United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
PECK AND HILLER CO.
Respondent.

OSHRC DOCKET
NO. 95-0362

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 February 20, 1996. The decision of the Judge will become a final order of the Commission on March 21, 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 March 11, 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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.

Date: February 20, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0362

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. PECK AND HILLER COMPANY, Respondent.	OSHRC DOCKET NO. 95-0362

APPEARANCES:

For the Complainant:
Rochelle Kleinberg, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
Robert D. Peterson, Esq., Rocklin, California

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, (Peck), at all times relevant to this action maintained a place of business at Everett Naval Station, Everett, Washington, where it was engaged in concrete form shoring. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 6, 1995 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Peck's Everett work site . As a result of that inspection, Peck was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Peck brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 9, 1995, a hearing was held in Seattle, Washington, and this matter is ready for disposition.

Facts

On February 6, 1995, in response to an employee complaint, Compliance Officer (CO) Michael Bonkowski conducted an inspection of a work site at the bachelor enlisted quarters of the Everett Naval Station (Tr. 6). On the third floor, Bonkowski found a wire rope guardrail which was installed 49 inches above the top of the rebar floor (Tr. 10-11). A second wire rope guardrail was very slack, and sagged from 44" at its points of attachment to within 30" of the floor midway between its two supporting columns (Tr. 11-12). Eight employees of the steel erection contractor on the project, Carbek Steel, were exposed to the hazardous condition (Tr. 12).

At the time of the inspection, Peck's employees were working on the second floor building formwork (Tr. 13). CO Bonkowski did not speak to any Peck employees regarding the third floor guardrails, but discussed the fall protection they were using on the second floor (Tr. 13, 24, 44). In that location all the Peck employees were properly using body harnesses or were working inside properly installed guardrails (Tr. 24). Peck had finished working on the third floor more than a week prior to the OSHA inspection; the was no evidence that any Peck employees had been in the area since (Tr. 29, 40, 43). Bonkowski stated that Peck's superintendent told him the lines on the third floor had been installed more loosely than those on the second floor because of problems with the lines pulling the vertical concrete forms out of plumb (Tr. 26). Bonkowski admitted he made no effort to determine whether the slack wire rope was, at the time of the inspection, in the same condition in which it had been installed (Tr. 41, 51).

The general contractor, Mortenson, was contractually responsible for maintaining the guardrails once Peck had ceased using them for their own employees (Tr. 40, 48, 63, 66).

Alleged Violation of §1926.502(b)(1)

Citation 1, item 1 alleges:

29 CFR 1926.502(b)(1): The top edge height of top rails, or equivalent guardrail system members, was not 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level:

a.) The guardrail on the west side of the third floor north wing of the BEQ was 49 inches above the rebar.

b.) The top rail of the wire rope guardrail along the north side of the third floor north wing of the BEQ was so loose that, under its own weight, it deflected to within 30 inches of the walking surface.

The cited standard provides:

> (b) "Guardrail systems." Guardrail systems and their use shall comply with the following provisions: (1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or should have known of the 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), *citing Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶25,578, pp. 31,899-31,900 (No. 78-6247, 1981).

The record establishes that the cited conditions were in violation of §1926.502(b)(1). Moreover, the record establishes the exposure of Carbek Steel's employees. The Commission has specifically held that it will impose liability on a subcontractor who creates or has control over a hazard even though only the employees of other subcontractors are exposed to the hazard. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 1992 CCH OSHD ¶29,923 (No. 90-2873, 1992).[1] Peck, however, maintains that the Secretary failed to show that Peck had knowledge of the violative conditions, contending that Mortenson, the general contractor, had contractually assumed control over the guardrails' maintenance over a week prior to the OSHA inspection.

First, it is well settled that an employer may not contract out of its statutory responsibilities under the Act. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198 n.13, 1975-76 CCH OSHD ¶20,691 (Nos. 3694 & 4409, 1976). As the Fifth Circuit stated in *Brock v. City Oil Well Service, Co.*, 795 F.2d 507 (5th Cir. 1986), the employer may elect to ensure the protection of employees by contracting out with others; however, the duty to provide the protection remains the employer's. "[I]f it does so and if those duties are neglected. . .he must take the consequences, and his further remedy lies against the private party with

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[1] Though the circuits are split on the Commission's application of the multi-employer doctrine, *See, Anthony Crane Rental, Inc., v. Reich*, No. , (D.C. Cir. December 1, 1995). [slip opinion], the ninth circuit has adopted it. *See, Beatty Equip. Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir. 1978).

whom he has contracted and whose breach exposes the employer to liability." *Id.* at 512, *citing Central of Georgia Railroad Company v. OSHRC*, 576 F.2d 620, 625 (5th Cir. 1978). Despite its contractual arrangements with Mortenson, therefore, Peck remained responsible for hazards stemming from the guardrails it erected.

Secondly, although Peck claims lack of knowledge of the condition of the third floor guardrails at the time of the OSHA inspection, at the hearing Peck's counsel failed to introduce any evidence regarding the condition of the guardrails at the time that they were initially installed. Moreover, Peck admitted that the guardrails were loosely installed to avoid pulling the concrete forms out of plumb. Absent any evidence that the guardrails were initially installed correctly, this judge can only conclude that the guardrails were initially installed in the condition observed by CO Bonkowski, and that Peck had knowledge of the violation.

The Secretary has established the cited violation.

Having affirmed the citation on the basis of the sagging guardrail, it is unnecessary to discuss the other allegation that a second guardrail was installed 4" too high. Assuming the existence of that violation, however, it is my view that such deviation from the specifications is not a "serious" violation.

Penalty

The Secretary proposes a penalty of $900.00. CO Bonkowski established that a fall 25 feet from the third floor over the sagging guardrail would likely suffer broken bones and hospitalization, or death (Tr. 27). That violation was properly classified as "serious." Bonkowski believed the probability of an accident occurring was low and classified the gravity of the violation as moderate (Tr. 27). Deductions were allowed for size, good faith and prior history (Tr. 28).

To the extent the proposed penalty includes a portion for the guardrail of excessive height, the gravity is overstated. Accordingly a penalty of $450.00 is assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.502(b)(1) is AFFIRMED, and a penalty of $450.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: February 9, 1996