UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
GILBANE BUILDING COMPANY
Respondent.

OSHRC DOCKET
NO. 92-2782

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 September 2, 1993. The decision of the Judge will become a final order of the Commission on October 4, 1993 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 September 22, 1993 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
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Review Commission
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Petitioning parties shall also mail a copy to:

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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: September 2, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2782

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-2782
GILBANE BUILDING COMPANY	:	
Respondent.	:	

Appearances:

For Complainant

Anita Eve Wright, Esq.
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania

For Respondent

James F. Sassaman
Director of Safety
General Building Contractors Association, Inc.
Philadelphia, Pennsylvania

John W. DiNicola, Esq.
Vice President and General Counsel
Gilbane Building Company
Providence, Rhode Island

Before: Administrative Law Judge John H Frye, III

DECISION AND ORDER

I INTRODUCTION

Respondent, Gilbane Building Company, is a construction contractor which had overall responsibility as construction manager for the Sterling Drug project located in Collegeville, Pennsylvania. As a result of OSHA's general schedule inspection of that

project conducted between April 21 and May 6, 1992, Respondent was issued one serious and one other-than-serious citation. The serious citation alleged five violations and the other-than-serious alleged one violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, as amended (Act). Respondent contested these allegations. Following the filing of a complaint and answer, a hearing was held on March 11, 1993. This decision resolves the matters in contest between the parties concerning these citations.

II OPINION

Respondent was issued the violations which are the subject of this proceeding under the multi-employer worksite doctrine because Respondent was responsible for the overall safety of employees at the worksite, despite the lack of direct exposure of any of its employees to the alleged hazards and without regard to whether Respondent created the hazardous situation. See *Secretary v. Grossman Steel & Aluminum Corporation*, 4 BNA OSHC 1185 (Rev. Com. 1975); *Secretary v. Anning-Johnson Company*, 4 BNA OSHC 1193 (Rev. Com. 1975). Respondent has not contested the proposition that it was responsible for overall safety at the worksite, nor has it contested the penalties assessed.

Respondent has defended against the citations by arguing that its witness, William A. Boozer, is more credible than OSHA's witness, CSHO Henry T. Doherty, Jr., and by pointing to Respondent's earnest and resolute promotion of safety on this jobsite. (See Respondent's brief, pp.2-5.) It is clear that Respondent has an outstanding and successful safety program. CSHO Doherty recognized this. (See TR 80; RX 1.)

However, Respondent has advanced no reason generally to discount CSHO Doherty's testimony. Both he and Mr. Boozer were forthright, experienced in construction, and knowledgeable with regard to OSHA requirements. Moreover, the fact that three violations were found in a project as large as the one in question should not be taken as indicating that Respondent's safety program is deficient or that OSHA made an effort to allege violations where none existed. It strains credulity to assert that any project of the size and complexity of this one could be conducted with no violations of OSHA requirements.

1. Citation 1, Items 1(a) and 1(b) - Alleged Violation Of 29 CFR 1926.104(c) Pertaining to Lifelines.

Item 1(a) was issued for a violation of 29 CFR 1926.104(c)[1] because a subcontractor's employee allegedly used a fibrous rope, lacking a wire core, as a lifeline in an area where it was subject to cutting by a drywall cart and by abrasion from the cement column to which it was tied. The compliance officer testified that the employee wore a safety belt with a lanyard which was hooked to an eye in the fibre core rope. The employee received drywall as it was unloaded onto the fourth floor through the wall opening, placed the drywall onto a cart, and moved it to work or storage areas on the floor. (TR. 21-23; GX 2(a)). Item 1(b) was issued because the employee allegedly used a defective wire rope for the same purpose. The Compliance Officer did not observe the wire rope in use, but testified that the employee told him that he had used it but set it aside in favor of the fibre rope which he liked better.[2]

At the hearing, some dispute arose as to whether the subject rope was a fall arrest or a restraint device. CSHO Doherty testified that he made the determination that the rope which is the subject of Citation 1, Item 1(a) was a lifeline because he observed the employee working in an area where he appeared to be exposed to a potential fall hazard.

