United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 96-0645
CRYSTAL BUILDERS, Respondent.	:	

Appearances:

Patrick D. DePace, Esquire
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Ronald L. Mason, Esquire
Emens, Kegler, Brown, Hill & Ritter
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Crystal Builders (Crystal) contests a citation issued by the Secretary on May 1, 1996. The citation, which contains two items, resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Anthony Lowe on April 17, 1996, at Crystal's worksite in Dublin, Ohio. Crystal is a small residential framing subcontractor who was in the process of framing a house at 5484 Fawnbrook Lane, Lot 94, in Dublin, Ohio, at the time of the inspection.

Item 1 of the citation alleges a serious violation of § 1926.501(b)(13), for failing to provide fall protection for its employees working at heights of 6 feet or more above lower levels. Item 2 of the citation alleges a serious violation of § 1926.503(a)(1) for failing to provide to its employees training in the recognition of fall hazards.

Crystal denies that it violated the cited standards. Crystal also contends that it is not an employer covered under the Occupational Safety and Health Act of 1970 (Act), and thus the Review Commission has no jurisdiction over it (Tr. 8).

Facts

Crystal was hired as a framing subcontractor for a residential house. Crystal had been on the site for several days prior to the April 17, 1996, inspection. It had begun work on the roof sheathing process approximately two days before the inspection (Tr. 147). When compliance officer Lowe arrived at the site, six Crystal employees were present. One employee was on the roof, sheathing (Exh. G-2; Tr. 13-14).

The house ranged in height from 8 feet to over 20 feet. The pitch of one of the roofs was 12 in 12, and the pitch of another roof was 10 in 12 (vertical to horizontal) (Tr. 16). Crystal provided no guardrail system, no safety net system, and no personal fall arrest system for its employees (Tr. 15).

Jurisdiction

Section 3(5) of the Act defines an employer as "a person engaged in a business affecting commerce who has employees . . .." Section 3(3) of the Act defines commerce as "trade, traffic, commerce, transportation or communication among the several States, or between a State and any place outside thereof . . .."

Crystal's office is located at 21530 Laurel Run Road, New Plymouth, Ohio. Crystal operates as a construction contractor.

It is well-settled that Congress can extend its constitutional jurisdiction through the commerce clause of the Constitution, including over companies that operate only in one State. Statutory jurisdiction under the Act exists where the business is in a class of activity that as a whole affects interstate commerce. *Clarence M. Jones, d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Even if Crystal's activities and purchases were purely local, its construction activities affected interstate commerce because there is an "interstate market in construction materials and services." *Id.* at 1531.

Furthermore, Crystal's owner, Keith Goodfellow, used a cellular phone to call Crystal's safety consultant during Lowe's inspection (Tr. 137). Crystal's cellular phone contract is with Cellular One, a business which operates nationwide. Crystal's use of the cellular phone brings the company within the jurisdiction of the Act. *Usery v. Franklin R. Lacy,* 628 F.2d 1226 (9th Cir. 1980).

Crystal was an employer engaged in a business affecting commerce within the meaning of the Act.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.501(b)(13)

The Secretary alleges that Crystal violated § 1926.501(b)(13), which provides:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.
>
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.
>
> Section 1926.502(k) provides in pertinent part:
>
> *Fall protection plan*. This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See § 1926.501(b)(2), (b)(12) and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment.

The Secretary has the burden of proving that Crystal committed a violation of the cited standard by a preponderance of the evidence. In order to establish a violation of a safety standard, the Secretary must show that: (1) the cited standard applies to the alleged condition, (2) the terms of the standard were not complied with, (3) employees were exposed to or had access to the violative condition, and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218 (No. 88-821, 1991).

1. Applicability of the Standard

Section 1926.501(b)(13) expressly applies to residential construction, in which Crystal was engaged.

2. Terms of the Standard not Complied With

The citation alleges that Crystal's employees "were framing and installing sheeting on a roof having a slope of 10 in 12 (vertical to horizontal) and 12 in 12 without being protected by guardrail systems, safety net systems, or personal fall arrest systems. The distance of the fall ranged from approximately 8 feet to over 20 feet." Crystal does not dispute that its employees were working at heights above 6 feet and that they were not protected by guardrails, safety nets, or personal fall arrest systems.

