SECRETARY OF LABOR, Complainant, v. ENGINEERED CONSTRUCTION SYSTEMS, INC., Respondent.	OSHRC DOCKET NO. 97-1949

APPEARANCES:

For the Complainant:
Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
James A. Dubee, Esq., Denver, Colorado

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, Engineered Construction Systems, Inc. (ECS), at all times relevant to this action maintained a place of business at a Quick Lube under construction at Santa Fe and Union, Englewood, Colorado, where it was engaged as the general contractor. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 27 through September 2, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of ECS's Englewood work site. As a result of that inspection, ECS was issued citations alleging violations of the Act together with proposed penalties.

By filing a timely notice of contest ECS brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On February 5, 1998, a hearing was held in Denver, Colorado.

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

29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms:

a) At 4611 S. Santa Fe Drive, Englewood, CO: Engineered Construction Systems, as the controlling contractor, did not ensure employees of their subcontractor's, Town and Country Masonry, were protected from falls exceeding 10 feet, in that guard rails were not provided on tubular welded scaffolding.

Facts

Following receipt of a complaint by the Denver area office, OSHA Compliance Officers (CO) Jack Cain and Thurman London arrived at ECS's Englewood work site on August 27, 1997 (Tr. 33). As they pulled up to the site, they observed masons setting block from scaffolding on the exterior of the building under construction (Tr. 34, 89-93). Cain and London contacted Greg Rickstrew, ECS's supervisor, who told them that it was ECS's policy to request a warrant before allowing any OSHA inspection (Tr. 38, 51). Cain and London left; however, London returned the following day, at which time he videotaped masons working from the same unguarded scaffolding (Tr. 89, 102; Exh. C-7, C-8, C-9).

ECS admits that Town and Country, its masonry subcontractor, raised its scaffolding above 10 feet sometime August 27, 1997, and that required guardrails were not installed (Tr. 127). Town and Country masons were exposed to the cited fall hazard (Tr. 60-61). Following the OSHA inspection on the 27th, ECS asked Town and Country to abate the guardrail hazard in writing (Tr. 63, 67, 128; Exh. C-16). On the 28th, ECS verbally requested that guardrails be installed, at 7:00, 8:00, and 11:00 a.m. (Tr. 164-65). On the evening of the 28th, ECS informed Town and Country, in writing, that it would not be allowed to resume work on the 29th unless the fall hazard was abated (Tr. 64, 68, 131; Exh. C-17). Cecil Rickstrew testified that under the terms of his contract with Town and Country, he was required to provide the subcontractor with three days notice of an observed safety violation before stopping their work (Tr. 141, 145).

Discussion

It is undisputed that Town and Country employees were exposed to the violative condition. ECS maintains, however, that it took all reasonable steps to have Town and Country abate the safety hazard, and that it is not liable for the violation.

The Commission has held that on a multi-employer site the general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. The general contractor is, therefore, responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity. *IBP Inc.*, 17 BNA OSHC 2073, 1997 CCH OSHD ¶31,296 (No. 93-3059, 1997).

It is admitted that ECS was both aware of the hazardous condition and had the authority to compel its subcontractor's compliance with OSHA regulations. ECS did, in fact, secure Town and Country's cooperation by refusing to allow them to work on August 29, 1997. ECS's failure to take effective action earlier is not excused by the three day notice provision in its contract with Town and Country. ECS's

obligations as an employer are spelled out by the Act, and may not be altered by contract with third parties. *Pride Oil Well Service,* 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992).

The violation is established.

Penalty

A penalty of $1,500.00 was proposed. That the violation was "serious" is stipulated. Town and Country employees were exposed to a fall hazard in excess of 10 feet for two days prior to the installation of guardrails. ECS is a small employer, with only eight employees (Tr. 7). The evidence establishes that ECS made repeated unsuccessful efforts to have the cited fall hazard abated, establishing its good faith.

Given its efforts to abate the hazard created by the subcontractor, greater credit should have been given for ECS's good faith. A penalty of $500.00 is deemed appropriate and is assessed.

Alleged Violation of §1926.501(b)(4)(i)

29 CFR 1926.501(b)(4)(i): Employees on walking/working surfaces were not protected from falling through holes more than 6 feet above lower levels, by the use of personal fall arrest systems, covers, or guardrail systems:

a) At 4611 S. Santa Fe Drive, Englewood, CO: Engineered Construction Services, as the controlling contractor, did not ensure employees of their subcontractor's Town and Country Masonry, were protected from falls exceeding 6 feet, in that floor openings were not provided with covers, and no alternative systems were used, in the following locations.

1. On the south side of the interior of the building, at the lube pit;
2. On the north side of the interior of the building, at the lube pit;
3. On the northwest corner of the interior of the building, at the stairway under construction.

During Cain's opening conference with Greg Rickstrew, he observed two employees standing inside the building under construction, between two open and unguarded pits passing what appeared to be hoses into or out from the pits (Tr. 39, 49). CO London also saw the two workers in the vicinity of the pits as he walked past the front of the building (Tr. 101-02). On September 2, 1997, Cain and London returned to the job site with a warrant (Tr. 52). The pits, which were approximately 7 feet, 11 inches deep, were covered with plywood (Tr. 44-46, 53). ECS employee's told Cain that the pits were covered on August 28 (Tr. 55). CO Cain testified that an ECS employee, Eloy Aquero Rodrigues, told him that he might have been one of the people Cain had seen inside the building on the 27th (Tr. 50, 57). Cain admitted, however, that Rodrigues was not sure of the date he last worked in or near the pit (Tr. 57, 78-79). Cain was unable to otherwise identify the employees seen near the pits on August 27 (Tr. 80).

Cecil Rickstrew testified that on August 27, 1997, construction of the pits was complete, and exhaust fans had been placed in the pits to dry them in preparation for painting (Tr. 134-35). Both Cecil and Greg Rickstrew testified that no work remained to be done in the area of the pits, and that there was no reason for its employees to be in the building (Tr. 137-38, 166-67). Cecil and Greg Rickstrew testified that ECS and Town and Country employees were warned to stay out of the area (Tr. 135, 156, 175). Neither Cecil or Greg Rickstrew were aware that anyone was in the pit area (Tr. 138, 170). The interior could be accessed, however, by ducking under the cross-bracing of the scaffolding (Tr. 156).

Discussion

As a threshold matter, ECS argues that the testimony of COs Cain and London was based on information obtained in contravention of ECS's Fourth Amendment rights and so should be excluded.

It is well settled that the Fourth Amendment only protects against intrusions into areas where an employer has a reasonable expectation of privacy. *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1991-93 CCH OSHD ¶29,852 (No. 89-2611, 1992). The Commission has held that there is no reasonable expectation of privacy when activities are conducted out of doors and not closed off to the public. *Id.* The work site in this case was a multi-employer construction site, on which both ECS and Town and Country conducted activities observable by the public. ECS could not reasonably have had any expectation of privacy on the job site. The COs' testimony was properly admitted.

The evidence establishes employee exposure to the unguarded pits. ECS, as the creating and controlling employer, is responsible for the cited hazard; therefore, it is irrelevant that the Secretary failed to establish whether the exposed employees were ECS or Town and Country employees.

The cited violation is established.

Penalty

A penalty of $1,500.00 was proposed. While employee exposure has been established, the paucity of evidence makes it impossible to ascertain either the length of exposure or the likelihood of an accident occurring. The gravity of the violation, therefore, must be deemed minimal. A penalty of $500.00 is appropriate and is assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.451(g)(4)(i) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.501(b)(4)(i) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: