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. Manhattan Construction "Florida," Inc.., Respondent.	OSHRC Docket No. 12-2083

APPEARANCES:

Amy R. Walker, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For Complainant

John M. Hament, Esq., Kunkel Miller & Hament, Sarasota, Florida
For Respondent

BEFORE: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Manhattan Construction "Florida" Inc. (MCF) is a general construction company headquartered in Naples, Florida. On August 1, 2012, at a MCF project to expand the Omni Amelia Island Plantation Resort, Fernandina Beach, Florida, two employees of E.C. Concrete, Inc. (ECC), the concrete contractor, were struck and injured entering Building B when approximately six shoring beams fell off the 7th floor. An ECC crew on the 7th floor had placed the beams on top of a shoring scaffold which tipped over when the crane's hoist chains became entangled with the scaffold's cross brace. As a result of the accident, a Safety Engineer (SE) with the Occupational Safety and Health Administration (OSHA) initiated an inspection on August 1, 2012.

On September 19, 2012, MCF and ECC were issued serious citations. The citation issued to MCF alleges a serious violation of 29 C.F.R. § 1926.501(c)(3) for failing to protect subcontractor employees on the ground from falling objects during overhead concrete work by

use of barricades.[1] The citation proposes a penalty of $3,825.00. MCF timely contested the citation.

A consolidated hearing with the serious citation issued to ECC (Docket No. 12-2082) was held on March 26 - 28, 2013, in Jacksonville, Florida.[2] The parties stipulated to jurisdiction and coverage (Tr. 19). The parties' post-hearing briefs were filed on June 3, 2013.

MCF denies the violation. MCF argues the Secretary failed to show that MCF knew the employees were exposed to falling objects as required by the § 1926.501(c)(3) because the accident was "unforeseen and freakish." MCF also claims the multi-work site defense because as the construction manager, it did not create or control the alleged unsafe condition and it had no employees exposed to the condition.

For the reasons discussed, MCF's alleged violation of § 1926.501(c)(3) is vacated and no penalty is assessed.

The Accident

MCF, as a general construction company, has five offices in Florida and employs approximately 150 employees. In 2011, MCF was contracted by the property owner to manage the construction of a large expansion project at the Omni Amelia Island Plantation Resort, Fernandina Beach, Florida. The project began in mid-October 2011 and was approximately 80 percent completed by the date of the hearing. MCF used twelve employees to manage the project, including the Operations Manager, a Safety Manager and Field Superintendents (Tr. 81, 604-605, 669).

To perform the concrete work, MCF contracted ECC to, in part, "provide the concrete forming, concrete pumping and placing, concrete finishing for the Hotel Buildings A, B, C, D and F at the OMNI Amelia Island Plantation Resort Project in Amelia Island, Florida" (Exhs. C-13, Ex A, p. 2). ECC's concrete work on the project began on January 15, 2012, and was completed in February 2013 (Tr. 380, 423).

On August 1, 2012, an ECC crew was on the 7th floor of Building B constructing the shoring system to support the concrete pour for the roof (Tr. 381). The tables supporting the 7th

[1] The violation of § 1926.501(c)(3) is alleged in the serious citation (item 3) issued to ECC. The Court's Decision and Order involving ECC is also issued this date.

[2] Although initially designated for simplified proceedings under 29 C.F.R. **§** 2200.200 *et seq*., the case was converted by the court, without objection by the parties, to conventional proceedings by Order dated March 29, 2013, because of the complexity of the issues and the length of the hearing (Tr. 490).

floor were still in place and extended beyond the concrete floor an additional 3 - 4 feet (Tr. 509). The shoring system used by ECC was rented and constructed in accordance with specifications provided by Aluma Systems Engineering (Exh. R-6; Tr. 424-425). ECC had assembled and placed shoring scaffolds parallel to and approximately 6 feet from the perimeter of the floor (Tr. 205). Each shoring scaffold weighed approximately 400 pounds and was rectangular in shape (approximately 4 feet wide, 7 feet long) with four vertical legs (10 feet high) and cross-braces (Exhs. C-6; Tr. 505-506, 525).[3]