Crystal contends, however that it had implemented a fall protection plan that brought it into compliance with § 1926.501(b)(13), as modified by OSHA Instruction STD. 3.1. Instruction STD 3.1 indicates that OSHA intends to undertake further rulemaking regarding the fall protection standards for construction. OSHA issued Instruction STD 3.1 on December 8, 1995, to address "the interim fall protection measures that will be acceptable for compliance with § 1926.501(b)(13), residential construction, during the rulemaking period" (Exh. R-1). Crystal relies on the OSHA Instruction as well as on other internal OSHA memoranda to support its contention that OSHA violated its own enforcement procedures. Crystal asserts that the language of STD 3.1, paragraph H, allows an employer to implement a written plan in lieu of the prescribed methods of fall protection in § 1926.501(b)(13) without first showing that the use of those methods would be infeasible or would create a greater hazard.

Crystal asks the court to consider Instruction S.D. 3.1 and the other memoranda when interpreting § 1926.501(b)(13). Under well-established rules of statutory construction, consideration of outside sources is inappropriate where, as here, the standard at issue is unambiguous. *Superior Electric*, 16 BNA OSHA 1494 (No. 91-1597, 1993). Furthermore, the Review Commission has consistently held that OSHA's internal documents do not have the force and effect of law, and do not confer procedural or substantive rights or duties on individuals. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 (No. 87-0922, 1993). Accordingly, this court will not look outside the language of the construction standards to interpret § 1926.501(b)(13).

As noted, Crystal does not dispute that its employees were working at heights above 6 feet without the protection of guardrails, safety nets, or personal fall arrest systems. Section 1926.501(b)(13) provides for an exception to the use of the three named methods of fall protection: "When the employer can demonstrate that it is infeasible or creates a greater hazard to

use these systems," *then* the employer can substitute a fall protection plan in accordance with § 1926.501(b)(13). The Note that accompanies § 1926.501(b)(13) goes so far as to set out a regulatory presumption that conventional fall protection is feasible and does not create a greater hazard. The Note specifies that the employer must show that using the alternative of a fall protection plan is appropriate for a *particular* workplace situation. Thus, the determination that conventional fall protection is either infeasible or creates a greater hazard must be made on a site-by-site basis. The employer cannot, as a matter of general policy, decide that it will treat all worksites as appropriate for a fall protection plan.

In the present case, Crystal failed to establish that it was appropriate to implement a fall protection plan for the particular workplace situation at 5484 Fawnbrook Lane. Crystal employed a safety consulting firm, LRR and Associates (Tr. 133). Claude Wayne Radcliff, the senior field inspector for LRR, prepared a written fall protection plan for Crystal in December, 1995 (Tr. 133, 167). Radcliff testified that he determined, in general, that a fall protection plan was appropriate for all of Crystal's residential construction, in lieu of guardrails, safety nets, or personal fall arrest systems (Tr. 189). Radcliff admitted that he did not make a specific determination regarding the feasibility of using conventional methods of fall protection on the Fawnbrook Lane worksite (Tr. 195, 204).

The Secretary contends that both guardrails and personal fall arrest systems are feasible and posed no greater hazard (Tr. 92). Crystal claims that both of these systems are infeasible, although it is clear from Crystal's objections that it actually is contending that the use of guardrails and personal fall arrest systems constituted a greater hazard.

> In order to establish the affirmative defense of infeasibility, an employer must prove that: (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection.

Armstrong Steel Erectors, Inc., 17 BNA OSHC 1385, 1387 (No. 92-262, 1995).

Crystal has failed to establish part (1) of the infeasibility defense. It does not claim that it would be either technologically or economically infeasible to install guardrails or use personal fall arrest systems, or that the installation of guardrails or the use of personal fall arrest systems would

impede necessary work operations. The concerns expressed by Goodfellow and Radcliff address the hazard presented by implementing the conventional methods of fall protection, not whether the implementation can be effected or afforded.

Thus Crystal's defense will be treated as a greater hazard defense.

> To establish the greater hazard defense, an employer must prove that (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting its employees from the hazards are not available, and (3) a variance is not available or that application for a variance is inappropriate.

Spancrete Northeast, Inc., 16 BNA OSHA 1616, 1618 (No. 90-1726, 1994) *aff'd,* 40 F.3d 1237 (2d Cir. 1994).

The Secretary contends that Crystal could have used either guardrails or a fall arrest system to protect its employees. Rich Burns, an OSHA compliance officer and fall protection specialist, described how guardrails could have been used during Crystals sheathing operations (Tr. 69-70, 93-94, 115). Burns also testified that Crystal could have used a personal fall arrest system called a "super anchor" system at its worksite. The super anchor system consists of a hook for vertical lifelines that is attached to a truss (Exh. R-2; Tr. 91).

Crystal objects to the installation of guardrails, arguing that it is dangerous for employees to disassemble the guardrails from a ladder, as they would be required to do. Goodfellow testified that, "It's just unsafe to work off a ladder and disassemble anything. A ladder is meant to climb up and that's it" (Tr. 133). Radcliff testified that Crystal's employees "are exposed to an equal, if not a greater hazard erecting and removing the guardrails than they are without the guardrails" (Tr. 177). Radcliff objected to the use of a super anchor fall arrest system because an employee could become entangled in the rope, or the anchor could give way (Tr. 171-173).

Crystal's concerns regarding the use of fall protection are general and not specific to the inspected worksite. Crystal's objections appear to be *post hoc* excuses for failing to use the prescribed methods of fall protection. Crystal has failed to establish by a preponderance of the evidence that the hazards created by using guardrails or a super anchor system are greater than not using the fall protection. Furthermore, Crystal has adduced no evidence that a variance was unavailable or that application for one was inappropriate.

Crystal has failed to establish a greater hazard defense. Crystal was in noncompliance with the terms of § 1926.501(b)(13).

3. Exposure of Employees

Compliance officer Lowe observed an employee working on the roof of the house at Fawnbrook Lane with no fall protection (Exh. G-2; Tr. 13). The employee was exposed to a fall greater than 6 feet.

4. Knowledge of Employer

Goodfellow owns Crystal. He was present at the site when Lowe arrived for his inspection. An employee was on the roof without fall protection, in the presence of Goodfellow (Tr. 13). Crystal knew of the violative condition.

The Secretary has established that Crystal violated § 1926.501(b)(13). The Secretary alleges that the violation is serious. The hazard created by Crystal's violation was that of a fall ranging from 8 feet to 21 feet. Such a fall would probably result in death or serious physical injury. The violation is serious.

Item 2: Alleged Serious Violation of § 1926.503(a)(1)

The Secretary alleges that Crystal violated § 1926.503((a)(1), which provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Goodfellow testified that every employee Crystal hires "gets trained right then on the spot" (Tr. 140). Goodfellow described the training he provided in the recognition of fall hazards (Tr. 141):

> You know, "if you're not able to be on the roof or work right on a roof, I don't want you on it, you know, if you get a little dizzy, I don't want you on it. You are to put slide boards on the roof." I tell them I don't want them hurt or dead. I want them working every day, the next day.

Goodfellow testified that he did not discuss guardrails, safety nets or personal fall arrest systems. Goodfellow did not train Crystal's employees to evaluate whether any of the three systems are feasible on a particular job (Tr. 141).

Goodfellow's testimony corresponds with that of compliance officer Lowe, who interviewed Crystal's employees regarding fall protection training. Lowe states (Tr. 29):

> I learned from the discussions that they were task trained is the terminology that they used which was, according to them, that they were trained in particular job tasks that they were doing so they wouldn't have to use any type of fall protection that we feel is acceptable to be used in this situation.
>
> So basically, I learned from them that they didn't use any type of fall protection such as personal fall arrest systems, safety nets, guarding.

Crystal failed to train its employees in the recognition of fall hazards and in the procedures to be followed in order to minimize these hazards. Goodfellow's admonitions to Crystal's employees do not approach the requirements of the standard. Crystal was in violation of § 1926.503(a)(1). The violation is serious. Failure to train employees in the recognition of fall hazards could result in death or serious injury.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Crystal employs 10 employees (Tr. 55). Crystal had previously been cited for violating the Act (Tr. 33). There was no evidence of bad faith on the part of Crystal. The gravity of items 1 and 2 is high. Falls from the heights at which Crystal's employees were working pose a serious hazard.

It is determined that a penalty of $2,000.00 each for item 1 and item 2 is appropriate.

Findings of Fact 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 hereby ORDERED that:

1. Item 1 of the citation is affirmed and a penalty of $2,000.00 is assessed; and

2. Item 2 of the citation is affirmed and a penalty of $2,000.00 is assessed.

KEN S. WELSCH
Judge

Date: