

Secretary of Labor,

Complainant,

v.

Artistic Enterprises, Inc.,

Respondent.

OSHRC Docket No. 02-2109

Appearances:

Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee
For Complainant

Daniel Moraru, President, Artistic Enterprises, Inc., Lawrenceville, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Artistic Enterprises, Inc., contests a citation issued to it by the Secretary on October 31, 2002, alleging serious violations of five construction standards of the Occupational Safety and Health Act of 1970 (Act). The citations arose from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Ronald Hynes on September 10, 2002, at a construction site in Huntsville, Alabama.

Item 1 of the citation alleges a serious violation of § 1926.100(a) for failing to require its employees exposed to falling objects to wear hard hats.

Item 2 of the citation alleges a serious violation of § 1926.451(b)(1) for failing to fully plank and deck each platform of a scaffold from which employees were working.

Item 3 of the citation alleges a serious violation of § 1926.451(e)(1) for failing to provide an access ladder to the working level of a scaffold.

Item 4 of the citation alleges a serious violation of § 1926.451(g)(1) for failing to provide fall protection for employees working from a scaffold.

Item 5 of the citation alleges a serious violation of § 1926.451(h)(2)(ii) for failing to install toeboards along the edges of scaffold platforms.

A hearing was held in this matter on August 12, 2003, in Huntsville, Alabama. Artistic was represented *pro se* by its president Daniel Moraru. The Secretary established jurisdiction and coverage at the hearing (Tr. 88-89). Both parties have declined to file post-hearing briefs.

Artistic contends that the employees exposed to violative conditions observed by Hynes were not its employees, but the employees of G & D Stucco, to whom Artistic subcontracted the job. Thus, Artistic argues, it is not liable for any of the alleged violations.

For the reasons discussed below, Artistic's argument is rejected and items 1 through 5 are affirmed.

Background

On September 10, 2002, compliance officer Ronald Hynes was staying at a Residence Inn in Huntsville, Alabama. As he left the hotel at 7:30 that morning, he noticed a Days Inn under construction across the street. Hynes observed several conditions that he considered OSHA violations. After consulting with OSHA's Birmingham area office, Hynes received permission to inspect the Days Inn site (Tr. 10-11).

Hynes took several photographs from across the street (Exhs. C-1 through C-9) before proceeding to the worksite. At the site, he presented his credentials to Mike Harvey, representing Atlantic United Construction, the general contractor, and to Virgil Ivan, who identified himself as Artistic's foreman (Tr. 11). Ivan called Gordu Puha, whom Hynes understood to be Artistic's superintendent (Tr. 12).

Artistic applies stucco using an "exterior insulation finish system" (EIFS) (Tr. 136). Atlantic United Construction contracted Artistic to apply exterior stucco to its Days Inn project (Tr. 9-10). On September 10, 2002, scaffolding had been erected along the front of the building, as well as along one side. The back of the building had been completed except for the "Days Inn" sign (Tr. 83-84). Hynes observed two employees, foreman Ivan and M. B. Artusio, working without hard hats on a scaffold. The scaffold was not fully planked and decked, it was not equipped with an access ladder or toeboards, and the employees were not using fall protection.

Based upon Hynes's recommendations, the Secretary issued the instant citation to Artistic, as well as a citation charging identical violations to Atlantic United Construction.

Was Artistic the employer of the exposed employees?

At the hearing, Moraru testified that Artistic had subcontracted the Days Inn job to G & D Stucco, a company owned and operated by Gordu Puha (Tr. 133). Puha also testified that his company had subcontracted with Artistic (Tr. 97). English is not Puha's native language, and his testimony was difficult to follow at times. He made it clear, however, that G & D subcontracted with Artistic and that G & D was performing the actual stucco work on the project. Neither Moraru nor Puha produced any documentary evidence showing that G & D exists or that a subcontract existed between G & D and Artistic.

When Hynes arrived on the site, Mike Harvey, the general contractor's superintendent, identified Artistic as the subcontractor whose employees were applying stucco to the building. Ivan and Artusio identified themselves as employees of Artistic. When asked why his own employees thought they were working for Artistic, and not G & D, Puha stated, "I don't know, because never no ask me who for what because they have already the information" (Tr. 108).

When questioned about what form his business takes, Puha at first stated that it was incorporated in the state of Georgia (Tr. 105). Later, without explanation, Puha stated that his company was, in fact, not incorporated. He also stated that he did not have Workers' Compensation Insurance (Tr. 110), then later stated that he did have it with Cowart Insurance (Tr. 118).

Moraru attempted to explain why the general contractor was unaware that G & D was the subcontractor on the job (Tr. 134-135):

MORARU: And to answer the other question that was raised to Mr. Puha before, how come Atlantic United Construction, they didn't know about them being on the site, is that they have changed few project managers at the site. So only Mike, the superintendent, Mike Harvey was the one who stayed with this company from the beginning of the project.

THE COURT: Okay. But wasn't he the individual that was there, Mr. Harvey?

MORARU: Yes. He was working for Atlantic United, I think from the beginning of this project.

THE COURT: Why wouldn't he know then?

MORARU: Because he was just a site superintendent, and the project manager is usually the one who has all the information.

Puha was unable to provide basic information about his own purported company. The general contractor's site manager as well as Puha's own crew thought that Artistic was the stucco subcontractor on the site. This evidence casts considerable doubt upon Artistic's claim that it was not the employer of the stucco employees working on the site.

The strongest evidence weighing against Artistic's claim that it subcontracted the Days Inn project to G & D is its own pre-hearing pleadings filed in this case. After the Secretary issued the citation on October 31, 2002, Moraru responded with a letter dated November 10, 2002, captioned "INTENT TO CONTEST CITATIONS AND PROPOSED PENALTIES." The letter appears under Artistic's letterhead and is signed "ARTISTIC ENTERPRISES, INC. /Daniel Moraru, President."

The letter states in its entirety:

In regards to the above referenced letter and inspection, we would like to contest all citations and proposed penalties due to the following reasons:

1. The EIFS work on the Days Inn Project, Huntsville, Alabama was already completed at the time of the inspection. Our crew was just installing the EIFS logo sign, and used temporary scaffolding.
2. Corrective measures were taken immediately, on the spot.
3. We have a good safety program and a good safety record. References from OSHA Safety Inspectors in Georgia are available.
4. We have immediately notif[ied] and held additional safety meeting[s] on all our job sites about the Alabama inspection.
5. We are a very small subcontractor, struggling to survive in a very competitive market and our profit margins on a project like the one inspected in Huntsville is far below the proposed penalties.
6. We took immediate corrective actions and will be more careful in the future to make sure that even on a small temporary condition, the work is performed on a safe environment and according with your rules and regulations.

So therefore, we kindly asked your cooperation in eliminating the monetary penalties and we assure you of our cooperation and carefulness in the future.

Following the filing of the Secretary's complaint on December 16, 2002, Moraru filed an answer on behalf of Artistic dated December 20, 2002. The answer contains five numbered paragraphs corresponding to the five alleged violations. Except for the item number and the first two sentences, the paragraphs are identical. The first paragraph is representative:

1. Citation 1, Item 1: Partially Denied

The employees doing EIFS work on the Days Inn Project, Huntsville, Alabama had hard hats available. D[ue] to the heat they took them off. **Corrective measures were taken immediately, on the spot.** We have a good safety program and a good safety record. References from OSHA Safety Inspectors in Georgia are available. We have immediately notif[ied] and hold additional safety meeting[s] on all current job sites about the Alabama inspection. AE is a very small subcontractor, struggling to survive in a very competitive market and our profit margins on a project like the one inspected in Huntsville is far below the proposed penalties. We took immediate corrective actions and will be more careful in the future to make sure that even on a small temporary condition, the work is performed on a safe environment and according with your rules and regulations.

Moraru refers repeatedly to “our crew” in both in his notification of contest and his answer. No reference is made to another contractor. When asked at the hearing why Artistic never mentioned that it had subcontracted the Days Inn project to G & D in its answer, Moraru responded (Tr. 142): “Because [the complaint] was addressed Artistic Enterprises and we answer just what it was the questions.”

Such a response would be questionable if given by a new small business owner with no previous history with OSHA. Coming from an experienced businessman with a history with OSHA, Moraru’s statement appears disingenuous.

