SECRETARY OF LABOR, Complainant, v. JFK BUILDERS, and its successors, Respondent.	OSHRC DOCKET NO. 02-0575

APPEARANCES:

For the Complainant:
Denise Hockley-Cann, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:
Keith A. Burg, Vice President, JFK Builders, Inc., Pewaukee, Wisconsin

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, JFK Builders, and its successors (JFK), at all times relevant to this action maintained a place of business at 1820 North Cape Street, Milwaukee, Wisconsin, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Exh. J-1).

On March 7, 2002, the Occupational Safety and Health Administration (OSHA) conducted an inspection of JFK's Milwaukee work site. On March 22, 2002 JFK was issued a "serious" citation alleging violation of §1926.501(b)(4)(I) of the Act, together with a proposed penalty of $1,575.00. By filing a timely notice of contest JFK brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 1, 2002, an E-Z hearing was held in Milwaukee, Wisconsin. No briefs are required in E-Z proceedings, and this matter is ready for disposition.

Alleged Violation

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(4)(I): Each employee on walking/working surfaces was not protected from falling through holes by personal fall arrest systems, covers, or guardrail systems erected around such holes.

> (a) On or about March 6, 2002, employees were not protected from falling 10-feet or more through a floor opening while shoveling some snow on top of a concrete deck at a residential construction project located at 1820 Cape Street, Milwaukee, Wisconsin.
>
> The cited standard requires:
>
> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Facts

The parties stipulate that at approximately 8:30 a.m., on March 6, 2002, JFK employees John Burris and Kyle Jaeger were instructed by their supervisor, Dale Zalewski, to clear snow and ice from the area around a floor hole on a ground level concrete deck, so that guardrails could be installed around the hole (Exh. J-1, ¶11 through 16, 19). The floor hole was approximately 6 feet wide by 17 feet long; the basement floor was at least ten feet below the ground level deck (Tr. 56; Exh. J-1, ¶17-18). Neither employee used fall protection, though both were warned that the floor hole posed a fall hazard (Tr. 33; Exh. J-1, ¶20). Mr. Burris was working approximately three feet from the edge of the floor hole when he turned, and fell though the hole in the deck to the floor below, sustaining serious injuries to his chest and side, including five broken ribs (Tr. 34-35; Exh. J-1, ¶23-24).

JFK argues that it would have been infeasible for its employees to use fall protection for the 15 to 20 minutes it took them to shovel the snow away from the floor hole. George Yoksas, area director for the Milwaukee OSHA office (Tr. 40; Exh. C-3), testified that the violative condition present at JFK's work site was very common (Tr. 44). According to Mr. Yoksas, JFK could have used several means to abate the hazard, including: personal fall protection, *i.e.* lanyards and harnesses; catch platforms or scaffolds; and/or various mobile work platforms (Tr. 44, 48, 50).

Personal Fall Protection. Mr. Yoksas did not know whether there was any place to tie off on the deck where Burris and Jaeger were working, but stated that anchors could have been installed by drilling through the spancrete deck and installing an I-bolt (Tr. 45-46). OSHA Compliance Officer (CO) George Pettaway similarly testified that there were no constructed beams or posts on the deck to

which a personal fall protection system could be anchored (Tr. 87). Pettaway, however, also believed that lanyards could have been anchored to the deck itself (Tr. 87). Yoksas stated that the necessary I-bolts cost between $100.00 and $200.00, and are reusable (Tr. 47, 54). According to Yoksas, it would have taken 15 to 20 minutes to install the I-bolt (Tr. 48).

JFK maintained that the general contractor would not allow them to drill into the spancrete deck, but introduced no corroborating evidence supporting its contention (Tr. 58-61).

Mobile Platforms. Yoksas testified that rolling scaffolds, scissors lifts or articulating boom platforms could have been used to hoist men up through the opening (Tr. 50, 52-53; Exh. C-4, C-5). Men working from a guarded platform could have safely shoveled snow and ice from the deck, and installed prefabricated guardrails around the floor hole (Tr. 50-52, 61; Exh. C-6 through C-9). Yoksas stated that a smaller unit would cost $150.00 to $200.00 per day to rent, with drop off and pick up charges equaling or exceeding the cost of rental (Tr. 54).

JFK maintained that a pallet of rebar blocked access to the basement level, where the mobile platform would have to be located (Tr. 67). Both CO Pettaway, and JFK's expert, Mr. John Hauke, president of Small Business Safety Specialists, Inc. (Tr. 94), agreed that there were some pallets of construction materials in the area under the floor hole at the time of the OSHA inspection (Tr. 92, 96). Yoksas, however, testified that it was common for subcontractors to ask the general contractor to have other subcontractors move their material out of the way when such material impedes the progress of ongoing work (Tr. 68).

Catch Platforms/Scaffolds. Yoksas further testified that a catch platform or scaffold could have been built up from the floor below using either wood and planking or scaffolding legs and screw jacks (Tr. 48, 64). Yoksas described the means of erecting a catch platform, and stated that it would have taken experienced employees an hour or two to erect a temporary catch platform to the level of the deck (Tr. 49, 81-82). CO Pettaway also testified that the installation of a simple scaffold or catch platform would have been a simple matter (Tr. 91). Yoksas suggested that JFK might have scaffolding in its inventory; otherwise, it would cost a few hundred dollars to rent scaffolding (Tr. 49). Employees working from the deck could then have shoveled the snow from the deck and installed temporary guardrails without exposure to a fall hazard (Tr. 48).

Again JFK maintained that the pallets of rebar blocked easy construction of scaffolding. Mr. Hauke stated that the pallets could have obstructed the construction of a catch platform (Tr. 96-97, 101), but admitted that the pallets could have been moved (Tr. 102). Mr. Hauke testified that the

inconvenience of removing the material did not outweigh the risk of serious injury to an employee falling through the hole in the deck (Tr. 103).

Respondent's expert, Hauke, stated that had he been on site at the time the decision was made to shovel around the deck hole, he would not have recommended that employees work around the floor hole without fall protection (Tr. 104).

Discussion

The existence of the cited violation is uncontested. JFK argues that it would have been infeasible to provide fall protection for employees installing guardrails. To establish the affirmative defense of infeasibility, an employer must show that 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Section 1926.501(b)(4) requires fall protection, and specifies the use of personal fall arrest systems, covers, or guardrail systems. The Secretary does not dispute JFK's contention that covers were infeasible (Tr. 16-17). She also agrees with JFK's assertion that guardrails could not be installed until snow and ice was removed from the deck (Tr. 62). JFK, however, failed to prove that personal fall protection could not be utilized while shoveling the roof and installing guardrails. While JFK maintained that it could not install I-bolts in the deck for the purpose of anchoring personal fall protection systems, it did not support its position on the record. Because Respondent did not carry its burden of showing the infeasibility of the means of compliance prescribed by the cited standard, it has not made out its affirmative defense.

Moreover, the Secretary has shown that alternative means of protection, such as catch platforms, scaffolds and/or mobile aerial lifts were available and feasible. JFK's sole objection to the Secretary's proposed means of abatement is unconvincing. While the testimony established that pallets of construction materials may have occupied the space immediately below the hole in the deck, it is clear that the pallets could have been moved out in the same manner they were moved in, presumably by forklift, to allow the construction of a catch platform or the use of a mobile platform. Either method would have allowed JFK employees to install guardrails without exposure to a fall hazard. The Secretary has established the cited violation.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

JFK is the employer of 76 employees (Exh. J-1, ¶4). No information regarding JFK's prior history or good faith was adduced at the hearing. According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm, unless the employer did not and could not, with the exercise of reasonable diligence, know the the presence of the violation. It is clear that the cited violation was serious and that the gravity of the violation is high, in that the violation actually resulted in an accident involving serious injuries, including five broken ribs. The Secretary's proposed penalty of $1,575.00 is deemed appropriate.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.501(b)(4)(i) is AFFIRMED, and a penalty of $1,575.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: September 24, 2002