United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR Complainant, v. CONSOLIDATED CONCEPTS, INC. CAMDEN DEVELOPMENT, INC., AND NOCONI CONSTRUCTION CORPORATION, Respondent.	OSHRC DOCKET NOS. 95-1529 95-1530 95-1531

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 11, 1996. The decision of the Judge will become a final order of the Commission on May 13, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 1, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 11, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 95-1529 & 95-1530 & 95-1531

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	
CONSOLIDATED CONCEPTS, INC., CAMDEN DEVELOPMENT, INC., AND NOCONI CONSTRUCTION CORPORATION,	:	OSHRC DOCKET NOS. 95-1529 95-1530 95-1531
	:	
Respondents.	:	

APPEARANCES:

Daphne A. Brechun, Esquire
Dallas, Texas
For the Complainant.

William C. Blayney
Humble, Texas
For the Respondents.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a three-story apartment complex construction site in Corpus Christi, Texas on July 13, 1995; as a result, Respondents Consolidated Concepts ("CCI"), Camden Development ("Camden") and Noconi Construction ("Noconi") were each issued a serious citation. All three Respondents contested the citations, and all three cases were designated as E-Z Trial cases pursuant to the Commission's new E-Z Trial Rule 203(a). The cases were consolidated for hearing purposes, and the hearing in this matter was held on January 11, 1996. At the hearing, the Secretary withdrew all four items of the citation issued to Camden. The Secretary also withdrew item 2 of the citation issued to CCI, leaving items 1 and 3 for resolution, and item 1 of the citation issued to Noconi, leaving item 2 for resolution.

Respondents' Motion to Dismiss

This case was originally set for hearing on December 19, 1996. In a pre-hearing telephone conference held December 11, 1995, the Secretary's counsel and the Respondents' representative were advised the hearing might not be held on the scheduled date due to the possible government shutdown. They were further advised that they should listen to the news and that if the government did shut down no hearing would take place on December 19. The government did in fact shut down on December 18, but Respondents' representative nonetheless appeared at the hearing location the next day with two witnesses. Respondents' representative then filed a motion to dismiss due to the Secretary's and the undersigned's failure to appear. This motion was renewed at the hearing. (Tr. 80-83). However, as noted at the hearing, the failure to appear under the circumstances of this case is no basis for dismissal. Respondents' motion is accordingly denied.

Respondents' Motion to Suppress

Respondents contend the inspection was invalid and that the evidence obtained by the OSHA compliance officer ("CO") should be suppressed. The basis of this contention is Respondents' claim the CO told the superintendent of Camden, the general contractor at the site, that he was there to gather information and not to conduct an inspection. (Tr. 34-35; 146-52). Camden's landscaping director and CCI's vice president both testified that Camden's superintendent advised them of OSHA's presence and told them not to worry because the CO was only there to gather information on two subcontractors and that it was not an inspection. (Tr. 95-99;109; 113). The CO, on the other hand, testified he was assigned to inspect the work site pursuant to a referral from a Wage and Hour employee who had been to the site. He further testified he first videotaped the cited conditions from a public parking lot across the street. He then went to the site and met with Camden's superintendent and told him he was not there to inspect his company but the two subcontractors who were the subject of the referral; he also told the subcontractors' representatives he was there on a referral inspection. The CO said Camden's superintendent at no time requested a warrant or attempted to stop the inspection. He also said Camden was cited after an accident on the job about a week later; another CO attempted another inspection but was refused entry, and the CO's supervisor told him to go ahead and cite Camden. (Tr. 22-73; 83-94; 125-28).

