Secretary of Labor,
Complainant,
v.

Cleveland Construction, Inc.,
Respondent.

OSHRC Docket No. **98-957**

APPEARANCES

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Office of the Solicitor
U. S. Department of Labor
Cincinnati, Ohio
For Complainant

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General Counsel, Cleveland Construction, Inc.
Mentor, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Cleveland Construction, Inc. (CCI), is a large commercial construction contractor with offices in Mason, Ohio. On April 1, 1998, Occupational Safety and Health Administration (OSHA) compliance officer James Denton conducted an inspection at the University of Cincinnati's Design Architectural Arts Pavilion (DAAP) following a complaint regarding workers failing to use fall protection. As a result of Denton's inspection, the Secretary issued two citations to CCI on June 4, 1998.

Item 1 of citation no. 1 alleges a serious violation of § 1926.20(b)(2) for failure to make frequent and regular inspections of the jobsite. Item 2 of citation no. 1 alleges a serious violation of § 1926.503(a)(1) for failure to provide a training program for each employee who might be exposed to fall hazards. Item 1 of citation no. 2 alleges a willful violation of § 1926.501(b)(4)(i) for failure to protect employees on a walking/working surface from falling through an open skylight.

CCI admits jurisdiction and coverage. A hearing was held on January 4, 1999. The parties have filed post-hearing briefs. For the reasons set out below, the two items in citation no. 1 are vacated, and item 1 of citation no. 2 is affirmed and reclassified as serious.

Background

In 1996 the DAAP was built at the University of Cincinnati. Valentine Construction was the general contractor for the project. CCI was a subcontractor to Valentine Construction, hired to install the metal studs, drywall, acoustic ceilings, skylights, windows, roofing, carpeting, and flooring on the building (Tr. 235-236). CCI subcontracted the installation of the windows and the skylights to LinEl. LinEl subcontracted the skylight work to another subcontractor (Tr. 154, 235-236).

Rhett Stayer, a supervisor for CCI, was in charge of CCI's construction work on the DAAP in 1996. Stayer was on site daily during the construction of the DAAP (Tr. 182).

CCI returned to the DAAP in 1998 to oversee the installation of new skylights to replace the original skylights which had not been properly installed in 1996. CCI oversaw the replacement of the skylights as warranty work (Tr. 55, 154, 172, 234-236). Stayer was the superintendent overseeing the replacement of the skylights. Stayer was not on site at all times because he was also overseeing several other projects for CCI (Tr. 9, 11, 68, 177, 234).

To replace the skylights, CCI again subcontracted with LinEl, who in turn subcontracted with Midwest Erectors. Because Midwest did not have sufficient manpower to remove and replace the skylights, CCI provided several employees to work as laborers. At any given time there were usually three employees of Midwest on site and two or three employees of CCI (Tr. 14, 34, 68, 154-155, 172-173, 251).

The skylight at issue in this case is not flush with the working surface of the roof. The skylight is set atop parapet walls which decline inwards toward the building. The parapet is approximately 60 inches high at the outer portion of the wall and slopes down to 30 inches at the inner portion. The parapet itself is 8 inches wide. With the exception of the outer wall, roof sections surround the parapets (Tr. 38-39, 190). The width of the skylight and parapet structure is 18 to 25 feet. The skylight itself is segmented and divided into seven units by fins (Tr. 20, 220). The glass is set in steel purlins (Tr. 243). Each piece of skylight glass is 47¾ inches by as much as 110 inches, and weighs 400 pounds (Tr. 238).

Ralph Kerby is a journeyman glazer who worked on the original skylight installation in 1996 (Tr. 8, 30). In 1996, a platform placed below the skylight openings served as fall protection. In addition, employees used safety harnesses and lanyards to tie off when working from the roof of the building, adjacent to the skylight openings (Tr. 9-11, 26, 32-33, 182). In 1998, a finished building with pendant hung lights and a library was beneath the skylight (Tr. 175).

In the spring of 1998, Midwest called Kerby to return to the DAAP to help with the removal and replacement of the skylights. Kerby worked for one day removing moldings and preparing the skylight glass for removal (Tr. 13-14, 33-34).

In order to replace the skylight, the workers removed the beauty caps and the pressure bar. The workers cut out the caulk and then removed the glass. Starting at the top of the skylight, four people applied suction cups to the glass pane and lifted it. Two by fours were slid underneath the glass and the glass was slid down the lower portion of the skylight with the help of gravity (Tr. 157, 237-239).

Once the glass was removed, the workers cleaned the steel by scraping off the old glazing tape and wiping down the frame. They then prepped the steel by applying new glazing tape (Tr. 19, 21). For the lower portions of the skylight unit, the workers would kneel on the roof with the parapet in front of them. The upper portion was accessed by a ladder placed on the ground. A worker would then lean out with the parapet at his chest. The innermost portions of steel were cleaned and prepped by laying planks across the purlins, two by two angle irons approximately 8 inches thick and made of steel. The workers would then lie on the planks to perform the work (Tr. 241-243).

Kerby did not work again on the site after his first day, but he did return to the site to collect his pay. Upon returning to the site, Kerby observed that some of the skylight glass had been removed and two Midwest glazers and two CCI laborers were scraping sealant from the frames of the skylight without using any means of fall protection, exposing them to a fall of approximately 16 to 22 feet through the skylight opening (Tr. 15-16, 39-40).

Kerby telephoned OSHA and informed the agency of the working conditions he had observed at the DAAP. On April 1, 1998, OSHA compliance officer James Denton arrived at the

site to conduct an inspection in response to Kerby's complaint. When he arrived, Denton went to the main roof of the DAAP, above the location where the skylights were being replaced. From that location, Denton observed the Midwest and CCI employees working on the skylight replacement. Denton videotaped the activity he observed (Exh. C-1; Tr. 56-59).

The videotape shows a Midwest employee standing between a skylight opening and a wall. CCI superintendent Stayer can be seen standing, walking, and scooting adjacent to a skylight opening without using any means of fall protection. Nothing was covering the skylight opening. Stayer and the Midwest employee were exposed the hazard of falling through the skylight opening (Exh. C-1; Tr. 60-63, 93-94).

After videotaping the site, Denton continued his inspection, including interviewing Stayer. As a result of Denton's inspection, the Secretary issued the two citations that gave rise to this proceeding.

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).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that CCI committed a serious violation of § 1926.20(b)(2), which provides:

> [P]rograms [for accident prevention] shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Stayer was CCI's competent person on the site. Denton testified that Stayer told him "that he had not conducted a, quote, work site safety inspection of the site; that it was part of his responsibility to do that, but he had not done it on this particular project" (Tr. 88). Denton also stated, "Mr. Stayer had been there from basically the inception of this work which would have been maybe ten days prior to my inspection. Mr. Stayer's failure to inspect falls in line also with anticipation of hazards, not only identifying what is there, but what might be there" (Tr. 114-115).

Denton took a written statement from Stayer the day of the inspection. The statement, which is not signed by Stayer, does not mention whether or not Stayer conducted safety inspections of the site (Exh. C-3; Tr. 115-116). The Secretary adduced evidence that Stayer did not document any safety inspections he made of the site (Tr. 217). Section 1926.20(b)(2) does not require that the inspection be documented.

Stayer disputes Denton's statement that he told Denton that he had not conducted any safety inspections at the site. Stayer testified (Tr. 177):

> I believe the question that I understood from Mr. Denton to be was, "How long have you been on the site?"
>
> And, my comment was that, "We've been back for two weeks. Then we started two weeks."
>
> I think there was a total misunderstanding of the question and answer, but I inspected the site every day prior to the start of work.

The Secretary argues that "[i]t is apparent that Mr. Stayer did not conduct the necessary inspections because on April 1, 1998, he arrived on the site, and an employee was already on the roof, exposed to a fall hazard" (Secretary's Brief, p. 15). An inspection conducted in compliance with § 1926.20(b)(2) would not have prevented the employee from getting on the roof before Stayer arrived at the site on April 1. The standard does not require that the competent person

maintain a continuous presence on the site, only that he or she conduct frequent and regular inspections of the site.

