



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
B & M CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 90-3089

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 July 8, 1993. The decision of the Judge will become a final order of the Commission on August 9, 1993 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 July 28, 1993 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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

A handwritten signature in cursive script, reading "Ray H. Darling, Jr.", written over a horizontal line.

Ray H. Darling, Jr.
Executive Secretary

Date: July 8, 1993

DOCKET NO. 90-3089

NOTICE IS GIVEN TO THE FOLLOWING:

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E. Carter Botkin
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,

Complainant,

v.

B & M BUILDERS COMPANY, d/b/a
 B & M CONSTRUCTION,

Respondent.

OSHRC DOCKET NO. 90-3089

APPEARANCES:

Margaret Terry, Esquire
 Dallas, Texas
 For the Complainant.

Bill Bowlin
 Houston, Texas
 For the Respondent, *pro se*.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought 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").

On July 11, 1990, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the boiler area of a power plant owned by the City of Lubbock, Texas, where Respondent ("B & M") was engaged in asbestos removal. As a result of the inspection, B & M was issued a serious citation with four items alleging violations of 29 C.F.R. §§ 1926.451(a)(13), 1926.451(d)(3), 1926.500(b)(1) and 1926.500(d)(1), respectively. B & M contested the citation, and a hearing was held on May 10, 1991.¹

¹The Secretary withdrew item 2 at the beginning of the hearing.

Background

The record shows that a previous inspection focusing on the asbestos removal aspects of the project had occurred on July 2, 1990, and that the subject inspection, which addressed only the scaffolding at the site, was the result of a referral pursuant to the July 2 inspection.² The record further shows the power plant was not in operation at the time of the inspection, and that the boiler area was in a building containing four boilers, two concrete pits, a trailer and a cooling tower; C-8 is a rough sketch of the building and its contents. Finally, the record shows that the only scaffolding inspected on July 11 was that around Boiler No. 6, indicated with a "B" on C-8.

The Evidence

Jack Haning, the OSHA compliance officer ("CO") who conducted the inspection, has over 15 years experience with OSHA. He testified he met with Mr. Mendoza, B & M's job superintendent, and that after donning protective equipment he and an employee Mendoza directed to accompany him entered the asbestos containment around Boiler No. 6.³ Haning saw no ladder or other safe means to access the boiler other than the scaffolding shown in C-1-2, and the employee told him workers had been using the scaffold ends to get up to the boiler to perform asbestos removal. Haning and the employee went to the level where work had been done, which was about 12 feet from the ground, where Haning saw two unguarded openings in the walkway around the boiler and an unguarded I-beam along the side of the boiler that served as a walkway. Haning identified C-6 as a photo of the I-beam and C-4-5 as photos of the openings, and noted that the employee with him, whose foot appears in C-5, indicated he and others had been working in these areas. Haning further noted that the opening in C-4 was also shown in the lower left corner of C-1. (Tr. 14-17; 21-36; 40-45; 48-55; 81; 87; 91-97).

Haning said all the cited conditions represented serious fall hazards which were exacerbated by the protective equipment required for asbestos removal and by the ax,

²B & M was apparently not cited as a result of the July 2 inspection.

³Haning did not recall the employee's name. (Tr. 26-27; 81).

buckets and crates he saw on the ground, on which employees could have fallen; workers could also have hit boiler or scaffold parts or the valve in C-7. Haning also said the only persons who entered the containment when he was there were the employee and himself, but that he concluded workers had been exposed to the cited conditions based on what the employee told him and on his own observations; there were showers and protective equipment in the containment and work materials in the area, such as the bucket in C-9, and the boiler looked as if it had been scrubbed clean. Haning noted Mendoza indicated there had been problems at the site and that he had replaced another supervisor, but that he did not tell him Boiler No. 6 was in a preparatory stage and that no removal had occurred there or that the missing items were being used in another containment; Mendoza did say there was work to do on another boiler, marked as "C" on C-8, before removal could take place there, and that the crew was engaged in redistributing the load in the disposal trailer.⁴ (Tr. 25-26; 34-39; 45-47; 53-56; 68-73; 77-81; 87; 92-98).

Bill Bowlin, president and co-owner of B & M, testified the company has been in business since 1985, that its only business is asbestos removal and insulation installation, and that it is licensed to perform asbestos removal by the Texas Department of Health. He further testified that the subject job, which began on May 2 and involved removing asbestos in different areas throughout the building, required numerous B & M employees but that due to a labor dispute the job superintendent and almost all the employees abandoned the site on June 23; the project was secured by posting several employees as guards, but no more removal work was done until July 5, when a new crew began at the site under Richard Mendoza, a newly-hired superintendent.⁵ Bowlin said Mendoza's priorities were to clean up, repair the containments, finish the turbine area, redistribute the load in the trailer and complete the preparation of Boiler No. 6. Bowlin also said no removal had taken place on Boiler No. 6 at the time of the inspection because its preparation was not yet complete, but

⁴Haning saw the crew working in and around the trailer; they were wearing protective equipment and handling bags with asbestos warning labels on them. (Tr. 69; 76-78; 91).

⁵In support of his testimony, Bowlin presented R-4, R-9 and R-12, copies of the employee time records for these periods. (Tr. 141-48; 159-63; 166-68; 199-210).

that employees could have used the scaffold to repair the boiler's containment. (Tr. 114-16; 141; 151-58; 163-65; 168-72; 190-96; 210-18).

Bowlin identified R-1 as the employee safety manual in effect during 1990, and R-10 and R-5 as the asbestos supervisor licenses of Mendoza and Charles Garcia, the previous job superintendent. He said the manual is provided to all new hires, that it was provided to Mendoza, and that it addresses ladder and scaffolding safety; he acknowledged the hazard of the cited conditions, but said Mendoza was very experienced and knew better than to allow work under such conditions. Bowlin noted Garcia advised him prior to leaving that everything at the site was in order, and that Phillip Hoot, B & M's project manager, had inspected the project and made oral reports of its progress; based on those reports, progress at the site was satisfactory until June 23. Bowlin further noted he himself had been to the site twice before June 23, when there was no activity in the Boiler No. 6 area, and that according to Mendoza, who still works for the company, the cited deficiencies were corrected before removal work occurred in that area. (Tr. 119-26; 148-50; 164-65; 168-71; 174-82; 185-91; 196; 199; 203-04; 211-12; 215-21; 230-31).

Discussion

The subject standards provide as follows:

1926.451(a)(13) - An access ladder or equivalent safe access shall be provided.

1926.500(b)(1) - Floor openings shall be guarded by a standard railing and toeboards or cover....

1926.500(d)(1) - Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent ... on all open sides....

B & M does not dispute that the conditions described by the CO existed at the site, or that the conditions represented serious violations of the standards set out above. It contends, rather, that no employees were exposed to the conditions based on Bowlin's testimony about the abandonment of the site and the preparatory status of Boiler No. 6 at the time of the inspection.

In addition to Bowlin's testimony, B & M proffered several affidavits in support of its contention. For reasons apparent on the record, a ruling on the admissibility of the affidavits was reserved and the parties were invited to argue this matter in post-hearing

submissions. The Secretary did so; B & M did not. I find the Secretary's reasoning completely persuasive; therefore, R-2, R-5, R-7, R-8 and R-11 are not received into evidence.⁶

Based on the foregoing, the only evidence to be considered in deciding the issue of employee exposure is the testimony of Bowlin and the CO. While Bowlin testified no removal work had taken place on Boiler No. 6 before the inspection, he himself admitted employees could have used the scaffold to repair the containment around that boiler. Moreover, it is clear Bowlin had no personal knowledge of the state of the boiler at that time since his only visits to the site were before any activity was taking place in that area. The CO's testimony, on the other hand, was based on his actual observation of the boiler and on the statements of the employee Mendoza directed to accompany him.

In its post-hearing brief, B & M attacked the hearsay nature of what the employee told the CO during his inspection of the Boiler No. 6 area. B & M has misread and/or misinterpreted the hearsay provisions of the Federal Rules of Evidence. Rule 801(d)(2) defines a statement which is offered against a party and which was made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," as an admission by a party-opponent and not hearsay. Clearly, the statements of the employee, B & M's representative, are admissions of a party-opponent and not hearsay; however, the weight to be given those statements depends upon their reliability and whether they are rebutted by other evidence. *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-49, 1991 CCH OSHD ¶ 29,354, pp. 39,467-69 (No. 87-1309, 1991).

⁶Despite the foregoing, I have looked carefully at the affidavits to determine what weight they would have been given had they been received into evidence. In this regard, I note that except for R-11 the affidavits are largely irrelevant, particularly since the Secretary does not dispute B & M's assertion that the site was abandoned. In R-11, Mendoza states he told the CO the missing scaffold parts "were being utilized in the active containments, since the containment at Boiler No. 6 was only in the prep stage." This statement is not admissible as an admission of a party-opponent, as are the statements of the employee who accompanied the CO, discussed below. However, even if R-11 were admitted it would be given very little weight based on my findings *infra* and on Mendoza's failure to testify; in this regard, I note Mendoza still works for B & M and could have testified at the company's behest.

The CO testified the employee told him he and other workers had used the ends of the scaffolding to get up to the boiler and that they had worked in the cited areas. The CO's testimony was credible and unequivocal, and the trustworthiness of the employee's statements is established by the CO's own observation of materials and equipment in the area as well as the asbestos removal that had occurred. Although B & M disputes this evidence the testimony of Bowlin does not refute it, since, as noted above, he had no personal knowledge of the status of the boiler. Bowlin's testimony about Mendoza's experience and what he, Garcia and Hoot told him likewise does not refute the Secretary's evidence; the statements of Garcia and Hoot address the status of the site before June 23, and any statements Mendoza may have made to Bowlin indicating no work occurred on the boiler are simply not credible, notwithstanding his experience, in light of the CO's unequivocal testimony and the fact Mendoza did not testify.

Based on the foregoing, it can only be concluded that B & M employees were, in fact, exposed to the cited conditions and that the Secretary has met his burden of proof in regard to all three of the contested items. These items are accordingly affirmed as serious violations, and after giving due consideration to the size, history and good faith of the employer, as well as to the gravity of the violations, a penalty of \$720.00 is assessed for each item.

Conclusions of Law

1. Respondent, B & M Builders Company, d/b/a B & M Construction, 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. §§ 1926.451(a)(13), 1926.500(b)(1) and 1926.500(d)(1).
3. Respondent was not in violation of 29 C.F.R. § 1926.451(d)(3).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1, 3 and 4 of citation number 1 are AFFIRMED as serious violations, and a penalty of \$720.00 is assessed for each item.
2. Item 2 of citation number 1 is VACATED.



E. Carter Botkin
Administrative Law Judge

Date: **JUN 28 1992**