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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 99-2247
	:	
H. CARR & SONS, INC.,	:	
	:	
Respondent.	:	

Appearances:

Paul J. Katz, Esquire Boston, Massachusetts For the Complainant.	John F. Neary, Esquire Pawtucket, Rhode Island For the Respondent.

Before: Irving Sommer
Chief Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) 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 work site of Respondent H. Carr & Sons ("Carr") located in Providence, Rhode Island, on October 18, 1999; as a result, OSHA issued Carr a serious citation, a "repeat" citation, and an "other" citation. Carr contested the citations, and the hearing in this matter was held in Providence, Rhode Island, on July 13, 2000. At the beginning of the hearing, the parties advised that they had settled the serious and the "other" citation, leaving for resolution only the "repeat" citation; the "repeat" citation alleges that employees working on the mezzanine level at the work site were exposed to an approximately 14-foot fall hazard in violation of 29 C.F.R. 1926.501(b)(1).[1]

[1]The Secretary amended the proposed penalty for the serious citation item from $2,500.00 to $1,250.00, and Respondent withdrew its contest as to that item. Respondent also withdrew its
(continued...)

The OSHA Inspection

Anthony Atack, the OSHA compliance officer ("CO") who conducted the inspection, testified that after arriving at the site, a shopping mall and movie theater construction project, he met with representatives of the general contractor. The CO and the representatives went to the theater area, where they saw an individual moving from a scissor lift to the mezzanine level; the mezzanine level was 14 feet above the concrete floor below, and the wire rope that was up along the edge of the mezzanine level was sagging and inadequate as fall protection. Tom Costa, Carr's foreman at the site, was summoned, and after the CO introduced himself and pointed out the condition Costa told him the individual was Matthew Kish, one of his employees. Costa then called out to Kish, who tightened up the rope; however, when the CO went up to the mezzanine level to speak to Kish he put his foot on the rope to check its deflection and it went all the way to the floor.[2] CO Atack held a closing conference at the site that day that was attended by a representative of the general contractor and various representatives of Carr, including Costa. (Tr. 8-20; 28-30; 55-63).

Discussion

The cited standard, 29 C.F.R. 1926.501(b)(1), provides as follows:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Carr does not really dispute the violative condition the CO observed, as described above. However, it does dispute that Matthew Kish was its employee. The Secretary, on the other hand, contends that Kish was Carr's employee, noting the CO's testimony that Tom Costa told him Kish was one of his employees. (Tr. 11; 28-29). The Secretary further contends that even if Kish was not a Carr employee, Carr was nonetheless properly cited for the violative condition. In this regard, the

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[1](...continued)
contest as to the "other" citation item. (Tr. 5).

[2]C-1 and C-2, the CO's photos, show (1) Kish on the mezzanine level and the sagging wire rope, and (2) the wire rope after the CO stepped on it and another employee who was hoisting materials down to the floor below. (Tr. 12-15; 18-20; 30; 59-61).

Secretary notes the parties' stipulation at the hearing that, on the day of the inspection, Matthew Kish worked under the direction and control of Carr by its foreman, Tom Costa. (Tr. 5).

In support of its assertion that Kish was not its employee, Carr points to the testimony of Matthew Kish himself that although he worked initially for Carr, at the time of the inspection he was employed by a company called K.B. Kelly ("Kelly"). Specifically, Kish testified that he worked for Carr on the mall part of the project until the end of July 1999, when he was laid off; around the first of August, Bob Bernier, the Carr foreman he had been working for, told him there was work on the theater part of the project, after which Kish reported to that area and worked there through the time of the inspection.[3] Kish said that he was a carpenter and that he did the same work in both areas of the project, although Costa was his supervisor in the theater area. He also said that he had not realized he was working for Kelly until he got his first paycheck in August, but it was his understanding that Kelly was a subcontractor that Carr used. (Tr. 31-38; 41-42).

Carr also points to the testimony of Tom Costa. Costa testified that Kish had been an employee of Kelly from the time he joined his crew in August 1999 and that he himself had kept the time for all of the Carr and Kelly employees on his crew and had supplied that information to Carr's field supervisor for payroll purposes. Costa further testified that most of the employees at the site were union workers who worked for various employers on various crews and that it was not unusual for him to have people in his crew who were employed by different entities. Costa said that Kelly was a subcontractor that he assumed was the minority contractor for Carr, but to his knowledge the companies did not interchange employees on a regular basis. (Tr. 44-45; 48-53).

Based on the record, and despite the testimony of Kish and Costa about Kelly, I conclude that Kish was an employee of Carr for purposes of the citation at issue. First, I note the CO's testimony that no one ever mentioned Kelly when he was at the site or indicated that Kish was employed by anyone other than Carr. (Tr. 17-18). Second, I note Carr's stipulation, set out *supra*, and Costa's admission that he alone controlled and supervised Kish's work on the day of the inspection. (Tr. 5; 54). Third, even assuming *arguendo* that Kish was an employee of Kelly for payroll and/or other purposes, I agree with the parties that the Commission's "economic realities test" applies here, and,

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[3]Kish testified that although he usually got work through his union that was not the case here. (Tr. 34-35; 41-42).

pursuant to that test, I find that Carr was the employer of Kish under the Act. The economic realities test "emphasizes the substance over the form of the relationship between the alleged employer and the workers," and the primary factor is "who has control over the work environment such that abatement of hazards can be obtained." *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637-38 (No. 88-2012, 1992). Carr urges it did not control the work environment for purposes of abating the cited condition. I disagree, in view of Costa's supervising Kish, and for the following reasons.

As the Secretary notes, Carr appears to be asserting the Commission's multi-employer work site defense.[4] Where, as here, the Secretary has made a prima facie showing that employees had access to the hazard contemplated by the standard, the employer may avoid liability by establishing that it did not create or control the violative condition and that it either (1) took realistic alternative measures to protect its employees or (2) did not know and could not reasonably have known the condition was hazardous. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976). Carr contends that it neither created nor controlled the cited condition; however, I find the evidence to be otherwise. The CO testified he was told, although he did not recall who said it, that Carr had been removing the wire rope to perform hoisting, and he also testified that the worker in C-2, who he was told was a Carr employee, was hoisting materials down to the floor. (Tr. 14-15; 19; 26-27; 60). Kish could not remember whether he or someone else had removed the subject rope, but he agreed that employees of Carr and other companies had been taking it down to load and unload materials on the mezzanine level. (Tr. 31-32; 39-43). Costa conceded that the worker in C-2 was an employee of Kelly, but he testified that he would "absolutely not" have instructed anyone under his supervision and control to modify the subject rope. (Tr. 47; 50; 53). This testimony is simply not credible, in light of the testimony of the CO and Kish, and I find as fact that employees under the direction and supervision of Carr had been taking down the rope in order to load and unload materials.

I further find that Carr exercised control over the cited condition such that it could have abated the hazard. The CO indicated that Kish tightened up the rope after Costa shouted up to him, and Kish himself so testified. (Tr. 11; 15; 23; 32; 37). Costa testified that he did not tell Kish to fix

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[4]As the Secretary also notes, Carr did not actually plead this defense.

the rope, but, rather, to come down. (Tr. 46-47; 51-52). This testimony is not credited in light of the contrary testimony of Kish and the CO. (Tr. 37-38; 56). Costa also testified that the general contractor, and not Carr, was in charge of maintaining the wire ropes, that the ropes had to be pulled with a torque to get the required 200 pounds of pressure, and that "[y]ou couldn't just do it with a wrench." (Tr. 47-48). The record does show that Kish did not tighten up the rope properly, in that it went down to the floor when the CO stepped on it. (Tr. 19-20; 30; 60-61). However, that Kish's attempt to fix the rope was deficient does not establish that abating the condition was beyond Carr's control, particularly in view of the fact that Costa instructed him to fix it; in addition, the CO testified that one individual could have fixed the rope. (Tr. 60). Moreover, while the CO agreed that the general contractor at the site was responsible for maintaining the wire ropes, he testified that an employer that had removed a rope was responsible for putting it back as it had been. (Tr. 26-27). Finally, although the general contractor was cited for the subject rope and other wire rope on the job due to its overall responsibility for fall protection at the site, (Tr. 25-30), Commission precedent is well settled that more than one employer may be cited for the same violative condition. *Id*.

Although the foregoing is sufficient to reject Carr's defense, Carr has also failed to show that it either (1) took realistic alternative measures to protect its employees or (2) did not know and could not reasonably have known the condition was hazardous. Kish and Costa both testified that safety meetings addressing fall protection were held at the site. (Tr. 38-39; 50). Regardless, Kish conceded he had used "poor judgment" with respect to the cited condition and that he did not use a personal fall arrest system until after the CO spoke to him. (Tr. 38-39). As to the final element, the record establishes that Carr knew or should have known that its employees were taking down the wire rope to perform hoisting work and that Carr likewise knew or should have known that the condition was hazardous. In this regard, I note the parties' stipulation that OSHA had cited Carr previously for a violation of the same standard at this same work site. (Tr. 21). Based on the record, the Secretary has demonstrated the alleged violation, and Carr has not met its asserted defense.[5]

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[5]In concluding Carr violated the standard, I have noted its suggestion that the condition the CO pointed out was Kish's stepping out of the aerial lift and onto the mezzanine level. (Tr. 45-47; 50-52). The CO's testimony establishes that he advised Carr officials, including Costa, of the violation as alleged in the citation. (Tr. 16; 55-58; 62-63). Carr's suggestion is rejected.

The Secretary has characterized this citation item as "repeated." A violation is properly classified as repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *See* section 17(c) of the Act. *See also Potlatch Corp.*, 7 BNA OSHC 1061, 1063-64 (No. 16183, 1979). As noted above, the parties stipulated that OSHA had issued a previous citation to Carr for violating the same standard at the same work site. Specifically, the parties stipulated that Carr was cited on September 1, 1999, for a violation of 29 C.F.R. 1926.501(b)(1), that the inspection involved the same mall project, and that the citation was resolved by an informal settlement agreement. (Tr. 21). On the basis of this stipulation, this item was appropriately cited as repeated. Item 1 of Citation 2 is therefore affirmed as a repeated violation, and the Secretary's proposed penalty of $12,500.00 is assessed.

Conclusions of Law

1. Respondent, H. Carr & Sons, Inc., is engaged in a business affecting commerce and has 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 was in serious violation of 29 C.F.R. 1926.453(a)(2).

3. Respondent was in "repeat" violation of 29 C.F.R. 1926.501(b)(1).

4. Respondent was in "other" violation of 29 C.F.R. 1910.178(1).

Order

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

1. Item 1 of Serious Citation 1 is affirmed, and a penalty of $1,250.00 is assessed.

2. Item 1 of "Repeat" Citation 2 is affirmed, and a penalty of $12,500.00 is assessed.

3. Item 1 of "Other" Citation 3 is affirmed, and no penalty is assessed.

/s/

Irving Sommer

Chief Judge

Date: 10 OCT 2000