Double "A" Industries, Inc.
Docket No. 01-0534
APPEARANCES

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U. S. Department of Labor
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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Double "A" Industries, Inc. (Double "A") provides labor and materials for slab, masonry, sheathing, and roofing work on construction projects in south Florida. On March 7, 2001, Occupational Safety and Health compliance officer (CO) William Cochran, while inspecting an adjacent job site, observed employees working on the roof of a guardhouse building under construction at a proposed residential community in Delray Beach, Florida. The employees were working without fall protection, hard hats, and proper use of portable ladders. After completing the other inspection, CO Cochran inspected the guardhouse project and recommended a serious citation, which was issued to Double "A" on March 13, 2001. Double "A" timely contested the citation.

The serious citation alleges that Double "A" violated 29 C.F.R. § 1926.20(b)(1) (item 1a) for failing to have a safety program; 29 C.F.R. § 1926.21(b)(2) (item 1b) for failing to train employees to recognize and avoid unsafe conditions; 29 C.F.R. § 1926.50(c) (item 2) for failing to have an employee trained in first aid on site; 29 C.F.R.§ 1926.100(a) (item 3) for failing to have employees wear hard hats; 29 C.F.R. § 1926.501(b)(13) (item 4) for failing to have employees use fall protection; 29 C.F.R. § 1926.503(a)(1) (item 5) for failing to train employees in fall protection; 29 C.F.R. § 1926.1053(b)(1) (item 6) for failing to extend portable ladders at least 3 feet above the landing; 29 C.F.R. § 1926.1053(b)(22) (item 7) for allowing employees to use ladders while carrying objects or loads; and 29 C.F.R. § 1926.1060(a)[1] (item 8) for failing to train employees in ladder safety. The serious citation proposes penalties totaling $17,250.

[1]Originally cited as 29 C.F.R. § 1926.1053(b)(1). Citation was amended to correct error.

A hearing was held in West Palm Beach, Florida, on November 15, 2001. Jurisdiction and coverage were stipulated (Tr. 6-7). The parties filed post-hearing briefs.

Double "A" does not dispute the violative conditions (Tr. 25-26). Double "A" argues that the employees were not its employees. It asserts that the employees were employed by an independent contractor. Also, under multi-employer workplace defense, Double "A" argues that it did not create or control the violative conditions and its employees were not exposed to an unsafe condition.

For the reasons discussed, the multi-employer workplace defense is rejected and the violations are affirmed against Double "A." A total proposed penalty of $10,000 is assessed.

The Inspection

Double "A" is a small construction contractor in Lake Worth, Florida, who provides material and labor to perform slab, masonry, and roofing work. Double "A" refers to itself as a "shell contractor."[2] Double "A" has been in business since 1988. It employs approximately 17 employees, including president and owner Frank Pantaleo, 9 superintendents/project managers,[3] and an office staff (Exh. C-1; Tr. 13, 32, 173-174, 222).

Double "A" does not employ laborers, carpenters or other trades to perform its construction work. Double "A" generally hires subcontractors to perform the specific work under the contract (Tr. 187-188). President Pantaleo characterizes Double "A" as "strictly a labor and material broker" (Tr. 175). Double "A" provides a superintendent/project manager to hire and schedule subcontractor activities, order materials, and assure that the job is completed in a timely manner (Tr. 32, 34, 182). If the work does not progress properly, the superintendent/project manager has the authority to fire and replace the subcontractor (Tr. 42).

On January 5, 2001, Kenco Communities, a general contractor, contracted Double "A" to prepare the slab, erect the masonry block, install the 1st and 2nd floor tie beams, and install the roof trusses and sheathing for a guardhouse at the entrance to the proposed Stone Creek Ranch

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[2]Shell construction involves the entire exterior of a building from the foundation to the roof, excluding roof shingles (Tr. 98-99).

[3]A project manager is a superintendent with a pay raise. Both positions perform essentially the same job (Tr. 175).

subdivision in Delray Beach, Florida. The proposed guardhouse was in excess of 2 stories high with multiple roofs and archways. The contract price for the work was approximately $38,000, which Double "A" considered a medium to small contract (Exhs. C-3, R-3; Tr. 183-184, 221).

Double "A" began its work on the guardhouse in February, 2001. Project manger Steve Crews,[4] who was assigned the project, visited the site approximately once a week (Tr. 42, 65-66, 223). Double "A" subcontracted the roof labor work to Carlos Alvizo.[5] Alvizo provided Double "A" a certificate of liability insurance, subcontractor information sheet, tax identification number, a contract as an independent contractor, and a non-compete agreement (Exh. R-5; Tr. 201). In early March, Alvizo left the project prior to completing the roofing work. Crews, then, verbally contracted the remaining roofing work to Nat Dela Cruz (Tr. 81-82, 215). Neither Pantaleo nor Crews had ever met or spoken with Dela Cruz. Crews made the arrangements through a foreman (Tr. 79-80, 224). Dela Cruz's subcontractor information was not provided to Double "A" until March 14, 2001, after OSHA's inspection (Exh. R-5; Tr. 200).

On March 7, 2001, CO Cochran was inspecting a trench project in Delray Beach, Florida. While making the inspection, he observed workers on another project approximately 50 yards away working on a guardhouse roof. He watched the work for approximately 40 minutes and noted that the workers were not using fall protection or wearing hard hats (Tr. 92-95). He observed [who he later identified as] Steve Crews on the ground, in and out of a pickup truck (Tr. 94). He determined that Crews was probably the superintendent.[6]

After completing the trench inspection, CO Cochran initiated an inspection of the guardhouse at approximately 11:00 a.m. (Tr. 99). He presented his credentials to Steve Crews, who identified himself as superintendent. Crews told Cochran that there were no subcontractors on site. Dela Cruz was not at the site at the time of the OSHA inspection (Tr. 79). The 7

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[4]Steve Crews has been employed by Double "A" for 7 years and as a project manager for almost 4 years (Tr. 32, 64). Pantaleo rated Crews as one of his better project managers (Tr. 223).

[5]He is referred to as Alvarez at several locations in the transcript.

[6]CREWS' TESTIMONY THAT HE WAS NOT ON SITE UNTIL AFTER THE OSHA INSPECTION STARTED IS NOT GIVEN WEIGHT (TR. 43, 45). CREWS WAS SPECIFICALLY IDENTIFIED BY CO COCHRAN AS THE PERSON OBSERVED DURING HIS TRENCH INSPECTION (TR. 94-95). ALSO, CREWS SEEMED CONFUSED, AS EVIDENT BY HIS ANSWERS TO OSHA'S EMPLOYER INFORMATION FORM (EXH. C-2). When Crews wrote "supervisor" on the employer representative form regarding who conducts safety meetings, he did not know what he meant and did not know if it referred to himself (Tr. 74-75). He also claimed he did not know what he meant when he wrote "weekly safety meetings" (Tr. 75).

workers working on the guardhouse roof were identified by Crews as employees of Double "A" (Exh. C-2; Tr. 94-96, 100, 102).

During the inspection, CO Cochran advised Crews that the workers on the roof were in violation of the fall protection standard (Tr. 95). Crews stopped the work and the workers came down and got into their vehicles (Tr. 99-100, 113). After completing the walkaround inspection, Crews instructed the workers to resume their work. He instructed the workers to erect a guardrail around the upper roof line where they were installing arches. After being advised that the guardrails needed midrails, Crews instructed the workers to correct the guardrails (Tr. 113-114, 141).

As a result of the inspection, CO Cochran recommended violations for the lack of fall protection, ladder safety and use, hard hats, and safety and health programs and training. The serious citation to Double "A" was issued March 13, 2001.

Discussion

The Secretary has the burden of proving a violation.

> In order to establish a violation of an occupational safety or health standard, 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).

Alleged Violations

The citation alleges violations of the requirements to have a safety program (item 1a); training on the recognition and avoidance of unsafe conditions (item 1b); a person on site with a certificate in first-aid (item 2); hard hats (item 3); fall protection (item 4); fall hazard training (item 5); portable ladders extending 3 feet above landings (item 6); loads not carried on ladders (item 7); and ladder training (item 8).

Double "A" does not dispute the application of the standards by OSHA and that the terms of the cited standards were not complied with by the workers (Tr. 25-26). Double "A" also does

not dispute that the workers were exposed to unsafe conditions. The workers were working on the roof without fall protection, improperly using ladders, and were not wearing hard hats (Tr. 92-93). The workers were working at heights of up to 24 feet and the roof's pitch was 5 in 12 (Tr. 125). The photographs taken by CO Cochran show employees exposed to the unsafe conditions (Exh. C-3, a-k). Also, OSHA's inspection file documents the violations (Exh. R-1).

If a culpable employer, the record establishes that Double "A" had knowledge of the unsafe conditions because of Crews' presence on-site. When a supervisory employee has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer and the Secretary satisfies his burden of proving knowledge. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A. L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). As project manager, Crews' knowledge is imputed to Double "A." "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Project manager Crews told CO Cochran that he was aware of the fall hazards and other hazards on site (Tr. 95). He knew the workers were not using fall protection and stated that fall protection was not used in residential construction (Tr. 129). Also, Crews knew that the workers were not wearing hard hats. He stated that hard hats were not on site (Tr. 122). Crews was on-site observing the work of the workers on the roof for approximately 40 minutes prior to OSHA initiating its inspection (Tr. 92-93). Also, the inspection file documents the lack of safety programs and training of the workers (Exhs. C-2, R-1).

Therefore, the violations are substantiated if Double "A" is found to be a culpable employer (Tr. 25-26). Double "A" argues that it was not the employer of the workers working on the guardhouse project. Double "A" asserts that the workers were employed by an independent contractor. It did not create or control the unsafe conditions observed by CO Cochran and its employee on site (Steve Crews) was not exposed to the conditions. Crews did not control the work. Double "A" asserts the multi-employer worksite defense.

The Secretary argues that Double "A" was the employer of the workers. If not the employer of the workers, the Secretary asserts that Double "A" was the culpable employer on a multi-employer worksite because of its control over the conditions.

Workers Not Employed by Double "A"

The Secretary argues that the workers observed working at the guardhouse project were employees of Double "A." During the inspection, CO Cochran believed that the workers were employees (Tr. 101). Project manager Crews never advised CO Cochran of the use of subcontractors by Double "A." On a written employer profile form used by Cochran, Crews answered "no" to a question asking if subcontractors were on the site (Exh. C-2; Tr. 100). Also, the roofing work being performed at the time of OSHA's inspection was part of the Double "A" contract with Kenco (Tr. 45, 78).

The record, however, fails to establish that Double "A" was the employer of the workers. In determining whether the workers were employees of Double "A," the economic realities' test is applied. As discussed in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992), the following factors are considered: (1) who the workers consider their employer; (2) does the alleged employer have the power or responsibility to control the worker; (3) does the alleged employer have the power to fire, hire, or modify the employment conditions of the worker; (4) does the worker's ability to increase his wages depend on efficiency rather than initiative, judgment, and foresight; and (5) how are the worker's wages established. The key factor in addressing an employment issue is the right to control the work. *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994). Also, control over the performance of the work, including the means and methods by which it is accomplished, is not dispositive of establishing employment status. *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001).

Although not dated until March 14, 2001, Dela Cruz furnished Double "A" a certificate of liability insurance, subcontractor information sheet, tax identification number, a contract as an independent contractor and a non-compete agreement (Exh. R-5; Tr. 200). The record shows that Dela Cruz had an oral contract to complete the roofing work (Tr. 78-80, 215, 217). The workers were employees of Nat Dela Cruz, an independent subcontractor, hired by Double "A" (Tr. 70-71). Crews' testimony as to the subcontractor's relationship is supported by president Pantaleo

and copies of Double "A" payroll records and subcontractors' file (Exhs R-2, R-5). There is no showing that Double "A" directly paid the workers doing the roofing work, supervised their daily work activities, or provided them with tools or equipment. Also, it was not shown that Double "A" could hire or fire the workers, nor were the workers entitled to the same benefits received by other employees of Double "A." The workers were not shown on the Double "A" payroll (Exh. R-2; Tr. 177-180, 182).

The workers were not employed by Double "A."

Double "A" was the Culpable Employer on a Multi-Employer Worksite

Although not employees of Double "A," Double "A" is nevertheless in violation of OSHA standards as a culpable employer. An employer at a multi-employer construction worksite is responsible for both those hazardous conditions to which its own employees at the site are exposed and those hazardous conditions to which it either creates or controls and to which employees of other contractors are exposed. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). An employer who controls or creates a worksite safety hazard is liable under OSHA even if the workers threatened by the hazard are solely employees of another employer. *Access Equipment Systems*, 18 BNA OSHC 1718, 1722-1723 (No. 95-1449, 1999).

Double "A" argues that it was not the general contractor and therefore was not in control of the guardhouse project. Its right to control an independent contractor was limited solely to an agreement as to the result to be accomplished. Section 4 of the contract between Double "A" and its independent subcontractor Nat Dela Cruz (Exh. R-5) provides that:

> The undersigned and Double A Industries, Inc., acknowledge that the undersigned shall not be subject to the provisions of any personnel policy or rules and regulations applicable to employees and the undersigned shall fulfill its responsibility independent of and without supervisory control by Double A Industries, Inc.

Double "A" argues that its independent contractors are in business for themselves. They maintain their own liability insurance, worker's compensation insurance and have their own employees (Tr. 194-195). Their business is separate, apart and distinct from Double "A." The contractors supply their own tools and equipment (Tr. 207). Double "A" argues that project

manager Crews was on the project solely to monitor the progress of the contractor's work (Double "A" Memorandum of Law).

Although the workers installing the roof may have worked for contractor Dela Cruz, the record shows that Double "A" was the culpable employer because it controlled the unsafe conditions at the worksite, including the abatement of conditions at the time of OSHA's inspection. Double "A" had considerable control and responsibility for the project. This was a multi-employer worksite. Kenco had hired other subcontractors to perform the plumbing, electrical, drywall and painting work on the guardhouse (Tr. 202). To perform its contract work on the roof, Double "A" subcontracted with Dela Cruz. Although Double "A" was not the general contractor, the record shows that an employer need not be labeled the "general contractor" to have control over a hazard, particularly one it knew existed and could abate.

Double "A" was contractually responsible for the construction of the roof on the guardhouse. Although the actual labor was contracted to a subcontractor, Double "A" remained responsible for the completion of the work (Exh. R-3; Tr. 83, 184, 218-219). It provided all the materials (Tr. 218). At least at the time of OSHA's inspection, project manager Crews oversaw the workers' activities on the job to assure compliance with its contract. Dela Cruz was not on the site (Tr. 79). Crews was observed overseeing the work for approximately 40 minutes prior to the OSHA inspection. Crews' job as project manager required that he work at the 3 jobsites he oversaw (Tr. 212-213). The work on the guardhouse had been going on for a month (Tr. 213). Also, after acknowledging the unsafe conditions to CO Cochran, Crews instructed the workers to stop work, install guardrails, make corrections to the guardrails, and resume work (Tr. 94-95, 99-100, 113-114, 141). He controlled their work.

Double "A" is the culpable employer and the violations are established.

Serious Classification

OSHA classified the violations as serious. A violation is serious under § 17(k) of the Act (29 U.S.C. § 666(k)), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur, it 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).

The cited violations were serious. Double "A" knew or should have known of the violations and there was a substantial probability that death or serious physical harm could result from the cited unsafe conditions. Project manager Crews was present on site. His knowledge is imputed to Double "A." Also, the failure to have safety programs, training, first aid, hard hats, fall protection, and portable ladder safety could cause serious injury or possibly death if not complied with. The employees were working at heights of up to 24 feet (Tr. 125). The employees were exposed to items falling from overhead without hard hats (Tr. 121-122). The employees were also improperly using ladders (Tr. 135-138). CO Cochran observed employees carrying large loads up ladders and ladders not extending at least 3 feet above the landing.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the 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.

Double "A" is a small employer with approximately 15 employees. Double "A" is entitled to additional credit for size because OSHA mistakenly believed that Double "A" had 50 employees (Exh. C-2; Tr. 13, 110-111, 222). Double "A" is also entitled to credit for history because it had not received previous citations within the preceding 3 years (Tr. 111). Good faith credit is not warranted because Double "A" admittedly has no safety programs, safety training, or safety equipment (Tr. 111-112).

The gravity of each cited violation was high due to the probability of death or serious injury (Tr. 110). There were 7 workers exposed to fall hazards, inadequate ladder protection, and overhead hazards.

Based on the gravity of each violation and allowing credit for size and history, a total penalty of $10,000 is reasonable for the cited violations. The penalty for each violation involving the lack of safety programs, first aid and training is $1,000. The penalty for each violation involving the lack of fall protection, hard hats, and ladder safety is $1,500.

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 serious Citation:

1. Item 1a, serious violation of § 1926.20(b)(1) and item 1b, serious violation of § 1926.21(b)(2), are affirmed and a grouped penalty of $1,000 is assessed.

2. Item 2, serious violation of § 1926.50(c), is affirmed and a penalty of $1,000 is assessed.

3. Item 3, serious violation of § 1926.100(a), is affirmed and a penalty of $1,000 is assessed.

4. Item 4, serious violation of § 1926.501(b)(13), is affirmed and a penalty of $1,500 is assessed.

5. Item 5, serious violation of § 1926.503(a)(1), is affirmed and a penalty of $1,500 is assessed.

6. Item 6, serious violation of § 1926.1053(b)(1), is affirmed and a penalty of $1,000 is assessed.

7. Item 7, serious violation of § 1926.1053(b)(22), is affirmed and a penalty of $1,500 is assessed.

8. Item 8, serious violation of § 1926.1060(a), is affirmed and a penalty of $1,500 is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 11, 2002