Secretary of Labor, Complainant, v. ThornCo, Incorporated, Respondent.	OSHRC Docket Nos. 04-0556 & 04-0557

Appearances:

Charles R. Hairston, Esq., and Madeleine T. Le, Esq.,
Office of the Solicitor, U. S. Department of Labor, Dallas, Texas,
For Complainant

Mr. Gary W. Thornton (Pro Se)
Baton Rouge, Louisiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

ThornCo, Inc., is a drywall and acoustical tile subcontractor located in Baton Rouge, Louisiana. On January 9, 2004, two Occupational Safety and Health Administration (OSHA) compliance officers observed men working, without apparent fall protection, on the roof of a mall undergoing renovation in Baton Rouge. The compliance officers conducted two separate inspections of the renovation site. The Secretary subsequently issued two citations to ThornCo which were assigned separate docket numbers.

The citation issued under Docket No. 04-0557 contains three items. Item 1 alleges a serious violation of § 1926.300(b)(1) for using a DeWalt metal cutting saw with a missing lower guard. The Secretary proposed a penalty of $2,000.00 for this item. Item 2 alleges a serious violation of § 1926.416(e)(1) for using a defective electrical cord on the DeWalt saw. The Secretary proposed a penalty of $375.00. Item 3 alleges a serious violation of § 1926.501(b)(1) for failure to provide fall protection for employees working at the edge of the mall roof. The Secretary's proposed penalty for this item is $625.00.

The citation issued under Docket No. 04-0556 contains one item, which alleges a serious violation of § 1926.453(b)(2)(v) for failing to ensure that employees wore body belts and attached lanyards to the baskets of aerial lifts. The Secretary proposed a penalty of $2,000.00.

Both cases were designated to proceed under E-Z trial procedures pursuant to Commission Rule 200 *et seq.* The cases were consolidated and a hearing was held in this matter on June 18, 2004, in Baton Rouge, Louisiana. Gary Thornton, owner and president of ThornCo, represented the company *pro se* at the hearing. The parties stipulated to jurisdiction and coverage. The parties have filed post-hearing written statements outlining their positions.

ThornCo's primary argument is that the workers referred to in the citations were not ThornCo employees. Except for the supervisory personnel, the workers at the site were provided to ThornCo through T&T Drywall, a labor supply company. ThornCo contends that T&T Drywall should be responsible for any safety infractions committed by employees it supplied to ThornCo. If it is determined that ThornCo was, in fact, the employer, ThornCo does not dispute the merits of items 1 and 3 of the citation docketed as No. 04-0557. ThornCo does dispute item 2 of that citation, as well as the item contained in the citation docketed as No. 04-0556. It also contests the serious classification and proposed penalties of all of the items.

For the reasons discussed below, it is determined that ThornCo was the employer of the employees at the sites observed by the compliance officers. All items of both citations are affirmed as serious violations, and a total penalty of $4,000.00 is assessed.

Background

Bon Marche Mall was the name of a mall located on Florida Boulevard in Baton Rouge, Louisiana. It had been closed for several years when it was purchased by Commercial Properties. The mall was undergoing renovation for two separate projects, the Cox project and the Bon Carre business park (Tr. 71, 96-97). At the time of the inspection, at least two general contractors were working on the renovation. On the east side of the mall, the general contractor was Matherine Contractors (for the Cox project) (Tr. 18). At an adjacent worksite of the mall, the general contractor was Buquet-LaBlanc (for the Bon Carre project) (Tr. 32).

On January 9, 2004, compliance officers Alma Michelli and Steven Devine were driving to a program planned inspection site when they observed several workers on the roof of the old mall. The workers were applying metal studs to the exterior east wall and were at the edge of the roof. The compliance officers could see no means of fall protection being used by the workers (Tr. 17-18).

Michelli and Devine parked their car and proceeded to the worksite. They went to the trailer of Matherine Contractors, the general contractor for that portion of the site. They met with Daryl Matherine, who identified the workers on the roof as employees of ThornCo, the drywall subcontractor (Tr. 18-19). Matherine told Michelli that Coy Childress was ThornCo's foreman on the site, but that he had just left, leaving Elbert (Elmo) Miller in charge of the crew (Tr. 19-20). Michelli interviewed Miller and inspected the site. She held a closing conference with Matherine and Miller (Tr. 21-24, 29).

As the compliance officers drove away from the site to go to lunch (they planned to return to the mall site after lunch), they observed a mall renovation worksite adjacent to the site they had just inspected. Buquet & LaBlanc was the general contractor on this portion of the mall. The compliance officers observed an employee using an aerial lift to access an opening on the third floor. He was not using any form of fall protection (Tr. 32). The crew working at that site was getting ready to go to lunch, so Michelli and Devine continued to their lunch. Afterward, the compliance officers returned to the second site (Tr. 31). When they entered the site, they encountered ThornCo foreman Charles Freeman (Tr. 32-33). Michelli and Devine held an opening conference with Larry Spring and Robert LeMoine, both from Buquet & LaBlanc, and with Freeman. They then interviewed Freeman and conducted another inspection (Tr. 37-38).

As a result of these two inspections, the Secretary issued the citations that gave rise to this consolidated case.

Were the Exposed Workers Employees of ThornCo?

ThornCo argues that no employment relationship existed between it and the exposed employees. To be held responsible as an employer under the Occupational Safety and Health Act of 1970 (Act), the alleged employer must exercise control over the workers, which includes economic factors as well as the means and methods by which work is performed. *Vergona Crane Co.*, 15 BNA OSHC 1782 (No. 88-1745, 1992). The Secretary has the burden of proof in establishing that the respondent is the employer of the workers in question. *Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 97-3359, 1997).

T&T Drywall is a labor supply company managed by Michael Todd Lang. Lang testified that he found drywall workers by advertising for them in the newspaper. T&T had developed a computer

data bank of the names of drywall workers (Tr. 107). When a drywall subcontractor would call requesting a certain number of workers for a specific project, T&T would notify the required number of workers and tell them when and where to show up. T&T does not train the workers or supply them with tools, equipment, or transportation. T&T does not supply supervisory personnel (Tr. 109-110). Lang stated, "All I do is supply a job. That's it"(Tr. 109). T&T supplied a total of 14 workers to ThornCo for the mall renovation project (Tr. 108).

The Review Commission uses an "economic realities test" in determining whether an employment relationship exists. Among the factors considered relevant are:

1. Whom do the workers consider their employer?
2. Who pays the workers' wages?
3. Who has the responsibility to control the workers?
4. Does the alleged employer have the power to control the workers?
5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7. How are the workers' wages established?

Loomis Cabinet Co., 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992), *aff'd.* 20 F.3d 938 (9th Cir. 1994). This test emphasizes the substance over the form of the employment relationship. The central inquiry "is the question of whether the alleged employer controls the workplace." *Id.*, at p. 1638. Using the *Loomis Cabinet* test to analyze the workers' relationships with T&T and ThornCo, it is determined that ThornCo was the employer who exercised control over the workers at the worksite. ThornCo was the employer of the drywall workers under the Act.

1. Whom Do the Workers Consider Their Employer?

The record is inconclusive regarding whom the workers considered their employer. None of the drywall workers observed by the compliance officers testified at the hearing. Michelli interviewed the workers, who told her that T&T had sent them to the site (Tr. 43, 57). Miller, who was acting foreman at the time of the inspection, told Michelli that he had been sent by T&T (Tr. 73). ThornCo foreman Freeman told Michelli that the workers in the aerial lifts were "his" workers (Tr. 34). The workers that ThornCo foreman Childress supervised had been working with Childress for two or three

years (Tr. 109). There is no indication whether the compliance officers asked the workers whom they considered their employer.

2. Who Pays the Workers' Wages? and

7. How Are the Workers' Wages Established?

Lang explained T&T's billing arrangement with the employers it supplies: "[O]nce a week, they send a time sheet to my office, and they give us the hours. We take the hours off of that and write them a check." ThornCo paid T&T $ 18.50 an hour for Sheetrock mechanics and $ 16.50 an hour for helpers (Tr. 115). Lang stated that T&T deducts a dollar an hour per worker (Tr. 111). The paychecks that the workers receive come from T&T. If a worker has a problem or question regarding his paycheck, he would go to T&T and not ThornCo (Tr. 114-115).

3. Who Has the Responsibility to Control the Workers? and

4. Does the Alleged Employer Have the Power to Control the Workers?

This is the central inquiry that determines the employment relationship. The record establishes that T&T had no control whatsoever over the employees once they were sent to a worksite. ThornCo set the schedule for the workers and its foremen gave the workers their daily assignments. ThornCo foreman Charles Freeman testified that he had control over the worksite. ThornCo owned the DeWalt saw and the aerial lifts being used by the workers. When ThornCo foreman Childress left the site, he designated Miller, who was supplied by T&T, as acting foreman (Tr. 20, 24, 38, 42, 110). William Gibbs, ThornCo's project manager, told Michelli that Childress had control of the site and could hire and fire employees on behalf of ThornCo (Tr. 30).

5. Does the Alleged Employer Have the Power to Fire, Hire, or Modify the Employment Condition of the Workers?

Freeman also stated to Michelli that he had the authority to hire and fire workers at the site (Tr. 40). When Michelli was interviewing one of the workers, Euriche Mendoza, she asked Mendoza if he could hire and fire people, and before he could answer, Mr. Freeman said, "I'm the only one that can hire and fire" (Tr. 40).

6. Does the Workers' Ability to Increase Their Income Depend on Efficiency Rather than Initiative, Judgment, and Foresight?

The workers did not have the ability to increase their income. They were paid a set hourly rate.

ThornCo argues that in its contract with T&T, T&T agrees to "protect, defend, indemnify and hold harmless ThornCo, Inc., . . .from and against all claims," which ThornCo interprets to include OSHA violations (Exh. R-1). As evident from its absence from the list of factors cited in *Loomis Cabinet*, the contractual agreement regarding liability is not determinative of the employment relationship. An employer cannot evade its responsibility for the safety of its employees by contractual consent.

Based upon this analysis, it is determined that ThornCo was the employer of the drywall workers observed by the compliance officers the day of the inspections. ThornCo controlled the manner and means of accomplishing the work. ThornCo supplied the tools and equipment, and its foremen set the schedule and assigned the work. The foremen had the ability to hire and fire workers. ThornCo's argument that the workers were employees of T&T for whom ThornCo had no responsibility under the Act is rejected.

Docket No. 04-0557

ThornCo stated at the beginning of the hearing that, if it were found to be the employer of the drywall workers, it would not dispute that it had violated items 1 and 3 of the citation issued under Docket No. 04-0557. ThornCo does dispute the Secretary's classification of the items as serious and her proposed penalties.

Item 1: Violation of § 1926.300(b)(1)

Section 1926.300(b)(1) provides:

> When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use.

ThornCo's employees working on the exterior east wall of the mall renovation were using a DeWalt metal cutting saw to cut metal studs. The saw was missing its bottom guard. Miller told Michelli that ThornCo employee Earl Jones had been using the unguarded saw for approximately two weeks (Exh. C-1; Tr. 21-25).

The hazard created by using an unguarded saw is the risk of amputation. In this case, the operator was required to hold the saw close to the point of operation (Tr. 46). The Secretary has established that the violation was serious.

Item 3: Violation of § 1926.501(b)(1)

Section 1926.501(b)(1) provides:

> 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.

ThornCo's employees were installing metal studs along the edge of the roof. The roof was at least 25 feet high. The workers were not using any form of fall protection because, Miller stated, there was no place to tie off (Tr. 19-20).

The hazard created by working at the edge of a roof 25 feet above the ground without fall protection is that an employee could fall, resulting in death or serious physical injuries. The Secretary properly classified the violation as serious.

Item 2: Alleged Serious Violation of § 1926.416(e)(1)

Section 1926.416(e)(1) provides:

Worn or frayed electric cords or cables shall not be used.

The cord to the DeWalt metal cutting saw that is the subject of item 1 was missing a grounding pin and was frayed at two points on the cord. ThornCo employee Earl Jones had been using the saw in that condition for at least two weeks (Exh. C-1, photos E and F; Tr. 21-25). When Michelli asked acting foreman Miller why ThornCo used the obviously defective saw, he replied, "The show must go on" (Tr. 24).

Although ThornCo did not concede the violation cited here, as it did for items 1 and 3, it presented no evidence at the hearing to rebut the Secretary's proof, nor did it address this item in its post-hearing statement.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

It is undisputed that the cited standard applies to the cord cited in item 2 and that the cord was frayed. Earl Jones used the saw on a regular basis, and it was available for use by other employees. The condition of the cord was obvious and in plain sight. The Secretary has established that ThornCo violated § 1926.416(e)(1).

The Secretary classified the violation as serious. Michelli testified that the cord's outer insulation was completely worn through, exposing the inner insulation. The saw was being used outside and it had been raining heavily in the days before the inspection. The missing grounding pin aggravated the hazard created by the frayed cord because no ground would exist to reduce the risk of electric shock if the inner insulation became worn through (Tr. 47-48). Under these circumstances, it is determined that the Secretary properly classified the violation as serious.

Docket No. 04-0556

Item 1: Alleged Serious Violation of § 1926.453(b)(2)(v)

The Secretary alleges that ThornCo committed a serious violation of § 1926.453(b)(2)v), which provides:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Michelli and Devine observed a ThornCo employee riding in an aerial lift without using fall protection at the Bon Carre site (Exh. C-1, photos C and D). Later that day, Michelli observed another ThornCo employee riding in a different aerial lift, also without fall protection. On this occasion the aerial lift raised the employee to a height of more than 30 feet to access a third story opening (Exh. C-1, photos A and B; Tr. 31-35). ThornCo foreman Charles Freeman was standing outside facing the aerial lift as his employee rode in it without fall protection (Tr. 32-33). When Michelli interviewed Freeman, he assured her that his crew always wore body harnesses. When she showed Freeman the photographs she had taken earlier, he conceded that the ThornCo employee in the aerial lift was not, in fact, wearing a harness or using fall protection (Tr. 38-39).

