Turner Construction Company
01-0814
APPEARANCES

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For Complainant

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Turner Construction Company (TCC) was the general contractor on a demolition project at the Atlanta Exchange building in downtown Atlanta that began March - April 2000. On the morning of January 5, 2001, at approximately 6:30 a.m., the body of a repair technician employed by United Rentals Company was found on the third floor of the building, presumably he fell from the fourth floor. Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) William Cochran, III, conducted a fatality inspection of the work site on January 5, 2001. As a result of this inspection, serious and repeat citations were issued to TCC on April 5, 2001. TCC timely contested the citations.

Citation No. 1, Item 1, alleges a serious violation of 29 C. F. R. § 1926.851(a) for failing to install a barricade at the bottom of the third floor south escalator to prevent access to fourth floor holes caused by the removal of the fourth-to-fifth floor escalator. The proposed penalty for the serious violation is $7,000.00.

Citation No. 2, Item 1, alleges a repeat violation of 29 C. F. R. § 1926.501(b)(4)(i) for failing to protect employees from falling through floor holes caused by the removal of the fourth-to-fifth floor north and south escalators and the third-to-fourth floor north escalator. This citation is classified as repeat based on a citation issued to TCC on February 22, 2000, alleging a violation of this same section. The proposed penalty for the repeat violation is $35,000.00.

The hearing was held in Atlanta, Georgia, on October 22 – 24, 2001. TCC admits jurisdiction and coverage. The parties submitted post-hearing briefs.

TCC denies the alleged violations and asserts that it had installed a barricade in front of the third floor south escalator and guardrails around the floor holes in the fourth floor. TCC also

claims that the alleged violations are barred by the six-month statute of limitation and that it is prejudiced because OSHA failed to have a final closing conference.

For the following reasons, the violations are vacated.

Background

TCC is primarily engaged in commercial and industrial construction. Its main corporate office is in Dallas, Texas. TCC has in excess of 4,000 employees.

In 2000, TCC was hired by Taconic Investment Services (Taconic), the owner of the Atlanta Exchange building, to conduct lead and asbestos abatement work and demolition work on the interior space of the building on the third through sixth floors (Tr. 263). The first and second floors of the building are occupied by Macy's department store (Tr. 41, 263). From October, 2000, to January 10, 2001, TCC had four to six of its own employees on the jobsite, including superintendent Harry Adams and carpenter Pedro Tovalin, who assisted Adams (Tr. 261, 294, 331, 333).

TCC subcontracted the abatement and demolition work to Southern Environmental Services (SES) who, in turn, subcontracted the demolition work to Overrocker Construction, Inc. (Overrocker) (Tr. 76, 221-222). TCC considered SES a "first-tier sub" because it had a contract with SES. Overrocker is considered a "second-tier sub" because TCC did not have a contract with Overrocker and could not directly address its employees (Tr. 264-265). TCC subcontracted miscellaneous work to Anning-Johnson Company (Anning), electrical work to Dynalectric Company (Dynalectric), and metal work to Superior Rigging Company (Tr. 262, 285).

Another general contractor working on the Atlanta Exchange building during the same time period as TCC was Beers Construction (Beers). Beers was hired by Level 3 Communications, a tenant of the building, to build-out the third and fourth floors and construct a mechanical penthouse to house generators and mechanical equipment on the fourth and fifth floors (Tr. 11-12, 222). Level 3 Communications was converting the space into an internet hotel (Tr. 9). Beers subcontracted with Anning and Dynalectric. Anning had a rental contract with United Rentals Company (United Rentals) to rent equipment such as scissor lifts.

Security for the jobsite was provided by Argenbright Security, who was hired by Taconic (Tr. 58, 273). Employees and visitors were supposed to sign in when they came on the jobsite, but this was not consistently enforced (Tr. 144, 274).

TCC did not have a contract with Argenbright, Beers, or United Rentals (Tr. 12, 222, 262, 273).

The demolition work involved removing walls, ceilings, electrical, plumbing, stairs and escalators (Tr. 223). Between mid-October and mid-November, 2000, the fourth-to-fifth floor north and south escalators were removed by Overrocker (Tr. 190, 226). The process involved first removing exterior pieces, such as the rubber handrails, treads, and stainless steel that covers the superstructure (Tr. 223). Employees had to work inside the steel frame of the escalator to remove the treads and to work on an aerial lift to remove the exterior stainless steel (Tr. 224). The motors for the escalator, located in a "machine room" which is a three-foot deep hole near the escalator, are removed (Exh. C-1; Tr. 202, 342). Finally, employees cut the steel frame, then pulled it down with chains (Tr. 203, 224, 338). The hole in the floor left by removal of the escalator was about 5 feet by 12 feet (Tr. 117).

Before the frame was removed, TCC installed wooden guardrails around the holes on the fourth floor left by the removal of the north and south escalators and machine rooms (Exhs. C-1, C-7; Tr. 231, 296). The guardrails were 6 to 12 feet away from the floor holes (Tr. 297, 322).

The third-to-fourth floor south escalator was not operational; however, employees used the escalator as a means of access between the third and fourth floors until mid-October, 2000 (Tr. 311-313). In mid-October, Beers complained that the dust coming up the third-to-fourth floor south escalator was interfering with their prep work on the fourth floor (Tr. 233, 306). To alleviate the dust, SES placed clear polyethylene over the top of the third-to-fourth floor escalator by gluing the edges to the concrete (Exh. C-7; Tr. 306, 307). Also, the guardrail was reconfigured to prevent downward access to the escalator (Tr. 298). According to superintendent Adams, a barricade was also placed in front of the escalator on the third floor at the same time (Tr. 298). The barricade, a four feet by four feet sheet of e inch pressboard with gray laminate on it, was screwed to the rubber handrail of the escalator (Tr. 233, 298-299). The words "do not remove" and "no se quite" were written on the barricade (Exh. R-4B, Tr. 287, 299).

On the morning of January 4, 2001, Larry Snead, Anning's project superintendent, telephoned United Rentals requesting repair for scissors lift #1899, located on the fourth floor (Exh. R-14; Tr. 363-365, 372). The scissors lift, used to lift personnel and equipment in order to wrap columns and beams for Beers, had a broken plug which was used to charge its batteries (Exhs. R-11, R-13; Tr. 363, 365, 372, 382-383). Snead stated that United Rentals told him that no one would come until the next morning (Tr. 366-367).

According to Wayne Ward, Anning's carpenter foreman, the general procedure for vendors coming on the jobsite was to schedule the vendors to arrive between 7:00 a.m. and 3:30 p.m., normal working hours, and for the vendors to go to the loading dock and telephone Ward (Tr. 387).

The dispatcher at United Rentals called its repair technician, Joseph Shipley, at 5:05 p.m. on January 4, 2001, and told him he could do the repair that day or first thing the next morning (Exh. R-14; Tr. 401, 405). Shipley told him he would do the repair work that day.

Sometime after 5:05 p.m. on January 4, 200l, Shipley entered the jobsite. It is not known how he accessed the building. He did not sign-in on the security log kept by Argenbright Security (Exh. R-6, Tr. 273).

At approximately 6:30 a.m. the next morning, on January 5, 2001, Shipley's body was found on the third floor directly below the hole in the fourth floor (Exh. C-6, Tr. 317). Although it appears that Shipley fell 17 feet through the floor hole in the fourth floor, near the third-to-fourth floor south escalator, it is not known how he fell. There were no witnesses to the accident.

That morning, there was no barricade in front of the third floor south escalator. It was laying on the floor with a corner broker off; there was a slit in the plastic sheet that covered the floor hole in the fourth floor; and part of the guardrail around the floor holes on the fourth floor was laying down on the floor (Exhs. C-4, R-4B, R-5; Tr. 131, 146, 165, 300). There were pieces of sprinkler pipe strewn about on the fourth floor and one joint pipe was found near Shipley's body on the third floor (Tr. 251). That morning, police, coroner's staff, and ambulance attendants came onto the jobsite. The jobsite was shut down that day (Tr. 74).

As a result of this fatality, OSHA began an investigation of the jobsite at approximately 10:00 a.m. on January 5, 2001. CO Cochran conducted an opening conference with TCC, Beers, Anning, Anning's union representative, United Rentals, and Taconic (Tr. 72-73). CO Cochran

returned to the worksite on January 10, 2001, and conducted an initial closing conference with the same group (Exh. R-1; Tr. 84, 139). On January 17-18, 2001, CO Cochran returned to the jobsite to conduct employee interviews.

Based on this inspection, citations were issued to TCC and to Overrocker.

DISCUSSION

Timely Issuance of Citation - § 9(c)

TCC asserts that the citation was not timely issued. OSHA began its investigation on January 5, 2001, and the citation was issued on April 5, 2001.

Section 9(c) of the Occupational Safety and Health Act (Act) provides that "[N]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U. S. C. § 658(c).

The purpose is "to ensure that claims are prosecuted while the events are still fresh, and witnesses can be obtained." *Safeway Store No. 914*, 16 BNA OSHC 1504, 1509 (No. 91-373, 1993). The Review Commission has long held that "an uncorrected violation may be cited six months from the time the Secretary discovers, or reasonably should have discovered, the facts necessary to issue a citation. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1519 (No. 90-2866, 1993).

The Secretary is not alleging any violations prior to October 5, 2001, six months before the citation was issued. The citation was timely issued within the statute of limitations.

Closing Conference

TCC contends that OSHA did not conduct a final closing conference after completing its inspection. Section 1903.7(e) of 29 C.F.R. provides:

> At the conclusion of an inspection, the Compliance Safety and Health Officer shall confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions in the worksite.

CO Cochran testified that he held an initial closing conference with TCC, Beers, SES, Anning, Anning's carpenter union, United Rentals, and Taconic on January 10, 2001. He provided them with the OSHA 3000 pamphlet ("Employer's Rights and Responsibilities" following an inspection), discussed violations and potential citations, and asked if anyone wanted to add anything (Tr. R-1, Tr. 84-85). CO Cochran conducted employee interviews on January 17–18, 2001. On January 18, he informed Jack D. Smith, TCC safety director, and Gerald Woody, TCC project superintendent, about the findings of the interviews and told them that he would telephone later and conduct a final closing conference if things changed (Tr. 92, 142). CO Cochran did not telephone TCC later because he stated it was not necessary to have a final closing conference since he had not discovered any new information that would change the initial closing conference (Tr. 171).

TCC does not dispute that there was an initial closing conference on January 10, 2001 and additional discussion on January 18, 2001. "Unless prejudicial, the relaxation or modification of such a procedural regulation [the requirement for a closing conference] does not warrant an invalidation of an agency's action." *Kast Metals Corp.,* 5 BNA OSHC 1861, 1862-1863 (No. 76-657, 1977) (citations not vacated since employer failed to demonstrate how it was specifically prejudiced by the failure to hold a closing conference).

In this case, TCC has not shown any prejudice. The initial closing conference provided TCC with information regarding the alleged violations and proposed citations and an opportunity to discuss pertinent information regarding the worksite.

TCC's claim that OSHA failed to hold a closing conference is rejected.

Alleged Violations

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

It is undisputed that the construction standards at Part 1926 apply to TCC. Also, TCC had actual knowledge of the floor holes and the need to barricade the third floor escalator to prevent access.

Multi-employer Worksite Doctrine[1]

The Review Commission has long held that a general contractor such as TCC 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 Co.,* 4 BNA OSHC 1193, 1199 (No. 3694, 1976) and *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185, 1188 (No. 12775, 1976). However, the duty imposed on a general contractor is a reasonable one. 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).

It is undisputed that TCC did not create the conditions alleged in the citation and none of its own employees were exposed to these conditions. TCC admits that it was responsible for correcting unsafe conditions on the jobsite as to the demolition work and had sufficient supervisory authority to obtain abatement of the alleged violations.

TCC gave its subcontractors copies of its safety program for the Atlanta Exchange site that specifically addresses holes and fall protection (Exh. R-7, paragraphs D14 & D16; Tr. 237). TCC required its subcontractors to follow the TCC safety program and they were required to distribute it to their employees and subcontractors (Tr. 238). TCC provided fall protection training on this jobsite to subcontractors (Tr. 284). TCC's safety director, Smith, discussed safety related items with all its subcontractors and did weekly safety audits of the jobsite (Tr.

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[1]TCC's argument that the multi-employer worksite doctrine is not applicable in the Eleventh Circuit (to which this case could be appealed) is rejected. There is no showing that the Eleventh Circuit, as a matter of law, rejects the multi-employer worksite doctrine. The Review Commission has determined that there is no Eleventh Circuit precedent and that application of Commission precedent is not precluded in an Eleventh Circuit case. *McDevitt Street Bovis., Inc.,* 19 BNA OSHC 1108 (No. 97-1918, 2000).

221, 239). One of TCC's superintendents, Adams, did daily walk-around safety checks of the jobsite and maintained the guardrails and barricade (Tr. 306, 320).

TCC had no contractual relationship with United Rentals. Anning made the repair call to United Rentals for work it was doing for Beers, not TCC. Anning had no reason to notify TCC that a repair technician was coming on site. Anning was not even aware that the repair technician was coming on January 4, 2001. TCC had no reason to know the repair technician was coming on site, after hours, on January 4, 2001. No TCC employees were on site after hours.

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). In this case, the Secretary failed to show that TCC knew or reasonably should have known that a repair technician of a vendor with a rental contract with a subcontractor of another general contractor would enter the jobsite after hours.

Alleged Serious Violation of 29 C. F. R. § 1926.851(a)

The citation alleges that TCC failed to install a barricade at the bottom of the third floor south escalator to prevent access to the fourth floor south holes, near the top of the escalator, caused by the removal of the fourth-to-fifth floor escalator. Section 1926.851(a) provides:

> Only those stairways, passageways, and ladders, designated as a means of access to the structure of a building, shall be used. Other access ways shall be entirely closed at all times.

On January 5, 2001, CO Cochran did not see a barricade at the bottom of the third floor south escalator (Tr. 95). The barricade was laying on the floor with a corner broken off. When he returned to the site on January 10, 2001, there was a barricade (pressed wood board) blocking access to the third floor south escalator. CO Cochran never saw any employees using the third floor south escalator (Tr. 161).

According to TCC superintendent Adams, he and carpenter Tovalin installed a barricade in November, 2000, to prevent access to the third floor south escalator, at the bottom of the escalator, at the same time plastic was put up for dust prevention (Tr. 298). Adams had written "do not

remove" in English and Spanish on the board. Adams, who walked the jobsite about 20 times a day every day, stated that the barricade remained in place until the day of the accident (Tr. 306). Adams stated that the barricade was in place when he left the jobsite on January 4, 2001, around 5:00 p.m. (Tr. 309). When he returned to work the next morning, around 6:30 a.m., the barricade was laying on the floor and part of it was broken off (Tr. 310).

Adams' testimony, regarding the existence of the barricade, is supported by other witnesses. TCC safety director, Smith, who was on site at least once a week, testified that there was a barricade in front of the third floor south escalator (Tr. 221, 255). Wayne Ward, Anning's carpenter foreman, who started work on the third floor in November – December, 2000, stated that the barricade was always up in front of the third floor south escalator and that the plywood had something written on it (Tr. 382, 388). Clete Myers, Dynalectric's foreman, who was on site full time from October, 2000, to January, 2001, stated that there was a sheet of plywood with "do not enter" or "do not remove" in front of the third floor south escalator (Tr. 286-287).

Conversely, there was testimony that there was no barricade. Evan Jahn, Beers project manager, who was at the jobsite about three or four days a week for meetings and to review the progress of the job, testified that he never saw a barricade; but he also never saw employees using the third floor south escalator (Tr. 37, 54). Wanda Dykes, an Argenbright security guard who was assigned to patrol the third floor from 3:30 p.m. to 11:30 p.m. on January 4, 2001, stated that there was no barrier in front of the third floor south escalator (Tr. 63). However, her testimony is unreliable because she stated she never saw Shipley's body on the third floor even though she was supposed to be patrolling the third floor that night; Argenbright told her that Shipley's relatives were planning to file a civil lawsuit against Argenbright; and she was absent from the job for a few hours on the night of the accident.

