



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
BAKER MASONRY, INC.
Respondent.

OSHRC DOCKET
NO. 92-0328

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 January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 1993 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 February 3, 1993 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
1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: January 14, 1993

DOCKET NO. 92-0328

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

BAKER MASONRY, INC.,

Respondent.

OSHRC Docket No. 92-328

APPEARANCES:

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U. S. Department of Labor
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For Complainant

P. E. Peterson, Esquire
Charleston, South Carolina
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Baker Masonry, Inc. (Baker), contests an alleged serious violation of 29 C.F.R. § 1926.1052(c)(1), for failure to provide standard guardrails on stairs leading to the atrium area and to the second floor, and a repeat violation of 29 C.F.R. § 1926.500(d)(1), for lack of standard railings, or the equivalent, on open-sided floors at the construction site of the Radisson Hotel on General MacIntosh Boulevard, Savannah, Georgia.

The owner/builder and general contractor for the construction of the Radisson Hotel was Columbia Sussex Corporation (Sussex) (Tr. 6-7). The height of the hotel was eight stories. A center atrium extended approximately 20 feet above the eighth floor (Tr. 7, 101). The superintendent for Sussex was John Galasso (Tr. 6). Baker, at the time of the inspection, was a subcontractor engaged in masonry work.

A fatality occurred on September 24, 1991, at the construction site when an employee fell in the atrium. The fatality was reported to the OSHA Area Director in Savannah, Georgia. Compliance Officer Luis Ramirez was assigned to conduct an investigation of the incident. He arrived at the site at approximately 4:00 p.m. He was accompanied by Compliance Officer Phillip Moncrief (Tr. 38-39). Ramirez identified himself and presented his credentials to Galasso. As he approached the site, he observed that the stairway leading from the lobby to the atrium was not provided with standard guardrails. He also observed that 90 percent of the guestroom windows facing the atrium were not guarded. Galasso showed Ramirez the atrium location where the deceased had landed when he fell. Due to his observations, Ramirez decided to expand the inspection to cover all the subcontractors. He returned on September 25 to conduct a general inspection. He commenced with an opening conference with all the subcontractors on September 25 and sought information on their responsibilities at the site.

The floor plan of the Radisson Hotel has been introduced into evidence as Exhibit C-1. It shows the stairway leading to the atrium at the first floor level. This is the main stairway of the hotel. It also shows the stairway leading from the atrium to the second floor. Galasso stated that, in September of 1991, Baker's trailer was located on the east side of the project (Tr. 11). He indicated that employees entered the building through the loading dock on the east side and that there were times during the job that everyone used the main stairway to reach the atrium (Tr. 11). This included Baker employees (Tr. 12).

Sussex had considerable difficulty maintaining barricades at the site. The seriousness of the problem was brought to the attention of subcontractors through the weekly job meetings (Tr. 15) and through the circulation of a general memorandum (Exhs. C-13, C-14; Tr. 14). Subcontractors were specifically informed that, if the barricades had to be removed,

fall protection in the form of safety belts was to be provided, if needed, for the employees and the barricades were to be returned to their normal position (Tr. 15-20, 28).

The Allegation

In order to establish a prima facie case that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the cited working conditions, (2) the terms of the standard were not complied with, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka Construction Management Corp.*, 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992); *Astra Pharmaceutical Products, Inc.* 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982). Constructive knowledge is demonstrated when the record reveals that the violative conditions were detectable through the exercise of reasonable diligence. *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 25,420 (No. 15757, 1981).

Alleged Violation of § 1926.1052(c)(1)

Section 1926.1052(c)(1) provides as follows:

(c)(1) Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with:

- (i) At least one handrail; and
- (ii) One stairrail system along each unprotected side or edge.

The stairway leading from the lobby to the atrium was not provided with standard stairrails (Exhs. C-2, C-3; Tr. 42). Compliance Officer Ramirez cited the condition as a violation based on the fact that he was informed by Galasso that everyone used the stairways¹ and that four Baker employees, according to Ramirez, informed him that they used the stairways (Tr. 45-46). On cross-examination, Galasso testified that he understood

¹ Galasso did not testify as to any specific dates. He merely stated that "there were times through the course of the job that, like I've stated in the past, that everyone used that main staircase" (Tr. 11). The job was approximately eight months in length (Tr. 113).

that Baker was charged with using an interior stairwell, not the atrium stairwell (Tr. 26-27). He admitted that the most accessible way for Baker employees to enter the building would be through the west wall where they were conducting their masonry work (Tr. 27-28).

The stairway leading from the atrium to the second floor was not fully provided with standard handrails (Tr. 46). Portions of the handrails were missing. Ramirez touched the rails and concluded they would not sustain 200 pounds. They were loose and his touch moved them to the side (Tr. 46-47). He concluded that a violation existed because he was informed by four unidentified Baker employees that they had used the stairs and the statement by Galasso that the stairs were used by all employees, including Baker employees. Galasso disputed this statement and was quite clear in his testimony that he observed no Baker employees using the stairway to the second floor. Ramirez considered that there was employer knowledge of the violations since the missing handrails were in plain view (Tr. 50).

Baker's superintendent at the site was Thomas Phillips (Tr. 75-76). He was at the site everyday when work was performed (Tr. 76). Baker's trailer was located on the east side (Tr. 82). Baker employees were instructed to report to the trailer before going to the job (Tr. 82). Phillips stated that employees had been instructed at all times that they were to use the stairwell close to the working areas (Tr. 82). According to Phillips, employees entered the stairwell on the east side. He stated emphatically that employees were instructed to use those stairs. He had no knowledge of any of his employees using the main stairway or the stairway leading to the atrium (Tr. 82-83). Ramirez did not observe any Baker employees using the stairways. He relied on the statements of Galasso and the four unidentified employees to determine the violations (Tr. 63). He testified that he interviewed the employees on September 25, 1991, on the eighth floor of the building (Tr. 60, 71-72). The employees were never identified by name. When Ramirez wanted to interview employees, he informed Phillips of his desire. He was introduced to four persons by Phillips and was certain that they were Baker employees (Tr. 73).

Baker employees were working on the eighth floor of the hotel. While Galasso stated that everyone had used the atrium stairs at some time, there was no specific date as to when Baker employees used the stairs. There is no credible evidence to rebut Phillips' assertion that his employees used the east and west stairs in performing their duties. Since the trailer

was located on the east side of the project, it is logical to assume that employees did not walk to the front of the hotel and ascend to the eighth floor by way of the main stairway. The stairway at the end was too convenient for them.

The Secretary has failed to meet her burden of proof on this issue. No credibility has been given to the four unidentified persons since their statements are in conflict with Phillips, a credible witness. No reason has been shown why employees would enter the main lobby of the hotel to ascend to their work area. They performed no work in the interior of the building. The date that the violation occurred is not identified.²

Phillips testified contrary to the four unidentified employees and the testimony of Galasso. Baker did not object to the out-of-court statements allegedly made by the employees. If an objection had been lodged, the statements would not have been deemed admissible under Federal Rule of Evidence 801(D)(2)(d), due to the lack of identity and position of the persons making the statements. Their lack of identity and position forecloses any ability of this judge to determine the trustworthiness of their statements. The statements by the employees alluded to by Ramirez were hearsay, which are out-of-court statements offered to prove the truth of the matter asserted. The reliability of the statements is dependent upon the credibility of the employees. Ramirez's credibility is not in question but does not establish that the employees used the stairways. His testimony will not independently support the violations. While the evidence has been admitted, it is for this judge to determine its reliability. Since Phillips was a credible witness, this judge is unwilling to give any credibility preference to unnamed employees. Baker has had no opportunity to cross-examine the employees or to attempt to impeach them as to their out-of-court statements. The Secretary relies on the statements, but the employees were not called as witnesses and remain unidentified. Baker has no opportunity to cross-examine them.

