

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Martin C. Heck Brick Contracting Co.,

Respondent.

OSHRC Docket No. 04-0781

Appearances:

Leigh Burleson, Esq., Office of the Solicitor, Department of Labor, Kansas City, Missouri
For Complainant

Donald W. Jones, Esq., Hulston, Jones & Marsh, Springfield Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Martin C. Heck Brick Contracting Co. (MCHB) was engaged to lay the exterior bricks and blocks for an addition to the Peoples Bank in Troy, Missouri, when the worksite was inspected by the Occupational Safety and Health Administration (OSHA) on February 25, 2004. As a result of OSHA's inspection, MCHB received repeat and other-than-serious citations on March 5, 2004. MCHB timely contested the citations.

The repeat citation alleges that MCHB violated 29 C.F.R. § 1926.451(g)(1) by failing to protect employees on a supported scaffold by guardrails from falling approximately 21 feet to the ground. The citation proposes a penalty of \$2,000.00.

The other-than-serious citation alleges that MCHB violated 29 C.F.R. § 1904.40(a) by failing to provide copies of OSHA Forms 300 and 300-A for calendar year 2003 within four hours of a request by the OSHA compliance officer. The citation proposes a penalty of \$400.00.

The hearing was held in St. Louis, Missouri, on September 2, 2004. The parties stipulated coverage and jurisdiction (Tr. 5). The parties filed post-hearing briefs.

MCHB denies the alleged violations¹ and moves to suppress the evidence on the basis that OSHA lacked a search warrant and permission to enter the property to make the inspection (Tr. 6). MCHB also argues that the cited scaffolding standard does not apply because the employees were in the process of erecting/raising the scaffold. With regard to the OSHA Form 300 and 300-A logs, MCHB asserts that it did not understand the compliance officer's request.

For the reasons discussed, MCHB's motion to suppress is denied; the alleged violation of § 1926.451(g)(1) is vacated; and the violation of § 1904.40(a) is affirmed with a penalty of \$200.00 assessed.

Background

MCHB is a masonry contractor in Fenton, Missouri. Its daily operations are run by Martin C. Heck, the son of the owner and founder. MCHB employs approximately 15 employees who are members of the bricklayers union (Tr. 205, 228-229). It has been in business for more than 35 years and is a member of Masonry Contractors Association (Tr. 224, 228)

In February 2004, MCHB's crew of three journeymen bricklayers (Robert Houston, Mark Cummiskey, Paul Mahoney) and one laborer were working on an addition to the Peoples Bank in Troy, Missouri (Tr. 141). The crew was supervised by Martin Heck as foreman (Tr. 159, 224). The addition involved adding a second floor and a new roof above the existing bank building (Tr. 241). The project's general contractor was Cannon Contracting (Tr. 104).

MCHB contracted to lay the exterior bricks and blocks for the new addition (Tr. 167, 231). To perform its work, MCHB used a hydro-mobile scaffold raised by hydraulics and supported frame scaffold which is raised by hand (Exh. C-2; Tr. 148, 214). Each section of the supported frame scaffold is 7 feet, 7 inches high and 5 feet wide (Tr. 210).

On February 25, 2004, MCHB's crew was laying block for the stairwell (Tr. 167, 206, 230, 238). The stairwell was approximately 22 feet by 10 feet (Tr. 239). At approximately 1:00 p.m., OSHA safety compliance officer Larry Davidson was driving past the bank and observed an employee standing on the supported frame scaffold approximately 21 feet above the ground. The scaffold did not have guardrails and the employee was not otherwise protected from falling

¹MCHB withdrew its unpreventable employee misconduct defense (Tr. 5).

(Exhs. C-1, C-2, C-3; Tr. 17, 27, 90-91, 102, 105).² Davidson parked his car in a parking lot across the street and videotaped the worksite (Tr. 91-92). He observed the employee standing on the work platform of the scaffold for a couple minutes before walking away (Tr. 79-80). The employee was Thomas Cummiskey (Tr. 148).

