SECRETARY OF LABOR,
Complainant,

OSHRC DOCKET NO. 97-0099
and 97-0100
[CONSOLIDATED]

v.

COMMERCIAL WALL, INC.,
Respondent.

APPEARANCES:

For the Complainant:
Helen J. Shuitmaker, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:
W. Dudley Leonard, Esq., Independence Missouri

Before: Administrative Law Judge: James H. Barkley

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Commercial Wall, Inc. (Commercial), at all times relevant to this action was engaged in construction, and maintained work sites at the Super 8 Motel at I-74 and Highway 150, Knoxville, Illinois, and the Holiday Inn Express on Main Street, Galesburg, Illinois (Answer ¶I, II). The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983); Respondent is, therefore, engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 11-14, 1996 the Occupational Safety and Health Administration (OSHA) conducted inspections of Commercial's Super 8 and Holiday Inn work sites. As a result of those inspections, Commercial was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Commercial brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On January 7, 1998, a hearing was held in Kansas City, Missouri. Prior to the hearing Complainant moved to amend "willful" citation 2, item 1, Docket No. 97-0100 to allege a violation of §1926.416(a)(i),

in lieu of §1926.416(g)(2)(i)(B)[Tr. 23]. No additional facts were alleged, and the motion to amend was granted (Tr. 31).[1] The parties have submitted briefs on the issues and this matter is ready for disposition.

**Control of the Galesburg Job Site**

*Facts*

Commercial's president, Robert Keating, testified that Commercial entered into a written contract with Hillcrest Development to frame the Galesburg Holiday Inn Express (Tr. 224). Commercial entered into the contract at the request of Mike Olender. Keating believed that Olender was the real party in interest, that is, the actual employer of the affected employees, and that Commercial Wall was merely "fronting" for Olender, who did not have the financial resources to enter into the contract (Tr. 238; *See also* testimony of Mike Olender, Tr. 210-11). Commercial, however, was the sole signatory on the contract and stood to make a $10,000.00 profit on the job (Tr. 211, 238). Commercial paid construction workers on a piecework basis to perform the contract (Tr. 180, 183). The workers' income was reported on a 1099 form (Tr. 182, 192). Commercial paid the framers' workman's compensation premiums (Tr. 181, 232-33).

Mike and Jason Olender acted as supervisors, hiring workmen, coordinating the work at the job sites, and reporting the work progress to Commercial on a biweekly basis. Commercial verified their information with the general contractor, and made out checks payable to the individuals named by the Olenders, according the piece work performed by each (Tr. (Tr. 75-76, 188-89, 225, 229). The checks were mailed to the general contractor, who gave them to the Olenders for distribution to the crew (Tr. 190-91). Mike Olender believed that the crews were Commercial employees (Tr. 194, 203). Keating testified, however, that he exercised no control over the work performed by the Olender's and their crews (Tr. 225, 239).

Jason Olender called Keating to tell him about the November, 1996 OSHA inspection at issue in this proceeding (Tr. 229-30). Keating was also informed about unabated fall hazards cited by OSHA on another Commercial job site in July, 1996 (Tr. 61, 230). Allen Cohen, a representative of the general contractor on that site, Porta McCurdy, which was also cited, told Keating that his crews were not complying with OSHA fall protection requirements (Tr. 226-27, 240). Keating testified that Cohen called him every other week telling him that he had caught Commercial's crews working without equipment again

[1] In its post-hearing brief, Commercial objects to the amendment on the grounds that the 6 months statute of limitations set under §9(c) of the Act has expired. An amendment asserting claims arising out of the same occurrence or hazard relate back to the date of the original pleading, pursuant to F.R.C.P. 15(c); therefore, there is no §9(c) bar. *Higgins Erectors & Haulers, Inc.*, 7 BNA OSHC 1736 (No. 78-3398, 1979); *Kaiser Aluminum & Chemical Corp.*, 5 BNA OSHC 1180 (No. 3685, 1977).