At approximately 9:00 a.m., the ECC crew had placed a bundle of six 17-foot long, aluminum shoring beams on top of a scaffold with the assistance of the crane located on the ground (Tr. 315, 508, 514). The beams were hoisted from the center of the 7th floor and placed on the scaffold. Each beam weighed approximately 60 pounds (Tr. 322, 579). After completing the hoist, the crane's hoisting chains became entangled with the scaffold's cross brace, causing the scaffold to be lifted off the floor and tipped over onto the floor's perimeter. The scaffold did not fall off the floor, but the aluminum beams on top did fall; injuring two ECC employees accessing Building B on the 1st floor entrance (Exhs. C-1, C-3; Tr. 44). This was the main entrance into the building and it was not barricaded to prevent access (Tr. 97). The guardrail system around the perimeter of the 7th floor had been removed along the front of Building B where the crew was placing the beams on top of the scaffolding (Tr. 319-320).

After OSHA was notified of the accident, the SE arrived at the project at approximately 10:00 a.m. to initiate an inspection (Tr. 31). The injured employees had been removed from the worksite and the fallen scaffold had been secured to the floor's edge (Tr. 164, 348). The SE held an opening conference and travelled to the 7th floor where the ECC crew was attempting to remove the fallen scaffold hanging over the edge (Tr. 153-154). The SE interviewed employees, took photographs, and gathered other information and documents. As a result of the OSHA inspection, MCF was issued the serious citation for violation of § 1926.501(c)(3) on September 19, 2012.

At the hearing, the parties agreed to the following stipulations (Exh. ALJ-1).

1. Manhattan was the construction manager on the subject project. ECC was a subcontractor who performed concrete work.

[3] During the hearing, there was discussion by counsel whether a shoring frame is also considered a scaffold. The court throughout this decision refers to the frame as a scaffold for consistency (Tr. 338). ECC officials in their interviews referred to the frames as scaffolds (Exhs. C-16, C-17; Tr. 45-47, 364-365).

2. An incident occurred on the morning of August 1, 2012, in which approximately 5 to 6 aluminum beams fell and injured two workers.
3. On August 1, 2012, [the SE] arrived at the worksite and conducted an investigation.
4. On August 1, 2012, ECC was working as a concrete subcontractor on the seventh-floor deck of Building B at the worksite pursuant to its contract with construction manager, Manhattan.
5. On August 1, 2012, ECC was in the process of assembling and placing engineered shoring on the seventh-floor deck of Building B to support concrete to be poured on the next deck of Building B pursuant to plans and specifications provided by nonparty Aluma Systems Engineering.
6. [The SE] was the only OSHA employee to perform an inspection of the worksite.
7. [The SE] confined his August 1, 2012, investigation to Building B.

Discussion

MCF denies the alleged violation § 1926.501(c)(3) and claims the record fails to show that it should have known the employees were exposed to falling objects. Also, MCF asserts the multi-employer worksite defense on the basis that, as the construction manager, it did not create or control the violative condition and had no employees exposed. At the hearing, MCF withdrew its alleged defenses of employee misconduct, greater hazard, impossibility and infeasibility (Tr. 11).

To prove a violation of the cited standard, the Secretary has the burden of proof.

> 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).

Serious Citation
Alleged Violation of § 1926.501(c)(3)

The citation alleges MCF violated §1926.501(c)(3) on the grounds that "[O]n or about August 1, 2012, subcontractor employees on the ground level below overhead concrete work were not protected from falling objects by use of a barricade."

Section 1926.501(c) provides:

> When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:
>
> *****
>
> (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that my fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

In addition to requiring employees to wear hard hats, § 1926.501(c) requires employers to protect employees from falling objects by barricading the area as alleged in this case or by two other measures including erecting toeboards, screens or guardrails to prevent objects from falling from higher levels (§ 1926.501(c)(1); or by erecting a canopy structure and keeping potential falling objects far enough from the edge (§1926.501(c)(2).

There is no dispute that at the 1st floor entrance there were no barricades to prevent access to Building B (Exhs. C-3, C-4, C-6, C-7). Also, the guardrail system at the perimeter of the 7th floor had been removed from the side above the entrance. There is no showing or allegation that there was a canopy structure to protect from falling objects (Exh. C-2).

The SE testified that the hazard of falling objects was caused by ECC's placement of the 10-foot high shoring scaffold, 5 feet 8 inches from the concrete perimeter of the 7th floor (Tr. 221-222). At the hearing, the Secretary also identified materials such as cross braces, wood and rebars lying on the floor as other possible falling objects (Tr. 89-90).

Multi-Employer Worksite

MCF argues that as the construction manager, it was not responsible for the alleged violation by virtue of its reliance on ECC's expertise, supervision and safety compliance efforts. ECC, as the concrete contractor, was contractually obligated to perform and supervise the concrete work as well as to ensure compliance with applicable safety standards.

MCF distinguishes the responsibilities of a construction manager and a general contractor. MCF's Operations Manager testified that a construction manager is not awarded the contract based solely on price, rather it is qualification based. A construction manager essentially manages the project on behalf of the owner. It does not perform any of the work on the project. As a construction manager, the award of subcontracts is negotiated and is also not solely based on price. According to the Operations Manager, the negotiations with ECC involved discussing safety and its assurance that it would perform the job safely. MCF relied on ECC to perform all of the safety aspects related to its concrete work including OSHA compliance (Exh. R-12; Tr. 606, 614-615, 617-618).

On the other hand, the Operations Manager testified that a general contractor is awarded the contract based on price and often performs certain portions of the trade work with its own employees. General contractors also award subcontracts based on price. As to safety, the general contractor performs some of the safety aspects on a project including the installation of handrails and guardrails.

On a multi-employer worksite such as in this case, the Review Commission considers each employer engaged in construction activities responsible under the Occupational Safety and Health Act (Act) for both those hazardous conditions to which its own employees are exposed subject to certain defenses and those hazardous conditions to 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. 2873, 1992).

There is no showing in this case that MCF's employees were exposed to the hazard of falling objects or that it created the hazard by placing the beams on the scaffolds. MCF was not the concrete contractor responsible for erecting the shoring system. Although the 1st floor entrance was designated as the employees' main access into Building B and it was not barricaded, MCF did not create an unsafe condition. MCF was not responsible for the performance of the concrete work and the placement of the shoring scaffolds and beams on the 7th floor. MCF relied on ECC to perform the concrete shoring work in accordance with the engineer's specifications (Exh. R-6).

The record establishes, however, that MCF was a controlling employer. A controlling employer may still be held responsible for violations of OSHA standards although it did not create the condition or have employees exposed. *Summit Contractors, Inc.,* 23 BNA OSHC 1196

(No. 05-0839, 2010). MCF contracted ECC to perform the concrete work. According to ECC's Superintendent, MCF retained the authority to stop ECC's work, correct unsafe practices including barricading an area, select access points to the work, and "somewhat" direct ECC's work. "Someone from Manhattan was on site at all times, yes" (Tr. 378-379). ECC considered MCF like a general contractor and its contract was with MCF (Tr. 378).

During the OSHA inspection, MCF agreed that it controlled the project and could correct hazards. It could stop a contractor if it saw an unsafe condition (Tr. 125). Even though ECC was responsible for safety under its contract with MCF, MCF was not relieved of its responsibility to ensure a safe workplace. An employer cannot contract away its OSHA obligations. *Baker Tank Co.*, 17 BNA OSHC 1177, 1180 (No. 90-1786, 1995). MFC's designation as a construction manager did not negate MCF's control over the project and its contractors.

The Operations Manager's testimony makes clear that as a construction manager, MCF still retained as much control over the project as a general contractor. He testified that MCF supervised the worksite every day. MFC's superintendents were on site any time work was being performed. MCF expected its superintendents to visit each work area at least once a day. MCF's Operations Manager and a superintendent agreed that MFC had the authority to stop the work of any contractor and had the authority to instruct any contractor to correct a condition that MCF deemed unsafe (Tr. 125, 663).

To be not held responsible for a violation created by a contractor, it must be shown that the controlling employer failed to exercise reasonable diligence to prevent and detect violations. The extent of the measures a controlling employer must implement to satisfy the duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). A controlling employer may rely in part upon the assurances of a contractor, so long as it has no reason to believe that the work is being performed unsafely. *Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984).

Although ECC's concrete work was open and obvious, the record shows that MCF lacked knowledge, as discussed below, that the scaffold and other objects posed a potential falling hazard.

Secretary's Burden of Proof

1. Application of § 1926.501(c)(3).

Section 1926.501(c)(3) applies to construction projects where there is a potential hazard from falling objects. The Omni Amelia Island project included the construction of several multi-story buildings such as Building B where the potential hazard from falling objects was present. The application of § 1926.501(c)(3) is established.

1. Noncompliance with § 1926.501(c)(3).

There is no dispute that the 1st floor entrance into Building B was not barricaded or otherwise protected from falling objects while ECC was erecting the shoring on the 7th floor (Tr. 87). On August 1, 2012, two ECC employees were struck and injured by the beams which had fallen off the 7th floor. The guardrail system with toeboards had been removed from the 7th floor perimeter above the entrance. Noncompliance with terms of § 1926.501(c)(3) is established.

2. Employees' exposure.

The 1st floor entrance was designated as the main access, if not the only access, into Building B (Tr. 372-373). ECC employees used the entrance while ECC crew on the 7th floor was erecting the shoring system. Two ECC employees were struck and injured by shoring beams which had fallen off the 7th floor. Employees' exposure is established.

3. MCF's Knowledge

Secretary claims MCF had actual and constructive knowledge of the hazard of falling objects from ECC's erection of the shoring system on the 7th floor. MCF's lead superintendent knew the 1st floor was not barricaded. He also knew of ECC's shoring work on the 7th floor (Tr. 87, 102, 125, 661). According to the Secretary, MCF also had constructive knowledge because ECC's shoring work was open and obvious that could have been discovered by reasonable diligence.

A MCF superintendent was assigned to inspect ECC's work daily. ECC's shoring work on the 7th floor was immediately above the 1st floor entrance into the building. The shoring work had started the day before the accident (Tr. 359). However, there is no evidence that a MCF superintendent was present during the shoring work prior to the accident on August 1, 2012. It was a very large construction project and the accident occurred at approximately 9:00 a.m.

The Secretary also relies on the contract between MCF and ECC to show knowledge. In the contract, ECC agreed that

> "Scaffolds shall be secured to the building structure to prevent tipping or falling when used closer than one and one-half (1½) times the scaffold height to an opening, or the edge of the building (*e.g.*, a scaffold ten feet (10') high within fifteen feet (15') from the edge of an opening, or the building, shall be secured to prevent tipping or falling). Locking the wheels on a mobile scaffold is not sufficient to prevent the scaffold from tipping or falling. (Exh. C-13, EXHIBIT A, p. 8 of 9, #13).

However, the contract provision is not an OSHA requirement under § 1926.450. There is no citation issued to MCF for violating the scaffold standards at § 1926.450 nor the concrete construction standards at § 1926.700. The presumption by the Secretary that the shoring posed a hazard because the contract scaffold requirements were not adhered to does not establish MCF's knowledge of the conditions on August 1 at the time of the accident. Neither MCF nor ECC are cited for failing to comply with the contract provision. There is also no evidence that MCF considered the scaffold on the 7th floor not in compliance with its contract with ECC.

Section 1926.501(c) requires the Secretary to show, as a predicate to requiring an employer to provide abatement measures such as barricading, that "an employee is exposed to falling objects." In order to determine the potential for falling objects, it is important to consider the nature of the object and distance of object from the perimeter.

