United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. PLUMB SQUARE & LOVELL, Respondent.	OSHRC DOCKET NO. 98-0982

APPEARANCES:

For the Complainant:
Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California

For the Respondent:
Gregory Lovell, Plumb Square & Lovell, Coronado, California

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Plum Square & Lovell (Lovell), at all times relevant to this action maintained a place of business at Stuart Mesa Elementary School, Camp Pendelton, California, where it was engaged in construction. Respondent admits it is an employer. Because construction is in a class of activity which as a whole affects interstate commerce, Lovell is subject to the requirements of the Act. *See, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983).

On March 20, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Lovell's Camp Pendelton work site. As a result of that inspection, Lovell was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Lovell brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 30, 1998, an E-Z hearing was held in San Diego, California. This matter is ready for disposition.

Alleged Violation of §1926.416(a)(1)

Citation 1, item 1 alleges:

29 CFR 1926.416(a)(1): Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means:

> A) Plumb Square & Lovell, Stuart Mesa Elementary School; Employees working on roof in close proximity to service drop were exposed to electric shock.

Facts

Scott Knowles, the OSHA Compliance Officer (CO), testified that On March 20, 1998 he inspected Lovell's work site, located at Camp Pendelton, a federal installation (Tr. 13-14).

CO Knowles testified that he observed Lovell's employees sawing and framing on a roof near a service drop (Tr. 16). The service drop, an insulated electrical wire being used to supply power to the employees' portable power tools, lay across the walk area of the roof (Tr. 16-17). Knowles testified that the wire posed a tripping hazard (Tr. 19). Because the service drop was energized, had the insulation been damaged from being walked on or by a power tool, employees could suffer electrical burns or shock (Tr. 17-19). The hazard was abated during the inspection by Lovell employees, who raised the service drop over the heads of the employees (Tr. 20).

Lovell argues that the cited service drop is insulated (Exh. R-11). Lovell maintains it is the practice at construction sites to work from service drops running along the ground, and that it is no more hazardous to run a line along the roof than on the ground (Tr. 48-49).

Discussion

The cited standard provides:

> No employer shall permit an employee to work in such proximity to any part of electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

The service drop noted by the CO was insulated. Nothing in the record suggests that the insulation was inadequate for its intended purposes; the CO's only concern was that the drop could be damaged as it lay on the ground. Based on my review of the language contained in §1926.416(a)(1), and Commission cases concerning that standard, I conclude that §1926.416(a)(1) is intended to prevent

employee exposures to uninsulated, energized power lines, where contact with such lines may result in electrocution. The standard does not, on its face, address the guarding of insulated lines.

I find that the cited standard is inapplicable to the cited circumstances in that nothing in that standard provides the employer with fair warning that the cited condition is proscribed. Citation 1, item 1 is vacated.

Alleged Violation of §1926.416(a)(1)

Citation 1, item 2 alleges:

CFR 1926.501(b)(1): Each employee on a walking/working surface with unprotected sides or edges which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems or fall arrest systems.

a) Plumb Square & Lovell, Stuart Mesa Elementary School: Framers working from roof without any fall protection were exposed to falls of 15 feet.

Facts

CO Knowles testified that Lovell's framers worked on the roof, which was approximately 15 feet off the ground, without the benefit of fall protection (Tr. 20-24). Knowles stated that the ground on the site was hard, compacted soil or concrete, and that a 15 foot fall would likely result in broken bones and/or fractures (Tr. 24-25).

Lovell argues that the height of the cited structure does not exceed 15 feet high at any point. Lovell argues that under California's OSHA standards, fall protection is required only for falls in excess of 15 feet. Gregory Lovell, Respondent's owner, testified that he was told by the general contractor Taylor & Ball, that California OSHA had jurisdiction over the work site, and that no fall protection was necessary (Tr. 50). Lovell testified that they had fall protection available on the site (Tr. 54).

Discussion

Lovell admits the cited violation, but states that he would have complied had he been aware that Federal OSHA had jurisdiction over his work site.

It is well settled that the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the conditions in their workplace; the employer is presumed to be familiar with the requirements of the law. *Ormet,* 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). Lovell's mistaken belief that California had jurisdiction over his work site, therefore, does not excuse the cited violation.

Moreover, the violation is "serious" as defined by §17k of the Act. The unrebutted testimony of the CO establishes that the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. Nonetheless, the evidence establishes that Lovell did attempt, in good faith, to ascertain which safety standards were in effect. Because Lovell demonstrated his willingness to comply with the spirit of the Act, I find that a minimal penalty, in the amount of $150.00, is appropriate to effect the Act's purposes.

Alleged Violation of §1926.501(b)(4)(ii)

Citation 1, item 3 alleges:

29 CFR 1926.501(b)(4)(ii): Each employee on a walking/working surface was not protected from tripping in or stepping into or through holes (including skylights) by covers:

> a) Plumb Square & Lovell, Stuart Mesa Elementary School: Framers building from roof were not protected from falling through skylight holes.

Facts

CO Knowles testified that in the course of their work Lovell employees walked past four skylights 93 ½ x 93 ½ square (Tr. 27-28; Exh. C-11). Knowles stated that although there was scaffolding approximately seven feet beneath some of the skylights, an employee's fall would not necessarily be broken. Knowles testified that he could fall all the way to the ground, resulting in broken bones and/or death (Tr. 29, 31).

Greg Lovell testified that the roof where the skylights were located had been completed, and that his carpenters had been instructed not to walk across the area because of the possibility of damaging the asphalt roofing (Tr. 40-43). Lovell testified that the prohibition against walking on the finished product is standard procedure, and that he was present on the roof to enforce the policy (Tr. 42-43). The only reason his employees were on the roof at all was to nail down some heads that were popping through (Tr. 43-44). CO Knowles admitted that he had not seen any of Lovell's employees walk across the open roof (Tr. 40).

Discussion

In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the job site, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Carpenter Contracting Corp.* 11 BNA OSHC 2027, 1984 CCH OSHD ¶29,950 (No. 81-838, 1984).

The CO did not see any employees walking in the area of the skylight. Complainant failed to introduce any other evidence establishing that Lovell's employees would have any reason to be in the zone of danger. Because the Secretary failed to establish employee exposure to the violative condition, citation 1, item 3 is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.416(a)(1) is VACATED.

2. Citation 1, item 2, alleging violation of §1926.501(b)(1) is AFFIRMED as a "serious" violation of the Act, and a penalty of $150.00 is ASSESSED.

3. Citation 1, item 3, alleging violation of 1926.501(b)(4)(ii) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: