

Metric Constructors, Inc.
OSHR Docket No. **00-1930**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Metric Constructors, Inc. (Metric), contests a citation and penalties issued by the Secretary on August 25, 2000. The citation alleges that Metric committed serious violations of five construction standards while acting as the general contractor on a barracks complex construction project in Savannah, Georgia, in February 2000.

Item 1 of the citation alleges a serious violation of § 1926.451(e)(1) for failing to provide ladders or other means of safe access and egress for employees performing masonry work on scaffolding. Item 2 alleges a serious violation of § 1926.451(g)(4)(i) for failing to provide standard guardrails or other means of fall protection for employees performing masonry work on scaffolding. Item 3a alleges a serious violation of § 1926.502(b)(1) for failing to maintain the top rails of its guardrail systems at least 39 inches above the working level exposing employees to fall hazards greater than 11 feet. Item 3b alleges a serious violation of § 1926.502(b)(2)(i) for failing to maintain midrails of its guardrail system between 19.5 and 21 inches above the working level. Item 3c alleges a serious violation of § 1926.502(b)(9) for failing to place flags with high visibility materials at no more than 6 foot intervals on wire rope used for top rails.

Metric's masonry subcontractor on the project was Joseph Watson, d/b/a Joseph Watson Masonry (JWM). The Secretary issued three citations to JWM arising from the same inspection and alleging serious, willful, and repeated violations of the construction standards (Docket No. 00-1726, Decision to be filed January 24, 2002).

A consolidated hearing was held in Savannah, Georgia, on January 31, and February 1

and 2, 2001; and in Atlanta, Georgia, on February 15 and 16, 2001. The parties stipulated jurisdiction and coverage (Tr. 6).

Metric denies the Secretary's charges and asserts it lacked knowledge of any OSHA standards being violated by JWM. For the reasons discussed below, item 1 of the citation is vacated. Items 2, 3a, 3b, and 3c are affirmed

Background

Pursuant to a contract with the United States Army Corps of Engineers (Corps), Metric began construction in September 1998 of a barracks complex at Hunter Army Air Field in Savannah, Georgia. As general contractor, Metric's responsibilities included overseeing JWM's masonry and brickwork. Metric's contract with the Corps required it to conduct daily inspections (Tr. 82, 100, 145, 404, 561). Metric had three employees on the site: project superintendent Tony Pittman, chief of quality control Robert Garcia, and carpenter and brick mason Lucky Caswell (Tr. 44, 243, 316, 831).

The project involved the construction of three three-story barracks buildings (buildings 310, 311, and 313) and a service community building (building 312). Each building is approximately 60 yards long and 20 yards wide.

Subcontractor JWM began installing the brick exterior on the buildings in August 1999. JWM owner Joseph Watson supervised the brick work for the first three months. In December, Watson left the site to start another project in Atlanta. After that, Watson visited the site each month for approximately 2 days. JWM foreman Jesse Fowler supervised JWM's employees on the site. JWM had approximately 20 employees (masons and laborers) on the project. Some of the employees were newly hired through the Savannah newspapers solely for the barracks project (Tr. 52, 55, 63-64, 340).

The Corps inspected the project daily for progress and quality, as well as for safety hazards (Exhs. R-1 through R-20). Fred Gotthardt, Corps supervising project engineer, performed the inspections, assisted by Steve Bentley and Christopher Pruitt (Tr. 79, 402, 476). When Gotthardt performed the inspections, he was accompanied by Metric's Pittman or Garcia, or both. If the inspection involved masonry work, JWM foreman Fowler participated in the inspection.

Gotthardt found repeated safety problems with the scaffolding and fall protection for the employees (Exhs. C-4 through C-18). Gotthardt noted the problems in the Corps's daily reports and informed Metric's representatives of what he found.

On February 29, 2000, Occupational Safety and Health Administration (OSHA) compliance officer Xavier Aponte conducted a programmed, planned inspection of the project. Aponte arrived at the site at approximately 10:00 a.m. He conducted an opening conference with Garcia, performed a walkaround inspection, and interviewed employees. As a result of Aponte's inspection, the Secretary issued the citation that gave rise to this case (Tr. 558-560).

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

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).

Metric's own employees were not exposed to the alleged hazardous conditions of the scaffolding. Nevertheless, as the general contractor, Metric can be held liable for hazardous conditions to which employees other than its own were exposed.

An employer at a multi-employer worksite is responsible for both those hazardous conditions to which its own employees at the site are exposed and those hazardous conditions which it either creates or controls and to which employees of other contractors are exposed. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). A general contractor, who, as in this case, does not have employees exposed and did not create the violative condition is still considered responsible for violations of a subcontractor where the general contractor could reasonably be expected to prevent or detect and abate the violation. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994). A general contractor at a construction project is presumed to have sufficient control over its subcontractors to require them to comply with the safety standards and to abate violations. *Gil Haugan, d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006 (Nos. 76-1512, 76-1513, 1979).