Artistic had been cited for safety violations under both federal OSHA and state plans in the previous 3 years in Michigan, Nevada, Georgia, and Alabama (Tr. 35-36). Moraru was the vice-president of another company, C & D European Stucco and Stones, Inc., and he testified as a witness in a Review Commission hearing before the undersigned on a 1996 inspection in Georgia. Moraru and his seven brothers had a number of other ongoing business interests at the time of the inspection, including Georgia Marketing Group (importing glass from Rumania), 3M Auto (commissioned purchase and sale of automobiles), Spirits of Transylvania (importing alcohol from Rumania), Alba Rental Corporation (office and equipment rental), and Elegant Construction Inc. (stucco construction) (Tr. 137, 146-149). It is not credible that an experienced businessman who had participated in several previous OSHA proceedings would respond to the Secretary’s complaint in the manner that Moraru did if he believed that his company had been incorrectly identified as the responsible employer.

Artistic's claim at the hearing that it had subcontracted the Days Inn project to G & D appears to be a *post hoc* attempt to evade responsibility for the safety violations committed by its own employees. The argument is rejected. Artistic is the employer of Ivan and Artusio, the employees observed by Hynes at the Days Inn site.

The Citation

The Secretary alleges that Artistic committed five serious violations of OSHA's construction standards. She has the burden of proving this violation 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Artistic was engaged in applying exterior stucco to a building under construction. The 1926 construction standards apply to the cited conditions. All of the alleged violative conditions occurred in plain view and in the presence of Artistic foreman Ivan. His knowledge is imputed to Artistic. The Secretary has established the elements of applicability and knowledge for all of the cited items.

Item 1: Alleged Serious Violation of § 1926.100(a)

Section 1926.100(a) provides:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The citation alleges that on September 10, 2002, Ivan and Artusio were not wearing protective helmets while working in an area where there was a possible danger of head injuries. Hynes testified that he observed Ivan and Artusio working one below the other on the scaffold located at the front of the building. Neither employee was wearing a hard hat. Hynes saw no hard hats available on the site. Photographs taken by Hynes corroborate his testimony that the employees were working on the scaffold while exposed to potential falling objects. The scaffold platforms were not equipped with toeboards, increasing the danger that tools and material, including hand trowels

and buckets of stucco material, could fall on the employee working below them (Exhs. C-3 through C-7; Tr. 22-25, 29, 32).

In its answer, Artistic admits that its employees were not wearing protective helmets at the time of Hynes's visit. Artistic claims that they had been wearing hard hats, but had taken them off due to the heat. (This claim does not excuse Artistic from compliance with the standard. Artistic neither asserted nor argued an employee misconduct defense.) Hynes took the photographs of the employees working without hard hats from across the street at approximately 7:30 a. m. on a day in mid-September. The temperature at the time was in the mid 70s (Tr. 79). Artistic's claim that its employees took off their helmets only after they became uncomfortably hot is not credited. Hynes testified that Ivan and Artusio had to borrow hard hats from the general contractor in order to abate the hazard (Tr. 33).

The Secretary has established that Artistic failed to require its employees to wear hard hats and that the employees were exposed to potential falling objects. Item 1 is affirmed.

Item 2: Alleged Serious Violation of § 1926.451(b)(1)

Section 1926.451(b)(1) provides:

Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports[.]

The citation alleges that the fabricated frame scaffold that Artistic's employees were working from was not fully planked or decked on September 10, 2002. In its answer Artistic states, "This was a very short term work after the main work was completed. Our crew was just installing the EIFS Logo sign, and used temporary scaffolding."

Artistic's employees erected the scaffold, which had a metal frame with two levels at 13 feet and 19 feet (Tr. 39-40). Hynes stated that on both working levels, Artistic had only one 10 to 12 inch wide board between the front uprights and the guardrail supports, instead of the five or six boards required to fully plank each level (Tr. 43). Boards were available on the site sufficient to fully plank and deck the scaffold (Tr. 44).

The scaffold was in plain view (Tr. 43). Exhibit C-3 shows an employee straddling two sections of the scaffold on a single plank. Exhibit C-6 shows foreman Ivan on the upper level and

Artusio on the lower level, both standing on a single board while applying stucco material to the wall (Tr. 47).

Moraru, who was not present at the site on the day of the inspection, suggested that the employees were in the process of erecting the scaffold and that is why it was not yet fully planked and decked. Puha (who was not present when Hynes was taking pictures of the worksite) stated that the employees were erecting the scaffold and that it was not completed at the time of Hynes's inspection (Tr. 98, 120).

Puha's entire testimony (even given the language difficulties) was confused and self-contradictory. His manner was evasive and at times appeared belligerent (Tr. 116, 121, 130). Hynes's demeanor, on the other hand, was focused and credible. Hynes stated emphatically that, "The employees were working from the scaffold system, so they weren't erecting it or disassembling it at the time of my inspection" (Tr. 87). The photographic exhibits bear out Hynes's testimony. Exhibit C-6 clearly shows the employees working with the stucco material on the wall. Exhibit C-8 shows Ivan standing on the upper level of the scaffold reaching into a window archway. When asked what the individual in the photograph was doing, Puha responded that he did not know (Tr. 122).

The Secretary has established that Ivan and Artusio were working in plain view from a single plank on levels at 19 feet and 13 feet respectively. Item 2 is affirmed.

Item 3: Alleged Serious Violation of § 1926.451(e)(1)

Section 1926.451(e)(1) 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 pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

Hynes testified that the scaffold was not equipped with any type of access ladder and that there was no access ladder anywhere on the site (Tr. 53). The employees accessed the two levels of the scaffold by climbing the crossbraces (Exhs. C-2 and C-9; Tr. 55). As Ivan climbed the crossbraces, he was carrying his tools in his hands, increasing his risk of falling (Tr. 56). Puha and

Ivan acknowledged to Hynes that they were in violation of § 1926.451(e)(1), but asked him “to look the other way” (Tr. 58).

Artistic offered no defense to this allegation. Item 3 is affirmed.

Item 4: Alleged Serious Violation of § 1926.451(g)(1)

Section 1926.451(g)(1) provides in pertinent part:

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.

Ivan and Artusio were working from heights of 19 feet and 13 feet respectively. It is undisputed that they were using no form of fall protection -- no guardrails, no safety nets, no personal fall arrest system, and no monitor (Tr. 61-62). The need for fall protection was more important due to the fact that the employees were working from a single plank rather than a fully planked platform.

Artistic offered no defense to this allegation. Item 4 is affirmed.

Item 5: Alleged Serious Violation of § 1926.451(h)(2)(ii)

Section 1926.451(h)(2)(ii) provides in pertinent part:

A toeboard shall be erected along the edge of platforms more than 10 feet (3.1 m) above the lower levels for a distance sufficient to protect employees below[.]

Artistic had not erected toeboards anywhere on the scaffold (Tr. 70). Ivan and Artusio were working at heights of 19 feet and 13 feet. Artusio was working directly below Ivan and was not wearing a hard hat. He was exposed to the risk of being struck by falling tools or materials (Tr. 72).

Artistic presented no defense to this charge. Item 5 is 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.

Artistic had 10 employees at the time of the inspection and is considered a small employer (Tr. 90). The Secretary had cited Artistic within the 3 years prior to the instant inspection (Tr. 34-36). Artistic gets no credit for good faith in this proceeding. It appears that it sought to avoid

responsibility for its violations by misrepresenting its true subcontractor relationship with the general contractor and adducing misleading testimony.

The gravity of each of the violations is high. If only one of any of the cited items had been affirmed, the gravity may have been reduced, but the totality of the violations exacerbated the hazards. The failure to wear hard hats was made worse by the lack of toeboards. The failure to fully plank the platforms increased the need for fall protection. Fully planked platforms would have provided surer footing for employees using the crossbraces to access the scaffold. The scaffold as erected created a highly hazardous environment for the employees. Two employees were exposed to the hazards as they worked from the scaffold.

It is determined that the appropriate penalties for the cited items is as follows:

Item 1	\$800.00
Item 2	\$1,500.00
Item 3	\$800.00
Item 4	\$2,000.00
Item 5	\$800.00

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. Item 1 of the citation, alleging a violation of § 1926.100(a), is affirmed, and a penalty of \$800.00 is assessed;
2. Item 2 of the citation, alleging a violation of § 1926.451(b)(1), is affirmed, and a penalty of \$1,500.00 is assessed;
3. Item 3 of the citation, alleging a violation of § 1926.451(e)(1), is affirmed, and a penalty of \$800.00 is assessed.

4. Item 4 of the citation, alleging a violation of § 1926.451(g)(1), is affirmed, and a penalty of \$2,000.00 is assessed; and
5. Item 5 of the citation, alleging a violation of § 1926.451(h)(2)(ii), is affirmed, and a penalty of \$800.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: December 12, 2003