

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Standard Building Company, Inc., and
Standard Systems, Inc.,

Respondent.

OSHRC Docket Nos. **06-1736 & 06-1737**

Consolidated

Appearances:

Linda M. Hastings, Esquire, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio
For Complainant

Glenn Croy, Senior Project Manager, Standard Systems, Inc., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsh

DECISION AND ORDER

On June 24, 2006, Occupational Safety and Health Administration (OSHA) compliance officer Robert Barbour was driving past a restaurant undergoing renovation at 5150 Mertin Drive in Mason, Ohio. He observed what he considered to be violations of the Occupational Safety and Health Act of 1970 (Act). Barbour stopped and conducted an inspection of the worksite. As a result of his inspection, the Secretary issued one citation each to Standard Building Company, Inc. (SBC), a construction management firm, and to Standard Systems, Inc. (SSI), a stucco contractor. These two companies share an address in Atlanta, Georgia, and both are owned by Valentin Ciuperca.

The citation issued to SBC originally alleged 11 items citing violations of OSHA's construction standards. The Secretary subsequently withdrew items 4, 5, 6, 7, 8, 9, 10, and 11, based upon the Review Commission's recent decision reversing its multi-employer worksite precedent in *Summit Contractors, Inc.*, 2007 WL 2265137 (No. 03-1622, 2007) (a controlling employer can no

longer be cited for hazardous conditions it did not create or to which its employees were not exposed) (Tr. 12)¹. Left for consideration are item 1, alleging a serious violation of 29 C. F. R. § 1926.20(b)(2) for failing to ensure a competent person made frequent and regular inspections of the job site; item 2, alleging a serious violation of § 1910.178(m)(5)(i) for leaving a powered industrial truck unattended without the operator within 25 feet of the controls; and item 3, alleging a serious violation of § 1910.178(l)(1)(i) for failing to ensure the operator of the powered industrial truck was properly trained. The total proposed penalty for these three items is \$6,000.00².

The citation issued to SSI alleges violations of 10 OSHA standards. As with SBC, items 1 and 2 allege violations of § 1926.20(b)(2) (competent person) and of § 1910.178(m)(5)(i) (unattended powered industrial truck) respectively. Item 3 alleges a serious violation of § 1926.404(b)(1)(i) for failing to use either a GFCI or an assured equipment grounding conductor program. Item 4 alleges a serious violation of § 1926.451(c)(2) for failing to fully plank or deck the working levels of scaffolds. Item 5 alleges a serious violation of § 1926.451(c)(2) for failing to utilize base plates and mud sills or other adequate firm foundation to support scaffolds. Item 6 alleges a serious violation of § 1926.451(e)(1) for failing to provide acceptable means of access and egress for workers on scaffold platforms. Item 7 alleges a serious violation of § 1926.451(f)(7) for failing to erect, move, or dismantle scaffolds under the supervision of a competent person. Item 8 alleges a violation of § 1926.451(g)(1) for failing to protect employees on a scaffold from falling. Item 9 alleges a violation of § 1926.451(g)(1) for failing to protect employees on a scaffold from falling by use of guardrail systems, safety net systems, or personal fall arrest systems. Item 10 alleges a serious violation of § 1926.503(a)(2) for failing to assure that each employee was trained by a competent person. The penalties proposed for these 10 items total \$ 28,500.00.

The court consolidated the cases for hearing which was held on June 21, 2007, in Cincinnati, Ohio. Glenn Croy, a senior project manager for SBC, represented both SBC and SSI *pro se*.

¹ The Secretary cited SSI for violating the same eight standards for which she cited SBC in the withdrawn items. The withdrawn items, numbered 4 through 11, correspond to items 3 through 10 issued to SSI.

² The citation lists a proposed penalty for item 1 in the amount of \$ 3,000.00. At the hearing, Barbour testified that amount was based on an incorrect calculation of the number of employees for SBC. The court granted the Secretary's motion to amend the proposed penalty amount to \$ 2,000.00 (Tr. 35).

SSI claims it performed no labor on the project and none of its employees were present on the worksite. SBC claims any violations on the site were the responsibility of subcontractor Whaley Construction.

The Secretary filed a post-hearing brief. SBC and SSI did not file briefs. Based upon the record, the court vacates the citation issued to SSI in its entirety. The court affirms items 1, 2, and 3 of the citation issued to SBC, and assesses a total penalty of \$6,000.00.

Facts

Valentin Ciuperca owns SBC and SSI, and both companies are located at 3786 DeKalb Technology Parkway in Atlanta, Georgia. SSI also has an office in Florida, through which most of its work is processed (Tr. 108). In May 2006, SBC began a small project in Mason, Ohio, renovating the interior and exterior of a restaurant for Amore de Brazil Churrascaria. The project lasted approximately 60 days (Tr. 110).

On Saturday, June 24, 2006, compliance officer Robert Barbour drove past the restaurant and observed employees working on a scaffold without fall protection (Tr. 17, 20). The employees were exposed to a fall of 15 to 20 feet (Exh. C-3; Tr. 31). Barbour stopped and held an opening conference with Ron Whaley and Felycianio Gallardo (Tr. 18). Barbour understood Whaley to be a superintendent for SBC, as well as a carpenter and owner of Whaley Construction, one of the subcontractors on the project. Barbour understood Gallardo to be a foreman for SSI (Tr. 19).

Barbour conducted an inspection of the worksite. He videotaped the conditions, took measurements, and interviewed several employees. Barbour returned to the worksite three more times and attempted to contact SBC's senior project manager Glenn Croy and a representative from SSI named Mike Chaco (Tr. 17-18, 20-21). He held a closing conference with Whaley and Gallardo (Tr. 20-21).

Based on Barbour's inspection, the Secretary issued the two citations now before the court³. Central to the disposition of both citations is the relationship of the purported supervisory employees, Whaley and Gallardo, to SBC and SSI. SBC and SSI deny that either employee held a supervisory position with either company, and therefore no knowledge of violative conditions can be imputed

³ A citation was also issued to Whaley Construction (Tr. 84).

to SBC, as the construction management firm in charge of the project, or to SSI, who claims it performed no work and had no employees on the project.

The Citation Issued to SBC (No. 06-1737)

The Secretary has the burden of proving each 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).

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

The citation alleges SBC's accident prevention program failed to provide for frequent and regular inspections by a competent person of the job site. Section 1926.20(b)(2) provides:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Section 1926.32(f) defines a competent person as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to make prompt corrective measures to eliminate them."

The Secretary's case is based on the assumption that Whaley was a supervisory employee of SBC's. SBC disputes this assumption. Whaley did not testify at the hearing. The only witnesses were Barbour and Glenn Croy, acting *pro se* for SBC and SSI.

Croy stated he was on site every two to three weeks. The last two weeks of the project, he was on site three or four days of the week (Tr. 111). Either he or Chaco checked on the work (Tr. 115-116). Whaley told Barbour he had made several inspections (Tr. 33). Barbour concluded Whaley was not a competent person based upon Whaley's "lack of knowledge of the fall protection systems for the scaffolding and also his not being familiar with the requirements for the powered industrial truck" (Tr. 33). Whaley's written statement (written down by Barbour and signed by Whaley on June 24, 2006) states in part, "No training on scaffold" (Exh. C-1; Tr. 34).

Based on his inspection, Barbour believed Whaley “was acting as the superintendent for general building. He was—my understanding, what he said to me was 25 percent of the time, he was hired by Standard Building to run the job out there and act as a superintendent, and his company, Whaley Construction, was doing the interior work” (Tr. 70).

At the top of the interview statement, a preprinted paragraph states “I am an employee of” and the blank has been filled in with “Standard Building Co.” The preprinted section continues with “My job classification:” which is filled in with “Carpenter/Superintendent/Contractor.” The statement does not indicate whether Whaley means he is a superintendent for SBC or for Whaley Construction (Exh. C-1). Barbour read Whaley’s statement at the hearing (Exh. C-1; Tr. 82-83):

I don’t know if Standard Company has safety and health program. They did not go over any program with me; been on the job about six weeks; been on another job for Standard since March. I am framing the interior, some concrete work. I told EIFS workers to install guardrails on the other side. They had been here about three weeks. I showed Francisco plans. Francisco was here Friday. . . . General superintendent Mike Chaco . . .has been on site about five weeks ago. Owner has been here about the same time.

Glen Croy, owner, Felyciano [Gallardo], set the scaffold on Saturday or Friday. I came to work in the a. m. They weren’t here. I saw scaffold and then they showed up and started working to finish EIFS. I told guys to get in the lift. They had harnesses on. I operated the lift. I wasn’t 25 feet in distance from the lift . Had no training on the lift, no discussion on the guardrail or fall protection of the guardrail. No training on scaffolding. I told them on the other site to install guardrail, Francisco and Felyciano [Gallardo]. I am willing to attend construction site safety class, and I want a safe work site.

Glenn Croy testified for SBC and SSI regarding Whaley’s status (Tr. 168-169):

Croy: [T]his thing [project] was so small, we didn’t have a full-time superintendent on it, and we had three other jobs in the area so [SBC superintendent Mike Chaco] would just stop by.

Q. But, that was the intent that Mr. Whaley was to act as the pseudo superintendent on the job?

Croy: No. We didn’t get any—[restaurant owner] Al Copeland Investment doesn’t require—they’re, I wouldn’t say old school, but they’re just very lax. They don’t require that stuff.

Q. Are you saying that Mr. Whaley did not act in the capacity as a superintendent?

Croy: We didn't have a full superintendent.

Q. "Yes" or "no," did he act in the capacity of a superintendent?

Croy: He acted in portions of the capacity. He did not act as a full superintendent.

Q. And, did he provide communication back to Standard Building about what was going on and what was progressing at the work site?

Croy: Not as a superintendent would with all the stuff. We definitely were in communication with him because a lot of stuff he was doing was winging it, but we also talked directly with the electrician directly with the plumber which if we had a full-time employee, then they would go to the superintendent. It's the superintendent's job to relay it into the office.

The evidence supporting the Secretary's claim that Whaley was a part-time supervisor for SBC is:

- Whaley's statement lists SBC as his employer;
- Whaley's statement says he directed another subcontractor's employees to install guardrails and to get in the lift basket to apply surface material to the building's exterior;
- Croy's statement that Whaley "acted in portions of the capacity" [of superintendent];
- SBC's invoice records indicate it paid Whaley Construction \$6,000.00 per week for "Framing labor" and "Supervision"; and
- Whaley used his powered industrial truck to elevate two of Gallardo's employees to apply surface material to the restaurant's exterior.

Although this evidence does not provide a detailed account of Whaley's supervisory duties (SBC and Whaley had a verbal contract), it is sufficient to establish Whaley was a supervisor for SBC. In his statement to Barbour, Whaley said Chaco had not been on the site for five weeks. If Whaley was making inspections for SBC, the Secretary has established Whaley was not a competent person within the meaning of the standard. Whaley had no training in safety for scaffolding or powered industrial trucks. If Whaley was not making inspections, then no one was, which is also a violation of the standard.

The Secretary must prove the employer had actual or constructive knowledge of the violative conduct. Whaley knew he had no training in scaffolding or powered industrial truck safety, yet he conducted inspections of the worksite. The imputation of a supervisor's knowledge to his or her employer is unsettled in some circuits (see discussion in *W. G. Yates Construction Co., Inc.*, 459 F.3d 604 (5th Cir. 2006)), but in the Sixth Circuit, where this case arises, the precedent is clear. Violative conduct by a supervisor raises an inference of lax enforcement, and the supervisor's knowledge may be imputed to the employer. *Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805(6th Cir. 2003).

The Secretary has established that SBC committed a violation of § 1926.20(b)(2). The citation alleges the violation is serious. Under § 17(k) of the Act, a violation is serious “if there is a substantial probability that death or serious physical harm could result from” the violation.

[T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that “an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.” *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH P29,500, p. 39,813 (No. 86-351, 1991)[.]

Flintco, Inc., 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

Whaley's inability to identify fall hazards exposed employees to fall hazards from the scaffold and the lift basket. The violation is serious.

Item 2: Alleged Serious Violation of § 1910.178(m)(5)(i)

Section 1926.178(m)(5)(i) provides:

When a powered industrial truck is left unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shall be shut off, and brakes set. Wheels shall be blocked if the truck is parked on an incline.

Section 1926.178(m)(5)(ii) states a truck is unattended “when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.”

Whaley Construction owned a powered industrial truck being used on the site. Barbour observed the lift of the truck raised in the air, with two employees standing in the lift basket while applying surface material to the restaurant's exterior. The top of the lift basket was approximately

24 feet above the ground. Whaley was the operator of the truck. He was not within 25 feet of the truck (Tr. 37-38).

Whaley Construction was hired to perform interior carpentry on the project. The employees in the lift basket did not work for Whaley Construction, and they were applying surface material to the exterior. Therefore, Whaley was acting in his supervisory capacity for SBC when he elevated the lift and then left the truck unattended. As a supervisor, Whaley's knowledge of his violative conduct is imputed to SBC.

The two employees were exposed to a fall of 24 feet. The violation is serious.

Item 3: Alleged Serious Violation of § 1910.178(l)(1)(i)

Section 1910.178(l)(1)(i) provides:

The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

Whaley admitted he had no training in operating the powered industrial truck and lift (Exh. C-1). As discussed under the previous item, Ron Whaley was acting in his capacity as SBC superintendent when he elevated the employees in the lift basket on the truck he was not qualified to operate. The Secretary has established a serious violation of § 1910.178(l)(1)(i).

The Citation Issued to SSI (No. 06-1736)

The Secretary cited SSI for violating 10 standards. She bases the citation on her understanding that Felyciano Gallardo was a foreman for SSI and he knew of the alleged violative conditions at the site. While Whaley clearly had some sort of employment relationship with SBC, Gallardo's ties to SSI are more difficult to define, as is Gallardo's actual identity.

Barbour testified he spoke with Gallardo, who told him, in an oddly worded way, that he was SSI's foreman (Tr. 76): "Mr. Gallardo was adamant. He was paid by the hour. 'Call Valentin. I'm employed by Standard Systems. I get paid by the hour. I get paid by the hour. I'm the foreman.' Numerous times, that's what he said to me."

Gallardo's interview statement lists SSI as his employer. His statement reads (Exh. C-2; Tr. 83-84):

I don't know if Standard Systems has a safety program; it didn't go over any with me. I had on-the-job training on scaffolds, on training on OSHA regulations. Here

about two to three weeks; staying at Day's Inn. Ron [Whaley] said to install guardrails on the other side; not on the scaffold we erected yesterday. We don't have ladder. Guys climb the end frames. I didn't think about guardrails; in a hurry to get the job done. I work for hours.

Gallardo signed the statement, spelling his name "Felyciano Gallardo."

SSI argues it was never on the site. Croy stated there were no contracts between SSI and SBC or the owner's businesses (Amore de Brazil and Al Copeland Investments) to perform any work on the project (Tr. 120, 127). Gallardo owned the company responsible for the EIFS work on the building's exterior. Exhibit R-2 is a copy of a purchase order showing SBC paid "Feliciano Gonzalez" \$ 10,150.00 to install EIFS systems to the building's exterior. Exhibit R-3 is a copy of a W-9 form for a "Feliciano Gallardo Gonzalez." According to Croy, Felyciano Gallardo and Feliciano Gallardo Gonzalez are the same person, and this person owns a company called "Feliciano Gallardo Gonzalez," which subcontracted with SBC to install the EIFS (Tr. 117-118).

One reason Gallardo was so insistent to Barbour that he worked for SSI may have been to avoid receiving a citation from OSHA in his own company's name. Asked how Gallardo would know to give the name of SSI as his employer, Croy responded that Gallardo is "out of Atlanta. He's in our office whenever—we pay most of our subcontractors, unless they're under contract, every two weeks, so a lot of subcontractors just stop by the office and pick up a check" (Tr. 121).

Neither SBC nor SSI was forthcoming with information or documentation during the course of this proceeding. Barbour attempted to contact representatives from both companies repeatedly. He returned to the worksite three more times after his initial visit in order to talk with management personnel and obtain documentation (Tr. 65-69, 88-91). The day of the hearing, the companies sent a project manager to represent both of them *pro se*. Barbour's frustration with the companies' lack of cooperation was palpable. His testimony reflects the difficulty in sorting out the working relationships of the employees on the site, who may have sought to mislead him (Tr. 95-96):

I mean, it's not in evidence here, but my conversation with Ron Whaley also indicated that "This is Standard Systems. I am Standard Building's superintendent and Ron Whaley Construction over here." It was pretty confusing. I mean, I had to take my time and talk to each of these guys separately just to kind of formulate my idea as to who's who on the job site, and that's what he indicated to me. It was known that these subs were in that conversation.

Nevertheless, it is the Secretary's burden to establish the cited employer was, in fact, an employer present at the worksite. Barbour's testimony regarding the statements of Whaley and Gallardo is insufficient to overcome Croy's assertion that SSI performed no work on the project. Croy was the project manager for the restaurant renovation. The documentation he presented succeeds in raising questions regarding Gallardo/Gonzalez's legitimacy as a business entity, but it suggests no link between Gallardo and SSI. Gallardo's statement he worked for SSI was self-serving.

The Secretary has failed to establish SSI was an employer present at the cited worksite. The citation issued to SSI is vacated in its entirety.

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.

SBC employs approximately 25 employees (Tr. 107). OSHA had cited SBC within the three years prior to Barbour's inspection (Tr. 36). SBC deserves no credit for good faith. From the start of this proceeding, SBC failed to cooperate with Secretary's representatives, refusing to return phone calls or respond to requests for documentation. The companies were represented at the hearing by a project manager who had no involvement with SSI, and who lacked relevant knowledge of SBC's business practices.

The gravity of the violations is high. Employees were exposed to falls from scaffolding and the lift basket, ranging from 15 to 24 feet. Falls from these distances could result in death or serious physical injury. Whaley, the person on site with the most authority, had no training in either scaffold or powered industrial truck safety, and was not aware of any safety plan in effect for SBC.

The court determines the appropriate penalty for each of the affirmed items is \$ 2,000.00, resulting in a total penalty of \$ 6,000.00.

**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:

SBC - Citation (Docket No. 06-1737)

Item 1, alleged serious violation of § 1926.20(b)(2), is affirmed and a penalty of \$2,000.00 is assessed;

Item 2, alleged serious violation of § 1910.178(m)(5)(i), is affirmed and a penalty of \$2,000.00 is assessed;

Item 3, alleged serious violation of § 1910.178(l)(1)(i), is affirmed and a penalty of \$2,000.00 is assessed;

Item 4, alleged serious violation of § 1926.404(b)(1)(i), is withdrawn by the Secretary;

Item 5, alleged serious violation of § 1926.451(b)(1), is withdrawn by the Secretary;

Item 6, alleged serious violation of § 1926.451(c)(2), is withdrawn by the Secretary;

Item 7, alleged serious violation of § 1926.451(e)(1), is withdrawn by the Secretary;

Item 8, alleged serious violation of § 1926.451(f)(7), is withdrawn by the Secretary;

Item 9, alleged serious violation of § 1926.451(g)(1), is withdrawn by the Secretary; and

Item 10, alleged serious violation of § 1926.501(b)(1), is withdrawn by the Secretary.

Item 11, alleged serious violation of § 1926.503(a)(2), is withdrawn by the Secretary;

SSI - Citation (Docket No. 06-1736)

- Item 1, alleged serious violation of § 1926.20(b)(2), is vacated;
- Item 2, alleged serious violation of § 1910.178(m)(5)(i), is vacated;
- Item 3, alleged serious violation of § 1926.404(b)(1)(i), is vacated;
- Item 4, alleged serious violation of § 1926.451(b)(1), is vacated;
- Item 5, alleged serious violation of § 1926.451(c)(2), is vacated;
- Item 6, alleged serious violation of § 1926.451(e)(1), is vacated;
- Item 7, alleged serious violation of § 1926.451(f)(7), is vacated;
- Item 8, alleged serious violation of § 1926.451(g)(1), is vacated;
- Item 9, alleged serious violation of § 1926.501(b)(1), is vacated; and
- Item 10, alleged serious violation of § 1926.503(a)(2), is vacated.

/s/
KEN S. WELSCH
Judge

Date: November 13, 2007