SECRETARY OF LABOR,
Complainant,

v.	:	OSHRC Docket No. 96-1302
	:	
R. P. CARBONE CONSTRUCTION CO.,	:	**(EZ)**
Respondent.	:	
	:	

Appearances:

Kenneth Walton, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Keith Ashmus, Esquire
Heather Areklett, Esquire
Thompson, Hine & Flory, P.L.L.
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

R. P. Carbone Construction Company (RPC) is in business as a construction general contractor in the Cleveland, Ohio area. On July 24, 1996, the Occupational Safety and Health Administration (OSHA) inspected a RPC project. As a result of the inspection, RPC received a serious citation alleging the lack of fall protection during steel erection in violation of 29 C.F.R. §1926.105(a). OSHA proposed a penalty of $1,500. RPC timely contested the citation.

The case was assigned to E-Z Trial proceedings under Review Commission Rules 200-211, 29 C.F.R. §2200.200-211. The E-Z Trial prehearing order dated November 14, 1996, set forth the parties agreed facts and statement of issues. RPC stipulates that at all times pertinent to this proceeding, it was an employer engaged in a business affecting commerce within the meaning of §3(5) of the Occupational Safety and Health Act (Act).

The hearing was held in Cleveland, Ohio, on December 4, 1996.

The Inspection

The parties do not significantly dispute the essential facts (Tr. 6-7). The project, referred to as the Luke Easter Recreation Center, is planned to be a large building enclosing approximately 43,000 square feet for use as an indoor skating rink, basketball facility, and track (Tr. 37, 44; RPC's Affirmative Defenses, p. 2). The building is arched in the center and measures a couple hundred feet long and over 40 feet high at its peak (Exh. R-1; Tr. 13).

RPC, as general contractor, subcontracted the steel erection work to CommSteel. The subcontract required CommSteel to furnish all labor, materials, equipment, and work supervision necessary to accomplish the steel erection work. CommSteel was also required to comply with all safety measures and applicable laws, rules, and regulations, including OSHA standards (Exh. R-2, Articles 3.1 and 6.2).

Construction on the building started in early May 1996 (Tr. 44). By July 10, 1996, most of the steel framing and trusses were installed, and the bridging and detailing work was started (Tr. 13, 50). By July 24, 1996, the date of the OSHA inspection, CommSteel was completing the bridging and detailing work and was starting to install the corrugated roof sheathing (Exh. C-1; Tr. 13).

The project superintendent, who coordinates the work of subcontractors, is RPC's sole employee on-site (Tr. 44, 48). He works from RPC's trailer and regularly walks through the construction area once or twice a day (Tr. 48). His walks take five minutes to one hour, and he is checking for caps on rebar, general housekeeping, and tripping hazards (Tr. 49, 61). Additionally, RPC's project manger who coordinates field activities, visits the project once a week to check on progress (Tr. 44, 61, 65).

After receiving a complaint for the lack of fall protection, OSHA inspected the project on July 24, 1996 (Tr. 15). Upon arriving at the project, the OSHA compliance officer observed two CommSteel ironworkers[1] installing bridging and small pieces of steel near the peak or uppermost portion of the structure approximately 42 feet above the ground (Tr. 13-14, 37). The ironworkers were not tying off their safety belts while welding or moving around the structure. Also, there were no nets, catch platforms, or other fall protection (Exh. C-1; Tr. 21, 38).

Additionally, the compliance officer observed other ironworkers without fall protection working on the north side of the structure. They were working at levels less than 25 feet above the ground (Tr. 34). At the far east end of the project, the compliance officer observed another crew of ironworkers installing corrugated roof sheathing and metal decking. This crew was tying their safety belts to static lines (Exh. C-1; Tr. 21-22).

The OSHA compliance officer located RPC's project superintendent at his trailer and conducted an opening conference with RPC and CommSteel (Tr. 16). He also walked the construction area and interviewed CommSteel's safety manager and the two ironworkers (Tr. 22, 26). The compliance officer was told that CommSteel's ironworkers did not use fall protection while installing bridging, connecting, and moving around the structure (Tr. 25-26).

On August 6, 1996, RPC was cited for failing to ensure the use of fall protection under §1926.105(a).[2] The citation was based on the two ironworkers installing the bridging near the peak of the structure.[3]

---

[1] One employee was the union steward.

[2] CommSteel was also cited for failing to use fall protection (Tr. 29).

[3] The ironworkers observed on the north side of the structure are not part of the citation because they were working below 25 feet (Tr. 34).

Discussion

The Secretary of Labor has the burden of proving a violation of a safety standard by a preponderance of the evidence. It must show that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

I. *Violation of 1926.105(a)*

The Review Commission has consistently held that §1926.105(a)[4] does not require the use of safety nets as long as any one of the enumerated methods of fall protection is used. *RGM Construction Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995). OSHA establishes a prima facie case upon showing that employees were exposed to a fall hazard in excess of 25 feet, and none of the protective measures were utilized.

RPC does not dispute that safety belts were practical and that the other methods of fall protection identified in § 1926.105(a) were not available. It is also undisputed that the two ironworkers were not using their safety belts while installing bridging and moving around the structure, and they were exposed to a fall of 42 feet. Thus, the record establishes that the requirements of §1926.105(a) were violated and employees were exposed to the violative conditions.

II. *General Contractor Responsibility*.

RPC argues, however, that as general contractor, it lacked knowledge, actual or constructive, of CommSteel's failure to use fall protection by the two ironworkers. RPC

---

[4] Section 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

asserts the multi-employer worksite defense (EZ Trial prehearing conference order). RPC relies on this court's decision in *Summit Contractors, Inc.*, 17 BNA OSHC 1854 (No. 96-55, 1996). In *Summit Contractors,* this court found that Summit did not violate §1926.501(b)(1) for the lack of a guardrail at an elevator opening on the fourth floor because it was not shown that it was reasonable to expect Summit as general contractor to have prevented or detected the unguarded opening left by a subcontractor.

A general contractor who does not have employees exposed and did not create the violative condition is responsible nevertheless for violations of other employers where the general contractor could reasonably be expected to prevent or detect and abate the violation. This responsibility does not depend on whether the general contractor actually created the hazard or has the manpower and expertise to abate the hazard. *Red Lobster Inns of America Inc.,* 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,635 (No. 76-4754, 1980). There is a presumption that the general contractor has sufficient control over its subcontractors to require them to comply with the safety standards and to abate the violations. *Gil Haugan d/b/a Haugan Construction Company,* 7 BNA OSHC 2004, 2006, 1979 CCH OSHD ¶ 24,105, p. 29,290 (Nos. 76-1512 & 76-1513, 1979). Therefore, the Review Commission has found it reasonable to expect the general contractor to ensure a subcontractor's compliance with safety standards such as §1926.105(a) if it can be shown that the general contractor could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity. The duty imposed on a general contractor is reasonable. *Knutson Construction Co*., 4 BNA OSHC 1759, 1761, 1976-77 CCH OSHD ¶ 21,185, p. 25,481 (No. 765, 1976), *aff'd,* 566 F.2d 596 (8th Cir. 1977).

For example, in *Knutson,* the Review Commission relieved a general contractor of liability for failing to detect a 1-inch crack on the underside of a scaffolding platform before it collapsed. It was concluded that it was unreasonable to expect a general contractor to detect such a crack. However, in *Blount International, Ltd.*, 15 BNA OSHC 1897, 1899, 1992 CCH OSHD ¶ 29,854, p. 40,750 (No. 89-1394, 1992), the Review Commission found it reasonable to expect a general contractor to detect a GFCI problem even though the condition was by nature latent and hidden from view.

In this case, the court concludes that RPC failed to exercise reasonable diligence to prevent or detect the lack of fall protection during CommSteel's bridging and detailing work. RPC's reliance on this court's decision in *Summit Contractors* is misplaced. Unlike in *Summit*, CommSteel's failure to use safety belts or other fall protection while installing bridging and detailing work was in plain view and observable throughout the construction site. The ironworkers were working in an open structure at heights in excess of 25 feet. Also, the lack of fall protection was shown to have existed for approximately two weeks while the birdging and detailing was installed (Tr. 50).

The court accepts the statements made to the compliance officer by the ironworkers to show how long CommSteel was working without fall protection (Tr. 25-26). In E-Z trial proceedings, hearsay is permitted. See Commission Rule 209(c), 29 C.F.R. § 2200.209(c). Weight is given to the statements because RPC did not deny the substance of the statements or show that CommSteel's fall protection program contained a contrary policy. The testimony of the project superintendent that he could not recall seeing ironworkers not tied off during his walkarounds does not show that fall protection was being utilized (Tr. 51). A general contractor must show that it acted reasonably in attempting to detect or prevent violative conditions. The record reflects the project superintendent may have lacked an adequate understanding of the fall protection requirements of §1926.105(a). The project superintendent admitted to the OSHA compliance officer that:

> Basically, he indicated that he didn't have a lot of experience lately, the past couple of years, with the structural steel. He mentioned that he had been on some renovation at the job site and that he wasn't familiar with the subpart or the portion of the OSHA regulations that deal with fall protection for steel erection (Tr. 27-28).

RPC argues it relied on CommSteel, a specialty subcontractor, in running a safe, efficient construction project. A general contractor may reasonably rely on its subcontractor's expertise so long as it has no reason to believe that the work is being performed unsafely. *Sasser Electric and Mfg. Co.*, 11 BNA OSHC 2133, 1984-85 CCH OSHD ¶ 26,982 (No. 82-178, 1984). Far from requiring a general contractor to duplicate a subcontractor's safety efforts, the Act demands only that a general contractor apprise itself of which safety efforts the subcontractor has chosen to make in performing the work. *Blount International Ltd., supra,* OSHC at 1900 n. 3.

Here, the record fails to show that RPC apprised itself of CommSteel's fall protection program. In subcontracting the steel erection work, it is reasonable to expect RPC to have some understanding of CommSteel's safety program, including fall protection. Fall protection provided to ironworkers is an integral part of the steel erection process. However, there was no showing that RPC reviewed or knew the details of CommSteel's fall protection program. Neither RPC's project superintendent nor project manager saw the fall protection plan. There also is no evidence that RPC discussed the method or scope of fall protection with CommSteel. If it had, RPC would have known that CommSteel was not intending to use fall protection while installing bridging and detailing. RPC has a responsibility to know its subcontractor's fall protection plan to assure its adequacy and compliance with safety standards. RPC knew that the ironworkers would regularly, and for long periods of time, be exposed to fall hazards in excess of 25 feet during steel erection. As general contractor, RPC has a responsibility to ensure that the ironworkers were not being exposed to an unsafe condition.

Reliance on a subcontractor's compliance with its subcontract agreement does not relieve the general contractor of its responsibility to prevent or detect the lack of fall protection. Without knowing the scope of CommSteel's fall protection, RPC failed to show it acted reasonably in attempting to prevent or detect an unsafe condition.

If RPC had reviewed the plan and relied on CommSteel's misunderstanding about the application of §1926.105(a) to bridging and detailing work, RPC may have been able to show that it acted reasonably in relying on a subcontractor's representations. However, no such showing or argument was made by RPC. To the contrary, the record shows the project superintendent never saw a written fall protection plan, nor was there any evidence that he requested or discussed the plan with CommSteel (Tr. 57). Thus, RPC failed to act reasonably as a general contractor in preventing or detecting an unsafe condition.

Accordingly, RPC's violation of ¶ 1926.105(a) is affirmed.

III. Classification

In determining whether the violations of § 1926.105(a) are serious within § 17(k) of the Act, OSHA must show that RPC knew or should have known, with the exercise of reasonable diligence, of the presence of the violations, and there was a substantial probability that death or serious physical harm could result from the condition.

As discussed, the record establishes that RPC should have known of the lack of fall protection with the exercise of reasonable diligence. RPC has "an obligation to inspect the work area, to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981). The lack of fall protection was in plain view and clearly observable. As for the expected injury, the issue is whether the resulting injury would likely be death or serious injury if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 30,148, p. 41,478, n. 5 (No. 91-862, 1993). The failure to utilize fall protection from a height of 42 feet can reasonably be expected to cause serious injury or death. Therefore, a serious violation is established.

IV. Penalty

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, 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 here.

OSHA proposed a penalty of $1,500. In considering the penalty, OSHA gave RPC 40 percent credit for size as a medium employer with less than 100 employees. There was no credit given for history and good faith because RPC received a previous citation within the last three years regarding the lack of fall protection. The court accepts OSHA's findings as to size, history, and good faith. With regard to the gravity, the probability and severity is considered high in that two employees were exposed to a fall of 42 feet without fall protection.

Accordingly, for a serious violation of § 1926.105(a), a penalty of $1,500 is assessed.

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:

1. Item 1 of the serious citation, in violation of § 1926.105(a), is affirmed and a penalty of $1,500 is assessed.

KEN S. WELSCH
Judge

Date: January 14, 1997