Secretary of Labor, Complainant, v. CB&I Constructors, Inc., Respondent.	OSHRC Docket No. **03-0333** **EZ**

Appearances:

Oscar L. Hampton, III, Esq., Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri
For Complainant

Carl B. Carruth, Esq., McNair Law Firm, P.A., Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

CB&I Constructors, Inc. (CB&I), through the CB&I Water division, contracted to design, fabricate, and erect an elevated water tower for the City of Blue Springs, Missouri. CB&I's employees performed the general construction work for the water tower, and other contractors were used for specialty jobs such as the electrical work. After an inspection by Occupational Safety and Health Administration (OSHA) on November 21, 2002, when CB&I was testing the water tower for leaks, CB&I received a serious citation on December 18, 2002. CB&I timely contested the citation.

The citation alleges a serious violation of 29 C.F.R. § 1926.404(b)(1)(ii) for failing to have ground fault circuit interrupter (GFCI) protection on the electrical contractor's extension cord used to power the contractor's conduit threader machine. The citation proposes a penalty of $1,500.

The case was designated to proceed under the Review Commission's EZ Trial procedure, 29 C.F.R. § 2200.200. The hearing was held on May 23, 2003, in Kansas City, Missouri. Jurisdiction and coverage are stipulated (Tr. 5).

CB&I denies that a violation of § 1926.404(b)(1)(ii) has been shown and also claims the multi-employer work site doctrine. CB&I argues that the record fails to show that the electrical contractor was not utilizing an assured equipment grounding program instead of GFCI or that the extension cord outlet was "120-volt, single phase, 15- and 20- ampere" as required by the standard. Even if noncompliance with the standard is established, CB&I asserts that it did not create or control

the lack of a GFCI and its employees were not exposed to a hazard. As general contractor, it claims that it should not be held responsible for the alleged violation. It was the electrical contractor who was responsible for providing ground fault protection and for operating the conduit threader machine.

For the reasons discussed, a violation of § 1926.404(b)(1)(ii) is vacated.

The Inspection

CB&I was contracted by the City of Blue Springs, Missouri, to design, fabricate, and erect an elevated water tower. The completed water tank was to be made of corrugated steel and sit on top of an enclosed concrete foundation with four floors or levels. CB&I is headquartered in Woodlands, Texas. While CB&I's employees actually erected the water tower, it subcontracted some specialty work, such as the foundation work, painting, electrical work, and the installation of an overhead door, to specialty contractors. Kansas City Electric Construction Co. was the electrical contractor (Exh. R-1; Tr. 91-92, 98, 112-113, 127, 153).

The work on the water tower was done sequentially in that each phase was performed independently by CB&I or a specialty contractor. CB&I did not have a supervisor on site to oversee the work of a specialty contractor. The foundation and construction work was completed by the middle of May 2002. CB&I then left the site and Kansas City Electric came on site to "rough-in" the electrical work. Afterward, the painters painted the tower. Kansas City Electric then returned to complete the electrical work. In November, 2002, work on the water tower was near completion. The electrical work was almost done and CB&I needed to test the tank for any leaks (Tr. 14, 96, 108, 126-127, 128, 130).

On November 21, 2002, OSHA Compliance Officer (CO) Robert Vezeau initiated a programmed inspection of the work site. He arrived at approximately 8:50 a.m. Two CB&I employees, Steven Swanson, CB&I Water construction supervisor, and his assistant, Scott McLean, who had arrived on site at approximately 7:00 a.m., were in the water tank to prepare for the hydro test.[1] Also on site were three employees of Kansas City Electric who were installing electrical conduit on the upper floors of the foundation. Two City of Blue Springs' employees were on the

[1]Hydro testing the tank involved filling the tank with water and checking for leaks (Tr. 130).

ground level of the foundation to observe the hydro test. There was no other work or employees on site (Tr. 12-13, 27, 48, 49-50, 130-131, 145, 163).

CO Vezeau entered the enclosed ground level of the foundation, which is approximately 78 feet in diameter,[2] with a concrete floor. No work was being performed and only the two city employees were present on the ground level. Other than a conduit threader machine used to cut threads on the ends of conduit, the area was essentially empty and "fairly clear" (Exh. C-2; Tr. 15, 27, 34, 52, 81).

A city employee notified supervisor Swanson of OSHA's presence. Swanson returned to the ground level and participated in the opening conference. CO Vezeau and Swanson then went to the floor where the electrical contractor's employees were installing conduit (Tr. 17-18, 20-21, 27, 43).

Having observed no unsafe conditions on the upper floors, CO Vezeau and Swanson returned to the ground level where Vezeau then observed that the 40-foot extension cord connected to the conduit threader machine and plugged into an electrical outlet did not have GFCI (Exh. C-1; Tr. 20-21, 26, 28, 57, 155). The extension cord and threader machine were owned by Kansas City Electric (Tr. 47). The threader machine was not in operation and no metal shavings were observed on the floor around the machine (Tr. 46, 74). Kansas City Electric abated the condition immediately by adding a GFCI to the extension cord (Tr. 40). CO Vezeau concluded his inspection at approximately 10:10 a.m. (Tr. 25).

The lack of a GFCI was the only alleged OSHA violation observed by CO Vezeau. Both CB&I and Kansas City Electric received similar citations (Tr. 52).

Discussion

[2]CO Vezeau estimated the ground level was approximately 60 feet in diameter (Tr. 34, 57). CB&I construction supervisor Swanson's estimate, however, is accepted because he was involved in the construction process of the tower (Tr. 159).

Item 1 - Alleged serious violation of § 1926.404(b)(1)(ii)[3]

The citation alleges that an extension cord used to power a conduit threader machine did not have GFCI protection. Section 1926.404(b)(1)(ii) provides in part that:

> All 120-volt, single-phase, 15- and 20- ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

A. Applicability of § 1926.404(b)(1)(ii)

The Part 1926 construction standards were applicable to CB&I's construction project in erecting the elevated water tower. There is no dispute that a 40-foot extension cord connected the conduit threader machine to the electrical outlet. Also, CB&I does not dispute that there was no GFCI protection (EZ Prehearing Telephone Conference Order, April 15, 2003).

Section 1926.404(b)(1)(ii) applies to all employers on construction sites who use 120-volt, single-phase, 15- and 20- ampere receptacle outlets which are not part of the permanent wiring of the building. The extension cord was not part of the water tower's permanent wiring.

In accordance with § 1926.404(b)(1)(i), an employer can use either GFCI or an assured equipment grounding conductor program as described in § 1926.404(b)(1)(iii). CB&I argues that the record fails to show that Kansas City Electric was utilizing GFCI protection as opposed to an assured equipment grounding conductor program (Tr. 82). CO Vezeau testified that he did not ask whether Kansas City Electric was utilizing an assured equipment grounding conductor program (Tr. 45-46).

Despite his testimony, the record makes a *prima facie* showing that Kansas City Electric was using GFCI. GFCI was noted at other locations on site and, when notified by OSHA of the lack of

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[3]To establish a violation of a standard such as § 1926.404(b)(1)(ii), 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).

a GFCI for the extension cord, Kansas City Electric immediately abated the condition by adding GFCI protection (Tr. 46, 75, 79). There is no evidence that Kansas City ever claimed it was using an assured equipment ground conductor program instead of GFCI. Also, CB&I did not present any evidence to show that an assured equipment program was being utilized by its subcontractor.

CB&I also claims that the receptacle outlet was not shown to be a 120-volt, single-phase, 15- and 20- ampere outlet (Tr. 84). The record does establish that the receptacle outlet was 120-volt. Although CO Vezeau did not test the outlet to determine the voltage or ampere, he testified that based on his experience[4] and observation, he knew the receptacle was 120-volt (Tr. 55, 65). He testified that it is unusual for an outlet to be less than 120 volts in a commercial industrial setting (Tr. 67). Vezeau's testimony is uncontroverted. CB&I's project manager Darwin White agreed that 120-volt was normal (Tr. 121, 123).

Despite the evidence of voltage, the record fails to show that the outlet was single-phase or the amperes. Vezeau's testimony regarding single-phase or ampere is silent. He presented no basis for concluding that the outlet was single-phase or that the amperes were 15 and 20 as required by § 1926.404(b)(1)(ii). Although he had a three-way electrical tester with him during the inspection, he apparently never used it on this outlet (Tr. 13, 65). In describing the purpose of GFCI, Vezeau testified that it was "used to cut off the flow of amperage before it does harm to a person if there is a fault in the circuitry" (Tr. 56). Project manager White testified that normal ampere was between 15 and 30 (Tr. 122, 124). OSHA standards at § 1926.404(b)(2) regulate outlet devices and set maximum ampere ratings for various circuits from 10 amperes to 50 amperes. Without a showing that the outlet was single-phase[5] and the amperes were 15 and 20, the record fails to establish the application of 1926.404(b)(1)(ii).

B. Noncompliance with the terms of § 1926.404(b)(1)(ii)

It is undisputed that if § 1926.404(b)(1)(ii) applies, there was no GFCI .

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[4]CO Vezeau has been an OSHA compliance officer since February 2002. Previously, he had worked for the Postal Service as a construction project manager for facilities (Tr. 66).

[5]It is noted that OSHA's electrical standards regulate both single phase and three phase circuits. *See* § 1926.404(f)(1).

C. Employee access to the violative conditions

There is no dispute that the threader machine was not being used at the time of the OSHA inspection (Tr. 46, 57). CO Vezeau did not know when the threader machine was last used (Tr. 28). There were no metal shavings on the floor around the machine (Tr. 74). However, the electricians were installing conduit which had been threaded on the upper floors (Tr. 61-62).

The test for determining employees' exposure to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The Secretary must show that it is reasonably predictable, either by operational necessity or otherwise, including inadvertence, that employees have been or will be in the zone of danger. *Fabricated Metal Products, Inc.,*18 BNA OSHC 1072 (No. 93-1853, 1997).

In the instant case, employees of the electrical contractor were installing conduit on the fourth floor. The threader machine was used to cut threads on the ends of the conduit so that the conduit could be fastened together to protect the electrical cord inside (Tr. 26-27, 63). The threader machine was plugged into the electrical outlet. It was available for use. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1284 (No. 91-862, 1993) (proof of availability for use is sufficient to establish employees' exposure to the standard requiring GFCI on an unprotected receptacle). Although a GFCI was immediately placed on the extension cord when discovered by CO Vezeau, there is no showing that a GFCI had previously been utilized.

D. Employer's actual or constructive knowledge

Neither the threader machine, extension cord, nor outlet receptacle were hidden from view or obstructed in any way (Exh. C-1; Tr. 36-37, 138). The ground level was "essentially an empty concrete floor" (Exh. C-2; Tr. 81). The threader machine was approximately 3 feet high and 1 foot wide (Tr. 35). Construction supervisor Swanson crossed directly over the extension cord twice prior to OSHA's inspection (Tr. 143). He saw the extension cord on the floor (Tr. 138).

In order to establish employer knowledge of a violation, the Secretary must show that the employer knew, or, with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.,*12 BNA OSHC 1962 (No. 82-928, 1986). An employer must make a reasonable effort to anticipate hazards to which employees may be exposed in the course of

their scheduled work. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980).

Also, an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A. L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995 (No 92-1022, 1994). When a supervisory employee has actual or constructive knowledge of the violation conditions, knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). Swanson was a supervisory employee and his knowledge is imputed to CB&I.

CO Vezeau considered the lack of GFCI protection as in plain view (Tr. 36-37). Except for the threader machine and extension cord, the ground floor was essentially empty. Based on his observations on the ground floor, Vezeau knew that the extension cord lacked GFCI (Tr. 24, 76).

Supervisor Swanson had only been on site that morning and was on the ground floor for a short duration, less than 10 minutes[6] (Tr. 132, 149). The electrical equipment, including the threader machine and extension, did not belong to CB&I (Tr. 47). No employees were at the threader machine and it was not in use. There is no evidence that CB&I employees had ever used the threader machine or were exposed to the lack of a GFCI (Tr. 47). It was not CB&I's responsibility to provide the GFCI.

