United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR
Complainant,
v.
E & R ERECTORS, INC.
Respondent.

Phone: (202) 606-5100
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OSHRC DOCKET
NO. 95-0190

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 22, 1996. The decision of the Judge will become a final order of the Commission on March 25, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 13, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 22, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0190

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

Complainant,

v.

Docket Nr. 95-0190

E & R ERECTORS, INC.,
SAMUEL GROSSI AND SONS, INC., and
BENSALEM STEEL ERECTORS, INC.,

Respondents.

Appearances

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For Complainant

John Philip Diefenderfer, Esq.
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For Respondent

BEFORE: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

INTRODUCTION

This case arose out of the inspection of the construction of the ASTM International Headquarters Building in West Conshohocken, PA, conducted by Compliance Officer George Boyd on December 1, 1994. As a result of the inspection, OSHA issued two citations to E & R Erectors, Inc. A notice of contest was filed, and the Secretary filed a complaint against E & R. After E & R claimed not to have been present on the ASTM site on December 1, the Secretary amended the complaint to join Bensalem Steel Erectors, Inc., and Samuel Grossi and Sons, Inc., both of which are related to E & R. Trial took place on September 29, 1995, in Philadelphia, PA. Prior to trial, the Secretary withdrew Citation No. 1, Item No. 2.

IDENTITY OF THE COMPANY PERFORMING THE WORK WHICH WAS CITED

E & R relies on the testimony of Eugene Grossi, its vice-president, as well as president and chief operating officer of Samuel Grossi and Sons, Inc., to establish that it was not at the ASTM site (Tr. 89, 94). Mr. Grossi testified that E & R does not work in Pennsylvania because it believes that it is being harassed by OSHA's Allentown office. (Tr. 94-95.) He produced payroll

records for E & R for the weeks ending November 29, December 6, and December 13, 1994, for jobs in New Jersey. (Tr. 94, RX 2.)

Samuel Grossi and Sons had been awarded a contract to furnish and erect the steel, joist, and metal deck for the ASTM International Headquarters by the general contractor, John McQuade Construction. (Tr. 111-12.) Mr. Grossi produced a subcontract between Samuel Grossi and Sons, and Bensalem Steel Erectors which covered the erection of structural steel, studs, and metal deck. (Tr. 92-93, RX 1.) Mr. Grossi maintains that the contractor on the site - presumably the one to which the citations should have been directed - was Bensalem. Bensalem is run by Mr. Grossi's niece and son, its principal officers. (Tr. 93.)

The Secretary points out that he cited E & R Erectors, Inc. because:

1) the superintendent of the general contractor on site, John McQuade Construction, identified the ironworkers as employees of E & R Erectors, Inc. (Tr. p. 15-16);

2) the ironworkers identified themselves as employees of E & R Erectors, Inc. (Tr. p. 18);

3) the ironworkers' foreman, Mr. Brown, told him that he worked for E & R Erectors, Inc. (Tr. p. 18-19, 72);

4) Walter Cantley introduced himself at the worksite as the superintendent of E & R Erectors, Inc. (Tr. p. 48, 72);

5) Mr. Cantley represented E & R Erectors, Inc., at the closing conference at the worksite (Tr. p. 48).

Indeed, subsequent to the issuance of the citations, Mr. Cantley attended the Informal Conference and discussed the citations at the OSHA area office. (Tr. p. 111). Samuel Grossi, who testified for respondent, conceded that Mr. Cantley was the supervisor for E & R Erectors, Inc., and that he does not work for either Bensalem Steel Erectors, Inc. or Samuel Grossi and Sons, Inc. (Tr. p. 106-107).

E & R objects that Mr. Boyd's testimony on this point is hearsay. However, Mr. Boyd testified as to what he had been told by E & R employees.[1] It is well-settled that such representations are admissions under Federal Rule of Evidence 801(d)(2)(D) and are not hearsay.

The evidence thus clearly shows that, even if the subcontract for steel erection at the ASTM headquarters was initially awarded by Samuel Grossi and Sons, Inc. to Bensalem Steel Erectors, E & R Erectors, Inc, was present at the site at the time of Mr. Boyd's inspection, performing the work which gave rise to the citations.

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[1] In one instance, Mr. Boyd related the representation of the general contractor's site superintendent. While this individual is not an E & R employee, there is no reason to question the reliability of his representation. He clearly was in a position to know the identity of the companies working on the site and would have no obvious reason to misrepresent the facts. I find that this statement meets the requirements of Federal Rule of Evidence 803(1).

Conversely, other than the subcontract, there is no evidence that Bensalem was engaged in the steel erection in question, and the uncontradicted evidence indicates that Samuel Grossi and Sons does not engage in that activity. Consequently, the complaints against these companies must be dismissed.[2]

THE CITATIONS

To establish a violation of any standard, Complainant must establish the applicability of the standard, non-compliance, employee exposure or access, and employer knowledge of the condition. Dun-Par Engineered Form Company, 12 BNA OSHC 1949 (No. 79-2553), Rev'd and remanded on other grounds, 843 F.2d 1135 (8th Cir. 1988), decision on remand, OSHRC docket No. 79-2553 (April 12, 1989).

Citation No. 1, Item No. 1

The standard at 29 C.F.R. § 1926.105(a) provides, in relevant part, that:

> 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.

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[2] The Secretary urges that I find that Bensalem and E & R are so closely related as to constitute a single enterprise in which the employees of one may be treated as the employees of the other. The Secretary's evidence on this point is weak. Moreover, because the evidence clearly shows that E & R, the original Respondent, was present at the site and conducted the activity which was cited, there is no need to reach this issue.

Section 1926.105(a) applies to the steel erection industry and requires the use of one of the appropriate listed devices to protect against exterior falls. Century Steel Erectors, Inc. v. Secretary, 14 OSHC 1273 (D.C. Cir. 1989); Brock v. Willson & Sons, 773 F.2d 1377, 12 OSHC 1499 (D.C. Cir. 1985). The Secretary establishes a prima facie case upon showing that the employees were exposed to a fall in excess of twenty-five feet and that none of the protective measures was used. Century Steel Erectors, Inc. v. Secretary, 14 OSHC 1273 (D.C. Cir. 1989). An employer may be cited for a violation of Section 105(a) in situations where safety belts and lines are the more practical forms of fall protection than nets. Secretary v. Anderson Excavating, 16 BNA OSHC 1601 (1993); Potomac Iron Works, 16 BNA OSHC 1299) (1993); Williams Erection, 15 BNA OSHC 1463 (1992).

At the worksite, ironworkers were installing 27 foot steel columns, each weighing approximately 6,300 pounds, on the third floor (Level B-1) of a three-story pre-cast concrete building that had no walls. (Tr. p. 17-18, 23, 31). Inspector Boyd observed the following procedure for setting the columns:

1. The foreman marks the columns, which are lying on the floor, to show the sequence in which they should be installed;

2. The workers, via radio, direct the crane operator where to boom over and place the loadline so it is above a column;

3. The workers attach the column to the load line with shackle and wire rope sling, and direct the crane operator to lift the load, suspending it vertically by the load line;

4. Two workers then walk the column to where it is to be bolted up, while one worker directs the crane operator by radio;

5. The workers orient the base plate of the column with four bolts in the appropriate imbed plate that is in the concrete deck, and lower the column onto the four bolts, rotating the column as necessary; and

6. The workers hand tighten nuts onto the bolts and then use a power wrench to fully tighten them. (Tr. p. 19-23, 26)

When Inspector Boyd arrived at the worksite, he observed that guard rails were missing on the southeast corner of the structure. These had been removed because they had been built over the imbed plates and would have interfered with the erection of two columns, which were put in place at approximately 10:00 a.m. on December 1, 1994. (Tr. p. 23-24, 102). Although they were working at the edge of the open-sided floor, the employees were not wearing fall protection while erecting these two columns, nor was any form of

fall protection was available to them. (Tr. p. 25) They were exposed to a fall hazard of approximately 33 feet on one corner where the column was set and approximately 30 feet in the other location where the column was set. (Tr. p. 25, 28-34, 126; GX 2, GX 3). At one location, the employees would have been standing within inches of the unguarded open-sided floor. (Tr. p. 27). Death could result from a fall from these locations. (Tr. p. 28).

The foreman was working in the area where the columns were installed. The lack of guardrails was obvious and could be seen from anywhere on the third floor. (Tr. p. 35-36). Fall protection could have been provided by using a safety belt or harness and a life line attached to an available imbed plate. (Tr. p. 36-37).

E & R argues that fall protection requirements applicable to steel erection are contained in Subpart R, not § 1926.105(a), which is a part of Subpart E.[3] It rests this argument on OSHA's promulgation of a Final Rule, *Safety Standards for Fall Protection in the Construction Industry,* 59 Fed. Reg. 40672, August 9, 1994. That rule did incorporate the fall protection provisions of § 1926.105(a) in § 1926.753 of Subpart R pertaining to steel erection. That change did not take effect until after the

[3] E & R apparently also believes that it was cited under Subpart M, Fall Protection. See its brief, p.6-7. This is not the case.

inspection and alleged violation in this case. See 59 Fed. Reg. 40672. Consequently, § 1926.105(a) is fully applicable.

E & R challenges Mr. Boyd's location of the two columns on the southeast corner of the building. At the hearing, Mr. Grossi marked GX 2, indicating his opinion that they were on the northeast corner. (Tr. 96; GX 2.) Apparently concerned that his position was not made clear at trial, Mr. Grossi submitted an affidavit with E & R's brief to which is attached a landscape plan for the ASTM Headquarters site. Mr. Grossi indicated that the columns were on the southeast corner of the building depicted on the landscape plan, in the same location where Mr. Boyd placed them. Consequently, I do not consider Mr. Grossi's testimony on this point to be reliable. I accept Mr. Boyd's testimony as accurate.

E & R also challenges Mr. Boyd's conclusion that the vertical distance from the location of these two columns to the ground was approximately 33 and 30 feet, respectively. In order for § 1926.105(a) to be applicable, this distance must be more than 25 feet. The Secretary introduced GX 3, which is an architect's drawing of an exterior wall showing the elevations of level B1, where the E & R employees were working, and P3, ground level. Mr. Grossi indicated that this drawing furnished a way to estimate the

vertical distance "pretty well." (Tr. 100.) The drawing shows that the overall vertical distance from B1 to P3 is 29 feet. However, it also shows that earth has been filled up against the side of the building, thus reducing the vertical distance to some extent.

At trial, there was considerable discussion of whether the columns in question were located over an area where soil had been excavated next to the building to permit trucks to back down to a loading dock, thus increasing the vertical distance, and, if not, whether earth had been backfilled, thus reducing the vertical distance. I find that it is not necessary to resolve this dispute.

GX 3 provides sufficient information to conclude that the vertical distance was at least 25.5 feet. Specifically, it shows that the vertical distance between B1 and P1 is 11 feet, between P1 and P2 is 9 feet, and between P2 and the bottom of an opening in the panel enclosing level P3 is 5.5 feet, a total of 25.5 feet.[4] The drawing depicts the backfill at a level below the bottom of the opening in the panel and sloping away from the building. Section 1926.105(a) is applicable.

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[4] Mr. Grossi calculated this distance to be 24 feet. (Tr. 100-01.) However, it is obvious that he overlooked the portion of the panel at the top of the opening. This is 1.5 feet.

The Secretary introduced evidence that the use of safety belts or a harness and life line would have been practical in this situation. Mr. Boyd testified that the easiest way to provide fall protection would have been to attach a life line for each exposed employee to one of the numerous imbed plates on the third level. Specifically, he testified that a shackle could have been attached to the imbed plate, with a lifeline attached to the shackle, and a rope grab and a lanyard attached to the life line. A retractable life line could have been used. (Tr. p. 37) If tied off in this fashion, the employee would have been free to move around, take down and replace the guardrails, and position and bolt up the columns. (Tr. p. 37-39, 132) Mr. Grossi conceded that, if tying off were required, Mr. Boyd's recommendation would be an option, and probably would have been used. (Tr. p. 102)

In its brief, E & R argues that Mr. Boyd conceded that the use of safety nets was not practical.[5] It also argues that, under the peculiar circumstances of the erection of the columns, life lines were also impractical in that they restrict the movement of the employees and make it difficult for them to avoid an out-of-control column.

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[5] E & R uses the term "feasible," which states a different requirement than "practical," the term which appears in § 1926.105(a). Century Steel, *supra*. I have substituted the latter for the former where it appears in E & R's brief.

E & R misreads Mr. Boyd's testimony with regard to safety nets. Mr. Boyd regarded nets as impractical because the employees installing them would be subjected to a fall hazard, not because they would be ineffective or overly difficult to install. (Tr. 39-40.) As the Secretary points out, if in fact life lines are impractical for the erection of the columns because they restrict the movement of the employees, the simple answer is to use life lines while installing the nets. Mr. Boyd obviously felt that life lines could be used during the erection of the columns themselves, thereby avoiding the necessity of nets and simplifying the job. E & R has not refuted the Secretary's *prima facie* case that a practical means of fall protection was available.

The Secretary has demonstrated that E & R was in serious violation of § 1926.105(a). He has proposed a penalty of $3,000, and Mr. Boyd testified as to how this was computed. E & R has not contested the amount. I find that $3,000 is appropriate and assess it.

Citation No. 2

The standard at 29 C.F.R. §1926.550(a)(9) provides, in relevant part, that:

> Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as

to prevent an employee from being struck or crushed by the crane.

On this jobsite, Respondent was operating a Hawthorne lattice boom crane. (Tr. p. 45) Thus, the standard is applicable. The swing area or counterweight was not flagged off or barricaded to prevent employees from walking through the area. (Tr. p. 46) In fact, one of the two operators of the crane was in the swing area. (Tr. p. 46) The operator told Inspector Boyd that he was an employee of E & R Erectors. (Tr. p. 77) In addition, the area was subsequently flagged off, and Mr. Cantley, superintendent for E & R Erectors, walked underneath the yellow flagging and proceeded though the entire counterswing area. (Tr. p. 48) Thus, employee exposure and employer knowledge is established. The violation was obvious. (Tr. p. 47-48) The Secretary has established a *prima facie* case for a violation of the cited standard. E & R has not addressed this citation in its brief. Accordingly, it has abandoned any defense to the substance of this charge.[6]

This violation was appropriately cited as Other-than-Serious in that there was no pinch point in which the employee could have been crushed between a counterweight and a stationary object.

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[6] Mr. Grossi indicated that E & R does not employ any crane operators. (Tr. 105.) I find Mr. Boyd's testimony that one of the crane operators indicated that he was employed by E & R to be more reliable. In its brief, E & R defends on the ground that it was not at the site. This defense has been rejected.

(Tr. p. 47) Accordingly, the $00 penalty proposed is appropriate and reasonable and is assessed.

CONCLUSIONS OF LAW

A. Respondent E & R Erectors, Inc., is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

B. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Citation 1, Item 1.

C. Respondent E & R Erectors, Inc., was in serious violation of the standard set out at 29 CFR §§ 1926.105(a). A penalty of $3000 is appropriate.

Citation 2, Item 1

D. Respondent was E & R Erectors, Inc., in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.550(a)(9). A penalty of $00 is appropriate.

E. Respondents Samuel Grossi and Sons, Inc., and Bensalem Steel Erectors, Inc., were not engaged in erecting steel at the ASTM Headquarters site.

ORDER

A. Citation 1, Item 1, is affirmed as a serious violation of the Act.

B. Citation 2, Item 1, is affirmed as an other-than-serious violation of the Act.

C. A total civil penalty of $3,000 is assessed against E & R Erectors, Inc.

D. The complaints against Samuel Grossi and Sons, Inc., and Bensalem Steel Erectors, Inc., are dismissed.

It is so ORDERED.

JOHN H. FRYE, III
Judge, OSHRC

Dated: FEB 22 1996
Washington, D.C.