After videotaping the site, Davidson entered the worksite and asked to speak to the employee in charge of the masonry work (Tr. 92). He was referred to Robert Houston. Martin Heck had been on the site during the morning but had left the site prior to Davidson's arrival (Tr. 159, 206). According to Davidson, Houston acknowledged that he was the foreman for the job (Exh. R-3; Tr. 110). Davidson held an opening conference with Houston and conducted a walkaround inspection (Tr. 52, 94, 107). After Davidson interviewed the employees, Houston sent them home (Tr. 105, 172). Davidson concluded his on-site inspection of MCHB at approximately 2:10 p.m. and began an inspection of the steel erection contractor (Tr. 99).³

On February 26, 2004, Davidson telephoned MCHB's office and spoke to Martin Heck. In addition to advising Heck of his inspection findings, he requested that Heck fax him copies of the company's OSHA Forms 300 and 300-A for calendar year 2003. The OSHA 300 and 300-A forms are the employer's log and summary of work-related injuries and illnesses (Exh. R-3; Tr. 56, 121). When Heck did not seem to understand the request, Davidson tried to explain the forms to him and agreed to fax him a copy with instructions (Tr. 121, 222). When he tried to fax the material to Heck, Davidson testified that he repeatedly got a busy signal. He then attempted to call Heck back several times that day without success (Tr. 121-122). After February 26, Davidson made no further attempts to contact MCHB about the forms nor did MCHB do any follow-up (Tr. 122). OSHA did not receive MCHB's 300 and 300-A Forms until after the citations were issued on March 5, 2004 (Tr. 122). MCHB showed no recordable work-related injuries and illnesses for 2003 (Tr. 125, 133).

As a result of Davidson's inspection, the citations herein were issued to MCHB.

² Davidson also observed two employees of the steel erection contractor on the roof level without fall protection (Tr. 29, 104). The steel erection contractor, Fastrack Erectors, was also inspected and cited (No. 04-0780).

³The steel erection contractor, Fastrack Erectors, also received a citation March 4, 2004 which it contested (Docket No. 04-0780). The hearing was held September 3, 2004 and the decision was entered November 26, 2004.

Discussion

OSHA's Inspection was Proper

_____ MCHB moves to suppress the evidence from the inspection. MCHB argues that the inspection was without consent and OSHA did not have a warrant.

It is undisputed that Davidson did not have an inspection warrant. In this case, however, an inspection warrant was not required because the violation was in the open and entry was not denied. Davidson's initial observations and his videotape showing the alleged violation were made from a public parking lot across the street from MCHB's worksite (Tr. 102).

The Commission has long held that pursuant to the "open fields" doctrine, there is no constitutional violation where an inspector makes observations from areas on commercial premises that are out-of-doors and not closed off to the public. *Concrete Construction Co.*, 15 BNA OSHC 1614, 1617 (No. 89-2019, 1992). "Where an area is outdoors and open to public view, there is no expectation of privacy, and the area is therefore not subject to the Fourth Amendment under the 'open fields' doctrine." *Gem Industrial, Inc.*, 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995).

When Davidson entered the worksite he met Robert Houston, a journeyman bricklayer who he understood to be the person in charge (Exh. R-3; Tr. 141). Although Martin Heck may have been the foreman of the crew, the record shows that Houston was left in charge of the crew and he permitted the inspection without objection (Tr. 53, 143). The laborer referred Davidson to Houston as the person in charge (Tr. 94). Bricklayer Mark Cummiskey testified that Houston was in charge at the time (Tr. 190). Further, it is noted that Houston participated in the walkaround inspection and showed an exercise of authority over the employees by sending them home (Tr. 19, 172). *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360, 86-469, 1992) (an employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor).

MCHB's motion to suppress is denied.

Alleged Violation of 29 C.F.R. § 1926.451(g)(1)

The citation alleges that MCHB failed to protect an employee on a supported scaffold approximately 21 feet above the ground level by a guardrail system.⁴ Section 1926.451(g)(1) provides:

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. Paragraphs (g)(1) (I) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

For overhand bricklaying operations from a supported scaffold, the standard requires that employees are protected from falling by the use of a personal fall arrest system or a guardrail system. See § 1926.451(g)(1)(vi).

There is no dispute that at the time of the OSHA inspection, MCHB's supported scaffold lacked guardrails and the employee on the scaffold was not protected from falling by fall protection including a personal fall arrest system (Exhs. C-1, C-2). The employee was exposed to a fall hazard of approximately 21 feet to the lower level (Tr. 17).

However, § 1926.451(g)(1) does not apply to the erecting/raising scaffold work being performed by MCHB's employees at the time of the inspection. Davidson only observed the employee standing on the scaffold facing the building and then waking off the scaffold (Exh. C-1; Tr. 28, 79-80, 101). Davidson did not see the employee perform any masonry work such as putting down cement or laying blocks (Tr. 82).

⁴ The Secretary has the burden of proving a violation.

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).

Houston and Cummiskey testified that at the time of the OSHA inspection, they were in the process of raising the scaffold before continuing to lay the blocks (Tr. 142, 180, 182).⁵ Cummiskey, who was standing on the scaffold, testified that he was talking with a laborer on the ground about raising the boards for the platform (Exhs. C-1, C-2; Tr. 180). Houston said that the guardrails had been removed to raise the walk boards (Tr. 149).

Unlike § 1926.451(g)(1) which OSHA cited, § 1926.451(g)(2) permits an employer not to use fall protection during erecting and dismantling of the scaffold if, under the circumstances, a competent person determines that the installation of such protection is not feasible or would create a greater hazard. Davidson agreed that guardrails may have to be removed to raise the scaffold (Tr. 85).

Based on the record, the Secretary failed to show by a preponderance of the evidence that §1926.451(g)(1) was applicable to the activities being performed by MCHB's employees at the time of the inspection. The observations made by Davidson and the testimony of the witnesses do not support a finding that the employees were engaged in masonry work. Instead, the employees were engaged in raising the scaffold which is covered by § 1926.451(g)(2).

Alleged Violation of 29 C.F.R. § 1904.40(a)

_____The citation alleges that MCHB failed to provide OSHA Forms 300 and 300-A within four hours after requested by the OSHA compliance officer. Section 1904.40(a) provides:

When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours.

An authorized government representative includes the compliance officer who conducted the inspection. *See* § 1904.40(b)(1)(i). Pursuant to § 1904.29, an employer is required to maintain OSHA 300 and 300-A forms or equivalent forms. The OSHA 300 form is entitled "Log of Work-Related Injuries and Illnesses" and the OSHA 300-A form is entitled "Summary of Work-Related Injuries and Illnesses."

⁵ It is noted that during the inspection, neither Houston or Cummiskey told Davidson that they were raising the scaffold (Tr. 59). However, it is unclear from the record whether the employees were asked about their activities or if they understood the significance of raising the scaffold.

Davidson verbally requested the forms by telephone on February 26, 2004, from Heck, the person in charge of MCHB (Tr. 56, 120). The argument that Heck may not have understood the request does not relieve the company of its obligations under the standard. It is noted that MCHB has been in business for approximately 37 years; Heck has worked in the business for approximately 30 years; and MCHB has been the subject of a prior OSHA inspection and citation (Exh. C-4; Tr. 205, 228). Similarly, OSHA's requirement that employers maintain a log and summary of work-related injuries and illnesses has been in existence since the inception of OSHA in 1971.

Despite OSHA's request on February 26, 2004, the MCHB's Forms 300 and 300-A were not provided to OSHA until after the citation was issued on March 5, 2004 (Tr. 122). MCHB offered no acceptable explanation for its failure to provide the requested forms within four business hours. MCHB's argument that the request for the records was made after the inspection is not accurate. Davidson's inspection continued through February 26, 2004, when he held a closing conference with Heck to discuss the nature of the alleged fall protection violation (Tr. 98).

The violation of § 1904.40(a) is affirmed.

Penalty Consideration

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.

MCHB employs 15 employees and is given credit for size as a small employer (Tr. 229). MCHB is not entitled to credit for history because it received another serious citation within the proceeding three years (Exh. C-4). Also, there is no showing of good faith.

A \$200.00 penalty for violation of § 1904.40(a) is reasonable. This a record keeping violation and no excuse was presented justifying why the records were not provided timely..

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 ORDERED:

1. Citation no. 1, item 1, alleged serious violation of 29 C.F.R. § 1926.451(g)(1), is vacated and no penalty is assessed.
2. Citation no. 2, item 1, alleged other-than-serious violation of 29 C.F.R. § 1904.40(a), is affirmed and a penalty of \$200.00 is assessed.

/s/

KEN S. WELSCH

Judge

Date: December 2, 2004