



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NORTHWEST ERECTORS, INC.,
Respondent.

OSHRC DOCKET
NO. 95-1687

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 13, 1996. The decision of the Judge will become a final order of the Commission on June 12, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 3, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 13, 1996

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NORTHWEST ERECTORS, INC.,

Respondent.

DOCKET NO. 95-1687

Appearances:

Donald K. Neely, Esquire
Matthew Rieder, Esquire
U.S. Department of Labor
Office of the Solicitor, Region III
Philadelphia, Pa.
For Complainant

James F. Sassaman
General Building Contractors
Association, Inc.
Philadelphia, Pa.
For Respondent

Before: Administrative Law Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, *et seq.*) hereinafter referred to as the "Act". Respondent, Northwest Erectors, Inc. ("Northwest"), at all times relevant to this action maintained a worksite at 893 River Road, Conshocken, Pennsylvania, where it was engaged in metal decking of the roof at this construction site. Northwest admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 25, 1995, Compliance Safety & Health Officer ("CO") George R. Boyd of the Occupational Safety and Health Administration conducted an inspection of the aforementioned worksite (Tr.14-15). As a result of this inspection, Northwest was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.105(a) and 1926.752(f). The total

proposed penalty was \$6,000.00. By timely notice of contest Northwest brought this proceeding before the Occupational Safety and Health Review Commission ("Commission").

On February 27, 1996, hearing was held in Philadelphia, Pennsylvania. At the commencement of the hearing the parties stipulated to the settlement of Citation 1, Item 1, alleging a violation of 29 C.F.R. §1926.105(a) with a penalty of \$1,500.00 (Tr. 5).¹ Remaining at issue is Citation 1, Item 2, alleging a violation of 29 C.F.R. §1926.752(f). The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

During the course of CO Boyd's inspection of the subject worksite, he had occasion to climb what was identified as "Stairway A", located on the north side of the building. Upon reaching the roof elevation of the stairway, he observed workers, who were subsequently identified as Northwest employees, "placing some type of steel in between or around some solid web roof joints" (Tr. 19). He observed the employees walking towards the center of the building, from an area where they had just installed or placed a piece of steel (Tr. 20-21). He observed that the decking to the east of him and "a little bit in the front of him" had been tack welded. However, the area where he observed employees walking did not "appear" to have been tack welded (Tr. 21 & 153). CO Boyd testified that while he was video taping the roof, employees carried a second piece of structural steel and placed it on top of the decking that was allegedly unsecured (Tr. 21). CO Boyd video taped an employee lifting a sheet of decking, which he had just laid, so that it would "overlap properly" (Tr. 49, Video Counter Nos. 7:35-7:38). CO Boyd also testified that when an area has been tack welded, a black mark is usually left which can be observed for some distance (Tr. 21).² CO Boyd testified that he did not attempt to walk out onto the deck during his inspection because he was not sure that the decking had been secured in all areas (Tr. 46-48).

CO Boyd issued a citation for a violation of 29 C.F.R. § 1926.752(f) because "[t]he

¹On April 15, 1996, a completely executed *Partial Stipulation of Settlement* was submitted to this Court. On April 19, 1996, this Court entered a *Consent Order Approving Settlement*.

² John Gaughan, Project Superintendent for Turner Construction Company, testified that because this deck was galvanized the tack weld had a silver coloration (Tr. 82).

decking that employees were working on was not secured, it was not tack welded in place.” (Tr. 22) He determined that the employees who walked across the decking, which had not been tack welded, were exposed to the hazard of the decking becoming displaced. This displacement could cause an individual to fall through an opening to the concrete floor below or cause an individual to fall and “end up straddling the roof joists” (Tr. 22 & 51).

Northwest presented testimony from two witnesses, who were present at the subject jobsite on the day of the inspection, Harry Anuszkiewicz, Territorial Safety Director for Turner Construction Company, and Michael Walsh, foreman for Northwest. Both of these witnesses were present at the subject worksite on a consistent basis. They testified that Northwest employed a system of laying deck on this project which consisted of interlocking, overlapping and welding to secure the decking during the roofing sequence (Tr. 101,106-107, 112-114)..

Mr. Walsh, an ironworker for 25 years, described the metal sheets as three foot wide and varying in length from fifteen feet to thirty-two feet. He estimated that the metal decking weighed approximately 125 to 150 pounds (Tr. 111).³ He described the sequence of laying deck. He explained that a 30 foot sheet is laid and one end is tack welded. It is realigned and usually tack welded in the middle with one or two tacks. It is then tack welded at the very end. (Tr. 113-114). He explained that tack welding is not always visible because of this the sequence. He testified that the cited area, where employees were observed walking, contained overlapped decking. The area which had been spot welded had been overlapped by four inches, thus, covering the tack welds (Tr. 118-119).

³The Secretary, in his *Reply Brief*, disputes Mr. Walsh’s calculations with regard to the weight of a 3 by 15 foot sheet of metal decking, i.e., 150 pounds. The Secretary points out that in view of Mr. Walsh’s testimony that Respondent’s Exhibit R-2(a) and (b) - a three foot section of decking - weighed five to six pounds, a 3 by 15 foot sheet weighed substantially less than 150 pounds. This court finds that the 150 pound weight applied to the longer sheets of metal decking in light of the following: (1) the Secretary’s Proposed Finding at No. 6 which sets forth that the panels of metal decking were 3 feet wide and 20 to 30 feet in length (Secretary’s *Reply Brief*, at p. 4) ; (2) Mr. Welsh’s testimony that the sheets ranged from 3 feet wide and 15 to 32 feet in length (Tr. 111); and (3) Mr. Gaughan’s testimony that the sheets on this project ranged from 3 feet wide and 20 to 30 feet in length (Tr. 79).

Alleged Violation of §1926.752(f)

Serious Citation 1, Item 2 alleges:

29 C.F.R. §1926.752(f): a) Roof - Metal decking was not laid tight and secured to prevent movement while employees worked and walking on the decking. Employees were exposed to a fall hazard of about 20 feet to the concrete floor below.

The cited standard provides:

(f) Metal decking of sufficient strength shall be laid tight and secured to prevent movement.

Discussion

Counsel for the Secretary contends in his post-hearing brief that “[t]he question presented by this case is whether metal decking must be tack welded in order to be ‘secured’ under §1926.752(f)”. The Secretary contends that “tack welding is a requirement to secure decking”. (Secretary’s Post-Hearing Brief p. 8). To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991).

The record is clear that the employees of Northwest were involved in the installation of metal decking at the subject worksite. Thus, the standard is applicable. The Secretary however, has not proven that the terms of the standard were not met. Thus, a prima facie case of a violation cannot be met. The evidence within the record does not indicate that the decking was not secured to prevent movement. The evidence establishes that during the laying of the metal decking, prior to welding, an employee could lift a sheet for realignment purposes or as CO Boyd described to “overlap properly” (Tr. 49). The sheets were also straightened out or twisted with a piece of wood (“4 by”) in order to align them (Tr. 112-113). However, once the sheets of metal decking were laid down, several methods of securing the decking were employed. The overlapping method involved the side by side overlapping of the metal decking sheets, one over the other, by four to six inches (Tr. 79). The interlocking method involved taking the lipped ends of two sections of metal decking and locking one end over the other end. As described by the

Secretary's witness, Mr. Gaughan, on cross examination, the female and male ends are locked into one another (Tr. 79-80). Once the decking was properly aligned, it was tack welded in place at strategic locations.

In support of its position, Northwest presented the testimony of expert witness, Mr. Charles Culver, Ph.D., PE, a consulting engineer whose specialty is structural engineering with an emphasis on steel structures (Tr, 121 & 125). He was formerly employed as the Director of the Office of Construction and Engineering for the Occupational Safety and Health Administration. It was his expert opinion that the subject metal decking met the requirements of the standard's mandate that decking be secured (Tr.132). He further testified that given an area where tack welding was not done, if the area had been overlapped and interlocked, it would meet the requirements of the standard (Tr. 136) He opined that the term "secured" meant that the decking would not jiggle around excessively and would not move or open up enough for someone to fall through (Tr.136). Furthermore, based upon his calculations, it would have taken a significant amount of weight and exertion to have moved the overlapped sheets of metal decking. For example, it would take 40 pounds of exertion to push a single 150 pound unattached sheet; and if two sheets were overlapped, and not tack welded, it would have taken 80 pounds of exertion (TR. 137). This Court finds Mr. Culver's testimony persuasive in light of his expertise in the steel structures field.

