UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Texas Erectors, Inc., Respondent.	OSHRC DOCKET NO. 09-0171

Appearances:

Carlton Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Harold E. Nutt, Texas Erectors, Inc., Hurst, Texas
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

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") conducted an inspection of a Texas Erectors, Inc. ("Respondent") worksite in Dallas, Texas on September 18, 2008. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two violations of the Act. Citation 1 Item 1(a) alleged a serious violation of 29 C.F.R. §1926.501(b)(1). Citation 1 Item 1(b) alleged a serious violation of 29 C.F.R. §1926.760(a)(1). The Secretary proposed a grouped penalty of $2,000 for both violations. Respondent timely contested the citation and an administrative trial was held on April 2, 2009 in Dallas, Texas. At the beginning of trial, the Secretary voluntarily withdrew Citation 1 Item 1(a), leaving only Citation 1 Item 1(b) in dispute. The Secretary filed a post-trial brief. Respondent did not file a post-trial brief. This case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Findings

On September 18, 2008, Compliance Safety and Health Officer ("CSHO") Josh Flesher, of the Dallas Area Office of the Occupational Safety and Health Administration, drove by Respondent's jobsite on North Industrial Avenue in Dallas, Texas. (Tr. 10-11). He observed what he believed to be fall protection violations during steel erection activities. (Tr. 11). Pursuant to his office's Regional Emphasis Program on fall hazards, he stopped and entered the jobsite to conduct an OSHA inspection. (Tr. 10-11). After identifying himself to a representative from the general contractor, he contacted Respondent's owner, Harold Nutt, who happened to be working at the jobsite that day. (Tr. 12, 14, 49).

During the inspection, CSHO Flesher observed and photographed two of Respondent's employees, Robert Scroggins and Jose Garcia, working on the top level of an unfinished building without using fall protection. (Tr. 16-19; Ex. A through O). The employees were wearing safety harnesses, but the harnesses were not connected to anything. (Tr. 18, 80). CSHO Flesher observed the two employees working on the roof without fall protection for approximately 30 minutes. (Tr. 29). The two employees were walking and working on building surfaces 16 feet 2 inches above the ground. (Tr. 23, 62).

Mr. Nutt and Respondent's foreman, Douglas Kerss, were photographed in plain view of the two employees not using fall protection. (Tr. 16-19, 58; Ex. A through O). Respondent had

"beamers" installed on the top level of the building, devices to which employees could secure their harnesses to protect them from falls. (Tr. 64, 80). However, Mr. Nutt acknowledged that neither of the two employees in the photographs was connected to the beamers at the time of the inspection. (Tr. 64, 80).

Respondent maintains that its employees were engaged in "connector" activities the entire time, and therefore, fall protection was not required until they reached heights exceeding 30 feet pursuant to 29 C.F.R. §1926.760(a)(3) & (b). (Tr. 61-62). Respondent refers to the language of the citation itself which states the employees were "installing a horizontal beam." (Tr. 63; Ex. P). Respondent argues that in steel erection, installing *is* connecting. (Tr. 63).

When he initially arrived at the jobsite, CSHO Flesher observed Respondent's employees installing web joists, which he conceded was connector work pursuant to 29 C.F.R. §1926.760(a)(3) & (b). (Tr. 39-40). However, Respondent's employees stopped performing connector activities and were simply walking and working on the structure while not using any hoisting equipment or performing any type of connecting work. (Tr. 27, 97; Ex. A through O). He acknowledged that at one point, the employees were using a SkyTrak (a type of hoisting equipment), but they were *removing* a steel beam from the building. (Tr. 97; Ex. N, O). Removal of structural steel is not encompassed by the definition of connector work. Furthermore, Mr. Kerss testified that when employees are connecting, they use welding equipment and/or bolting materials. (Tr. 93). The employees in the photographs were not using welding equipment or bolting materials at the time of the alleged violation. (Ex. A through O).

Respondent introduced additional photographs which depict employees working on other areas of the building, at other times, connecting and welding steel. (Ex. R-3 through R-6). However, the activity in those photographs is not alleged to constitute a violation of the cited standard. CSHO Flesher testified that when employees stop performing connector work to engage in other types of steel erection activity, they are required to use fall protection at heights

above 15 feet. (Tr. 27, 97). Mr. Kerss corroborated CSHO Flesher's position by testifying that if Respondent's employees have to wait 15 minutes or more in between connecting jobs, he expects them to tie-off to the beamers. (Tr. 95).

During the inspection, Mr. Nutt provided CSHO Flesher with Respondent's written safety and health program which required employee fall protection only when working 25 feet or more above the ground. (Tr. 25-26). There was also a reference in that section of Respondent's safety and health program to OSHA's promulgation of a new standard. (Tr. 25). CSHO Flesher testified that §1926.760 was amended in 2002 to require fall protection during steel erection at heights exceeding 15 feet. (Tr. 25, 46). The court's review of the Federal Register indicates that the amendment to the regulation was actually effective July 18, 2001. *66 FR 5196-01*. Apparently, Respondent's safety and health program had not been updated to reflect the change in the regulation.

CSHO Flesher characterized the violation as serious on the basis that falls from 16 feet could result in broken bones, serious internal injuries, or even death. (Tr. 31). In calculating the proposed penalty of $2,000, CSHO Flesher considered that two employees were exposed to the condition for approximately 30 minutes with no alternative form of fall protection. (Tr.31-32). He characterized the likelihood of an actual accident as "great" because employees were working near unprotected edges and one employee actually had one leg hanging off the building for a few minutes. (Tr. 32). He reduced the initial penalty calculation by 60% for Respondent's status as a small employer (ten employees) but did not reduce the penalty calculation for history due to the fact that Respondent received an OSHA citation in 2007. (Tr. 32-33). He provided no penalty reduction for good faith during the inspection because Mr. Nutt was initially unwilling to provide requested information, and Respondent's written safety program incorrectly identified 25 feet as the threshold height requiring fall protection. (Tr. 12-13, 33).

Discussion

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1(b) that:

> *29 CFR 1926.760(a)(1): Except as provided by paragraph (a)(3) of this section, each employee engaged in steel erection activity who was on a walking/working surface with an unprotected edge more than 15 feet (4.6-meters) above a lower level was not protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems, or fall restraint systems: On the steel beam at the existing building located at 921 North Industrial Avenue in Dallas, Texas 75207. On or about September 18, 2008, at least one employee who was installing a horizontal beam was not protected from falling approximately 15-feet 10-inches to the lower level.*

The cited standard provides:

> *(a) General requirements: (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.*

It is undisputed that Respondent was engaged in steel erection activities more than 15 feet above the ground. Therefore, the cited standard applies to the condition. The primary issue in dispute is whether or not Respondent's employees were engaged in connector activities pursuant to the exception in §1926.760(a)(3). "Connector" is defined as "an employee who, working with hoisting equipment, is placing and connecting structural members and/or components." *29 C.F.R. §1926.751*. Connecting work requires the use of fall protection only at heights "more than two stories or 30 feet (9.1 m) above a lower level, whichever is less." *29 C.F.R. §1926.760(b).*

The exception for connecting activities was intended to be narrowly construed. *66 FR 5196-01*. In Exhibits A through O, the photographs offered in support of Citation 1 Item 1(b), I find that Respondent's employees were not performing connector work. They were not placing or connecting structural steel. They were not using hoisting equipment. They were not welding or bolting structural steel. They were simply walking and working on top of the building, near and sometimes partially overhanging from its edges, at a height of 16 feet, without fall protection. The Secretary established a violation of the cited standard.

Employee exposure to the violative condition was clearly established through the investigative photographs and Mr. Nutt's acknowledgement that the exposed employees worked for Respondent. (Tr. 64; Ex. A through O). Knowledge of the employees' lack of fall protection on the part of the owner and foreman is imputed to the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). Lastly, a 16 foot fall from the top of a building onto the ground could undoubtedly result in serious physical harm or death.

Affirmative Defenses

Respondent did not argue any affirmative defenses at trial and did not submit a post-hearing brief.

Penalty

In calculating the appropriate penalty for a violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. §666(j).* Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

Two employees were exposed to the condition for at least 30 minutes. CSHO Flesher testified that one employee said they were working without fall protection all day prior to the inspection, but no evidence was introduced regarding their precise locations or the type of work they had been performing. (Tr. 29). Considering the totality of the circumstances, I find that a penalty of $1,000 is appropriate for the violation.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1(b) is AFFIRMED and a penalty of $1,000 is ASSESSED.

Date: June 22, 2009
Denver, Colorado

/s/_____
Benjamin R. Loye
Judge, OSHRC