the employer could not, with the exercise of reasonable diligence, have discovered the hazard, citing *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶20,690 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976).

This judge notes that the *Anning-Johnson* rule cited by Delta is intended to address latent hazards, where the cited employer could neither have readily detected, nor abated said hazard. *See; 4G Plumbing & Heating, Inc.*, 6 BNA OSHC 1528, 1978 CCH OSHD ¶22,658 (No. 12892, 1978) [plumbing and heating subcontractor had neither the expertise, nor the equipment necessary to discover electrical subcontractor's failure to ground a cited electrical outlet].

Delta was aware of its duty to provide a safe work environment for its employees, and did conduct an inspection of the roof before beginning work there, ascertaining that the roof holes were covered. Delta failed, however, to ensure that the roof covers were secured, as required by the standards. The violative conditions were open and obvious, and were discoverable by any construction inspector familiar with the OSHA fall protection standards, which are applicable across the board to all

construction trades. Delta had the means of abating the hazard, which they did, immediately following the accident.

This judge cannot find that Delta exercised due diligence in its inspection of the roof for pre-existing hazards, or that Delta lacked control of the work site so as to preclude its abatement of such hazards. This judge, therefore, cannot find that Delta established the affirmative defense set forth in *Anning-Johnson*.

The cited violation has been established.

Penalty

OSHA determined the severity of the hazard to be high, probability of an injury to be greater. The gravitybased penalty was calculated to be \$5,000.00. No reduction was given for good faith because a fatality was involved, and no reduction was given for history because of previous violations within the last three years. However, a 20 percent reduction was given based on Delta's size, resulting in a proposed penalty of \$4,000.00 [Stip. 25].

That a fatality resulted from this violation establishes that the gravity of the violation is high. A 20 percent reduction was granted on the basis of Delta's size. No basis for further reduction is set forth in the record. The proposed penalty of \$4,000.00 will be assessed.

Alleged Violation of §1926.502(I)(4)

Serious citation 1, item 2 alleges:

29 CFR 1926.502(I)(4): All covers were not color coded or marked with the word "HOLE" or "COVER" to provide warning of the hazard:

At the US Food Service jobsite, dry food warehouse, on 081299 an employee engaged in picking up materials, removed an unsecured skylight cover marked as "man HOLE" and inadvertently stepped into the hole falling to the ground 31 feet below. During the inspection of 081399, other covers were marked with a circle and back slash.

29 CFR 1926.502(I)(4) requires the following:

(i) Covers. Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements: (4) All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

Discussion

As in the item above, Delta admits the existence of the violative conditions, and its employees' exposure to them. The cited condition was in plain view of Delta's safety and/or supervisory personnel; Delta does not argue that it was unaware of the cited conditions. As above, Delta argues that it was not the creating or controlling employer.

For the reasons set forth above this judge finds that Delta had sufficient control of the work site

to abate the cited hazards, and has not made out the affirmative defense set forth in *Anning-Johnson*.

The violation is established.

Penalty

OSHA determined the severity of the hazard to be high, though the probability of an accident occurring was lesser. The gravitybased penalty was calculated to be \$2,500.00. No reduction was given for good faith because a fatality was involved, and no reduction was given for history because of previous violations within the last three years. However, a 20 percent reduction was given based on Delta's size, resulting in a proposed penalty of \$2,000.00 [Stip. 33].

Delta argues that the cited violation played no part in the accident, since Burklin removed a man hole cover that *was* clearly marked. It is well settled that the characterization of a violation is not dependent upon whether the condition actually caused, or was likely to cause an accident. The only relevant inquiry is whether, if an accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). A 31 foot fall through an unmarked manhole would undoubtedly result in serious physical harm, and the violation here was clearly characterized as "serious." That the cited violation was not the proximate cause of the accident is recognized in the "lesser" probability rating, and is reflected in the lower proposed penalty.

This judge finds that the proposed penalty of \$2,000.00 is appropriate, and will be assessed.

Alleged Violation of §1926.503(b)(1)

Serious citation 1, item 3 alleges:

29 CFR 1926.503(b)(1): The employer did not verify compliance with the training requirements of the fall protection standard by preparing a written certification record:

At the US Food Service jobsite, no record was available for the training of temporary workers.

29 CFR 1926.503(b)(1) requires the following:

(b) Certification of training. (1) The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

Discussion

Delta admits the facts as cited, but argues that Stand-By Personnel, the temporary service

providing day laborers, was in a better position both to provide training and to maintain the required training records for those laborers. Delta admits that it did not obtain any documentation from Stand-By showing that the laborers Stand-By provided did, in fact, receive the requisite training. Delta maintains that it found, upon inquiry, that the laborers supplied had not been trained, Delta would be required to provide the training itself, making the use of hired day laborers economically infeasible (Respondent's Brief in Support of its Motion for Summary Judgment).

As a threshold matter, this judge notes that the employer may not use the adjudicatory process to challenge the wisdom of a required safety measure. *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985). Moreover, Delta's hypothetical describes the very situation the standard is intended to prevent. Where the employer fails to ascertain a laborer's level of training, and no training has been provided by the temporary service, the employer may, unknowingly, send the temporary worker into hazardous situations he is not prepared to deal with, exposing him to injury. Delta's argument must, therefore, be rejected.

The violation is established.

Penalty

OSHA determined the severity of the hazard to be high, probability of an injury to be lesser; therefore, the gravitybased penalty was calculated to be \$2,500.00. No reduction was given for good faith because a fatality was involved, and no reduction was given for history because of previous violations within the last three years. However, a 20 percent reduction was given based on Delta T's size, resulting in a proposed penalty of \$2,000.00 [Stip. 40].

For the reasons stated by the Secretary and in my discussion above, the proposed penalty is deemed appropriate, and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.502(I)(3) is AFFIRMED, and a penalty of \$4,000.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of §1926.502(I)(4) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of §1926.503(b)(1) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: