SECRETARY OF LABOR,

Complainant,

v.

Summit Contractors, Inc.,

Respondent.

OSHRC Docket No. 00-0838 (E-Z)

APPEARANCES:

Richard M. Muñoz, Esquire; Chris Greer, Esquire; Office of the Solicitor, U. S. Department of Labor; Dallas, Texas; For Complainant

Robert Rader, Esquire; Rader & Campbell, Dallas, Texas; For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Summit Contractors, Inc., is a general contractor in the construction industry. On January 25, 2000, Occupational Safety and Health Administration (OSHA) compliance officer John Ammon conducted an inspection of Summit's worksite at 130 NE 24th Street in Guymon, Oklahoma. As a result of Ammon's inspection, the Secretary issued two citations on April 13, 2000.

Item 1 of Citation No. 1 alleges Summit committed a serious violation of § 1926.1052(c)(1)(i), for failing to install a handrail on a stairway. Item 1 of Citation No. 2 alleges an other-than-serious violation of § 1926.150(c)(1)(i) for failure to have a fire extinguisher available on the site.

This case was assigned for E-Z proceedings. The hearing was held on July 21, 2000, in Oklahoma City, Oklahoma. Summit asserts the affirmative defense of infeasibility regarding Citation No. 1. For the reasons set out below, Citation No. 1 is vacated and Citation No. 2 is affirmed.

Background

Summit was the general contractor overseeing the construction of an apartment complex in Guymon, Oklahoma. On January 25, 2000, compliance officer John Ammon conducted a general scheduled inspection at the construction site after holding an opening conference with Summit site superintendent Gary Evans (Tr. 9).

The apartment complex was two stories high, with 30 apartments on each floor (Tr. 20). A stairway consisting of 12 risers (up to the main landing) was the only means of access for employees between the first and second floor. The stairway was between two walls (Exh. C-1; Tr. 14). Each riser was 36 inches wide, 7¾ inches high, and 11 inches deep (Tr. 16). There was an approximate 2-inch gap between the end of the riser and the wall on each side of the stairway where trim work was to be installed later. The total distance between the stairway walls was 39 to 40 inches (Tr. 17, 81). The vertical distance between the first floor and the main landing was approximately 8 feet (Tr. 22). The stairway was not equipped with a handrail (Tr. 14).

Fire extinguishers were not available in the apartment complex under construction. Summit had fire extinguishers in its office trailer (Tr. 25).

Summit had only two employees on the site -- superintendent Gary Evans and employee Brian Gilmore. Gilmore regularly checked the subcontractors' ongoing work to determine if it met Summit's requirements. He used the stairway at issue to access the second floor (Tr. 27). At least two subcontractors, Bowman Painting and Drywall and Miller Woodwork, were working at the site the day of Ammon's inspection (Tr. 31).

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.1052(c)(1)(i)

The Secretary contends that Summit committed a serious violation of § 1926.1052(c)(1)(i), which provides:

> Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with:
> (i) At least one handrail[.]

The parties agree that the Secretary has established a prima facie case that Summit violated § 1926.1052(c)(1)(i). Summit was in noncompliance with the terms of a § 1926.1052(c)(1)(i), a standard that applies to stairways such as the one at issue. Summit's own employee as well as the employees of Summit's contractors used the stairway. Summit was aware that no handrail had been installed in the stairway (Tr. 79-80).

Infeasibility

Summit asserts the affirmative defense of infeasibility.

> In order to establish the affirmative defense of infeasibility, an employer must prove that: (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection.

Armstrong Steel Erectors, Inc., 17 BNA OSHC 1385, 1387 (No. 92-262, 1995).

Summit does not argue that installing a handrail was either technologically or economically infeasible under part (1)(a) of the infeasibility test. A permanent handrail was later installed as part of the finished stairway (Exh. R-1, Tr. 63). Rather, Summit contends that it could not have installed a handrail under part (1)(b) of the test at the time of Ammon's inspection because it would have made necessary work operations technologically or economically infeasible .

Summit's site superintendent Gary Evans explained that the installation of the handrail would have impeded two separate work operations that were in the process of being completed: (1) texturing and painting the stairway walls and (2) transporting refrigerators, kitchen ranges, and other major appliances up the stairway for installation in the apartments.

Handrail as Impediment to Painting

Evans testified that in the early stages of construction, a temporary handrail had been installed in the stairway. The handrail stayed up until it was time to hang the sheetrock for the stairway walls (Tr. 67). After hanging the sheetrock, workers taped and "bedded" (plastered) the sheetrock, which could not be done with a handrail in place (Tr. 68). Next, the walls were textured and allowed to dry (Tr. 69).

This is the state the stairway walls were in on the day of Ammon's inspection. Painting was the last part of the stairway process to be completed before the appliances were to be transported to the second floor (Tr. 70). As soon as the appliances were moved up the stairway, the permanent handrail was installed (Tr. 74).

The painting was done before the appliances were transported up the stairway and into the individual apartments. When asked why the appliances could not have been moved upstairs before the complex was painted, Evans replied, "[The painters] paint them with big spray rigs, and they've got to have room to go up and down the walls. And there's just literally not enough room to have the cabinets sitting in the center of the floor and the appliances sitting in the center of the floor in order to get a good pattern" (Tr. 72).

The undersigned asked why the work could not be sequenced so that the upstairs apartments would be painted, the appliances would be transported up the stairway with a temporary handrail installed, and the stairway then painted. Evans replied that the painting subcontractor paints all sections of the apartment complex in one visit. He stated that, for economical reasons, the painter "tries to paint the whole unit in its entirety. In their contracts, it's like time is money, and they hate to come back. You know, because that is more time. And then, that is a cost to them" (Tr. 72). The process of painting and texturizing the walls could not be done with even temporary handrails in place. The supports for the temporary handrails, as well as the rails, would have to removed for painting since the permanent supports were to be put in a different location along the wall.

Handrail as Impediment to Moving Appliances to the Second Floor

Evans testified that the distance between the stairway walls was 39 inches (Tr. 64). The permanent handrail that was eventually installed extended 5½ inches from the wall, leaving a clearance of 33½ inches. Evans stated that the day of Ammon's inspection, Summit was "getting

ready to have the major appliances delivered and installed in [the] apartments" (Tr. 66). The largest appliances were the refrigerators, which Evans estimated as being 35 inches wide (Tr. 66).

The Secretary contended that the width of the refrigerators may have been only 32¾ inches wide, leaving a clearance with the handrail installed of ¾ of an inch (Tr. 88). Even accepting the Secretary's contention, the undersigned determines that hauling a several-hundred-pound refrigerator up 12 steps with a horizontal clearance of less than 1 inch, a necessary work operation, is technologically infeasible.

Handrail Made Necessary Work Operations Infeasible

Ammon inspected Summit's site on a day when the workers were preparing to perform two separate tasks related to the stairway: painting the stairway walls and moving major appliances to the second floor. Neither of these tasks could be accomplished with a handrail in place. Summit has established that, in the narrow time-frame of that particular day, two of its necessary work operations would have been technologically infeasible had the handrail been in place.

No Feasible Alternative Means of Protection

Summit also has the burden of proving that it used an alternative method of protection or that there was no feasible alternative method of protection. The hazard the standard is intended to prevent is falling down the stairway. A handrail provides a support for an employee to grasp should he or she stumble and start to fall. (It is noted that a handrail would be of dubious value to employees using both hands to haul major appliances up the stairway.) The stairway at issue had walls on either side of it, which would prevent an employee from falling off the side. If employees stumbled, they could brace themselves on either wall to help them regain their balance. Given the confines of the stairway, no feasible alternative method of protection was possible, and the enclosed space itself minimized the possibility that an employee would fall, as well as minimizing the severity of the injuries if a fall occurred.

Summit has established its infeasibility defense. Item 1 of citation no. 1 is vacated.

Citation No. 2

Item 1: Alleged Other-Than-Serious Violation of § 1926.150(c)(1)(i)

The Secretary alleges that Summit committed an other-than-serious violation of § 1926.150(c)(1)(i), which provides:

> A fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.

There were no fire extinguishers inside the apartment complex (Tr. 25-26). Evans testified that it was the subcontractors' responsibility to provide their own fire extinguishers (Tr. 74).

Evans stated (Tr. 74-75):

> In good faith, I bought several fire extinguishers ourselves. I had two in my office trailer and then one in my office itself. And I believe I pointed out to Mr. Ammon where there was two setting up on the top shelf there. We had storage vaults next to the office trailer, and I had given fire extinguishers to my subcontractors to either put in their containers or carry in their trucks.

The subcontractors had keys to the storage containers and could have taken a fire extinguisher into the building with them whenever they reported to work (Tr. 75). Evans testified that fire extinguishers were frequently stolen from the site if they were left in the building (Tr. 76). He estimated that if an employee needed to use a fire extinguisher in the building, it would take "three to four minutes" to retrieve one from the storage containers (Tr. 77).

Summit's argument that it was the responsibility of the individual subcontractors to provide their own fire extinguishers is rejected. Section 1926.150(c)(1)(i) does not require an employer to have a fire extinguisher available in its immediate work area. It requires a fire extinguisher to be provided for each 3,000 square feet of the protected building area. The standard focuses on the geographical placement of fire extinguishers in relation to the building. Subcontractors may come and go, and work in different areas of the building, but the presence of the fire extinguishers in or near the building is meant to remain constant while work is being performed. As the general contractor and controlling employer, Summit had responsibility to comply with the cited standard. Furthermore, Summit had two employees of its own on the site who would be exposed to a hazard in the event of a fire.

The standard specifically requires fire extinguishers to be within 100 feet of the protected area. Summit's fire extinguishers were located approximately 200 feet from the apartment complex (Tr. 46). Evans claimed that an employee could retrieve a fire extinguisher in three or four minutes from the locked storage container. The standard is intended to prevent such a lapse

of time until a fire extinguisher can be located. Three or four minutes can mean the difference between minor damage and devastating loss in the event of a fire.

The Secretary has established that Summit committed an other-than-serious violation of § 1926.150(c)(1)(i). The gravity of the violation is low. Summit would shortly install fire extinguishers in each apartment unit (Tr. 28). The subcontractors working at the time of the inspection were painting and trimming out the apartment units (Tr. 77). No penalty is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.1052(c)(1)(i), is vacated and no penalty is assessed; and
2. Item 1 of Citation No. 2, alleging an other-than-serious violation of § 1926.150(c)(1)(i), is affirmed and no penalty is assessed.

/s/

NANCY J. SPIES
Judge

Date: August 11, 2000