(Tr. 240, 243). Keating authorized Mike Olender to obtain fall protection equipment, *i.e.* safety belts, following Commercial's receipt of the July, 1996 OSHA citation (Tr. 226-27). Keating visited the Porta McCurdy job site to warn his crews to use fall protection (Tr. 244). Keating didn't know whether the Olenders used the fall protective equipment on all subsequent jobs, but stated that it had been used "on many occasions" (Tr. 228). Keating testified he had a standard safety handbook, which he kept in the job site trailer, but did not provide any safety training to the Olenders (Tr. 228). Keating relied on the general contractors on each new job site to hold safety meetings with Commercial's crews, and to require safety equipment, including fall protection (Tr. 231-32).

*Discussion*

Commercial maintains that, because it exercised no control over the Galesburg job site, it cannot be cited for its crews' violation of OSHA standards. This judge does not agree.

The key factor in determining whether a party is an employer under the Act, however, is whether it has the *right* to control the work involved. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD P 29,775, p. 40,497 (No. 88-1745, 1992). Commercial clearly had that right here, though it failed to exercise it. The framing work was performed pursuant to Commercial's contract with Hillcrest, and Commercial stood to profit by it. The framers were paid by, and believed they were employed by Commercial. Though Commercial abrogated all supervisory responsibility to Hillcrest and to the Olenders, Commercial presumably could have had them disciplined or fired. (Jimmy Evans, the OSHA Compliance Officer (CO) testified that Keating planned to send someone else up from Kansas City to replace Mike Olender as supervisor [Tr. 104]).

Finally, Commercial assumed responsibility for the framers' safety, supplying them with safety information and equipment. In the absence of another party explicitly accepting responsibility for job site safety, Commercial was required to ensure that these employees complied with OSHA safety regulations. *See also, Del-Mont Constr. Co.*, 9 BNA OSHC 1703, 1706, 1981 CCH OSHD P 25,324, p. 31,390 (No. 76-4899, 1981).

## Alleged Violations -Galesburg, Holiday Inn Express

**Repeat citation 1, item 1** alleges:

29 CFR 1926.100(a):

Employees working and walking at ground level on the south side of the building were exposed to the hazard of falling objects in that they were not wearing hard hats.

THE COMMERCIAL WALL, INC. COMPANY WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD 29 CFR 1926.100(a), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 122193600 CITATION NUMBER 1, ITEM NUMBER 2, ISSUED ON AUGUST 8, 1996, WITH RESPECT TO A WORKPLACE LOCATED AT 1711 W. CARL SANDBURG DR., BUILDINGS 1 & 2, GALESBURG, IL, 61401.

*Facts*

Donald Crose, a general inspector for the city of Galesburg, testified that while on the Galesburg work site he saw framing crews under the direction of Mike Olender working without hard hats in areas where they could be struck by falling debris or building materials (Tr. 162-64). Mike Olender testified that Commercial employees worked without hard hats on the Galesburg site (Tr. 203).

*Discussion*

Commercial does not dispute the existence of the violative conditions, arguing only that Mike Olender was responsible for safety on the job site. It is well settled that Commercial is responsible for its supervisor's knowledge of those conditions, as well as his failure to enforce the cited OSHA standard on the job site. *Ormet Corp*., 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991).

*Penalty*

The violation has been proven and the $2,000.00 penalty proposed by the Secretary is affirmed.

**Willful citation 2, item 1**, as amended, alleges:

29 CFR 1926.416(a)(i):

Unqualified person(s) were working on the ground in the vicinity of overhead lines and brought a conductive object closer to the unguarded, energized overhead line than the distances given in paragraph (g)(2)(i)(A). Employee(s) were using a rope tag-line to guide the trusses over a live 7200Kv overhead electrical line. Employee(s) were holding the rope tag-line as it was making contact with the live overhead electrical line.

The cited standard provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

*Facts*

Donald Crose, a general inspector for the city of Galesburg, stated that on November 7, 1996, he observed Commercial employees under the direction of Mike Olender hoisting trusses over the 7200v power lines above Hillcrest's construction trailer (Tr. 142-43, 147-49, 152). One to four workmen were guiding the trusses with tag lines which were actually touching the power line (Tr. 144, 151). Crose ascertained that the power line had not be deenergized (Tr. 144-45).

Crose testified that the ground in the area was muddy; tire tracks in the area were filled with water (Tr. 150). Crose stated that as the trusses were moved, the lines were coils lay on the ground (Tr. 150).

It was not Commercial's general practice to hoist the trusses; seven trusses had been unloaded on the wrong side of a fence (Tr. 169).

*Discussion*

The employee handling a tag line that was in contact with the energized power line was in violation of the cited standard, though his contact was indirect. Contact with an energized line through conductive tools or materials may cause the harm contemplated by the cited standard, *i.e.* electrocution. Though the tag line was not shown to be conductive, had the rope become wet it could have acted as a conductor, electrocuting employees holding the tag line as it contacted the 7200v line.

A violation of the standard has been established.

*Willful*

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980).

The Secretary introduced no evidence that the violative conduct was undertaken either with disregard for the requirements of the Act, or with indifference to employee safety. CO Evans testified that he relied on his observation of additional violations at Commercial's Knoxville site in deciding to cite the Galesburg violations as willful (Tr. 128). However, As discussed more fully below, the Secretary failed to show that Commercial was the employer on the Knoxville site. Moreover, this violation occurred before

OSHA visited the Knoxville site, and so evinces no disregard for OSHA's authority. Complainant failed to prove that the cited violation was willful.

Where the Secretary alleges that a violation is willful but fails to prove willfulness, an other-than-serious violation may be affirmed. A serious violation will not be found unless the parties have expressly or impliedly consented to try the issue of whether the violation was serious. *Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD ¶29,439 (No. 87-619, 1991). The Secretary did not allege, in the alternative, that the violation was serious, and Commercial presented no evidence on this subject. I cannot, therefore, find that Commercial consented to try the issue of whether the violation was serious. The violation will be affirmed as an "other than serious" violation.

*Penalty*

A penalty of $27,500.00 was proposed. The violation was not found to be willful. The gravity of the violation was overstated by the CO. The tag rope was not shown to have been conductive; four employees were exposed for approximately 45 minutes (Tr. 166); there were no injuries (Tr. 167). Commercial did not normally hoist trusses into place, and had no prior violations of the provisions at §1926.416 *et seq.*

The Commission has clear authority to assess an appropriate penalty based on the gravity of the violation, however, regardless of their classification as serious or non-serious. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1991-93 CCH OSHD ¶29,531 (No. 88-282, 1991). Based on the facts in the record, I find that a penalty of $2,000.00 is appropriate.

**Willful citation 2, item 2**, alleges:

29 CFR 1926.501(b)(13):

Employee(s) installing roof sheathing and fascia boards were unprotected from the hazard of falling from heights of 25 to 30 feet to the ground below.

The cited standard provides:

> *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.. . .

*Applicability*

Commercial argues that the cited standard is specifically applicable to residential and does not apply to commercial construction, such as that involved at the Galesburg Holiday Inn. At the hearing, however,

CO Evans explained that the term "residential construction" applies not to the ultimate use of the structure under construction, but to the type of construction, *i.e.* cut wood, or "stick" construction, which is typically used in homebuilding (Tr. 84). The CO's interpretation has been formalized in STD 3.1 - Interim Fall Protection Compliance Guidelines for Residential Construction, issued on 12/08/95. According to that directive, all or discrete parts of a large commercial construction may come under the standard's scope if the construction materials, methods and procedures are essentially the same at those used for typical house and townhouse construction.

The interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). The Secretary's interpretation is not inconsistent with either the terms or the purpose of the regulation. Because the Galesburg motel was stick construction (Tr. 100), the cited standard is applicable here.

*Facts*

CO Evans testified that when he arrived on the Galesburg site on November 12, 1996 he observed Jason Olender working on the roof, installing roof sheeting and fascia boards (Tr. 113). Olender was not using fall protection (Tr. 113-14). When interviewed, Olender told Evans that the fall protection had not been delivered to the job site (Tr. 118).

Evans testified that he had spoken to both Mike and Jason Olender on November 7, at another job site, about using fall protection on roofs (Tr. 128). At that time, Mike Olender told Evans that they were familiar with OSHA fall protection requirement (Tr. 55-56). Evans stated that he warned Mike Olender on the 7th that he would be visiting the Galesburg work site on the 12th (Tr. 128-29). In addition, Evans ascertained that the general contractor, Hillcrest, had warned Jason Olender earlier on November 12 that he was in violation of OSHA standards by failing to utilize fall protection (Tr. 130-31).

*Discussion*

The underlying violation is not disputed.