The scaffold in this case was not shown to be reasonably expected to tip over from hoisting chains and pose a falling object hazard. The scaffold weighed in excess of 400 pounds and was stable. The scaffold consisted of four legs, spread 4 feet apart in width and 7 feet apart in length. It posed no tipping hazard. The scaffold was located almost 6 feet from the perimeter of the concrete floor. The beams that sat on top of the scaffold weighed approximately 60 pounds apiece and were 16 feet in length.

The other objects on the 7th floor noted by the Secretary such as cross braces, rebar, and wood pieces, are also not shown to pose a falling object hazard. The other objects were identified by the Secretary's counsel after reviewing the photographs taken by the SE after the accident. According to the SE, he only considered the beams on the scaffold as falling objects. He did not measure the location of the other objects to the perimeter of the floor. Also, the record fails to show that the other objects were in the same location shown in the photographs prior to the accident or were moved as a result of the accident and urgency to remove the fallen

scaffold from hanging over the perimeter. The other objects were incapable of rolling toward the edge and appear situated far enough from the perimeter to prevent accidental displacement (Tr. 551-552).

The 7th floor deck extended beyond the concrete perimeter an additional 3-4 feet because of tables supporting the 7th floor (Tr. 208). The SE agreed that any object that fell from the concrete perimeter would have fallen onto the tables extending beyond the perimeter. However, he did not consider the tables when he recommended the citation (Tr. 234-235, 307-309). Although the tables had 24-inch gaps where a column was located, the tables provided addition protection from potential falling objects beyond the concrete perimeter, particularly a 16-foot long beam. Additional protection from falling objects was also provided by the vertical rebar, approximately 30 inches high and approximately 20 inches apart, located along the perimeter of the floor. The rebars were in place for an eventual cement wall (Exhs. C-7, C-15; Tr. 375, 521-522).[4]

In a prior inspection of Building B on June 28, 2012, the same SE found no problems and recommended no violations based on his focused inspection that included struck by hazards or hazards of falling objects. He had observed ECC's shoring system under similar conditions, yet he did not find any problems or recommend a citation (Tr. 271-275, 635-636). He was unable to testify that a violation regarding falling objects would have been found in this case, but for the accident (Tr. 258). The accident on August 1, 2012 was not foreseeable (Tr. 258).

A licensed professional engineer testified as an expert that under foreseeable conditions, there was no employee exposure to a hazard of falling objects posed by ECC's shoring system. The engineer, with extensive experience in designing and inspecting shoring systems, performed calculations based on the project plans including material weights, crane specifications and measurements (Exh. R-5; Tr. 448, 546). He concluded that even assuming the beams were accidentally dislodged or displaced from atop the scaffold, the beams would at most fall 18 inches from the base of the scaffold in the worst case (Tr. 520). The beams, if dislodged, would never, under any reasonable circumstances, travel far enough to go over the edge. He has

[4] There was also an 8 to 10-foot wide covered setback between the 7th floor and 1st floor deck. Although the covered portion of the setback did not extend the entire length of the 1st floor, the setback provided some additional protection from falling objects despite the accident on August 1, 2012 (Exhs. C-1, C-5; Tr. 654-655).

never designed a shoring system where he anticipated a crane picking up a scaffold or the beams on top of the scaffold being displaced.

MCF's Operations Manager testified that MCF lacked knowledge of the conditions on the 7th floor (Tr. 641-643). The August 1, 2012, accident was "freakish." None of the MCF and ECC employees with long careers in the concrete industry had ever experienced, heard or seen of a similar accident (Tr. 248, 385, 414, 530, 593-594).

An employer is responsible for hazards normally and reasonably anticipated based on knowledge, experience and expertise of the work being performed. The Secretary must show the existence of conditions likely to lead to the hazard; a potential for falling objects. *Conagra Flower Milling Co.*, 16 BNA OSHC 1137, 1142 (No. 88-1250, 1993).

MCF's violation of § 1926.501(c)(3) is not established.

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:

Citation No. 1, Item 1, alleging a serious violation of § 1926.501(c)(3), is vacated and no penalty is assessed.

SO ORDERED.

/s/ Ken S. Welsch
Ken S. Welsch
Administrative Law Judge

Dated: September 3, 2013
Atlanta Georgia