Mr. Culver also presented convincing evidence in response to a statement made by CO Boyd during the Secretary's presentation of rebuttal. CO Boyd stated that there was enough flexion in this steel that could cause several sheets to be displaced if someone were to kick it or step on it (Tr. 152). He believed that within the small lapped area of the interlocked frame there existed enough play for the sheet to move, if someone were to kick the space created by the lapped area measuring approximately 3/4 inches (Tr. 152) although overlapped and interlocked, was still subject to displacement or movement because there was an approximate three-quarter inch play in the small lipped frame sitting inside a valley of steel (Tr. 152). Mr. Culver, however, presented testimony which demonstrated the difficulty in kicking up the sheets of metal decking, which varied in weight, and creating a hole large enough (at least 2 foot square) for an individual to fall through (Tr. 154-156).

As previously found by a Commission Judge the "standard does not prescribe the

particular means necessary for compliance.” *Metro Steel Deck Erectors, Inc.*, 7 BNA OSHC 1369, 1370 (No.78-2544, 1979)(Judge DeBenedetto). The standard only mandates that the decking of sufficient strength be laid tight and secured to prevent movement. The standard does not mandate that “tack welding” be the sole means of security against movement. The system which Northwest employed to lay decking utilized several methods to secure the deck against movement. It was CO Boyd’s testimony that the area employees were observed walking had not been tack welded, and thus, unsecured and violative of the subject regulation. The record contains sufficient evidence which indicates that the decking was in fact secure against movement. Mr. Walsh’s testimony with regard to the “invisible” tack welding of the sheet of decking under the overlap is credited in light of the fact that, as foreman of this jobsite, he was familiar with the sequence of laying deck (Tr. 113-114 & 117-118). Additionally, the Secretary presented no testimony to discredit his assertions. Moreover, the testimony of Mr. Culver with regard to the security of the deck, absence the tack welding, was also convincing.

This court also notes that the Secretary’s witnesses acknowledged that there are different methods of securing decks such as tack welding, clamping, screwing, and fastening. James Gaughan, Turner Construction’s Project Superintendent for this worksite, testified that different decking systems have their own internal or their own systems which include overlapping, interlocking, and bolting the sheets together (Tr. 76 & 79) . He had visited the subject worksite the day before CO Boyd’s inspection, and observed that the deck had been overlapped and interlocked as well as tack welded in places. On cross examination, he testified that he did not believe that, absent tack welding, foot traffic would have dislodged the decking in light of the system installed (Tr. 83).

The Secretary also presented testimony, with regard to the alleged hazard, from Herbert Washington, a former Occupational Safety and Health Specialist. He testified that in 1987, he had inspected a fatality which involved metal decking. The decking had become dislodged while two employees carried metal sheets across unsecured decking. He testified that the decking had not been secured by clamping, welding, or any other means, and that the decking had not been interlocked or overlapped (Tr. 89-90).

Findings 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 ORDERED that the remaining violation contained in Docket No. 95-1687 be disposed of as follows:

Serious violation of Citation No. 1, Item 2, §1926.752(f), is VACATED.



Covette Rooney

Judge, OSHRC

Dated:

Washington., D.C.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR:
UNITED STATES DEPARTMENT OF LABOR

OSHRC DOCKET
No. 95-1687

Complainant

INSPECTION
No. 123256018

v.

NORTHWEST ERECTORS, INC.,

Respondent

CONSENT ORDER APPROVING SETTLEMENT

The parties advise that Citation 1, Item 1 has been amicably resolved and agree to entry of the order set forth below.

Citation 1, Item 2 is still at issue. The case was tried before this Administrative Law Judge on February 27, 1996 in Philadelphia, Pennsylvania and is still active. It is therefore ORDERED that:

1. The Stipulation of Settlement agreement is approved and the terms thereof are incorporated into this Order.

2. The citation item and proposed penalty is affirmed, modified or vacated in accordance with the Stipulation of Settlement agreement.

3. The total penalty associated with the affirmed citation item amounts to \$1,500.00.



Honorable Covette Rooney
Judge, OSHRC

Dated: 4-19-96