Secretary of Labor,
Complainant,
v.

Watkins Engineers & Constructors, Inc.,
Respondent.

OSHRC Docket No. **00-0283**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Watkins Engineers & Constructors, Inc. (WEC), is a general construction contractor with approximately 3000 employees. In 1999 WEC was the general contractor for the construction of its own three-story office building in Tallahassee, Florida. WEC contracted the work with various subcontractors, including Buddy's Glass & Window, Inc. (Buddy's Glass), the glass installation contractor (Exh. C-5).

On December 14, 1999, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) John Toth, from the Jacksonville, Florida, OSHA area office, conducted a programmed inspection of WEC's project (Tr. 46). Upon arrival at the site at approximately 8:00 a.m., the CO found that the building was complete and occupied by WEC. Nevertheless, he met with John Jackson, WEC's contract manager. Jackson informed him that the building was completed in late November (Tr. 50). CO Toth mentioned the scaffolding at the rear corner of the building to Jackson who told him that the equipment was being taken away (Tr. 50-51). CO Toth left the building believing that this was a noninspection situation. As he was driving away he saw a man climbing the crossbraces of the scaffolding (Tr. 51-52). He stopped his car and initiated the inspection.

As a result of this inspection, citations were issued to Buddy's Glass and WEC. The citation issued to Buddy's Glass was resolved informally with OSHA. The citation issued to WEC alleged three serious violations: Item 1, 29 C. F. R. § 1926.451(b)(1) for failing to have working levels of the scaffold fully planked; Item 2, 29 C.F.R. § 1926.451(e)(1) for failing to use a ladder to access the scaffold; and Item 3, 29 C.F.R. § 1926.451(g)(1) for failing to protect employees from a fall hazard by failing to have guardrails on the top level of the scaffold. A penalty of $1,875 is proposed for each alleged violation. WEC timely contested the Citation and Notification of Penalty.

The hearing was held on June 30, 2000, in Tallahassee, Florida. The parties stipulate jurisdiction and coverage. WEC alleges that it is not liable for the violations because the Eleventh Circuit Court of Appeals has rejected the multi-employer worksite doctrine. Also, WEC denies it knew or should have known of the alleged violations. Additionally, WEC asserts that the standards cited are not applicable to dismantling of scaffolds.

For the following reasons, the court finds that the Eleventh Circuit has not addressed the multi-employer worksite doctrine. However, the alleged violations are vacated because WEC was not aware, with the exercise of reasonable diligence, of the alleged violative condition. Also, the standards cited do not apply to dismantling of a scaffold.

Background

Although WEC's building was essentially finished and occupied in November, 1999, Buddy's Glass was behind schedule on completing the trim work on the corner windows (Tr. 104). At the time of the OSHA inspection (December 14), three glaziers with Buddy's Glass were on site using the scaffold (Tr. 25). The scaffolding was originally five bucks high; the four bucks up from the ground were each 6 feet high; the top buck was only 4 feet high (Tr. 32, 43). Along one wall of the building, the scaffolding was two bucks long and only one buck long on the other wall (Exhs. C-1, C-2). Each buck was approximately 5 feet wide. The scaffolding was erected by Versa Wall, another company owned by Buddy Boyette, owner of Buddy's Glass (Tr. 26).

Buddy's Glass foreman Garry Watford testified that the crew had finished the window trim on the corner windows and were in the process of dismantling the scaffolding (Tr. 27).

Employee DeSantis Stevens was on the scaffolding, approximately 24 feet above the ground (Exhs. C-3, C-4; Tr. 51). He was handing down scaffolding to employee Curt Jones who was on the lowest buck. Jones then handed it down to Watford, the foreman, who was on the ground (Tr. 32, 33). Stevens was not tied off because he had to unhook himself in order to hand down the scaffolding; and, since the scaffolding was being dismantled, there was nothing for him to tie off to (Tr. 16-17, 22, 39).

