
SECRETARY OF LABOR,
Complainant,

v.

JOHNSON BUILDING CORPORATION,
Respondent.

OSHRC Docket No. 97-506

E-Z

Appearances:

Kenneth Walton, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

John S. Hillery, *Pro Se*
Johnson Building Corporation
Herndon, Virginia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Johnson Building Corp. (Johnson), contests the Occupational Safety & Health Administration (OSHA) citation issued to it on March 25, 1997. The citation related to construction of a retail shopping area in Canton, Ohio. Johnson was the general contractor for the project (Tr. 14, 29). Specifically, the Secretary charges that in violation of § 1926.20(b)(2), Johnson failed to make frequent and regular jobsite inspections; and that in violation of § 1926.21(b)(2), Johnson failed to instruct employees on how to recognize and avoid jobsite hazards. Jurisdiction and coverage are admitted (Pre-Hearing Order).

Procedural Background

The case was designated E-Z and was assigned to the undersigned. By Order dated June 2, 1997, a hearing on the merits was scheduled for July 3, 1997, in Canton, Ohio, to be preceded by a pre-hearing telephone conference scheduled for June 13, 1997. At all stages of the case, the respondent was represented by John S. Hillery, Johnson's project manager.

Hillery participated in the scheduled pre-hearing telephone conference on Johnson's behalf. The Secretary was represented by Solicitor's Office attorney, Kenneth Walton. During the pre-hearing conference, Hillery stated that he intended to call Johnson's employee witnesses, including Superintendent Eugene Gentry. Hillery advised that he might also call the employees of one or more

of the subcontractors. At the conclusion of the pre-hearing conference, the parties were reminded that if the case was not resolved by settlement, I would see each at the hearing on July 3, 1997. Several days before the scheduled hearing, my office spoke with Hillery and with counsel for the Secretary. Each advised that settlement was not possible. Each further stated that he was ready to proceed to hearing (Tr. 4). In addition, counsel for the Secretary spoke with Hillery within a week of the hearing, and Hillery assured him that he would be at the hearing (Tr. 38).

The Secretary's counsel and witness appeared on July 3, 1997, at the designated time and place in Canton, Ohio. Neither Hillery, Gentry, nor any other witness appeared for respondent. I requested that my office contact Johnson to determine why Hillery had been delayed past the starting time for the hearing. Having reached Hillery in Herndon, Virginia, by telephone, Hillery advised my office that he did not intend to appear and that Superintendent Gentry informed him that morning that he would not attend either. Hillery made no effort to notify my office or opposing counsel of his decision not to participate in the hearing which he had requested. The Secretary's counsel moved to dismiss arguing that Johnson had abandoned the case. A ruling on the motion was deferred.¹ As discussed more fully below, the Secretary presented evidence which established Johnson's *prima facie* violation of each of the cited standards.

The Inspection

OSHA Compliance Officers Diane Fossum and Tom Henry inspected the Johnson worksite on March 18, 1997, and again visited the site on March 19, 1997. On March 18, 1997, Fossum waited in a parking lot adjacent to the Johnson site to meet fellow compliance officer Henry. They intended to begin an unrelated, scheduled inspection at another location. From the parking lot, Fossum observed individuals on the Johnson jobsite walking on trusses on top of a building and walking or climbing on a scaffold. No fall protection was in use (Exh. C-1; Tr. 13-16). Based upon her observations, when Henry arrived, the compliance officers determined that they should inspect the Johnson site. They identified themselves to Johnson's Superintendent Gentry, who was Johnson's only employee there. Gash Concrete Corp. (Gash), the concrete subcontractor, also had employees on the site at the time of the inspection. Gash's employees were the individuals Fossum observed from the parking lot (Tr. 34).

¹ Respondent has not requested reinstatement pursuant to Commission Rule 64(b). Because of the disposition of the case on the merits, it is unnecessary to rule on the Motion to Dismiss.

In addition to the lack of fall protection, the scaffolding being used by Gash's employees was not fully planked. The sizes of the planking varied, and the planking was not secured to the scaffold. Ladders resting on the scaffold 18 to 20 feet above the ground, likewise, were not secured. The employees worked around and under the scaffolding without wearing hard hats or other head protection (Exh. C-2, C-3; Tr. 19-20, 36). Fossum and Henry completed Johnson's inspection mid-morning and left for their previously planned inspection site.

The next morning on March 19, 1997, while waiting at the same parking lot, Fossum noticed employees on the Johnson jobsite working from a 14-foot high platform, again without fall protection. The compliance officers returned to the Johnson site to advise Gentry of their observation. Gentry was in Johnson's job trailer when they arrived. The trailer window afforded a clear view of the platform and the employees' activities (Exh. C-5, C-6; Tr 26-27).

Citation 1

Items 1 and 2: §§ 1926.20(b)(2) and .21(b)(2)

The Secretary asserts that Johnson did not properly inspect the worksite for safety hazards and that it failed to train employees to recognize and avoid hazardous conditions. Johnson's pre-hearing position was that the individual subcontractor alone was responsible for the safety of its employees. Johnson's position ignores the fact that a prime contractor may be liable for violations to which a subcontractor's employees are exposed, if the prime contractor has general supervisory authority over the worksite and has notice of the violations.

Johnson had control over the worksite (Tr. 29). Because of the obviousness of the fall protection, scaffolding, and head injury hazards, Johnson had notice that it should take steps to assess the safety of the jobsite. Specifically referring to a contractor's obligation to inspect and train, "generally speaking, it is primarily the general contractor's responsibility to coordinate the subcontractors." *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1412 & n.4 (No. 89-1206, 1993). *See also A/C Electric Co.*, 15 BNA OSHC 1425, 1427-28 (6th Cir., 1991); *Blount Intl., Ltd.*, 15 BNA OSHC 1897, 1899-1900 & 1902-03 (No. 89-1394, 1992).

Gentry advised Fossum that he had not inspected the site for safety nor did he seek documentation that any subcontractor inspected for safety (Tr. 23, 24). In fact, Fossum and Henry determined that Gash had not made a safety inspection of its work operations either (Tr. 36). It is questionable whether Johnson gave Gentry the means to determine compliance with safety

requirements. On its Canton jobsite, Johnson had no hazard communication program, no safety and health programs, no training documents, no emergency evacuation or response procedures, and no other documents relating to safety. In spite of the fact that Johnson began work on the project more than a month before the inspection, Gentry “was still waiting on programs from the main office” (Tr. 22-23, 33).

Likewise, Johnson made no effort to train, to coordinate training, or to seek documentation from subcontractors that employees had been trained to perform their work safely. Gash had no documented training or safety programs for its employees (Tr. 32, 35-36). Gentry’s attitude toward safety is understood from his explanation to Fossum that he did not wear a hard hat or seek to enforce a hard hat policy because he had been told “OSHA is not strong on it so, therefore [I] did not implement it” (Tr. 37).

Johnson, a controlling employer with notice of the hazards, made no effort to coordinate inspections or training on the jobsite. Johnson, through Gentry, had knowledge of this omission. Johnson violated §§ 1926.20(b)(2) and .21(b)(2). Employees were exposed to fall hazards from platforms and scaffolds and head injuries from falling debris. Ignoring the hazards and failing to train employees to avoid such hazards subjected employees to the possibility of death or serious physical injury. The violations are affirmed as serious.

Penalty

In arriving at an appropriate penalty, the Commission must give “due consideration” to the size of the employer’s business, the gravity of the violation, the employer’s good faith, and history of past violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

Johnson had 20 employees at the time of the inspection and is a small employer. The Secretary correctly concluded that no credit for good faith is available to Johnson. Johnson ignored its safety and health responsibilities. Other than perhaps having a safety checklist, which may have existed at its home office but not on the site, Johnson had no safety program or training for its employees. Johnson’s past history is assessed as a positive factor. It had not been previously inspected and had no record of previous violations. Five employees were affected (Tr. 31, 35, 37). The gravity of the violation is moderately high because of the likelihood of falls or head injuries on

a jobsite without safety inspections and where employees were untrained in safety. Recommended penalties totaling \$1,200 are assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Item 1, § 1926.20(b)(2) is affirmed. A penalty of \$ 600 is assessed.
2. Item 2, § 1926.21(b)(2) is affirmed. A penalty of \$ 600 is assessed.

NANCY J. SPIES
Judge

Date: July 23, 1997