The existence of the barricade in front of the third floor south escalator to prevent access on January 4, 2001, is supported by a preponderance of the evidence. Other than the repair technician from United Rentals, there is no evidence that employees used the escalator to access the fourth floor when the floor holes were opened in November, 2000. Even with regard to the repair technician, it is speculative that he used the third-to-fourth floor south escalator.

The Secretary also alleges that the third floor south escalator should have been barricaded before mid-October to prevent access to the holes. CO Cochran stated that the distance between the

third and fourth floors was 17 feet. The record shows that the fourth floor holes were not open prior to the demolition of the third floor ceiling in November and December, 2000 (Tr. 207, 343). Brumagin, Overrocker's foreman, testified that the machine hole on the fourth floor next to the top of the third-to-fourth floor south escalator was about three feet deep, and the escalator hole was about three and one-half feet deep because the bottom of each hole was the ceiling of the third floor (Tr. 202, 204, 342). Brumagin stated that he and his crew never worked on a hole greater than six feet deep when demolishing the escalators on the fourth floor (Tr. 338). CO Cochran admitted that he did not know the depth of the holes when the fourth-to-fifth floor escalators were removed (Tr. 149). Thus, employees using the third-to-fourth floor escalator to access the fourth floor before the barricade was installed in mid-October were not exposed to a fall hazard on the fourth floor.

Because there was a barricade in place at the bottom of the third-to-fourth floor south escalator when the third floor ceiling was demolished in December, 2000, there was no access to the holes on the fourth floor. Accordingly, the record fails to support a violation of § 1926.851(a).

Alleged Repeat Violation of 29 C. F. R. § 1926.501(b)(4)(i)

The citation alleges that TCC failed to protect employees from falling 17 feet to a concrete floor through the floor holes created by removal of the south escalator from the fourth to fifth floor, and by removal of the north escalator from the third to fourth floors and fourth to fifth floors. Section 1926.501(b)(4(i) provides:

> (4) *Holes*. (i) Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

It is undisputed that in mid-October 2000 wooden guardrails, which complied with the guardrail standards, were installed around the floor holes created by the removal of the fourth-to-fifth floor north and south escalators and the third-to-fourth floor north escalator. Brumagin admitted that he and other Overrocker employees worked inside the guardrails on the fourth floor to complete escalator demolition and were not tied off because the holes were only three to three and one-half

feet deep (Tr. 193, 194, 198, 202, 342). Until the ceiling of the third floor was demolished in December 2000, the fall hazard was less than six feet.[2]

When CO Cochran was on site, he never saw any employees working inside the guardrails on the fourth floor north and south (Tr. 164). There is no evidence that anyone was inside the guardrails on the fourth floor after December, 2000, except possibly the repair technician. The alleged violation of § 1926.501(b)(4)(i) is vacated.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 on the preceding decision, it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.851(a) is vacated and no penalty is assessed.

2. Citation 2, Item 1, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(4)(i) is vacated and no penalty is assessed.

/s/

KEN S. WELSCH

Date: April 22, 2002 Judge

[2] The Secretary filed a Motion for Reconsideration of the Order Correcting Transcript claiming that the testimony of Jahn is critical to proving this violation. That Motion was denied because the court reporter's notes did not reflect an error in the transcript. Even though Jahn stated that he saw employees inside the guardrails, he did not know the depth of the holes inside the guardrails (Tr. 33). Moreover, his credibility does not depend on the one word "crane" that the Secretary wanted deleted.

[3] Although the violation is classified as repeat under § 17 of the Act, it is noted that the Secretary, in order to prove any violation to be repeated, "must demonstrate that the earlier citation upon which he relies became a final order of the Commission prior to the date of the alleged repeated violation." *Potlatch Corporation*, 7 BNA OSHA 1061, 1064 (No. 16183, 1979). In this case, the Secretary presented no evidence to demonstrate that his citation was a final order.