The record establishes that Metric exercised control over the conditions of the worksite. Project superintendent Pittman and quality control chief Garcia were at the site on a regular basis, and they walked the site daily with Corps engineer Gotthardt. Metric paid for the scaffolding rentals and its carpenter, Caswell, signed the scaffolding invoices, which included safety rules for scaffolding (Exhs. C-20, C-21; Tr. 327). Also, Metric conducted daily inspections of the site.

Item 1: Alleged Serious Violation of § 1926.451(e)(1)

The Secretary alleges that Metric committed a serious violation of § 1926.451(e)(1), which provides:

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. Cross braces shall not be used as a means of access.

The citation alleges two instances of violative conditions:

- a) At the construction site, Bldg. 311, east - Employees were exposed to fall hazards while performing masonry work on the 3rd level (and above) of a scaffold that was not provided with ladders or any other means of safe access/egress, on or about 02/29/00.
- b) At the construction site, Bldg. 311, west - Employees were exposed to fall hazards while performing masonry work on the 2nd level of a scaffold that was not provided with ladders or any other means of safe access/egress, on or about 02/29/00.

As expressed in the language of § 1926.451(e)(1), OSHA permits the use of hook-on ladders, the tops of which are flush with the working surface of the scaffold. Metric contends that the Corps's regulations require that access ladders extend two feet above the working surface (Tr. 501), but Gotthardt and Bentley both denied that the Corps prohibits the use of hook-on ladders or that they informed Metric and JWM that it did (Tr. 86, 420).

Based on its belief that Corps regulations prohibited hook-on ladders, Metric built its own ladders (Tr. 327). Garcia testified that "the Corps didn't really like them and kept saying, 'We would like the store-bought ones.' So we said, 'All right, fine. We'll use both. Let's go ahead and buy some more ladders'" (Tr. 327-328). Metric purchased ladders to be used with the

scaffolds (Exh. R-28).

The record establishes both that Metric provided ladders for access to the scaffolds, and that the Corps had ongoing problems with JWM's employees failing to use the ladders.

Gotthardt stated (Tr. 86):

I had had numerous discussions with regard to ladders [prior to February 29, 2000]. As scaffolds would be moved from one location to another, the ladders seemed like they wouldn't move with the scaffolds, and about the time that we would get the scaffold or the contractor would get the scaffold set up properly with all the ladders and so forth, they would finish their work in that area, and they would start moving to another location.

Gotthardt had "numerous discussions" with Garcia and Pittman "over the period of time before" the OSHA inspection (Tr. 86).

The Secretary's basis for citing item 1 appears to have changed between the date the citation was issued and the date of the hearing. Each instance of item 1 in the citation charges Metric with a violation of § 1926.451(e)(1) for permitting employees to work on "a scaffold that was not provided with ladders." At the hearing, compliance officer Aponte conceded that the scaffolds were provided with ladders.

Aponte testified that he observed two job-made ladders leaning against the scaffolds that are the subject of this item. It was Aponte's opinion that the job-made ladders were structurally defective (Exhs. R-27, R-31; Tr. 562-564, 590-591). The Secretary's examination of Aponte led to some confusion regarding where the alleged violation occurred, with Aponte contending that the adequacy of the ladders was at issue:

Q.: Was this ladder a part of any of the violations that you had found?

Aponte: There were some problems with the ladder. So one of the job-made ladders that had some structural defects on it [sic]. It did not have any supports or filler blocks between the cleats.

Judge Welsch: The question she asked was: Is that ladder that's depicted at that portion of the video part of any of the alleged violations that you cited in this case?

Aponte: Yes.

Judge Welsch: Do you know which one?

Aponte: That would be the citation for 451(e)(1), citation 1, item 1.

Q.: Do you have any knowledge as to whether employees used this ladder?

Aponte: No, ma'am.

(Tr. 591).

Counsel for Metric objected to the Secretary's further examination of Aponte regarding the adequacy of the ladders, stating that Metric had not been cited for having inadequate ladders. Counsel for the Secretary agreed, stating, "[W]e're not citing the ladder standard. We're citing the safe access standard" (Tr. 593). Counsel for the Secretary expressly declined to amend item 1 to cite a more specific ladder standard (Tr. 596-597). Counsel for the Secretary did move to "amend the complaint to conform to the evidence," allowing consideration of the condition of the ladder when determining whether Metric violated § 1926.451(e)(1), instead of whether any ladder had been provided at all. The court left this question open (Tr. 595-596).

In her subsequent case and in her post-hearing brief, the Secretary has failed to show that the presence of a defective ladder providing access to a scaffold can support finding a violation of § 1926.451(e)(1). That standard requires that when scaffold platforms are more than 2 feet above or below the point of access, "ladders . . . shall be used." If the Secretary had evidence that the ladders used were defective, she could have cited Metric under § 1926.1053, which contains detailed, specific requirements regarding the dimensions and load-bearing capacities of the ladder rungs, cleats, and steps.