It is undisputed that ThornCo's employees were not wearing body belts with lanyards attached to the boom or basket of the aerial lift in which they were riding. These two employees were exposed to the hazard of falling from the aerial lifts. Their presence in the aerial lifts was in plain view and

occurred in front of ThornCo's foreman. The only element of proof that ThornCo disputes is whether the cited standard applies to the cited conditions.

Immediately following the text of § 1926.453(b)(2)(v), the standard states:

> NOTE TO PARAGRAPH (b)(2)(v): As of January 1, 1998, subpart M of this part (§ 1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under § 1926.502(e).

Based upon this note, ThornCo argues that OSHA recognizes that body belts are not acceptable, and thus it cannot be held liable for not ensuring that its employees wore body belts with attached lanyards while in the aerial lifts. The note states that body belts are not acceptable as part of a personal fall arrest system, which is how ThornCo interprets the body belt and lanyard required by § 1926.453(b)(2)(v). However, the note states that the use of a body belt in a restraint system is acceptable.

The Secretary issued a Letter of Interpretation dated February 18, 1999, which addresses the issue of the use of body belts. In that Letter, the Secretary states, "A restraint system consists of a body belt or harness, lanyard and anchor" (Exh. C-3). Because ThornCo was operating an aerial lift, its employees should have been using a restraint system consisting of a body belt and lanyard. Section 1926.453(b)(2) applies to the cited condition. The Secretary has established a violation of the cited standard.

ThornCo asserted the affirmative defense of infeasibility. In order to establish this offense, an employer must show that the (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

ThornCo based this defense on its mistaken assumption that the body belt and lanyard constituted a personal fall arrest system rather than a restraint system. ThornCo believed that the anchorage requirements set out in §1926.502(d)(15) applied to the body belts and lanyards required for protection on the aerial lifts. As noted above, a body belt and lanyard constitute a restraint system, not subject to the anchorage requirements. ThornCo failed to establish this defense.

The hazard created by ThornCo's failure to require its employees to use a restraint system was a fall of more than 30 feet. The violation was properly classified as serious.

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.

At the time of the inspection, ThornCo employed 25 to 30 employees that it payed directly and considered to be ThornCo employees (Tr. 131-132). In addition, ThornCo had 14 employees on the mall renovation project that were supplied by T&T (Tr. 108). ThornCo had a history of a previous violation within the past two years (Tr. 50). ThornCo is credited with good faith. It has a written safety program (Tr. 49).

The gravity of all of the cited items is high. Items 1 and 2 of the citation docketed under Docket Number 04-0557 pertain to the DeWalt saw. The saw had been used for at least two weeks with a missing lower guard. Use of the saw required the operator to place his hand near the point of operation. The saw was used outside during a period of heavy rain with a frayed cord and a missing grounding pin. It is determined that a penalty of $ 1,500.00 is appropriate for item 1 and $ 375.00 is appropriate for item 2.

The violation of § 1926.501(b)(1) for failing to use fall protection while working at the edge of the roof (item 2 of Docket No. 04-0557) exposed employees to a fall of 25 feet. A penalty of $625.00 is appropriate.

The violation of § 1926.453(b)(2)(v) for failing to use a body belt and lanyard attached to the boom or basket while riding in an aerial lift (item 1 of Docket No. 04-0556) exposed employees to a fall of more than 30 feet. The gravity of this violation is exacerbated because the aerial lift was sitting on rain drenched ground, making it unstable. Michelli stated, "It had been raining for days. There were big ruts in the mud. When we walked to the trailer, we walked in mud up to our knees. It is just very chaotic and just a big soup bowl almost" (Tr. 52). A penalty of $ 1,500.00 is assessed.

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 that:

1. Under Docket No. 04-0557, item 1 of the citation, alleging a serious violation of § 1926.300(b)(1), is affirmed and a penalty of $ 1,500.00 is assessed;

2. Under Docket No. 04-0557, item 2 of the citation, alleging a serious violation of § 1926.416(e)(1), is affirmed and a penalty of $ 375.00 is assessed;

3. Under Docket No. 04-0557, item 3 of the citation, alleging a serious violation of § 1926.501(b)(1), is affirmed and a penalty of $ 625.00 is assessed; and

4. Under Docket No. 04-0556, item 1 of the citation, alleging a serious violation of § 1926.453(b)(2)(v), is affirmed and a penalty of $ 1,500.00 is assessed.

/s/ KEN S. WELSCH

Date August 2, 2004

KEN S. WELSCH
Judge