Also, if the lack of a GFCI was in plain view, CO Vezeau did not notice it when he first initiated the OSHA inspection on the ground floor and conduced the opening conference (Tr. 44). He was also on the ground floor for approximately 10 minutes before going to the upper floors (Tr. 16-17).

Unlike Vezeau, who was conducting a safety inspection, Swanson was only on site to conduct a hydro test of the tower, which was not on the ground floor. He was not on site to supervise or audit the electrical contractor's work (Tr. 134). When he arrived, Kansas City Electric's employees were already working on the 4th floor (Tr. 149). There was no one on the ground level (Tr. 157). Also, Swanson testified that he is not familiar with electrical equipment. He is not an electrician (Tr. 152). CB&I did not "have expertise to do the electrical work" (Tr. 92).

[6]He had not been to the water tower for at least two weeks (Tr. 159).

Although possibly in plain view, the lack of a GFCI in this case was not shown to be readily apparent. As discussed, the requirement for GFCI is conditioned on knowing that the receptacle outlet was "120-volt, single-phase, 15- and 20- ampere" and an assured equipment grounding conductor program was not being utilized. As CB&I construction supervisor, it was not shown that he should have known the outlet capacity. Also, Swanson was on the ground level for a short duration and for another purpose. The threader machine was not used by CB&I, nor was it CB&I's equipment. At the time, the threader machine was not in use and no employees were in the area. Further, the GFCI could have been placed at either end of a 40-foot extension cord (Tr. 56).

Multi-Employer Work Site[7]

A general contractor, who, as in this case, did not have employees exposed and did not create the violative condition may still be considered responsible for violations of a subcontractor where the general contractor could reasonably be expected to prevent or detect and abate the violation. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994).[8] A general contractor's responsibility does not depend on whether it actually created the hazard or has the manpower and expertise to abate the hazard. *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762 (No. 76-4754, 1980).

In *Knutson Construction Co.*, 4 BNA OSHC 1759, 1761 (No. 765, 1976), *aff'd.* 566 F.2d 596 (8th Cir. 1977), the Review Commission did not hold a general contractor responsible for failing to detect a one-inch crack on the underside of a scaffolding platform before it collapsed. The Commission concluded that it was unreasonable to expect a general contractor to detect such a crack. However, in *Blount International Ltd.*, 15 BNA OSHC 1897, 1899 (No. 89-1394, 1992), the Commission found it reasonable to expect a general contractor to detect a GFCI problem in a panel distribution box even though the condition was by nature latent and hidden from view. The

[7]CB&I's argument that this was not a multi-employer worksite, but rather a sole employer site, is rejected. CB&I as general contractor contracted Kansas City Electric to perform the electrical work. Both CB&I and Kansas City Electric were on site at the time of the OSHA inspection.

[8]It is noted that CB&I is headquartered in Texas within the 5th Circuit Court of Appeals, which has rejected the multi-employer concept in a series of mostly tort cases but has not considered the issue in the context of a Commission casework site doctrine. See discussion, *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000).

Commission concluded that the general contractor failed to ask the electrical contractor or conduct its own test of the box. It did not exercise due diligence in inspecting for the violative condition.

The general contractor at a construction project is presumed to have sufficient control over its subcontractors to require them to comply with the safety standards and to abate violations. *Gil Haugan, d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006 (Nos. 76-1512 & 1513, 1979).[9] Under its contract with Kansas City Electric, CB&I reserved the right to take action against a specialty contractor for unsafe conditions, including directing that the condition be fixed and the contractor's work stopped (Exh. R-1; Tr. 104-105). CB&I project manager Darwin Witte agreed that if a CB&I supervisor observed an unsafe condition, he has the authority and is required to tell the subcontractor to fix the problem and cease its work until abated (Tr. 104-105, 111). CB&I's contract with Kansas City Electric specifically reserves to CB&I the right to cease a subcontractor's work if it is unsafe. The Contract at paragraph 2.8 states, in part:

> The Subcontractor shall be solely responsible for the prevention of accidents on or in the vicinity of the Work. The Subcontractor shall establish and maintain during the course of the Work a safety program implementing safety measures, policies and standards conforming to those required by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner including, but not limited to, requirements imposed on the Contractor by the Prime Contractor. The Subcontractor shall comply with the reasonable recommendations of insurance companies having an interest in the Project, and shall stop any part of the Work which the Contractor deems unsafe until corrective measures satisfactory to the Contractor shall have been taken. The Contractor's failure to stop the Subcontractor's unsafe practices shall not relieve the Subcontractor of the responsibility to provide a safe work environment.

The Commission has concluded that there is sufficient supervisory authority and control where a general contractor has "specific authority to demand a subcontractor's compliance with safety requirements, to stop a subcontractor's work if safety violations were observed, and to remove

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[9]The D.C. Circuit Court of Appeals in a non-construction case, *IBP, Inc. v. Herman*, 144 F.3d 861, 866 (1998), made it clear that the Secretary has the burden to establish that a general contractor has sufficient control of a work site and that the most a general contractor could be expected to do without express authority to do anything other than to terminate a contract would be to point out safety violations when occurring. This was not sufficient control. To date, the Review Commission has not applied the *IBP* reasoning to construction cases.

a subcontractor from the worksite." *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000).

Because of the scheduling of the work, CB&I did not have employees generally present on site during the subcontractor's work performance (Tr. 128). CB&I considered it unsafe to employees to have other contractors on site at the same time (Tr. 96). However, CB&I supervisors periodically visited the site (Tr. 99). Also, CB&I received reports from contractors regarding work progress or problems (Tr. 100).

The threader machine and extension cord did not belong to CB&I. CB&I employees never used the equipment (Tr. 47, 58). Other than the lack of a GFCI, the equipment was in good condition (Tr. 45). The electrical work was being done by a qualified speciality contractor. CB&I had used Kansas City Electric on other projects and found their work of high quality and safe (Tr. 93, 136-137). CB&I did not have the expertise to perform such specialty work (Tr. 92, 97). The record fails to show that CB&I did not exercise due diligence in ensuring that Kansas City Electric operated a safe workplace. There was no reason offered for CB&I to foresee that Kansas City Electric would fail to provide GFCI protection for the extension cord.

The threader machine was not shown to have been used on the day of OSHA's inspection (Tr. 28). It was not used during the inspection period (Tr. 57). Nor was it in use when Swanson arrived at 7:00 a.m. (Tr. 143). There were no metal shavings on the floor around the threader machine which might have indicated recent use (Tr. 74). The lack of a GFCI was the only safety violation observed by CO Vezeau during his approximate one hour inspection of the site (Tr. 48).

CB&I supervisor Swanson was only present on site to conduct a hydro test of the water tank for the city (Tr. 130, 134). He was not on site to oversee the electrical contractor's progress or work. The threader machine was not in use and there was no reason for Swanson to inspect the machine or determine GFCI protection. Even if he had noted that the extension cord did not have a GFCI, Swanson would have had to investigate further to determine if one was required. Based on the record, CO Veseau determined that a GFCI was not on the extension cord but failed to determine that one was required. He did not test the circuit, note whether it was single-phase, or determine the amperage.

Swanson was not reasonably able to detect the lack of a GFCI. Besides his lack of knowledge regarding electrical equipment and also it was not part of his job duties, Swanson was only on the ground level for approximately 10 minutes. Even if he crossed over the extension cord to access the upper floors, it is noted that the GFCI could have been attached at either end of the 40-foot extension cord (Tr. 56). Also, the compliance officer did not at first detect the lack of a GFCI when he was on the ground level for 10 minutes waiting for Swanson (Tr. 44). The absence of a GFCI was not readily apparent. He did not see the alleged violation until he "got closer to it" (Tr. 21).

CB&I did not have employees exposed and did not create the lack of a GFCI. As general contractor, the record fails to show that CB&I could have reasonably been expected to prevent or detect and abate the lack of a GFCI.

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:

1. Citation 1, Item 1, alleged serious violation of § 1926.404(b)(1)(ii), is vacated and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: June 25, 2003