Just before their morning break around 9:30 a.m., Gregory Hagel, WEC superintendent for the building project, came outside for the first time that day and asked Watford if Buddy Boyette had instructed them to clean the glass before they dismantled the scaffold (Tr. 102-103). Even though glaziers do not customarily clean windows, Hagel wanted them to clean the windows because WEC had all the windows cleaned before the building was occupied (Tr. 104-105). Watford said he had not received cleaning instructions from Boyette; he would have to confirm this job change with Boyette; and besides, they could not clean the windows because they did not have any cleaning materials with them (Tr. 17, 19, 27, 30-31). As Hagel was going back inside the building, CO Toth approached the scaffolding (Tr. 53). CO Toth talked with the employees who told him that they were dismantling the scaffold, but Toth testified that he saw no evidence of it (Tr. 67-68).

Hagel came back outside to talk with CO Toth, who testified that Hagel told him that the employees were cleaning the windows but said nothing to him about the scaffold being dismantled (Tr. 57, 61). Hagel testified that he did tell CO Toth that Buddy's employees were dismantling the scaffolding (Tr. 122, 127).

CO Toth observed only four bucks on the scaffolding. He testified that on the top buck the deck was supposed to be 5 boards wide but only had 2 boards (Tr. 62). Watford testified that the other three deck boards were on the next level down because of the dismantling process (Tr. 43). CO Toth stated that there was no access ladder and no guardrails on the top buck (Exh. C-1, Tr. 52). Watford testified that the ladder, which hooked to the top frame, had been taken away as part of the dismantling process since the top frame that held it up had already been removed (Tr. 37, 42). CO Toth acknowledged that he saw a ladder about 100 feet from the scaffold (Tr. 65). The inspection was concluded around noon.

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a standard.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1 – Alleged Violation of § 1926.451(b)(1)

Section 1926.451(b)(1) provides in part:

> (b) Scaffold platform construction. (1) Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports.

The citation alleges that the scaffold was not fully planked to the guardrail supports, exposing an employee to a potential fall hazard of approximately 24 feet to ground level. There is no dispute that at the time of OSHA's inspection, the top floor of the scaffold was not fully planked, having only two of five planks, and that employee Stevens was standing on the top floor approximately 24 feet above the ground (Exhs. C-3, C-4).

The Secretary established that the scaffold was not fully planked and as a result, an employee was exposed to a fall hazard.

Item 2 – Alleged Violation of § 1926.451(e)(1)

Section 1926.451(e)(1) provides:

> (1) When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The citation alleges that an access ladder was not provided for climbing the scaffold. It is undisputed that at the time of the OSHA inspection, there was no ladder on the scaffold (Exhs. C-3, C-4). CO Toth testified he saw employee Stevens climbing the crossbraces of the scaffolding and that a ladder was laying about 100 feet from the scaffolding.

The Secretary established that there was no access ladder on the scaffold and as a result, an employee was exposed to a fall hazard.

Item 3 – Alleged Violation of § 1926.451(g)(1)

Section 1926.451(g)(1) provides in part:

> (g) Fall Protection. (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

The citation alleges that an employee on the scaffold approximately 24 feet above the ground was not protected from a fall hazard by guardrails or other personal fall protection. There is no dispute that the scaffold did not have guardrails on the top buck and that one employee (Stevens) was standing on the top buck. Stevens was wearing his safety harness but was not tied off (Exhs. C-3, C-4)(Tr. 55).

The Secretary established that there were no guardrails on the scaffold and as a result, an employee was exposed to a fall hazard.

MULTI-EMPLOYER WORKSITE DOCTRINE

Since *Anning-Johnson Co.,* 4 BNA OSHC 1193 (No. 3694, 1976) and *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185 (No. 12775, 1976), the Review Commission's position on responsibility for safety on a multi-employer worksite has been that a general contractor on a multiple employer project possesses sufficient control over the entire worksite to assure that the other employers fulfill their obligations with respect to employee safety which affect the entire worksite. *Anning-Johnson* at 1199; *Grossman* at 1188. The duty imposed on a general contractor is a reasonable one. *Knutson Construction Company,* 4 BNA OSHC 1759, 1761 (No. 765, 1976); *aff'd.* 566 F.2d 596 (8th Cir. 1977). The Review Commission has determined that a general contractor is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.

Centex-Rooney Construction Co., 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). This duty applies to an employer even if its own employees are not exposed to the hazard. *Flint Engineering & Construction Co.,* 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). In exercising reasonable diligence, a general contractor may rely in part upon the assurances of a subcontractor to protect against hazards, so long as it has no reason to believe that the work is being performed unsafely. *Sasser Electric and Manufacturing Co.,* 11 BNA OSHC 2133, 2136 (No. 82-178, 1984).

Eleventh Circuit Law

WEC's office is located in Tallahassee, Florida, which is in the Eleventh Circuit. Accordingly, this case could be appealed to the Eleventh Circuit. "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case – even though it may differ from the Commission's precedent." *Kerns Brothers Tree Service,* 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

WEC argues that the law of the Eleventh Circuit on multi-employer worksite liability is the same as the former Fifth Circuit because prior Fifth Circuit law is binding on the Eleventh Circuit.[1] WEC argues that the former Fifth Circuit rejected the multi-employer worksite doctrine and held that a general contractor is not responsible for the safety violations of a subcontractor. WEC relies on *Southeast Contractors, Inc. v. Dunlop,* 512 F. 2d 675 (5th Cir. 1975) (*per curiam*), *rev'd.* 1 BNA OSHC 1713 (No. 1445, 1974); *Horn v. C. L. Osborn Contracting Co.,* 591 F. 2d 318 (5th Cir. 1979); *Melerine v. Avondale Shipyards, Inc.,* 659 F. 2d 706 (5th Cir. Unit A Oct. 23, 1981); *Barrera v. E. I. DuPont De Nemours & Co.,* 653 F. 2d 915 (5th Cir. 1981).

The Review Commission has recently determined that there is no Eleventh Circuit precedent. The "Eleventh Circuit has neither decided nor directly addressed the issue of multi-employer liability" under the Act. The adverse circuit law of the former Fifth Circuit does not preclude application of Commission precedent in an Eleventh Circuit case. *McDevitt Street Bovis, Inc.,* 19 BNA OSHC 1108 (No. 97-1918, 2000). Also, although not binding precedent, the Eleventh Circuit affirmed *per curiam* the decision of an Administrative Law Judge finding a general contractor in violation even though it was not clear whether any of its employees were exposed to the hazard.

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[1] Decisions of the former Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama,* 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

Pace Construction Corp. v. Secretary of Labor, 840 F. 2d 24 (11th Cir. 1988), *aff'd.* 13 BNA OSHC 1282 (No. 86-517, 1987).[2]

Therefore, there is no showing that the Eleventh Circuit, as a matter of law, rejects the multi-employer worksite doctrine.

Application of Doctrine to WEC

It is undisputed that WEC did not create the conditions alleged in the citation and none of its own employees were exposed to them. This does not, however, relieve WEC of responsibility under the multi-employer worksite doctrine. Even though Buddy's Glass was the last subcontractor on the job site, both WEC and Buddy's Glass continued to maintain a general contractor-subcontractor relationship. WEC had sufficient supervisory authority to obtain abatement of the alleged violations. Superintendent Hagel testified that he held safety meetings once a week when the building was under construction with all the subcontractors and their employees who were on site (Tr. 113). Contracts with the subcontractors made it mandatory to attend these meetings and to comply with applicable safety requirements (Exh. C-5, Tr. 114). Watford testified that Hagel could remove him from the jobsite if he disobeyed a safety order from Hagel (Tr. 20-21). Watford testified that Hagel would check on their work and give instructions to them about four or five times a day (Tr. 34).

