

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant
v.
Framers R Us, Inc.,
Respondent.

OSHRC Docket No. **10-1813**

Appearances:

Schean G. Belton, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

Jesus Contreras, Owner, and Jamie Contreras, Co-Owner, *pro se*, Framers R Us, Inc., Winder, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Framers R Us, Inc. (Framers) is in business as a framing contractor for single family homes and some commercial projects in Georgia and the bordering states. On July 30, 2010, Framers was framing a motel under construction in Birmingham, Alabama, when the project was inspected by the Occupational Safety and Health Administration (OSHA). The inspection was initiated after the OSHA compliance officer observed an employee without fall protection working on the third level which had unprotected edges. As a result of the OSHA inspection, Framers received serious and repeat citations on September 2, 2010. Framers timely filed its notice of contest.

Citation no. 1 alleges serious violations of 29 C.F.R. § 1926.1053(b)(4) (Item 1a) for failing to use a ladder for the purpose designated and 29 C.F.R. § 1926.1060(a)(1)(iii) (Item 1b) for failing to train each employee on the proper use of portable ladders by a competent person. The citation proposes a group penalty of \$2,640.00.

Citation no. 2 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(1) (Item 1) for failing to provide fall protection by guardrails, safety nets or personal fall arrest for each employee on a walking/working surface with an unprotected side or edge. The repeat citation proposes a penalty of \$9,240.00.

The hearing was held in Birmingham, Alabama on January 19, 2011. Co-owners, Jesus and Jamie Contreras, represented Framers *pro se* (Tr. 7). The parties stipulated jurisdiction and coverage (Tr. 9). The parties filed post hearing statements of positions on March 1, 2011.

Framers denies the alleged violations. Since it did not own the ladder, Framers argues it should not be held responsible for its improper usage. With regard to the alleged fall protection violation, Framers asserts employee misconduct in that it provided a safety harness and training to the employee. Framers also claims it was the only employer to receive an OSHA citation although other employers worked on the project.¹

For the reasons discussed, the items 1(a) and 1(b) are affirmed and a group penalty of \$1,500.00 is assessed. Item 2 is vacated.

Background

Framers is a small residential and commercial framing contractor with an office in Winder, Georgia. Framers was incorporated in 2007 and is owned by husband and wife, Jesus and Jamie Contreras. Jesus Contreras has 10 years of framing experience. At the time of the OSHA inspection, Framers employed six employees (Tr. 91-92).

In April 2010, Framers subcontracted to frame a motel under construction in Birmingham, Alabama. The general contractor contracted the framing work to another company who subcontracted the work to Framers. Jesus Contreras supervised the framing work on the project (Tr. 91, 93-94).

On July 30, 2010, OSHA safety compliance officer (CO) Javier “Alex” Rodriguez, who was driving near the project at approximately 11:00 a.m., observed an employee on the third level,

¹ Even if other employers were on-site and did not receive an OSHA citation, Framers is not relieved of its safety obligations to comply with the Occupational Safety and Health Act (Act). OSHA has “broad prosecutorial discretion” in deciding who to inspect and prosecute for violations of the Act. *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153 (No. 83-299, 1987). The selection of Framers for inspection and issuance of citations was not motivated for harassment purposes or had an harassing effect. This argument by Framers is rejected.

approximately 30 feet above the ground. There were no guardrails or safety nets at the unprotected edges. The employee was not wearing a safety harness or lanyard. Another employee working on the third level was wearing a harness. Contreras had assigned the employees to finish installing the plywood on the second and third levels (Exhs. C-1, C-2; Tr. 22, 24, 59, 113).

CO Rodriguez parked his car, took two photographs, and initiated an OSHA inspection. He met the general contractor who identified Framers as the framing contractor on the project (Tr. 66). Rodriguez held an opening conference with Jesus Contreras (Tr. 17-18).

During the walk-around of the project, CO Rodriguez observed a 10-foot, A-frame ladder in the closed position used to access the third level from the second level (Exhs. C-3, C-4; Tr. 27). The ladder was leaning into the third level opening. CO Rodriguez asked Mr. Contreras and the employees about training on the proper usage of ladders (Tr. 34). He also interviewed the employee who was on the third level without fall protection (Tr. 64).

Prior to the OSHA inspection, Framers had received a serious citation on November 16, 2009, which also included an alleged violation of § 1926.501(b)(1). The earlier citation involved a workplace in Pelham, Alabama and alleged that “one employee was observed standing on an outside wall performing framing work and was not protected from falling approximately 40 feet to the ground below.” Framers did not contest the earlier citation and entered into an informal settlement agreement with OSHA on December 2, 2009 which reduced the proposed penalty for the § 1926.501(b)(1) violation. The earlier citation became a final order on December 29, 2009 (Exh. C-5; Tr. 42-43).

As a result of the OSHA inspection in this case which took approximately 2 hours, the serious and repeat citations at issue were received by Framers on September 2, 2010 (Tr. 88).

Discussion

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 fo the violation (*i.e.*, the employer either knew, or with the exercise or reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Framers does not dispute the application of the cited construction standards to its framing project in Birmingham, Alabama. Framers also does not dispute the employees' exposure to the cited conditions.

Alleged Violations

SERIOUS CITATION NO. 1

Item 1a - Alleged violation of § 1926.1053(b)(4)

The citation alleges, in part, that "employees were using a WARNER "A" frame ladder that was in a closed position." Section 1926.1053(b)(4) provides:

Ladders shall be used only for the purpose for which they were designed.

During the inspection, CO Rodriguez observed the 10-foot, "A" frame ladder in a closed position used to access the third level (Exhs. C-3, C-4). The ladder was leaning against an opening in the third level. Rodriguez testified the ladder was not secured at the top or bottom to prevent it from slipping. It also did not extend three feet above the third level (Tr. 27-28).

Although Rodriguez did not observe employees using the ladder, the ladder provided the only means for employees to access the third level. At least two employees were working on the third level at the time of the OSHA inspection (Tr. 32, 68-69). There is no evidence the ladder was used prior to the OSHA inspection (Tr. 117). According to CO Rodriguez, an "A" frame ladder is designed to be used in the open position (Tr. 27). An A-frame ladder used in the closed position is less stable and contrary to its designed purpose.

Framers does not dispute the improper use of the A-frame ladder. Framers' argument that it was not responsible because it did not own the ladder, is rejected. Although Framers may not have owned the ladder or installed the ladder, there is no dispute Framers' employees used the ladder to access another level. Framers' employees were exposed to the improper use of the "A" frame ladder.

An employer engaged in construction activities on a multi-employer work site is responsible under the Act for both those hazardous conditions to which its own employees at the site are exposed subject to certain defenses and those hazardous conditions to which it either created or controlled and to which employees of other contractors are exposed. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 2873, 1992). To avoid responsibility where its own employees are

exposed to a hazard, a non-creating, non-controlling employer has the burden of raising and proving, by a preponderance of the evidence, what is known as the multi-employer work site affirmative defense.

To establish the defense, an employer must show that it

- (1) did not create the hazardous condition,
- (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard, and
- (3) took reasonable alternative steps to protect its employees or did not have and could not have had with the exercise of reasonable diligence notice that the violative condition was hazardous.

16 Capform, Inc., 16 BNA OSHC 2040, 2041 (No 91-1613 1994).

In this case, Framers neither plead nor has proven the multi-employer worksite defense. Since the defense was not pled by Framers, and the Secretary did not try the issue by consent, Framers' assertion of the defense is denied. However, even if properly claimed, the record fails to establish the defense. The Court notes that Framers is not represented by an attorney or consultant with experience and knowledge of OSHA proceedings.

Although it did not create or control the hazardous condition, Framers failed to show it took reasonable measures to protect its employees accessing the third level. Framers did not show it notified the general contractor or the subcontractor who had installed the ladder about the improper use of the "A" frame ladder or requested a replacement ladder. The A-frame ladder was replaced with a proper extension ladder during the OSHA inspection (Tr. 35, 50). Also, there is no showing Framers cautioned its employees about using the ladder or could not have found other means to access the third level. Framers failed to show an exercise of reasonable diligence.

The violation § 1926.1053(b)(4) is established.

Item 1b - Alleged violation of § 1926.1060(a)(1)(iii)

The citation alleges, in part, that "employees were not trained by a competent person in the proper use of portable ladders." Section 1926.1060(a)(1)(iii) identifies the training requirements regarding the hazards associated stairways and ladders and includes training on:

The proper construction, use, placement, and care in handling of all stairways and ladders.

The standard requires the training to be provided by a competent person (Tr. 33). CO Rodriguez agrees Mr. Contreras is a competent person capable of providing such training (Tr. 70). Rodriguez's opined that if the employees had been trained, the employees would not have used the closed A-frame ladder (Tr. 33, 72). He asked Mr. Contreras for proof of training on ladder usage (Tr. 34). He also asked the two employees who were on the third level about their training. The two employees stated they had received no ladder training (Tr. 34, 36).

Framers provided OSHA a copy of its safety manual which included a section on ladder safety (Tr. 58, 73, 86). Ms. Contreras testified the manual had been used for approximately 10 years (Tr. 97, 108). CO Rodriguez considered the safety manual adequate (Tr. 81). According to Framers, each employee is required to read and sign the manual.

Framers' reliance upon its safety manual is misplaced. There is no showing Framers provided such ladder training to employees. The implementation of a safety manual is not a substitute for employees' training. Ms. Contreras testified she did not provide training on the company safety procedures because she lacked construction experience (Tr. 98, 106). Although Mr. Contreras testified to discussing safety precautions with employees, there is no showing such discussions involved the proper use of ladders or that such discussions constituted employees' training (Tr. 107, 115). There is no evidence that the weekly meetings included a topic on proper ladder usage (Tr. 122).

A violation of § 1926.1060(a)(1)(iii) is established. The record fails to show the employees received training on the proper use of ladders.

Serious Classification

Framers' violations of §1926.1053(b)(4) and §1926.1060(a)(1)(iii) are properly classified as serious. Under § 17(k) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. In determining whether a violation is serious, the issue is not whether an accident is likely to occur. The issue is whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Framers should have known the employees were using the closed A-frame ladder because it was the only means available to access the third level. Mr. Contreras had assigned the employees to work on the second and third levels. Mr. Contreras and the employees acknowledged the lack of training in proper ladder usage (Tr. 34). A fall from an improperly installed 10-foot A-frame ladder could be serious injury including broken bones or serious sprains (Tr. 31).

Penalty Assessment

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Review Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Framers is a small employer with six employees (Tr. 91). Framers is not entitled to credit for history based on the prior 2009 serious citation (Exh. C-5; Tr. 46). Framers is entitled to credit for good faith because of maintaining a safety manual and some training records which CO Rodriguez considered adequate (Tr. 81).

A grouped penalty of \$1,500.00 is reasonable for serious violations of § 1926.1053(b)(4) and § 1926.1060(a)(1)(iii) (Items 1a and 1b). At least two Framers' employees used the closed A-frame ladder to access the third level. The ladder was on site only at the time of the OSHA inspection. The record fails to show employees' training on ladder usage or ladder safety.

REPEAT CITATION NO. 2

Item 1 -Violation of § 1926.501(b)(1)

The citation alleges, in part, that "an employee working from the outer cap of the floor decking did not have any type of fall protection." Section 1926.501(b)(1) provides:

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.

There is no dispute that one employee on the third level installing plywood was not wearing a safety harness. Also, there were no guardrails or safety nets at the unprotected edges (Exh. C-1; Tr. 22, 39, 114, 120). The third level was approximately 30 feet above the ground (Tr. 22, 39). Another employee working on the third level was wearing a safety harness (Tr. 39).

The employee who was not wearing a safety harness acknowledged to OSHA that he should have been wearing his harness for fall protection. The employee showed CO Rodriguez the safety harness (Tr. 76). The employee had worked for Framers since June 2010 (Tr. 115).

Mr. Contreras agreed the employees on the third level should have been wearing a safety harness. Mr. Contreras claimed the employee was trained to properly utilize fall protection (Tr. 75). On the morning of the OSHA inspection, Mr. Contreras testified that he instructed the employees to finish the plywood on the second and third levels (Tr. 113). He said that he thought all employees were wearing their harnesses on the third level (Tr. 120). Safety harnesses, hard hats, and safety glasses were available for employees' use in the trailer (Tr. 116). When he asked the employee why he failed to wear his harness, Contreras testified the employee claimed he did not think he needed a harness because he was at least 8 feet from the unprotected edge (Tr. 121).

A violation of § 1926.501(b)(1) is not established. The record fails to establish Framers, through its supervisor, Mr. Contreras, knew or should have known of the employee's failure to wear a harness on the third level. Also, it fails to establish employee's exposure to a fall hazard.

In order to show employer's 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, 1965-66 (No. 82-928, 1986).

At the time of the OSHA inspection, Mr. Contreras was working inside the construction and could not see the employees on the third level (Tr. 65). There is no evidence Mr. Contreras knew the employee was on the third level and not wearing his safety harness. Mr. Contreras had instructed all the employees to use their harnesses that morning (Tr. 113, 123). Framers' work rules required employees to utilize harnesses and anchor the lanyards on the third level (Tr. 126-127). Mr. Contreras had installed anchor points on the third level to attach the fall protection (Tr. 127). According to Mr. Contreras, he had instructed the employee without a harness to finish work on the second level at the start of the day (Tr. 113). He did not direct him to work on the third level (Tr. 113). The employee admitted to CO Rodriguez that he should have been wearing his harness when he was on the third level (Tr. 76). Rodriguez had observed the employee on the third level for less than 5 minutes (Tr. 63).

Framers showed reasonable diligence to prevent the non-usage of safety harnesses. It had a work rule which employees knew. The employees received training and instruction on the requirements for fall protection. Contreras was on site providing adequate supervision. *Mosser Construction Co.*, 15 BNA OSHC 1408 (No. 89-1027, 1991).

Also, the record fails to establish employee's exposure. The record fails to show how close the employee was from the unprotected edge and whether he was in the zone of danger. The third level was flat. According to Contreras, the employee said he was in excess of 8 feet from the unprotected edge (Tr. 120-121). CO Rodriguez observed the employee from the ground level and was not in a position to see how close the employee was from the unprotected edge (Exh. C-1). He observed the employee for less than 5 minutes. The employee was approximately 30 feet above the ground (Tr. 22). The test for determining an employee's exposure to a hazard is whether it is reasonably predictable that the employee would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co. Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). CO Rodriguez did not identify whether 8 feet from the unprotected edge was within the zone of danger.

A violation of § 1926.501(b)(1) is not established.²

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.

²Since the record fails to establish employer's knowledge or employee's exposure, there is no need to address Framers' unpreventable employee misconduct defense.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Items 1a and 1b of Citation no. 1, alleging serious violations of 29 C.F.R. § 1926.1053(b)(4) and § 1926.1060(a)(1)(iii), are affirmed and a grouped penalty of \$ 1,500.00 is assessed.
2. Item 1 of Citation no. 2, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(1), is vacated and no penalty is assessed.

\s\ Ken S. Welsch

KEN S. WELSCH
Administrative Law Judge

Date: April 19, 2011