The violation is vacated.

² Section 9(c) of the Act provides:

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Alleged Violation of 29 C.F.R. § 1926.500(d)(1)

Section 1926.500(d)(1) provides:

(1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Baker is charged with failing to provide standard railings and toeboards on balconies on the second through the eighth floors of the building. An unguarded balcony is an open-sided floor. *Pace Construction Corp.*, 14 BNA OSHC 2216, 1991 CCH OSHD ¶ 29,333 (No. 86-758, 1991).

Baker erected a scaffold on the north side of the hotel in order to perform masonry work on the exterior. Employees reached the scaffold by entering the building and proceeding to the floor where the scaffold had progressed. Each room was provided with a sliding glass door and a full length window. The doors opened onto a balcony. The balconies were not guarded at the time of the inspection (Exhs. C-8 thru C-11; Tr. 56). Four unidentified Baker employees informed Ramirez that they used the balcony as access to the scaffold from the building and that they jumped from the scaffold to the building in order to exit the scaffold (Tr. 54).

While Ramirez was talking with Galasso at the atrium, he observed an employee step on an unguarded balcony (Tr. 54-55). Galasso testified with respect to the same incident but indicated that Thomas Phillips, superintendent for Baker, was informed of the incident and the employee was fired (Tr. 26, 32). Phillips indicated that the incident was called to his attention and that he fired him "on the spot" (Tr. 79). Galasso was specific in his testimony that this was the only occasion that he saw a Baker employee using an unguarded exterior balcony (Tr. 32). Ramirez observed this one incident. The other incidents referred to are dependent upon the credibility of the four unidentified employees. Ramirez observed Baker was using a nonstop scaffold which contained guardrails on the exterior of the

scaffold. Phillips stated that where they encountered an open window, a guardrail was on the front of the scaffold near the building (Tr. 75-76). When employees were working on the lower level, they used an extension ladder to ascend to the scaffold. From the fourth floor upward, they ascended the scaffold from the balcony (Tr. 77). The scaffold was fully boarded. As the scaffold moved upward, a steel cable was encountered across the building through all the openings. In order to accomplish their work, Sussex had to cut the cables out with a torch. Underneath the scaffolding, X-braces were installed as the process moved upward (Tr. 78). Phillips and Baker's president, David Pettit, indicated that the interior and exterior of each open-sided floor were guarded when employees commenced work. Pettit stated that all safety precautions were taken while working on the balconies. Employees allegedly used safety belts when the barricades had to be removed (Tr. 111-113).

Phillips indicated that employees entered the scaffold at an area where there were guardrails. When employees reached the eighth floor when the scaffolding was above the balcony, Phillips stated that they entered by a guardrail and an extension ladder. Ramirez observed one employee jump from the scaffold to an unguarded balcony. The employee was fired for his conduct. This incident provides no basis to conclude that Baker was in violation of the standard. Phillips' testimony indicates that employees were properly protected. He was unaware of the incident when it happened. He responded in a forceful and positive manner when informed of the facts. Ramirez's testimony that he was informed by four employees that they jumped from the scaffold through the unguarded windows provides the only support for the violation. As previously stated, Phillips was a credible witness and no weight is given to the statement by unidentified employees. Baker should not be found guilty on such tenuous evidence. It has had no opportunity to face its accusers, who remain unidentified. If Ramirez was so informed by the four employees, the Secretary should have felt an obligation to at least confront Baker with its accusers. While hearsay by employees is admissible under Rule 801(D)(2)(d) after establishing the scope of the employees' employment, this does not establish the credibility of persons so identified. The determination of credibility is left to the trier of fact. In this case, the Judge is unwilling to discredit Phillips' testimony on the representations by unidentified persons.

The violation is vacated.

**FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby

ORDERED: That the serious citation, repeat citation and proposed penalties issued to respondent on December 13, 1991, are vacated.

/s/ James D. Burroughs

JAMES D. BURROUGHS

Judge

Date: January 7, 1993