Based on the CO's representation to Camden it would not be cited it is clear that the citation issued to that company was inappropriate.[1] However, the Secretary has properly resolved this issue by withdrawing the citation. Moreover, it would appear that Camden's superintendent simply misunderstood what the CO said about inspecting the site. Finally, there is no evidence that the representatives of the two subcontractors made any objection to the inspection, and the record indicates they did not. (Tr. 31-32). Regardless, Commission precedent is well settled that under the "open fields" exception to the Fourth Amendment employers have no reasonable expectation of privacy with respect to activities conducted out of doors which are plainly visible from public property. *See Broshear Contractors, Inc.*, 16 BNA OSHC 2094, 2095 (No. 91-2125, 1994), and cases cited therein. It is apparent from the CO's testimony and C-1 and C-4, photos made from the videotape he took from across the street, that the conditions cited in this case were plainly visible from public property. Respondents' motion to suppress is therefore denied.

The CCI Citation

Items 1 and 3 of the citation issued to CCI allege that two employees installing flashing on the edge of a roof were exposed to a fall hazard of approximately 30 feet. Item 1 alleges a violation of 29 C.F.R. 1926.501(b)(10) in that the employee was working at the edge of the roof without fall protection, while item 3 alleges a violation of 29 C.F.R. 1926.602(c)(1)(viii)(A) in that the employee was standing on an unsecured pallet, rather than a safety platform, on a forklift. The CO's testimony and C-4 clearly establish the violative conditions. (Tr. 57-73). CCI does not deny that the violations occurred but contends OSHA cited the wrong employer. The CO testified he spoke to the individual operating the forklift, who identified himself as a foreman of CCI and the two workers installing the flashing as his employees. The CO also indicated one of the workers identified himself as a CCI employee. (Tr. 31-32; 62-66; 70-72). However, CCI's vice president testified extensively about CCI's role in the subject job. He testified that CCI, a construction contracting company, contracted with Camden to oversee the roofing job and make sure it was done properly. CCI then subbed out the job to another company. The roofing subcontractor provided its own employees and equipment for the job, except for fall protection, which CCI provided, and CCI, whose employees consisted of

[1]Absent such representation, the citation would have been proper. The cited conditions, described below, were obvious, and Commission precedent is well settled that general contractors are responsible for overall safety at job sites.

a president, a vice president, an accountant and an office worker, had no employees of its own on the job. CCI's president or vice president visited the site every other week to check on the job and pay its subcontractor. While safety was discussed during these visits and Camden held weekly safety meetings at the site, the subcontractor was responsible for the supervision and safety of its own employees. CCI's vice president said this particular roofing company was doing another job for CCI at the same time as the subject job and identified R-1 as CCI's contract with the company. He also said the company had been subbing for CCI for about two years and had worked for no one else during that time to his knowledge. He noted, however, that CCI bid out all of its jobs, that it was presently using three or four different subcontractors, and that the subject roofing company was not always awarded CCI's jobs just as CCI was not always awarded Camden's jobs. (Tr. 99-140).

The Secretary objected at the hearing to R-1 and the testimony of CCI's vice president on the basis that it constituted an affirmative defense that Respondent was required to disclose prior to the hearing. The evidence was admitted due to my conclusion that Respondent was merely rebutting the Secretary's prima facie showing of employee exposure, but the record was left open at the Secretary's request for CCI to provide a copy of its contract with Camden. CCI did so, and the Secretary has now filed a post-hearing letter. Based on this letter the Secretary no longer contends the employees at the site were those of CCI, although he still objects to the admission of the foregoing evidence; rather, he now urges that because of OSHA's position with respect to multi-employer work sites and language in its contract with Camden CCI should be held responsible for the subject violations. Specifically, the Secretary notes that section C.6.a. of the OSHA Field Inspection Reference Manual ("FIRM") states that an employer who is responsible by contract or by actual practice for safety and health conditions on a work site shall be cited whether or not its own employees are exposed. The Secretary further notes that sections 5.5 and 14.1 of the contract with Camden state, respectively, that CCI shall comply with the Act and rules and regulations thereunder and that assignment or transfer will not release CCI from its responsibility to perform its obligations under the contact.

Based on the record it is clear CCI was not the employer of the workers at the site. In regard to the Secretary's alternative contention, I have reviewed both R-1 and CCI's contract with Camden. I have also considered the language of the OSHA FIRM as set forth in the Secretary's letter. The contract with Camden does indicate that CCI was responsible for safety on the roofing job. However,

R-1, CCI's contract with the roofer, contains essentially the same language as to that company. Further, Exhibit A to R-1 specifically states that "[a]ll roofers must wear safety harnesses and be tied off to roof at all times" and that "[s]ubcontractor will be fined $50.00 per violation per man." While this language and the biweekly safety discussions noted above indicate an attempt to ensure the roofer complied with fall protection requirements neither these measures nor either of the contracts, in my view, provides a basis for holding CCI liable for the subject violations. This finding is supported by the CO's own testimony that had he known the actual identity of the roofer that company would have been cited. (Tr. 124). It is also supported by the fact that there is no evidence CCI had knowledge that its subcontractor was not complying with fall protection requirements. In citing from the OSHA FIRM, the Secretary seems to infer that CCI was responsible for safety at the site just as a general contractor would be. As noted above, but for the circumstances in this case the citation issued to Camden, the general contractor, would have been appropriate. Regardless, under the facts of this case it is my conclusion the Secretary has not met his burden of proving CCI was responsible for the subject violations. In addition, even if CCI had given notice of its intent to present evidence in this regard prior to the hearing it is difficult to fathom what more the Secretary could have presented that is not now part of the record. The citation items are accordingly vacated.

The Noconi Citation

Item 2 of the citation issued to Noconi alleges an employee was working from a pump jack scaffold with no guardrails, exposing the employee to a fall hazard of 18 feet, in violation of 29 C.F.R. 1926.451(y)(11) and (a)(4). The CO's testimony and C-1 clearly establish the violative condition. (Tr. 36-46). Respondent disputes neither the violation nor that it was the responsible employer, relying instead on its contention that the inspection was invalid. (Tr. 146-49). This contention was addressed and dismissed above, and this citation item is accordingly affirmed as a serious violation. The Secretary proposed a penalty of $1,500.00 for this item. This proposed penalty took into account the gravity of the violation as well as the employer's size, history and good faith. (Tr. 74-76). After giving due consideration to these factors, I conclude that the assessment of the proposed penalty is appropriate.

Conclusions of Law

1. Respondents Consolidated Concepts, Inc., Camden Development, Inc., and Noconi Construction Corporation are engaged in businesses affecting commerce and have employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent Consolidated Concepts, Inc., was not in violation of 29 C.F.R. §§ 1926.501(b)(10), 1926.503(a)(1) and 1926.602(c)(1)(viii)(A).

3. Respondent Camden Development, Inc., was not in violation of 29 C.F.R. §§ 1926.451(y)(3), 1926.451(y)(5), 1926.451(y)(11), 1926.451(a)(4), 1926.501(b)(10) and 1926.602(c)(1)(viii)(A).

4. Respondent Noconi Construction Corporation was not in violation of 29 C.F.R. §§ 1926.451(y)(3) and 1926.451(y)(5).

5. Respondent Noconi Construction Corporation was in serious violation of 29 C.F.R. §§ 1926.451(y)(11) and 1926.451(a)(4).

Order

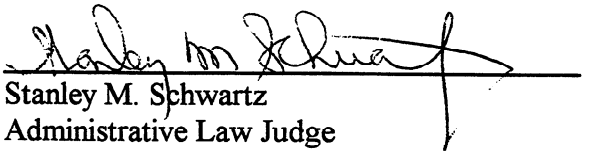
On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1-3 of the citation issued to Consolidated Concepts, Inc., are VACATED.

2. Items 1-4 of the citation issued to Camden Development, Inc., are VACATED.

3. Item 1 of the citation issued to Noconi Construction Corporation is VACATED.

4. Item 2 of the citation issued to Noconi Construction Corporation is AFFIRMED as a serious violation, and a penalty of $1,500.00 is assessed.



Stanley M. Schwartz
Administrative Law Judge

Date: April 1, 1996