Where the employer inspects or examines the worksite, "the burden is on the Secretary to demonstrate that the employer's failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence." *Texas A. C. A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995). The Secretary failed to establish that WEC did not exercise reasonable diligence to prevent or detect any safety violations. On the morning of the inspection Hagel was aware the scaffold was being dismantled. He actually wanted to stop the dismantling so the crew would be able to clean the windows before they left the site. There is no showing that prior to the dismantling the scaffold was not fully planked with an access ladder and guardrails. Hagel testified that he never saw Buddy's Glass employees installing trim without the full scaffolding up (Tr. 128).

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[2] Though not binding precedent, an unpublished opinion is of persuasive authority. Rule 36-2 of the Eleventh Circuit Rules of Procedure; *Edelman v. Jordan*, 415 U.S. 651,671, 94 S. Ct. 1347, 1354 (1974) (summary affirmances are of some precedential value).

The Secretary failed to prove that WEC knew or should have known with the exercise of reasonable diligence that Buddy's Glass crew would not have properly re-erected the scaffold before cleaning the windows. The record indicates the windows were not cleaned until the next day (Tr. 17). There is no showing the corrections were not made. Foreman Watford testified that they rebuilt the scaffold before cleaning the windows (Tr. 29).

APPLICABILITY OF CITED SCAFFOLD STANDARDS

The Secretary alleges that Buddy's Glass employees were working on the scaffolding either installing trim or cleaning the windows at the time of the OSHA inspection. WEC asserts that the scaffold was being dismantled at the time of the inspection and, therefore, the cited standards are not applicable.

The Secretary has adopted other standards which address scaffold dismantling. The OSHA standards recognize an exception to the requirements for full planking, an access ladder, and fall protection when employees are engaged in erecting and dismantling scaffolding. Section 1926.451(b)(1)(ii) provides that during dismantling "only the planking that the employer establishes is necessary to provide safe working conditions is required." Under § 1926.451(e)(9), safe access is required for each employee dismantling a scaffold when it is feasible and does not create a greater hazard. Similarly, § 1926.415(g)(2) provides that fall protection be provided during the dismantling process where "such protection is feasible and does not create a greater hazard."

The testimony is uncontradicted that Buddy's Glass was in the process of dismantling the scaffold just before the OSHA inspection. Foreman Watford testified that the dismantling was started at 7:00 a.m. (their usual start time) on the morning of the inspection (Tr. 31). Apparently, at 9:30 a.m., when superintendent Hagel asked Watford if Boyette had told them to clean the windows, before they took down the scaffolding, he observed the employees dismantling the scaffold (Tr. 102). Hagel stated that he had told the glaziers to store their material near a wooded area away from the new grass next to the building (Tr. 110). Hagel believed the dismantled scaffolding and ladder were stored in the wooded area (Tr. 109, 110). CO Toth admitted that Buddy's Glass employees told him they were dismantling (Tr. 67-78). Watford testified that they had finished the trim work and were not cleaning the windows on the day of the inspection because they had no cleaning materials with them (Tr. 17, 27). He said they rebuilt the scaffold and installed guardrails before cleaning the windows the day after the inspection (Tr. 17, 29). Watford's

testimony is credible because he is not an employee of WEC and his own employer, Buddy's Glass, had already settled its citation with OSHA.

Since dismantling of the scaffold was in process, the standards cited by OSHA are not applicable.

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) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

CITATION NO. 1.

1. Item 1, alleged violation of § 1926.451(b)(1), is vacated and no penalty is assessed.
2. Item 2, alleged violation of § 1926.451(e)(1), is vacated and no penalty is assessed.
3. Item 3, alleged violation of § 1926.451(g)(1), is vacated and no penalty is assessed.

/S/
KEN S. WELSCH
Judge

Date: January 5, 2001