The Secretary cited Metric for violating § 1926.451(e)(1), claiming that Metric failed to provide ladders to scaffolds being used by JWM's employees on or about February 29, 2000. The record establishes that, on that date, ladders were provided for the scaffolds (Exh. R-27, R-31). Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1926.451(g)(4)(i)

Section 1926.451(g)(4)(i) provides:

Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

On the day of Aponte's inspection, a JWM employee was performing masonry work from

an outrigger section of a tubular welded frame scaffold without fall protection on the ends and sides of the platform. The scaffold was located on the west side of building 311. The employee was working approximately 12 feet above the ground (Exhs. C-23, C-24; Tr. 644, 647, 652).

On the east side of building 311, a JWM employee was mixing mortar on the third level of a tubular welded frame scaffold. He was approximately 18 feet above the ground. There was no fall protection provided for the outside of the scaffold (Exhs. C-22, C-25; Tr. 649, 672).

Another JWM employee was performing brick masonry work from an outrigger platform located adjacent to the second level of the tubular welded frame scaffold on the west side of building 311. There was no fall protection on the sides or ends of the platform. The employee was working approximately 12 feet above the ground (Exh. C-26; Tr. 651-652).

Metric argues that it did not have the requisite knowledge that JWM's employees were using the scaffolds located at building 311. Caswell, Metric's lead carpenter, testified that JWM foreman Fowler had been told to have the masonry crew report to building 312 that morning to complete interior block work. As far as Metric knew, no employees were supposed to be working on the unguarded scaffolds at building 311 that morning (Tr. 842-843).

Metric's claim that it was unaware that JWM's employees were working on the unguarded scaffolds the morning of the OSHA inspection is rejected. Aponte videotaped the worksite before he held his opening conference with Metric. The videotape shows Garcia, Metric's chief of quality control, walking past the employees working from the unguarded scaffolds at building 311. The scaffolds are in plain view of Garcia (C-19; Tr. 575-578). Actual or constructive knowledge of a supervisory employee is imputed to the employer, and the Secretary makes a *prima facie* showing of knowledge by proving that a supervisory employee knew of a violation. *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598).

The Secretary has established a serious violation of § 1926.451(g)(4)(i). Item 2 is affirmed.

Items 3a, 3b, and 3c: Alleged Serious Violations of §§ 1926.502(b)(1), (b)(2)(i), and (b)(9)

The Secretary alleges that Metric violated §§ 1926.502(b)(1), (b)(2)(i), and (b)(9), which provide:

(b) *Guardrail systems.* Guardrail systems and their use shall comply with the following provisions:

(1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

...

(2) . . .

(i) Midrails, when used, shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

...

(9) Top rails and midrails shall be at least one-quarter inch (0.6 cm) nominal diameter or thickness to prevent cuts and lacerations. If wire rope is used for top rails, it shall be flagged at not more than 6-foot (1.8 m) intervals with high-visibility material.

Aponte found several defects in the guardrails erected on the scaffolds located at buildings 311 and 313. As with the previous item, Metric argues that JWM's employees were not supposed to be working on building 311 the day of the OSHA inspection, and thus Metric lacked knowledge that employees were being exposed to violative conditions there. As determined under the previous item, JWM's employees were working in plain view on the scaffolds, and Metric's Garcia was videotaped walking past them. Metric was aware that employees were working on scaffolds at building 311.

On February 29, 2000, JWM employees were working on the second and third floors of the east side of building 313, and on the second and third floors of the east side of building 311. They were working more than 12 feet above the ground (Exh. C-22; Tr. 672, 776). The top rails and the midrails of the guardrail system consisted of steel cables. Aponte took a series of measurements of the guardrails on the breeze ways on the east sides of buildings 313 and 311. The top rails were between 34 and 38 inches high and the midrails were between 17 and 19 inches high (Tr. 664-669). The steel cables did not have any flagging or any other type of highly visible material (Exh. C-25; Tr. 671). Bentley testified that the Corps had ongoing problems with the steel cables not having enough tension in them. He stated that the cables "were usually sagging or laying on the ground." Bentley had discussed the problem with Garcia (Tr. 406).

The Secretary has established serious violations of §§ 1926.502(b)(1), (b)(2)(i), and (b)(9). Items 3a, 3b, and 3c are affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Metric employed over 250 employees at the time of the inspection. OSHA had cited Metric within the 3 years prior to the inspection (Tr. 673). Metric is given no credit for good faith because Corps's representatives experienced ongoing problems with Metric's enforcement of safety regulations. The gravity of the violations of the guardrail standards is high. Employees were exposed to falls of 12 to 18 feet and were working with either inadequate fall protection or no fall protection.

It is determined that the appropriate penalty for item 2 is \$7,000.00. The appropriate total penalty for items 3a, 3b, and 3c is \$5,000.00

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, alleging a serious violation of § 1926.451(e)(1), is vacated and no penalty is assessed;
2. Item 2, alleging a serious violation of § 1926.456(g)(4)(i), is affirmed and a penalty of \$7,000 is assessed; and
3. Items 3a, 3b, and 3c, alleging serious violations of §§ 1926.502(b)(1), (b)(2)(i), and (b)(9), are affirmed and a total penalty of \$5,000 is assessed.

/s/

KEN S. WELSCH

Judge

Date: January 24, 2002