UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
BETA CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 92-2642

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 May 20, 1993. The decision of the Judge will become a final order of the Commission on June 21, 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 June 9, 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
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.

Date: May 20, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2642

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
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SECRETARY OF LABOR, Complainant, v. BETA CONSTRUCTION CO., INC., Respondent.	OSHRC Docket No. 92-2642

APPEARANCES: Richard W. Rosenblitt, Esq.
Office of the Solicitor
U.S.Department of Labor
For Complainant

Michael Allen and
Daniel Gordon, Pro Se
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

DECISION

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by an industrial hygiene compliance officer of the Occupational Safety and Health Administration, Beta Construction Co., Inc., ("Respondent") was issued one citation alleging that it failed to comply with the construction safety standard

at 29 C.F.R. § 1926.56(a) (1991). A penalty of $525 was proposed[1]. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Washington, D.C., on January 28, 1993. No affected employees sought to assert party status. Both parties have filed post-hearing briefs and the Secretary, pursuant to leave granted by the Administrative Law Judge, has filed a reply brief.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in roofing contracting. It is undisputed that at the time of this inspection Respondent was engaged in roofing removal and replacement. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent in an employer within the meaning of § 3(5) of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Commission precedent regarding the culpability of general contractors on multi-employer construction sites is clear.

> The Commission has held that, on multi-employer construction sites, the general contractor is responsible for violations of its subcontractors that the general contractor could reasonably be expected to prevent or to detect and abate by reason of its supervisory capacity over the entire worksite, even though none of its own employees is exposed to the hazard. (Citations Omitted.)

[1] The Secretary's complaint reduced the classification of the alleged violation from serious to other than serious and the amount of the proposed penalty from $525 to $250.

Gil Haugan Construction Co., 7 BNA OSHC 2004, 2006 (Nos. 76-1515 and 76-1513, 1979). The Commission has recently reiterated this holding. *Blount International, Ltd.*, 15 BNA OSHC 1897 (No. 89-1394, 1992).

Respondent, a general contractor was retained to remove and replace roofing on a federal government building. It had a superintendent present on the roof during the night-time hours when its subcontractor, ABTEC, Inc., ("ABTEC") was removing roofing materials under inadequate lighting conditions which were violative of the requirements of OSHA standards. It is therefore in violation as alleged.

Respondent had a contract with the U.S. General Services Administration ("GSA") to do the roofing work on the headquarters of the Department of Housing and Urban Development in Washington, DC. The contract required, among other things[2], that Respondent have a competent superintendent present during the performance of all work (Exhibits G-4 thought G-7; Tr. 14-15, 145-146). Respondent supplied the lights for the night time work and most likely regularly assisted in setting up the lights before the beginning of the night shift. The lights were stored under Respondent's control when not in use (Tr. 131-132; 194).[3]

The OSHA industrial hygiene compliance officer who conducted the inspection had been trained in and had experience in light measurement and was using equipment which had been properly calibrated and tested before use. During his inspection, he observed employees of ABTEC working in areas in which the light measured 1.95 foot-candles, less than the minimum of 5 foot-candles required by Table D-3 referred to by 29 C.F.R. § 1926.56(a) (1991). The compliance officer's testimony was competent, reliable and

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[2] That the contract might have also placed upon Respondent the burden of complying with all pertinent safety and health regulations and assuring that it sub-contractors did so also, is inconsequential. The general contractors responsibility under the Act is imposed by law and can not, even if the parties desired to do so, be displaced by a contract agreement.

[3] Respondent's contention that ABTEC set up the lamps and controlled storage, is rejected. Even if it were so, Respondent still failed in its supervisory duty as the general contractor.

credible. His demeanor was appropriate, his factual testimony is consistent with other facts of record and he presented factual bases for his conclusions.

On this record, the Secretary has demonstrated that the cited standard applies in that roofing repair and removal is alteration or repair within the meaning of 29 C.F.R.§ 1926.10 (1991). The Compliance Officer's testimony establishes the violative condition. There is no dispute that Respondent was the general contractor which supervised and had the ability to control a work-site where a sub contractor's employees were working under inadequate lighting conditions. The violative conditions of darkness were readily visible and obvious. Respondent, as the general contractor and through its contracts, had the personnel and expertise to abate the hazard. In at least some of the areas, it was so dark that the light meter showed virtually no reading at all.[4] Even a casual inspection of the work area would have alerted a competent superintendent that the lighting was poor or almost non-existent. Thus, whether or not Respondent's own employees were exposed to the hazard[5], it was nonetheless responsible for the condition as the general contractor. In addition, the hazard was so obvious that Respondent knew, or reasonable should have known of the violative condition. The Secretary has thus demonstrated, by a preponderance of the evidence, all of the necessary elements to show a violation of a standard. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Respondent's argument that it was allowed to and did delegate to its sub-contractor responsibility for the proper performance of the job is, even if true, insufficient to absolve

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[4] The facts that there may have been adequate lighting on other occasions or that there were sufficient lighting instruments available to adequately light the work area do not detract from the credibility of the inspecting officer's testimony and measurements as to the lighting conditions which existed at the time of his inspection.

[5] Complainant argues that Respondent's own employee, the Superintendent, was exposed to the hazard in that he worked or at least had access to the zone of danger created by the violative condition. Although not necessary to the decision, were this issue before the Administrative Law Judge, just such a factual finding would be made.

itself of its responsibility imposed by the Act on general contractors. It is rejected. Similarly rejected is its argument that its superintendent, Mr. King, could not supervise ABTEC's work because he was not licensed in asbestos removal[6] and that he was not permitted within 50" of the asbestos removal work being done. The lack of lighting could be easily observed according to the inspecting officer.

Respondent's claimed improprieties in the manner of inspection, closing conference, telephone conference and informal conference have not been shown to be prejudicial. As with its other claims of prejudice (e.g., delay in issuance of citation), its ability properly to defend the citation on the merits has not been shown to be diminished even if the alleged improprieties did occur. Respondent's arguments are thus rejected. Respondent's argument that it is entitled to have inferences drawn as to the inadequacy of the light measuring equipment does not withstand scrutiny. All material properly discoverable had been produced by the Secretary. Respondent was afforded an opportunity to review all of the material and did so. At no subsequent point after its review of the material did Respondent claim that materials requested for its examination were not produced.

The violation was, as alleged, other than serious. The lack of adequate lighting led to tripping and falling hazards which would likely result in contusion and abrasions. More serious injuries were not likely. A penalty of $250 is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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[6] It is undisputed that the roofing material being removed and replaced contained asbestos, that ABTEC was a licensed asbestos removal contractor, and that the work was being done out-of-doors.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(2), in that it failed to comply with the standard at 29 C.F.R. § 1926.56(a).

4. The violation was other-than-serious.

5. A penalty of $250 is appropriate.

ORDER

1. The citation issued to Respondent on or about July 20, 1992, is AFFIRMED.

2. A penalty of $250 is assessed.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: MAY 14 1993
Washington, D.C.