UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Central Building & Preservation, Respondent,	OSHRC DOCKET NO. 09-2023

Appearances:

Lisa Williams, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois
For Complainant

Charles T. Rivkin, Esq., Central Building & Preservation, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Central Building & Preservation ("Respondent") worksite in Chicago, Illinois on July 7, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two serious violations of the Act with penalties totaling $4,500.00. Respondent contested the citation items and a trial was conducted on January 19, 2011, in Chicago, Illinois. At the beginning of the trial, Complainant withdrew Citation 1 Item 2. (Tr. 6-7). Therefore, only Citation 1 Item 1 remained in dispute for this proceeding.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. Respondent is an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). Resp. Amended Answer; *Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Astra Pharmaceutical Prod*., 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

Factual Findings

On July 7, 2009, Respondent had employees working on a building directly across the street from OSHA's Regional Office in Chicago, Illinois. On that same day, OSHA Assistant Regional Administrator Sandra Taylor observed through her window what she believed to be violations of OSHA's fall protection regulations. (Tr. 12). She asked Brian Sturtecky, an OSHA Technical Advisor on Construction Enforcement, to get a camera and photograph the employees

working on the top floor of the building. (Tr. 12). Consequently, Mr. Sturtecky took several photographs of two employees working approximately 200 feet above the ground, next to and sometimes leaning partially over the outside edge of the building, while their harnesses were not connected to anything. (Tr. 13-14, 33, 38; Ex. C-1B, C-1C, C-1F, C-1I, C-1J, C-1K, C-1L, C-1Q). Mr. Sturtecky then went across the street, entered the building, and conducted an opening conference to formally initiate an inspection. (Tr. 21). The local OSHA area office in Calumet City, Illinois was also contacted and asked to send a Compliance Safety and Health Officer ("CSHO") to the jobsite. (Tr. 22). A short while later, CSHO Drew Youpel arrived, and took over the investigation. (Tr. 22, 32).

Once on site, OSHA spoke with the two individuals who had been photographed and learned they were Oscar Ramos, a Laborer employed by Respondent, and Servando Duran, a Foreman employed by Respondent. (Tr. 21, 32, 36, 48; Ex. R-1, R-2, R-4). The investigative photographs obtained by OSHA establish that both Foreman Duran and Mr. Ramos were openly working inches from the edge of a 200 foot drop with their harnesses not connected to anything to protect them from falling.

Discussion

Citation 1 Item 1

In Citation 1 Item 1, Complainant alleged:

> *29 C.F.R. 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems: (a) on or about July 7, 2009, at the above addressed job site, on the east side of the roof, employees engaged in swing stage assembly were exposed to falls*

from the roof created by the presence of unprotected sides.

The cited standard provides:

> *29 C.F.R. 1926.501(b)(1): Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.*

The record clearly establishes that cited standard applies and was violated. (Ex. C-1B, C-1C, C-1F, C-1I, C-1J, C-1K, C-1L, C-1Q). Both Foreman Duran and Mr. Ramos were exposed to the violative condition as they walked and kneeled on the outer edge of the building while not protected. *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). The court further finds that both actual and constructive knowledge of this condition were established in this instance. Actual knowledge of the violative condition is imputed to Respondent through Foreman Duran's presence and participation in the violation. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367 (7th Cir. 1997); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). Constructive knowledge was established due to the open, obvious, and plainly visible nature of the violative condition. *Kokosing Construction Co., Inc*., 17 BNA OSHC 1869, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996). Lastly, it is beyond dispute that a 200 foot fall could result in serious physical harm or death. Therefore, the citation was properly characterized as a serious violation. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). The court also notes that Respondent basically conceded the occurrence and characterization of the violation in its post-trial brief: "Respondent, after reviewing the citation and the facts, admitted their correctness and that a serious violation had occurred." (Resp. Brief, p. 2).

Complainant established all of the *prima facie* elements necessary to prove a violation of 29 C.F.R. §1926.501(b)(1).

Affirmative Defense

Respondent's primary contention is that the citation should be vacated because the violation was a result of unpreventable employee misconduct. In order to establish this affirmative defense, an employer is required to prove that it: (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) took steps to discover violations of the rules, and (4) effectively enforced the rules when violations were discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087, 1995-97 CCH OSHD ¶31,451 (No. 91-2494, 1997). A supervisor's direct involvement in a violation is strong evidence that an employer's safety program is lax. *Archer-Western Contractors Ltd*., 15 BNA OSHC 1013, 1991 CCH OSHD ¶29,317 (No. 87-1067, 1991). Also, when the alleged misconduct involves a supervisor, the defense is more rigorous and more difficult to establish since it is a supervisor's duty to protect the safety of employees under his supervision. *Id.* In such an instance, Respondent must establish that it took all feasible steps to prevent the incident, including adequate instruction and supervision of its supervisory employee. *Id*.

Although Respondent was afforded an opportunity to present substantive witness testimony,[1] it failed to do so and simply offered five exhibits, which the court admitted. (Tr. 45-54). Although the documents themselves can be afforded little weight, as there was no related testimony introduced, they establish that Respondent had some written safety rules and that its employees were issued fall protection equipment. (Ex. R-1 through R-5). Respondent's documents, even viewed in a light most favorable to Respondent, fall woefully short of meeting the burden of establishing an employee misconduct defense. *Rawson Contractors*, Inc., 20 BNA

[1] The court asked Respondent whether it had any witnesses to call, but apparently based on pre-trial conversations with Complainant's counsel, Respondent had none. (Tr. 45-47). Despite Respondent's representative's resistance, he was sworn-in for the purpose of introducing Respondent's proffered exhibits. (Tr. 47).

OSHC 1078, 2002 CCH OSHD ¶32,657 (No. 99-0018, 2003). Accordingly, Respondent's assertion of unpreventable employee misconduct is rejected.

Additionally, Respondent's arguments concerning the impropriety of the court removing this case from Simplified Proceedings are similarly rejected. Commission Rule 204 affords the court full discretion to remove a case from Simplified Proceedings, which it did based on Complainant's articulated need for discovery relating to Respondent's assertion of an employee misconduct defense. The case was placed back under Conventional Proceeding rules after Complainant filed her *Motion for Discontinuance of Simplified Proceeding*. Respondent did not file a response to Complainant's motion. The court finds that its decision did not prejudice Respondent's ability to defend the allegations in this case in any way.

Penalties

Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. §666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). CSHO Youpel considered the violation to be of "high" severity with a "greater" probability of an accident, and after a forty-percent reduction for Respondent's size, proposed a $3,000.00 penalty. (Tr. 37-38). Based on the statutory criteria and the totality of the circumstances discussed above, the court assesses the penalty as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is AFFIRMED and a penalty of $2,000.00 is ASSESSED.

_/s/_____
SIDNEY J. GOLDSTEIN
Judge, OSHRC

Date: May 31, 2011
Denver, Colorado