UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Ultra Commercial Interiors, Inc., Respondent.	OSHRC Docket No. **10-1645**

Appearances:

Lydia A. Jones, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Andrew N. Gross, General Counsel, HB Training and Consulting, Lawrenceville, Georgia
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Ultra Commercial Interiors, Inc. (UCI), contests a citation issued to it by the Secretary on July 27, 2010. The Secretary issued the citation on the recommendation of Occupational Safety and Health Administration (OSHA) compliance officer Charles Johnson. Johnson recommended the citation following his inspection of a construction site in Marietta, Georgia, on February 26, 2010, where UCI was working as a subcontractor. One of UCI's employees had fallen through a hole in the second floor of a building under construction, seriously injuring his leg.

The Secretary withdrew Item 1 of the Citation, which alleged a serious violation of 29 C. F.R. § 1926.20(b)(2). Item 2 of the Citation alleges a serious violation of 29 C. F. R. § 1926.502(i)(3), for failing to secure a cover placed over a hole in the floor. Item 3 of the Citation alleges a serious violation of 29 C. F. R. § 1926.502(i)(4), for failing to either color code the cover or mark it with the word "HOLE" or "COVER." The Secretary proposed a penalty of $ 2,500.000 each for Items 2 and 3.

UCI timely contested the Citation. A hearing was held in this matter on January 6, 2011. UCI stipulates to jurisdiction and coverage. The parties have filed post-hearing briefs. The only issue in dispute is whether UCI had constructive knowledge of the violative condition of the hole cover. In its Answer, UCI asserted the affirmative defense of employee misconduct. UCI did not present evidence supporting this defense at the hearing, and did not argue it in its brief. The employee misconduct defense is deemed abandoned.

For the reasons discussed below, the court affirms Items 2 and 3 of the Citation, and assesses a penalty of $ 1,000.00 for each item.

Background

UCI performs heavy gauge exterior framing, as well as drywall and acoustical work. Its principal place of business is in Alpharetta, Georgia.

UCI was hired by general contractor DPR to do the framing for a new building at Southern Polytechnic State University in Marietta, Georgia. The building, now complete, is a three-story Engineering Technology Center (ETC). This large project required the services of numerous subcontractors. UCI began working on the project in December 2009. After working on the first floor, UCI left the site for approximately two months. UCI returned to the site on Thursday, February 25, 2010, to begin work on the second floor.

On Friday, February 26, 2010, UCI supervisor Baron Clemons assigned his framing foreman, [redacted], and laborer Louis Lampton to lay out doors and windows for the southwest corner of the second floor. At approximately 10:30 a. m., [redacted] stepped on the edge of a plywood board on the floor, thinking it was debris left by another subcontractor. The board, which was 3 feet wide and 8 feet long, was actually covering a hole in the floor that was 2 feet wide and 6 feet long. [redacted] dislodged the board and fell through the hole to the concrete floor 16 feet below. On his way down, he struck some metal ductwork installed below the first floor ceiling. [redacted] knocked a section of the ductwork loose, and fell with it to the floor.

Someone called 911. EMTs responded to the call, and [redacted] was taken by ambulance to a hospital. He sustained serious injuries to his knee and ankle. He had been unable to return to work at the time of the hearing.

The Citation

The Citation alleges:

> [Item 2:] 29 CFR § 1926.502(i)(3): Covers for holes in floors were not secured when installed to prevent accidental displacement by the wind, equipment, or employees.
>
> a) Site– ETC second floor near room 238; Two employees were exposed to fall hazards of 16 feet to the concrete floor below while working near floor holes that had unsecured floor covers.
>
> . . .
>
> [Item 3:] 29 CFR § 1926.502(i)(4): Covers for holes in floors were not color coded or marked with the word "HOLE" or "COVER" to provide warning of the hazard.
>
> a) Site–ETC second floor near room 238: Two employees were exposed to fall hazards of 16 feet to the concrete floor below while working near a floor hole with a cover that was not color coded or marked.

The standards at 29 C. F. R. §§ 1926.502(i)(3) and (4) provide:

> (3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.
> (4) All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Only UCI's knowledge of the violative condition is at issue. UCI stipulates 29 C. F. R. §§1926.502(i)(3) and (4) apply to the cited conditions. It agrees the hole cover was not secured and was not marked, in violation of the terms of the cited standards. Two of UCI's employees had access to the faulty hole cover, and one of its employees was seriously injured when he fell through the hole.

The Secretary does not argue UCI had actual knowledge of the violative condition. She contends, however, UCI had constructive knowledge of the violative condition based on the presence of its framing supervisor, [redacted], whose knowledge is imputed to UCI. *Dover Elevator*

Co., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

Constructive Knowledge

The Secretary establishes constructive knowledge by proving that, with the exercise of reasonable diligence, an employer could have known of the violative condition. "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc*., 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003).

The hole at issue was intended to allow ductwork to pass between the second and third floor of the ETC. Earlier in the week, DPR had directed subcontractor Zebra Construction to remove formwork from the hole so that subcontractor McKinney Electrical could install the necessary ductwork. Zebra and McKinney employees removed the cover over the hole. When the cover was replaced, it was not secured or marked.

DPR held weekly subcontractor meetings so that all subcontractors would be aware of the work being performed that week. UCI supervisor Baron Clemons attended the subcontractor meetings as UCI's representative. Clemons was aware Zebra was removing formwork and McKinney was installing ductwork in the area UCI 's crew was scheduled to work.

DPR required its subcontractors to perform daily inspections of the areas in which their employees were to work, and to report any safety hazards found there. DPR provided the subcontractors with a daily safety audit sheet which had a checklist for safety items. Clemons testified he routinely checked "no" for Item 2, which states, "Jobsite is cleaned /organized" (Exh. 6b). Clemons testified, "[T]here was so much on the floor, a lot of debris on the floor, and just everything was scattered. Before we could pretty much work a section, we had to try to clear things out. So that was the biggest thing. I mean, it's just obvious. You walk on the floor and could barely get around" (Tr. 135). Prior to the day of [redacted]'s accident, Clemons had seen unsecured plywood boards in other areas of the jobsite covering holes (Exh. C-14). When he had a crew

working on the high roof area of the ETC, Clemons observed unsecured, unmarked plywood boards covering holes. Clemons instructed his crew to stay away from the boards. Clemons did not report the boards on his daily safety audit, but he verbally told a representative of DPR about the violative conditions.

On the morning of the accident, Clemons assigned [redacted] and Lampton the task of "laying out" doors and walls on the second floor. Laying out requires the UCI employees to draw lines in chalk on the floor to mark the walls, doors, and windows shown on the set of drawings. The section UCI was scheduled to lay out that day measured approximately 200 feet by 70 feet (the entire area of the second floor was much larger, longer than a football field).

Both supervisor Baron Clemons and foreman [redacted] were qualified as competent persons. Clemons did not personally inspect the area of the second floor that day, entrusting that task to [redacted]. Clemons did not caution [redacted] about the possibility that plywood boards lying on the floor could be covering holes.

[redacted] had worked in construction for 25 years at the time of the hearing. He began working for UCI in 2007. [redacted] had received competent person training and was aware he was required to inspect the worksite before commencing work each day. [redacted] was experienced at reading floor plans. On the floor plans for the second floor of the ETC, the hole at issue was marked with an "X" (Exh. R-1). [redacted] understood that the "X" marked either a hole or an installation, but that it was not part of the flat surface of the floor.

The day of the accident, [redacted] and Lampton arrived on the second floor at approximately 10:00 a. m. [redacted] echoed Clemons's remarks regarding the disorganized, cluttered condition of the site:

> As usual, it was full of lots of material. Materials on the floor. It was very dirty. There was a lot of plywood everywhere. The electricians' work was everywhere. The materials from the – excuse me, from the air conditioner units were everywhere. Also, the plumbers' materials. So we had to sweep and clean up the floor in order to be able to put down the lines.

(Tr. 217).

[redacted] saw several plywood boards lying on the floor. Based upon his prior experience working at the site, he knew it was possible the boards were covering holes. As he approached the piece of plywood at issue, he recognized there may have been a hazardous condition:

> Since it wasn't marked–since there was lots of plywood on the floor and it wasn't marked or nailed, there were no railings around it, then *one is pretty cautious because no one really knows if there is a hole there or not*. And because we know this, neither can we also every time we see a piece of something go lifting up each individual piece to see if there is a hole under there or not.

(Tr. 222) (emphasis added).

Despite recognizing the plywood boards may be covering holes, [redacted] rationalized that he cannot check every one of them on the basis it would be too time-consuming. Here, however, he had a copy of the floor plan showing him that either a hole or an installation was located underneath the board. [redacted] was on notice that the board could be covering a hole. Clemons was aware other subcontractors were lax in properly securing and marking covers for holes on the site, yet he did not remind [redacted] to check under the boards. Under these circumstances, a person exercising reasonable diligence would have looked under the board to determine whether it was covering a hole. Upon ascertaining that it, in fact, did cover a hole, a reasonable person would have required the general contractor to abate the hazardous condition before continuing work in the area.

The Secretary has established UCI, through Clemons and [redacted], had constructive knowledge of the violations. Items 2 and 3 of the Citation are affirmed.

The Secretary classified the items as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. [redacted] seriously injured his back and leg when he fell through the hole in the second floor. At 16 feet, the fall could have been fatal. The violations are properly classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

The record does not indicate how many employees UCI had at the time of the inspection. Johnson testified he allowed a penalty adjustment of 40 percent for company size, indicating the company is small. The Secretary had not cited UCI in the three years prior to Johnson's inspection. UCI demonstrated good faith in this proceeding.

"Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The gravity of the violations is high. Two employees were exposed to the hazardous condition, for a period of approximately half an hour. A 16-foot fall onto concrete is likely to seriously injure or kill an employee. The metal ductwork that [redacted] fell with may have broken his fall, saving him from a more serious injury.

The court finds mitigating circumstances here. UCI was neither the creating nor controlling employer. The testimony of Clemons and [redacted] established they were well-trained and capable as competent persons. UCI is paying the price in this case for the unsafe habits of other employers–both the employer who failed to secure and mark the board, and the employers who failed to clean up their messes. The volume of the debris and clutter contributed to [redacted]'s reluctance to check under the boards, because he believed it would be too time-consuming.

While it is ultimately the responsibility of UCI to inspect and find hazardous conditions in the area where its employees are working, the court finds grounds here for reducing the Secretary's proposed penalty. It is determined that a penalty of $ 1,000.00 each for Items 2 and 3 is appropriate.

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. Item 1 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.20(b)(2), was withdrawn by the Secretary. Item 1 is vacated, and no penalty is assessed;

2. Item 2 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.502(i)(3), is affirmed, and a penalty of $ 1,000.00 is assessed;

3. Item 3 of the Citation, alleging a serious violation of 29 C. F. R. §1926.502(i)(4), is affirmed, and a penalty of $ 1,000.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: May 16, 2011