*Willful*

As in the previous item, Commercial argues that the Olenders were responsible for safety on the job site. It is well settled that the employer is responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions. *Tampa Shipyards, Inc.*,15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992) [leadermen's longstanding and reckless practices well known to supervisory personnel; employer's training and monitoring was haphazard]. In July, 1996, Commercial was cited for failure to require its personnel to wear

fall protection. Commercial knew that its crews, which included Mike Olender, continued to ignore the fall protection requirements even after the citation. Yet Commercial made no effort to ascertain that the equipment was used on subsequent jobs. Both Olenders were cautioned by CO Evans only days before the November 12 inspection about the need for fall protection. Evans even warned he would be visiting the Galesburg site. The Olenders' failure to comply with OSHA fall protection requirements in the face of Evans' warning clearly shows a disregard for the requirements of the Act.

This item was properly classified as willful.

*Penalty*

A penalty of $35,000.00 was proposed.

Evans stated that Olender and three other unprotected Commercial employees were exposed to a potentially fatal 30 foot fall to the ground (Tr. 122-24, 139). Evans estimated that the four employees had been working on the roof rafters for approximately two days (Tr. 124-25). Evans stated that the likelihood of a fall was high because of the steep pitch of the roof, .512 (Tr. 125). No alternate means of protection were in use (Tr. 125). There were no injuries or deaths on the site (Tr. 126).

Commercial is a small company, and the proposed penalty reflects a 50% reduction for size (Tr. 127). No credit for good faith was afforded as Commercial had been cited within the preceding six months for fall protection violations (Tr. 62, 127). The penalty proposed by the Secretary is appropriate and is affirmed.

**Alleged Violations - Knoxville, Super 8**

Willful citation 1, item 1 alleges:

19 CFR 1926.501(b)(13):
Employee(s) were installing roofing near the eave of the building and were exposed to falls of up to 20 feet to the ground. The employer did not provide a fall protection system nor were alternative measures taken to eliminate the hazard.

**Control of the Knoxville Job Site**

Commercial verbally contracted with Madan Construction to frame the Knoxville Super 8 (Tr. 224). Keating testified that the roofing was beyond the scope of Commercial's contract (Tr. 234). Mike Olender testified that Mike Stroop subcontracted out the roof from Dan Madan Construction (Tr. 207). Olender testified that Stroop was paid in a lump sum by Madan Construction, and did not believe that Stroop's laborer's received checks from Commercial Wall (Tr. 208). Commercial introduced a lien waiver from

Mike Stroop, indicating that Stroop, d/b/a M&S Roofing, performed the roofing work on the Knoxville site (Tr. 235-36; Exh. R-1).

CO Evans testified that when he arrived on the Knoxville site on November 7, he observed workers installing tar paper on the roof deck (Tr. 42). One of the roofers, Mike Stroop, identified himself as an employee of Commercial Wall (Tr. 45-46). Jason Olender was also working on the roof (Tr. 49). Evans assumed that he and the other roofers were installing the roof for Commercial (Tr. 65).

*Discussion*

The evidence fails to establish by a preponderance of the evidence that Commercial Wall was the employer of the roofers observed on the Knoxville job site. Commercial had a contract at the Knoxville site for framing and may have employed both Stroop and Olender for framing work. At the at the time of the OSHA inspection, however, these workers were installing roofing, work beyond the stated scope of Commercial's contract. The record establishes that these workers did piece work for contractors other than Commercial; at the time of the inspection they appear to have been working for Dan Madan and Mike Stroop.

Because the Secretary failed to prove that Commercial had any right to control either the cited employees or the hazardous condition, this citation will be VACATED.

## ORDER

**Docket No. 97-0099**

1. Citation 1, item 1, alleging violation of §1926.501(b)(13), is VACATED.

**Docket No. 97-0100**

1. Repeat citation 1, item 1, alleging violation of §1926.100, is AFFIRMED, and a penalty of $2,000.00 is ASSESSED.

2. Citation 2, item 1, alleging violation of §1926.416(a)(1), is AFFIRMED as an "other than serious" violation, and a penalty of $2,000.00 is ASSESSED.

1. Willful citation 2, item 2, alleging violation of §1926.501(b)(13), is AFFIRMED, and a penalty of $35,000.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: