



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

CLASSIC HOMES DIV. OF ELITE, INC.,
Respondent.

OSHR DOCKET
NO. 93-1947

**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 December 16, 1994. The decision of the Judge will become a final order of the Commission on January 17, 1995 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 January 5, 1995 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.
Executive Secretary

Date: December 16, 1994

DOCKET NO. 93-1947

NOTICE IS GIVEN TO THE FOLLOWING:

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Sidney J. Goldstein
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SECRETARY OF LABOR,
Complainant,

v.

CLASSIC HOMES,
DIV. OF ELITE, INC.,
Respondent.

OSHRC DOCKET
NO. 93-1947

APPEARANCES:

Dewey P. Sloan, Jr., Esq., Office of the Solicitor, U.S. Department of Labor,
Kansas City, Missouri.

Peggy Tilton, Safety Administrator, Health-Safety Management, Colorado Springs, Colorado.

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm a citation issued to the Respondent by the Occupational Safety and Health Administration for the alleged violation of two safety regulations relating to the construction industry. The matter arose after a compliance officer for the Administration inspected one of Respondent's worksites, concluded that the company was in violation of two safety regulations, and recommended that the citation be issued. The Respondent disagreed with the citation and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

Item 1 of the citation charged that:

Catch platform(s) were not installed as required below the working area of roof(s) more than 16 feet above the ground:

a) As controlling employer, employees were not protected from falling when working on roof 17' high at 15285 Jessie Drive, Colorado Springs, CO.

in violation of the regulation found at 29 CFR §1926.451(u)(3) which provides in part:

A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard.

Item 2 of the citation alleged that:

Wall opening(s) from which there was a drop of more than 4 feet, and the bottom(s) of the opening(s) were less than 3 feet above the working surface(s) were not guarded by rail(s) in a manner that would effectively reduce the danger of falling:

a) As controlling employer, employees were not protected by adequate guardrails when working near wall openings at the following locations on the second floor of the residence under construction at 15285 Jessie Drive, Colorado Springs, CO:

1. Northwest area, second floor,
2. Southwest corner, second floor.
3. Southeast corner, second floor.
4. Northeast corner, second floor.

in violation of the regulation at 29 CFR §1926.500(c)(1) which reads in part as follows:

(c) *Guarding of wall openings.* (1) Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded * * *.

The material facts are not in substantial dispute and may be briefly stated. At the time of the inspection the Respondent was engaged in the construction of a home at 15285 Jesse Drive in Colorado Springs, Colorado, and subcontracted roofing work to Robert Beck & Son. The parties also agreed that employees of the subcontractor were not protected from falling when working on the roof 17 feet high in violation of the regulation found at 29 CFR §1926.451(u)(3), and that catch platforms were not installed as required below the working area of the roofs more than 16 feet above ground.

With respect to item 2, the parties also agreed that an employee of Robert Beck was exposed to wall openings from which there was a drop of more than 4 feet, and the bottom of the opening was less than 3 feet above the working surfaces not guarded by rails in a manner that would effectively reduce the danger of falling.

At the hearing the compliance officer testified that he observed the alleged infractions of the regulations and took photographs of the house under construction. Robert Beck, the subcontractor, confirmed that he was allowed to work without fall protection, and that one of his employees was applying sheeting on the exterior of a window without being tied off and unprotected by guardrails.

A project manager for the Respondent testified that he was responsible for about twenty homes; that he inspected the various jobsites assigned to him; and that he had authority to correct hazards and ensure abatement of any safety violations. If he saw a worker acting unsafely, he would caution him and explain the dangers. If there were two or more safety violations, the subcontractor was subject to termination. He also had authority to make sure there was compliance with safety regulations.

On these factors, the Complainant's position is that the Respondent was in violation of the two regulations despite the fact that its employees were not working at the jobsite. The Respondent disclaims responsibility for the safety infractions on the grounds that the workers were not employees of the Respondent; that the subcontractor was the controlling employer; and that the violations were created by the subcontractor whose workers were the only individuals exposed to any danger.

The question whether a contractor may be held in violation of a safety regulation although it had no employees at the jobsite has been before the Commission in the past. On this point the Commission rejected the idea that liability under the Occupational Safety and Health Act of 1970 should be based solely on the employment relationship. And in the case of *Brennan v. Occupational Safety and Health Review Commission (Underhill Construction Corporation)*, 513 F2d 1032, the court held that an employer's specific duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard. It is a duty over and above his general duty to his own employees.

General contractors normally have the responsibility and means to assure that other contractors fulfill their obligations with respect to employee safety. The Commission has stated that it will hold a general contractor "responsible for safety standard violations which it could have reasonably have been expected to prevent or abate by reason of supervisory capacity. The duty of a general contractor is not limited to the protection of its own employees from safety hazards, but it extends to the protection of all employees engaged at the worksite.

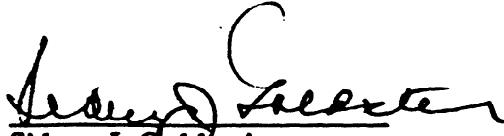
While the subcontractor had authority to control its employees, the Respondent also had controlling authority over Beck and Son. Admittedly, the violations were not created by the Respondent, and none of its workers were exposed to the dangers. However, both the Commission and the courts have held that overall responsibility for the safety of all workers on the project is in the general contractor's province.

Thus, it is concluded that the Respondent was in violation of items 1 and 2 of the citation despite the fact that its employees were not exposed to the dangers described. Therefore, items 1 and 2 of the citation are affirmed.

There arises the question of penalties. The Administration proposed penalties of \$2,500.00 for each of the alleged violations. Based upon the fact that the Respondent had a program of checking subcontractors for adherence to safety regulations; that it employed safety superintendents to check on work habits of its subcontractors; and that none of its employees were exposed to the dangers involved, a penalty of \$1,000.00 is in

order for the violation described in item 1. Further, since employees involved in item 2 were in far less danger than those in item 1, a penalty of \$600.00 is proper.

In sum, the two items of citation in issue are affirmed, with a penalty of \$1,000.00 for the violation of item 1, and a penalty of \$600.00 for the violation of item 2.


Sidney J. Goldstein
Judge, OSHRC

Dated: December 9, 1994