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[1] Section 104(c) provides:

> Lifelines used on rock-scaling operations, or in area where the lifeline may be subjected to cutting or abrasion, shall be a minimum of 7/8-inch wire core manila rope. For all other lifeline applications, a minimum of 3/4-inch manila or equivalent, with a minimum breaking strength of 5,400 pounds, shall be used.

[2] Respondent defended against this citation in part by casting doubt on the assertion that the wire rope was used by the employee. Respondent's witness, William Boozer, testified that he interviewed the masonry contractor foreman following the conclusion of the inspection, and learned that the wire rope had been used as part of a tag line system to control a load of scrap masonry material being moved so that the load did not swing. (TR. 148).

CSHO Doherty had a conversation with the exposed employee, but he could not recall whether the employee referred to the rope as his lifeline. However, because the conversation included the discussion of safety belts and lanyards, he strongly believed that the rope was identified as a lifeline during the conversation. (TR. 116-117). To the contrary, Respondent contended that the rope was an application of a restraint system which Gilbane utilizes as a means to avoid the need for fall protection in its safety program (Tr. at 134). Respondent's witness William Boozer explained that the fibre rope to which the employee had attached his lanyard was a restraint system which did not permit the employee to reach a point where he needed a fall arrest system:

> The rope was being used as a restraint device, it was tied to a column back inside of the building, its measured out length, plus the length of the lanyard of the gentleman who was tied to it was so measured out so that the employee tied to it and could pull on it, he was maintained at least 3 feet back from the fall edge of the building.

(Tr. at 140). Mr. Doherty's unverified assumption to the contrary must give way to this unequivocal and unchallenged statement; the findings reflect the rope's use as a restraint system.

The Secretary maintains that OSHA regulations do not draw a distinction between ropes used as fall protection and those used as part of a restraint system. Instead, a lifeline is defined in Section 1926.107(c) as "a rope, suitable for supporting one person, to which a lanyard or safety belt (or harness) is attached." Thus, regardless of the characterization given to the rope used by the employee with respect to Item 1(a), the rope met the definition set forth in Section 1926.107(a) and, given its exposure to cutting and abrasion, use of the rope as a fall arrest system or a restraint device exposed the

employee to a fall hazard which could result in serious physical injuries in the event the rope failed.

While the Secretary is correct that the standard in question does not separately define a restraint system, that argument misses the point of the restraint system: to prevent the employee's access to a fall hazard which requires the use of a lifeline. It is obvious that the physical capabilities of a restraint system need not be as great as those of a lifeline to accomplish this purpose. The Secretary made no attempt to show that the restraint system in use was not adequate to prevent the employee from gaining access to a fall hazard. Consequently, Citation 1, Items 1(a) and 1(b) must be vacated for failure to show employee access to a hazard.

2. Citation 1, Item 2 - Alleged Violation Of 29 CFR 1926.451(d)(10) Pertaining to Fall Protection on Scaffolding.

CSHO Doherty testified that while conducting his inspection, he observed an employee of a subcontractor working on scaffolding which did not have guardrails. The employee ascended the scaffold and reached the 14-foot level work platform where he tied his lanyard off to a wire rope strung throughout the scaffolding for that purpose. Based on these observations, CSHO Doherty issued a citation alleging a violation of 29 CFR 1926.451(d)(10) for failing to equip the scaffold with standard guardrails.[3]

[3]Section 1926.451(d)(10) provides in relevant part:

> Guardrails made of lumber, not less than 2 X 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 X 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

It is undisputed that there were no standard guardrails on the scaffold. Respondent asserts that because the scaffold was erected with a static line with an adequate number of cable clamps to which the employees tied off, guardrails were not required. (TR. 151-152, and 166-170).

A similar argument was made and rejected in *Secretary v. Dick Corporation*, 7 BNA OSHC 1951 (Rev. Com. 1979). Relying on the provisions of the standard, in that case respondent interpreted § 1926.451(d)(10) as requiring employers either to equip their scaffolds with standard guardrails or to provide their employees with some form of "equivalent protection." The Commission rejected this argument, finding that the standard requires that tubular welded frame scaffolds be equipped with guardrails. The Commission noted that under the clear terms of the standard, the "equivalent protection" language relied upon by the employer only referred to the material used in constructing the required guardrails. Thus, the standard does not permit employers to substitute other means of fall protection for guardrails.

Respondent relies on *Secretary v. Western Waterproofing Company, Inc.*, 5 BNA OSHC 1496, 1500 (Rev. Com. 1977), for the proposition that safety belts and lanyards are an alternative to guardrails. *Western Waterproofing* is distinguishable. In that case, Respondent was cited for failing to install required guardrails. It defended on the basis that it lacked control over the site of the missing guardrails and lacked capability to install them. It had, however, taken the alternative step of supplying employees with safety belts and lanyards. The Commission found this to be an adequate defense under the *Anning-Johnson* and *Grossman Steel* cases, *supra*. Here, Respondent does not deny

that it controls the worksite and could install guardrails. Citation 1, Item 2, is affirmed. The proposed penalty in the amount of $2,000.00 penalty is appropriate and is affirmed.

3. Citation 1, Items 3(a) and 3(b) - Alleged Violation Of 29 CFR 1926.500(f)(1)(i) and 1926.500(f)(1)(iv) Pertaining to Construction of Guardrails.

Respondent was issued a citation alleging violations of 29 CFR 1926.500(f)(1)(i), because posts supporting the wood railing surrounding the fourth floor duct shaft were installed at intervals in excess of eight feet, and 29 CFR 1926.500(f)(1)(iv), because the rails were allegedly incapable of withstanding a load of at least 200 pounds with a minimum of deflection.[4]

It is undisputed that the posts were spaced at 9 1/2 foot intervals. CSHO Doherty testified that posts placed in excess of the 8-foot intervals set forth in the standard allows the railings to bend and break and creates a potential for fall hazards. (TR. 48-49; GX 8(a)). He also testified that in the event the railing failed, an employee working and traveling in close proximity to the railing would be exposed to a potential 30 foot fall hazard to a concrete floor. (TR. 49-50 and 63).

In addition to the posts, CSHO Doherty found that, in order to obtain the necessary length, the top rail had been spliced about three feet from its juncture with one of the posts. (TR. 52). Because the posts were 9 1/2 feet apart and there was a splice at

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[4]Section 1926.500(f)(1)(i) states:

> For wood railings, the posts shall be of at least 2-inch by 4-inch stock spaced not to exceed 8 feet; the top rail shall be of at least 2-inch by 4-inch stock; the intermediate rail shall be of at least 1-inch by 6-inch stock.

Section 1926.500(f)(1)(iv) states:

> The anchoring of posts and framing of members for railings of all types shall be of such construction that the completed structure shall be capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail, with a minimum of deflection.

the end of the top railing, the compliance officer believed that the railing would not meet the 200 pound deflection test. (TR. 53). Given the construction of the railing, the Secretary submits that greater tautness was achievable in the top rail at this site and that the amount of deflection exceeded the smallest degree possible for the railing. However, the Secretary offered no evidence of a test to verify this assumption.

Respondent concedes that the posts were more than eight feet apart. However, Respondent argues that the Secretary must demonstrate that the railing in question failed to meet the minimum deflection test of § 1926.500(f)(1)(iv). Respondent's witness, Mr. Boozer, testified that the splice in question was overlapped three feet and secured by several 20-penny nails which were bent over to prevent their pulling out under pressure. Mr. Boozer also testified that, if properly done, the splice should make the railing stiffer and that he had found that railing systems mounted on posts spaced as these posts were sometimes passed and sometimes failed a deflection test. (TR 154-58.)

In view of the fact that the posts were not properly spaced, the Secretary has established a violation of § 1926.500(f)(1)(i). However, nothing in the language of § 1926.500(f)(1)(iv) supports the Secretary's position that failure to meet the required spacing for the posts or the existence of a splice dictates the conclusion that the deflection requirements must be presumed to be violated. Mr. Boozer's testimony that a proper splice can actually strengthen a railing and that the nine and one-half foot spacing may or may not result in excess deflection is uncontradicted and credible. I conclude that the Secretary has not established a violation of § 1926.500(f)(1)(iv).

The Secretary proposed a grouped penalty in the amount of $5,000.00 as proposed for Items 3(a) and 3(b).[5] In view of the fact that the Secretary established a violation only with respect to Item 3(a), I find that a penalty of $2,500.00 is appropriate.

4. Citation 2, Item 1 - Alleged Violation Of 29 CFR 1926.405(a)(2)(ii) Pertaining to Suspension of Temporary Lighting.

CSHO Doherty issued a non-serious citation alleging a violation of 29 CFR 1926.405(a)(1)(ii)(F) for allowing temporary lighting to be suspended by electrical cords which were not designed for such suspension. He testified that he saw temporary lights suspended by THHN wire. He believed the wiring could break or become damaged from contact with lifts or with personnel using the lifts in the area of the wiring, resulting in an exposed energized line. (TR. 58-60; GX 11(a) and 11(b)). The cited condition was non-serious because it posed a hazard of shock or burns, not death or serious injury. (TR. 60).

Respondent contends that this citation should be reclassified as *de minimis* in light of Mr. Boozer's testimony that, in order to reach the wiring and be exposed to the hazard, employees would have to utilize platforms which are insulated, thus making the possibility of injury remote. (See TR 179.) However, Mr. Boozer also testified that the wiring was subject to manipulation by 1200 construction workers. (See TR 181-82.) I find that the item is properly classified.

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[5]Respondent urges that, if affirmed, Item 3(a) should be reclassified as "other-than-serious" and as "de minimis." Respondent has advanced no persuasive argument for these positions.

III. FINDINGS OF FACT

1. Respondent, Gilbane Building Company ("Gilbane"), is a Rhode Island corporation engaged in the construction industry.

2. On April 21, through May 6, 1992, Gilbane maintained a workplace at the Sterling Winthrop Inc. project at 1032 Black Rock Road, in Collegeville, Pennsylvania, which consisted of nine buildings comprising the Sterling Research Group.

3. Gilbane had approximately eighty (80) employees at the Collegeville worksite. Approximately 25 of the 80 employees were superintendents, who acted as safety inspectors. (TR. 131).

4. Gilbane was the construction manager for the 32 trade contractors on the worksite. (TR. 14). Gilbane had a safety incentive program in effect at the worksite to encourage compliance with safety rules by contractors and/or subcontractors. In the event safety procedures were not followed by contractors or their employees, Gilbane issued safety citations. Gilbane also exercised the authority to fire employees on the spot for safety infractions. (TR. 132).

5. On April 21, 1992, CSHO Doherty arrived at the Collegeville worksite to initiate a general schedule safety inspection of the construction work being performed by Gilbane and the construction contractors and/or subcontractors at the site. (TR. 14-15).

6. Upon arriving at the inspection site, CSHO Doherty conducted an opening conference with and explained the nature of the inspection to William Boozer, Loss Control Manager for Gilbane, and the project managers for Gilbane and Sterling Drug.

(TR. 15). William Boozer, Carl Shipley, Lisa Powers, and an unnamed person, present on behalf of Gilbane attended the conference. (TR. 16 and 18).

7. As the result of the inspection of the worksite, violations were issued to Gilbane under the multi-employer worksite doctrine. CSHO Doherty determined that Gilbane was in charge of the overall safety of employees at the worksite, was the controlling contractor, conducted daily safety inspections of the worksite, and had the ability to correct or to direct that violations be corrected. (TR. 20 and 65).

8. Citation 1, Item 1(a) charges a serious violation of 29 CFR 1926.104(c) an employee of a subcontractor allegedly used a lifeline made of a fibrous rope lacking a wire core in an area where it was subject to cutting and abrasion and, at another time, used lifeline made of a defective wire rope. (TR. 21-22, 32-36, 198-99; GX 2(a), 2(b), and 4).

9. The employee worked in close proximity to a 36 foot fall hazard through a wall opening. (TR. 29 and 31; GX 1).

10. The employee used the ropes as a restraint system which maintained a minimum distance of three feet between the fall hazard and the employee. The ropes did not serve as lifelines. (TR. 134-37, 140-45; RX 4, RX 5, RX 6.)

11. Citation 1, Item 2, alleges a violation of 29 CFR 1926.451(d)(10) that requires standard railings on any tubular welded frame scaffold over 10 feet high. In the east atrium of Building 4 of the worksite an employee of a contractor was working at the 14 foot level of a scaffold that did not have a standard railing. The employee had

secured his lanyard to the 5/16 wire rope strung throughout the scaffold for fall protection. (TR. 41; GX 6).

12. Citation 1, Item 3(a), charges a violation of 29 CFR 1926.500(f)(1)(i) that requires that wooden guard railings be supported by posts which are spaced not more than eight feet apart. The wood railing guarding a potential 30 foot fall hazard down a duct shaft to a concrete floor was supported by posts spaced 9 1/2 feet apart. An employee of the dry wall contractor was exposed to this hazard. (TR. 48-50 and 53).

13. Citation 1, Item 3(b), charges a violation of 29 CFR 1926.500(f)(1)(iv) that requires that guard rails be capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail with a minimum of deflection. The guard rail referred to in Finding 12 was supported by posts spaced 9 1/2 feet apart and the top rail was spliced at a point three feet from a post by overlapping the rails by three feet and securing them with several 20-penny nails which were bent over to prevent their being pulled out. (TR. 53, 154-58; GX 8(a) and 8(b)).

14. Citation 2, Item 1, charges a violation of 29 CFR 1926.405(a)(2)(ii)(F) which prohibits the suspension of temporary lights by their electrical cords unless the cords are designed for this purpose. THHN wire, which is not designed to suspend lights, was used to suspend temporary lights. (TR. 57-58; GX 11(a) and 11(b)).

IV. CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce and is subject to the requirements of the Act.

2. Respondent did not violate 29 CFR 1926.104(c) as charged in Citation 1, Items 1(a) and 1(b).

3. Respondent violated 29 CFR 1926.451(d)(10) for failing to erect guardrails on the tubular-welded frame scaffold at the worksite. The violation is properly classified as serious.

4. A penalty in the amount of $2,000.00 for the violation was calculated in conformity with the requirements of Section 17(j) of the Act and is an appropriate penalty.

5. Respondent violated 29 CFR 1926.500(f)(1)(i) for failing to install posts spaced at eight-foot intervals under the railing at the fourth floor duct shaft. The violation is properly classified as serious.

6. A penalty in the amount of $2,500.00 for this violation was calculated in conformity with the requirements of Section 17(j) of the Act and is an appropriate penalty.

7. Respondent was not shown to have violated 29 CFR 1926.500(f)(1)(iv) with regard to the anchoring of posts and framing of members for the guardrail around the duct shaft.

8. Respondent violated 29 CFR 1926.405(a)(1)(ii)(F) by suspending temporary lights by their electrical cords which were not designed for such suspension. The violation is properly classified as other-than-serious.

9. In conformity with the requirements of Section 17(j) of the Act, no penalty was proposed for Citation 2, Item 1.

10. Respondent is liable for these violations and proposed penalties under the multi-employer worksite doctrine.

V. ORDER

1. Citation 1, Items 2 and 3(a), are affirmed as serious violations of the Act.

2. Citation 2, Item 1 is affirmed as an other-than-serious violation of the Act.

3. Total civil penalties of $4,500.00 are assessed.

JOHN H. FRYE, III
Judge, OSHRC

Dated: SEP 21 1992
Washington, D.C.