The only evidence of a violation that the Secretary adduced was Denton's statement that Stayer told him that he did not conduct safety inspections of the site. This statement is not corroborated by Stayer's written statement taken by Denton, and it was directly refuted by Stayer at the hearing. The Secretary has failed to establish by a preponderance of the evidence that Stayer failed to make the required inspections. Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1926.503(a)(1)

The Secretary alleges that CCI committed a serious violation of § 1926.503(a)(1), which appears in subpart (M) and provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

The Secretary's basis for citing this item is Denton's testimony regarding his interview with CCI employee Mike Zapf. Denton stated (Tr. 86):

> I had sat down and interviewed a couple of other employees, laborers that were on the site, one in particular, this Mr. Zapf, who I asked about training specifically, and he told me that he had been part of some safety and health meetings where various topics had been discussed but he had no specific training in the OSHA subpart (M) fall protection requirements.

The court asked Denton for a more detailed description of the his interview with Zapf (Tr. 135-136):

> Q.: And, what was it specifically about what Mr. Zapf told you that led you to conclude that there was no training program?
>
> Denton: When I asked him specifically about the OSHA requirement under Subpart (M) for fall protection, if he knew those or had been trained on those, and his answer to me was, "no."
>
> Q.: Let me ask you this: Was that the question you asked him; whether or not you were trained under Subpart (M), fall protection?

Denton: Yes.

Q.: I don't want to put words in your mouth. Tell me as best you can exactly what the question was that you asked Mr. Zapf.

Denton.: I asked it in two ways. I first said, "What training have you received while employed with Cleveland Construction?"

And, then, his answer to that was that he had participated in some safety meetings where certain topics had been discussed.

The second part of that was, "Had you received any training in the OSHA Subpart (M) fall protection standards?"

And his answer to that was, "no."

CCI produced a training form, signed by Zapf and dated April 8, 1997. The form states that the employee has attended a training session conducted by the site superintendent, and that the training included (Exh. R-3):

3. Duty to have Fall Protection
   A) Six (6) foot rule for walking/working surfaces
   B) Explain: building edge, floor openings, wall openings
   C) Ten (10) foot rule for scaffolds
   D) Explain: guardrails/endrails, personal fall protection systems, warning lines and safety monitors

When Denton asked Zapf if he had been trained in fall protection, Zapf asserted that he had. This training is documented in Exhibit R-3. Zapf only answered in the negative when Denton asked him if he had been trained under "subpart (M)."

Employers are not required to ensure that their employees memorize the table of contents of the 1926 standards. An employee who has received fall protection training in compliance with the requirements of subpart (M) may not know that the fall protection standards are contained in subpart (M). In the present case, Zapf told Denton that he had received fall protection training. The Secretary adduced no proof that the training was deficient.

The Secretary has failed to establish a violation of § 1926.503(a)(1). Item 2 is vacated.

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.501(b)(4)(i)

The Secretary alleges that CCI committed a willful violation of § 1926.501(b)(4)(i), which provides:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Denton observed and videotaped Stayer walking down the sloped wall next to the skylight opening. Stayer then sat down, stood up, and slipped as he walked back up the slope (Exh. C-1; Tr. 94). A Midwest employee was between the skylight opening and the wall of the building (Tr. 97). Both men were exposed to a fall of 18 to 22 feet through the skylight opening (Tr. 62). The skylight opening was uncovered, and no other form of fall protection was used.

CCI argues that § 1926.501(b)(4)(i) did not apply to the skylight worksite at the time of Denton's inspection. CCI states (CCI's Brief, p. 11):

> Stayer's whole purpose was to supervise the erection of a scaffold and ramp, investigate, inspect, and assess the workplace conditions prior to the commencement of construction that day. He did not perform any work.

CCI contends that Stayer only discovered that the glass had been removed from the frames after he had walked up the ramp to the roof. At that point he also saw that a Midwest employee was exposed to the fall hazard. CCI argues that Stayer had no choice but to remain exposed to the fall hazard while he directed the employees to abate the hazard by placing planking over the opening. Stayer and the employees did not use fall protection while planking over the skylight opening (Tr. 141-142).

CCI's argument that the cited standard does not apply because Stayer was not doing actual work on the skylight is rejected. Section 1926.501(b)(4)(i) applies to Stayer's activities at the time of Denton's inspection. The fact that Stayer was not engaged in actually installing glass at the time of his exposure to the fall hazard does not alter the fact that he was exposed to the fall while in the scope of his employment.

CCI also argues that § 1926.501(b)(4)(i) does not apply to the cited conditions because a skylight is not a hole in a walking/working surface. CCI cites § 1926.501(b)(10) as being more applicable to the conditions at issue. Section 1926.501(b)(10) applies to "Roofing work on Low-slope roofs," and allows the use of a safety monitoring system (which CCI claims it was using in the present case) on roofs that are 50 feet or less in width.

Section 1926.501(b)(10) applies to "roofing work," which § 1926.500(b) defines as "hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, but not including the construction of the roof deck." CCI was doing none of these things. Furthermore, the cited standard, § 1926.501(b)(4)(i), specifically identifies skylights as holes within its meaning. Section 1926.501(b)(4)(i) is applicable in the present case.

The Secretary has established that the cited standard applies; that CCI's employee failed to use fall protection, in violation of the cited standard; that CCI's employee was exposed to a fall hazard; and that CCI knew of the violative condition because it was a CCI superintendent who committed the violation. CCI asserted no affirmative defenses prior to the hearing. The Secretary has established a violation of § 1926.501(b)(4)(i).

Willful Classification

The Secretary alleges that CCI's violation of § 1926.501(b)(4)(i) was willful. Willfulness is defined by the Review Commission as "one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Conie Construction, Inc.,* 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994).

> [A] violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of an employer's good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.

Williams Enterp., Inc., 13 BNA OSHC 1249, 1259 (No. 85-355, 1987).

The Review Commission has held that "a willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the

employer's efforts are not entirely effective or complete." *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-239, 1995), *aff'd* 73 F.3d 1455 (8th Cir. 1996).

The Secretary has failed to show that the violation was willful. Stayer's behavior was careless, but it was not shown to be intentional or committed with reckless disregard. Stayer was surprised to observe an employee exposed to a fall hazard when he gained access to the roof on April 1. He wished to act quickly to abate the hazard. Stayer explained his predicament at the hearing (Tr. 166-167):

> At that point I was faced with--there was only three things I could do: Number one, I could tell him to get out of there, but that would involve walking up the ramp that the guy walked down that he shouldn't have. My second option was, I could have gone back to the studio--left this guy on the roof, gone back to the studio, got my lanyard, my personal fall protection, try to find a janitor who would let me off the roof. Then, I would have had to put a safety line up to go to the edge of the roof to drop a line.
>
> Then, I would have headed on back around, somehow got it from the ground and re-hooked myself up in that facility which would probably take about 45 minutes. I couldn't leave the guy on the roof. The guy showed some poor discretion by going up there. I had no choice. I had to stay there with my eyes on that guy and cover the hole, and that's what I did. I had no choice. It was a Catch 22.

The violation is classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

CCI employed over 200 employees at the time of Denton's inspection (Tr. 45). The Secretary has cited CCI for serious violations of the Act within the past three years (Exh. C-4). CCI is credited with showing good faith because it has a written safety program, which includes training in fall protection (Exh. C-2).

The gravity of the violation is high. Stayer walked down a slippery slope without fall protection while next to an opening that was 18 to 20 feet above the floor below. Furthermore, Stayer was a supervisor who was responsible for identifying unsafe conditions on the worksite.

It is determined that a penalty of $2,000.00 is appropriate.

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 of citation no. 1, alleging a serious violation of § 1926.20(b)(2), is vacated and no penalty is assessed;

2. Item 2 of citation no. 1, alleging a serious violation of § 1926.503(a)(1), is vacated and no penalty is assessed; and

3. Item 1 of citation no. 2, alleging a willful violation of § 1926.501(b)(4)(i), is affirmed as serious and a penalty of $2,000.00 is assessed.

KEN S. WELSCH
Judge

Date: August 2, 1999