SECRETARY OF LABOR, Complainant, v. G-MAC CONSTRUCTION COMPANY, INC., Respondent.	OSHRC DOCKET NO. 96-1770

APPEARANCES:

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

For the Respondent:
Kenneth R. Raynor, Esq., Templeton & Raynor, P.A., Charlotte, North Carolina

Before: Administrative Law Judge: Stanley M. Schwartz

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, G-MAC Construction Company, Inc. (G-MAC), at all times relevant to this action maintained a place of business at 8736 West Dodge, Omaha, Nebraska, where it was engaged in stucco construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 19, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of G-MAC's West Dodge work site. As a result of that inspection, G-MAC was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest G-MAC brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 28, 1997, a hearing was held in Omaha, Nebraska. At the hearing G-MAC stipulated that the cited conditions existed, and that employees under the supervision of Eucardo Molina were exposed to the violative conditions (Tr. 6). G-MAC maintains, however, that Molina is an independent contractor, and that his laborers are not employees of G-MAC (Tr. 6). The parties agree that the only issues in dispute

are the employer/employee relationship between G-MAC and Eucardo Molina, and the effect of that determination on the "willful" characterization of the cited violation (Tr. 6). The parties have submitted briefs on those issues and this matter is ready for disposition.

Facts

On November 6, 1995, G-MAC entered into a subcontract with Graham Construction Company, Inc., under which G-MAC was to provide exterior insulation finish systems (E.I.F.S.) work at the Omaha, NE Comfort Inn on West Dodge (Tr. 36; Exh. C-10). G-MAC agreed to furnish all labor, supervision, material, and equipment necessary to complete the work contracted for (Exh. C-10). G-MAC agreed to bear the cost of any losses suffered by the Graham Construction resulting from G-MAC's default (Exh. C-10). G-MAC agreed to comply with all OSHA requirements, and to be responsible for all citations incurred by its agents and employees (Exh. C-10). Finally, G-MAC agreed to enforce Graham's safety rules, and acknowledged that its employees could be terminated for violation of those rules (Exh. C-11). G-MAC's profit on the Omaha job was approximately $29,000.00 (Tr. 128-29).

G-MAC obtained a Contractor Registration Certificate for the State of Nebraska for the purpose of providing E.I.F.S. in Omaha County (Tr. 30, Exh. C-7).

On April 10, 1996, G-MAC entered into a subcontractor agreement with Eucardo Molina, under which Molina agreed to provide materials and labor to perform the West Dodge Comfort Inn project (Tr. 84, 109; Exh. R-3). Glen McCullough, president of G-MAC, testified that G-MAC uses subcontractors rather than traditional employees so that he doesn't have to maintain a supervisory presence on the job site. McCullough stated that this is a cost saving measure common in the industry (Tr. 89-90, 115). Molina testified that he had no specialized skill or experience that Glen McCullough had not also acquired in his 12 years in the business (Exh. R-11, p. 23).

Molina has worked for G-MAC, as well as for other contractors since 1988 (Tr. 33, 87-89). G-MAC paid Molina a percentage of the contract price in weekly or biweekly increments based on the percentage of the work completed (Tr. 28; Exh. R-11, p. 30). Molina was never issued a W-2 form; his income from G-MAC was reported on a Form 1099-B (Tr. 91; Exh. R-2).

Molina's materials and scaffolding were purchased and paid for by G-MAC (Tr. 46). McCullough, however, testified that the cost of those materials, in addition to the cost of necessary safety equipment, was charged back to Molina, and deducted from the total contract price (Tr. 46, 95, 117). Molina testified that he incurred losses on equipment rental when the West Dodge job ran over due to rain delays. G-MAC covered the cost of the additional equipment rental, approximately $13,000; however, Molina testified that

those costs were to be deducted from some future contract price (Exh. R-11, p. 51). Molina provided his own tools (Tr. 117).

Molina hired and fired his own laborers, and determined the wages of his employees (Tr. 85-87; Exh. R-11, p. 15), which were paid from his contract proceeds (Exh. R-11, p. 31). None of the laborers worked on any other G-MAC projects (Exh. R-11, p. 33). G-MAC has other crews, which it uses when Molina is busy (Exh. R-11, p. 12, 26).

Molina testified that his contract prohibited G-MAC from assigning additional projects without a change order (Exh. R-11, p. 26).

McCullough testified that Molina had complete control over the laborer's duties (Tr. 85-87 McCullough relayed Graham's instructions on day to day operations to Molina, but Molina made the final decision on how work was to be performed (Tr. 92-93, 96). McCullough testified that Molina refused to follow the instructions he relayed from Graham (Tr. 93; Exh. R-10). Molina understood that G-MAC had the authority to terminate their contract only should he fail to finish the job to the general's satisfaction (Exh. R-11, p. 19).

G-MAC carried workman's compensation insurance for the workers on the Omaha work site (Tr. 32). No other benefits were provided by either G-MAC or Molina (Exh. R-11, p. 39).

McCullough admitted that he knew that G-MAC was ultimately responsible for Molina's compliance with health and/or safety regulations under OSHA's multi-employer work site doctrine (Tr. 118-19). McCullough was aware of the fall protection requirements and testified that Molina was made aware of them; G-MAC provided Molina with safety work rules and policies (Tr. 28, 123). McCullough instructed Molina to comply with all applicable safety regulations, and rented necessary safety equipment for him (Tr. 93-94, 119).

Employer/Employee Relationship

In *Secretary of Labor v. Vergona Crane Co., Inc.* 15 BNA OSHC 1782, CCH OSHD ¶29,775 (No. 88-1745, 1992), the Commission adopted the position that the term "employee" should be interpreted under common law principals. The Commission stated that:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business

> of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

citing the Supreme Court's opinion in *Nationwide Mutual Insurance Co. V. Darden*, 112 S.Ct. 1344, 1348, (1992)(citations omitted).

Few of these factors point to an employer/employee relationship between G-MAC and the stucco laborers on the West Dodge work site, *i.e.*:

< G-MAC is in the stucco construction business, and Molina did not have any specialized skill or experience that Glen McCullough did not have;

< G-MAC paid worker compensation premiums for Molina's employees.

Rather, the majority of the factors suggest that Molina was an independent contractor, and that neither he nor his crew were employees of G-MAC:

< Though Molina had a longstanding relationship with G-MAC, he also worked for other contractors; when he had other contracts G-MAC used other crews;

< Molina's contract prohibited G-MAC from assigning additional projects without a change order.

< Molina and his crew provided their own tools;

< The cost of materials were subtracted from Molina's contract price;

< Molina was paid a percentage of the contract price in weekly or bi-weekly increments, based on the percentage of the work completed, his laborers were paid a salary from the contract proceeds;

< G-MAC had no input into hiring or firing, wages, hours or any other of the crew's conditions of employment.

It is clear from the record that G-MAC had a minimal presence on the job site, and exercised little or no control over the way Molina accomplished his work. Nor has the Secretary established any specific contractual right for G-MAC to control the manner and/or means by which the job was accomplished. Molina's sub-contract states only that the work is to be performed "in a time of fashion," and to the full satisfaction of the Architect or Owner (Exh. R-3). Molina believed that G-MAC had the authority to terminate their contract only if he failed to finish the job to the general's satisfaction.

The record establishes that Molina was an independent contractor, under the common law principals enunciated by the Commission.

Multi-Employer Work Site

G-MAC admits that, even in the absence of an employer/employee relationship, as a construction trade contractor, it is responsible for the safety violations of its subcontractor to the extent it could

reasonably have been expected to prevent or abate those violations by means of its supervisory role. *IBP Inc.,* No. 93-3059 (April 18, 1997)[Commission slip opinion]. *See also; Foit-Albert Associates, Architects & Engineers, P.C.*, No. 92-0654 (April 21, 1997)(Commission slip opinion).[1]

G-MAC argues, however, that Complainant did not make out a *prima facie* case in this instance, because it did not show that G-MAC had knowledge of the cited violation. In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited employer either knew or could have known of the violative 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).

Facts. On the day of the inspection, four of Molina's crew worked on an unguarded tubular welded scaffold approximately 40 feet high (Tr. 22; Exh. C-5). Molina told OSHA Compliance Officer D. Craig that the scaffold company had already taken the guardrails back, because he had not anticipated doing any more work from the scaffolding (Exh. C-5).

On June 18, 1996, a month prior to the OSHA inspection Tony White, Graham's superintendent, issued a written safety violation warning to Molina regarding the absence of guardrails and ladders on both June 10 and June 17 (Tr. 41; Exh. C-15). White noted that he had gotten no response to his verbal warnings on those dates (Exh. C-15). On June 20, 1996, White notes in his Job Site Safety Checklist that G-MAC scaffolds need rails and ladders, stating that Molina "obviously doesn't care" (Tr. 41-42; Exh. C-15).

McCullough stated that he was in daily contact with Tony White, and visited the job site on four or five occasions to investigate the quality of the work (Tr. 86, 120-21). McCullough admitted he was aware that White had told Molina repeatedly about safety violations (Tr. 34-35, 121; C-9). McCullough stated, however, that he believed Molina was in substantial compliance with the regulations following Graham's June warning and up until the July inspection (Tr. 126-27). Following the OSHA inspection G-MAC ordered the required guardrails, which were on site the following day (Tr. 34, 121).

McCullough told OSHA that G-MAC had trouble with supervisors on other job sites, and that G-MAC was cited five times one summer (Tr. 35; Exh. C-9).

---

[1] In *Foit-Albert*, the Commission stated that the construction standards may be applicable to entities which do not perform physical trade labor even where such entity is not empowered to direct the means and method of construction. Non-trade employers are subject to the standards where, as here, their duties (*e.g.*, recommending and implementing change orders, certifying trade contractors' work for payment) reflect a general managerial responsibility, and where, as here, the employer takes specific actions to effectuate safe work practices at the site.

Discussion. As noted above, the Secretary may establish an employer's knowledge by showing that it could have known of the violative condition with the exercise of reasonable diligence. Reasonable diligence includes adequate supervision and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.,* 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991).

G-MAC contracted to perform Graham's stucco work, specifically guaranteeing that such work would be performed in a manner consistent with Graham's safety rules and all applicable OSHA regulations. G-MAC then subcontracted the stucco work to Molina, without reference to safety. G-MAC provided a safety program, but provided no training or supervision to assure that safety program would be complied with. As a cost saving measure, G-MAC had determined not to provide supervision at any of its job sites. G-MAC continued this course, despite receiving a number of OSHA citations at other unsupervised sites, and in the face of its knowledge that Molina had violated guardrail regulations at the West Dodge work site.

G-MAC admits that it deliberately chose not to maintain a supervisory presence on the West Dodge work site, despite its contractual and statutory responsibility to assure that Graham's stucco work was performed safely, and its knowledge of safety problems. G-MAC cannot now use its abrogation of its obligations as a defense to violations it could have known of, had it exercised due diligence.

The Secretary has established G-MAC's constructive knowledge of the cited violations.

Willful. G-MAC knew it was ultimately responsible for the safety of its subcontractors' employees, but chose not to exercise any supervisory authority over those operations. Complainant maintains that G-MAC's decision not to maintain a supervisory presence at the West Dodge work site amounts to plain indifference to the safety of Molina's crew, and that the cited violations were properly classified as "willful." This judge does not agree.

G-MAC did not leave Molina's workers completely unsupervised, but relied upon the supervision of the general contractor, Graham Construction. Graham had supervisory personnel on site, and had the authority to stop the stucco work for safety violations. McCullough was in daily contact with Graham, and knew of Superintendent White's attempts to ensure Molina's compliance with the scaffolding regulations. McCullough believed that the violations observed by White in June had been abated, and that Molina was in compliance with the regulations following White's June warning and up until the July inspection.

In light of Graham's demonstrated inability to consistently control either Molina's work performance or safety practices, G-MAC's reliance on White's supervision failed to comply with the Act's requirement that it exercise due diligence. This judge, however, cannot find that G-MAC's reliance on Graham, though

negligent, constituted plain indifference to Molina's workers' safety. There is no evidence that McCullough had any specific reason to believe that Molina would return the scaffold guarding equipment that G-MAC had secured for him, and which had been in use since June, and resume working from the unguarded scaffold.

The violations will be affirmed as "serious" violations of the Act, as the Secretary has established that a fall from 40 feet to the ground would likely result in serious bodily harm or death (Tr. 55).

Penalties

A penalty of $1,200.00 was proposed for serious citation 1, item 1. That item alleges:

29 CFR 1926.100(a):

> 8736 West Dodge, Omaha, NE: Employees on scaffold where overhead work was being performed were not protected by hardhats.

G-MAC is a small company, with 30 employees (Tr. 47, 77). The gravity of the cited violation was deemed low (Tr. 49).

A penalty of $56,000.00 each was proposed for willful citation 2, items 1 and 2, those citation alleges:

29 CFR 1926.451(a)(13):

> 8736 West Dodge, Omaha, NE: Access ladder or equivalent safe access was not provided. Employees accessed scaffold by climbing the frame and the cross braces.

29 CFR 1926.451(d)(10):

> 8376 West Dodge, Omaha, NE: Employees working on a tubular welded frame scaffold were exposed to fall hazards in excess of 40 feet due to the lack of guardrails on the scaffold. Scaffold was 8 sections high and employees were observed working on the top two sections.

The gravity of the cited violations was deemed high because a fall from the forty foot scaffolding would likely result in severe injury or death (Tr. 51-52). CO Craig testified that G-MAC had previously been cited for violation of the same standard (Tr. 48).

G-MAC introduced evidence enabling the undersigned to draw conclusions as to G-MAC's financial health, which was poor. G-MAC's income for the 1996 tax year was just over $19,000.00; a loss carryover from preceding years exceeded its 1996 income; it had no active jobs at the time of the hearing (Tr. 106). The proposed penalties are excessive in that they amount to more than five times G-MAC's 1996 income. In *Colonial Craft Reproductions*, 1 BNA OSHC 1063 (No. 881, 1972), the Commission held that the

purposes of the Act are not served by the assessment of "destructive" penalties. The following penalties are deemed appropriate.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.100(a) is AFFIRMED, and a penalty of $100.00 is ASSESSED.

2. Citation 2, item 1, alleging violation of §1926.451(a)(13) is AFFIRMED as a "serious" violation, and a penalty of $1,000.00 is ASSESSED.

3. Citation 2, item 2, alleging violation of §1926.451(d)(10) is AFFIRMED as a "serious" violation, and a penalty of $1,000.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: