

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division)	Docket No. 09-00135SH
)	
Plaintiff,)	
)	
vs.)	Citation No.: D0554-030-09
)	
Kory Jan Williams,)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to notice, a hearing was held in Portland, Oregon, on September 21, 2010 before Administrative Law Judge (ALJ) Fisher. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Carol Parks. Defendant, Kory Jan Williams, proceeded *pro se*.

Exhibits 1 through 21 were submitted and admitted into evidence. The record closed on September 21, 2010.

ISSUES

Defendant appeals the propriety of citations issued April 14, 2009, containing alleged violations with proposed penalties totaling \$2,200.00.

FINDINGS OF FACT

Defendant has owned/operated Kory Williams Construction, as a sole proprietorship generally engaged in general construction since approximately 1998. (Ex. 13-4). At all times relevant hereto, defendant was actively licensed with the Construction Contractors Board (CCB). (Witness testimony).

In January 2009, defendant entered into a contract with PMP to do the roofing on a three building condo project located on SW Eastman Parkway in Gresham. (Witness testimony; Exs. 2; 144; 14-5). Under the terms of the contract with PMP, defendant was allowed to subcontract portions of the roofing project. (Ex. 2-3). If he did so, however, he was required to use only licensed, bonded, and insured subcontractors. (*Id.*)

Believing that the project was too big for him to do by himself, defendant sought the services of Mr. Backes to help him complete the roofing project. (Witness testimony). Under the terms of defendant's agreement with Backes, Backes was to be paid \$55 per square of shingles for his labor in installing 85 squares of shingles. (Witness testimony; Exs. 12; 13; 19). Defendant made at least one payment to Backes for work performed prior to the completion of the project. (Witness testimony; Ex. 13-9).

Defendant believed Backes to be actively licensed with CCB. (Witness testimony).

On February 18, 2009, Senior Compliance Officer (SCO) Stapleton was driving by the aforementioned condo project on Eastman Parkway and noticed two workers, who appeared to have no fall protection, on the roof of one of the projects' three-story buildings. (Witness testimony). Consequently, SCO Stapleton stopped, took some photographs, and after identifying herself, spoke with defendant. (*Id.*) Among other things, defendant informed SCO Stapleton that both he and Backes were sole proprietors, actively licensed with CCB. (*Id.*) Upon further investigation, SCO Stapleton determined that Backes was not actively licensed with CCB. (*Id.*) Accordingly, SCO Stapleton began an on site inspection. (*Id.*)

Defendant was SCO Stapleton's escort for a portion of the inspection. (Ex. 5). Mr. Sisson (PMP's on site superintendent) was the escort for the remainder of the inspection. (*Id.*) SCO Stapleton took photographs of her observations. (Witness testimony; Ex. 6). Among other things, SCO Stapleton observed that: (1) a ladder on a partially decked third story extended only two inches above the gutter upon which it rested; (2) there were numerous holes between deck joists (on the deck where the aforementioned ladder stood) exposing workers using the ladder to falls of approximately 18 to 22 feet; and (3) the aforementioned ladder was not properly secured against displacement.

On April 14, 2009, OR-OSHA issued Citations and Notifications of Penalties as follows:

Citation 1 Item 1: A violation of OAR 437-003-3502(1)(b) using slide guards on roofs with a ground-to-eave height greater than 25 feet. Because the violation was complied with at the time of the inspection, OR-OSHA assessed a proposed penalty of \$825.

Citation 1 Item 2a: A violation of 29 CFR 1926.1053(b)(1) requiring that when portable ladders are used for access to an upper landing surface, the ladder side rails extend at least 3 feet above the upper landing to which the ladder was used to gain access.

Citation 1 Item 2b: A violation of OAR 437-003-1501(1)(a) requiring that employees on walking/working surfaces more than 6 feet above lower levels be protected from falling through holes by personal fall arrest systems, personal fall restraint systems, safety net systems, guardrail systems, or covers erected around such holes.

Citation 1 Item 2c: A violation of 29 CFR 1926.1503(b)(6) requiring that ladders be used only on stable and level surfaces unless secured to prevent accidental displacement. OR-OSHA grouped items 2a, 2b, and 2c together and assessed a proposed penalty of \$1,375.

CONCLUSIONS OF LAW AND OPINION

Defendant timely appealed the citation under ORS 654.078. Therefore, OR-OSHA has the burden to not only establish a denied violation, but also that the penalties assessed therein were reasonable. OAR 438-085-0820(1).

Defendant asserts, among other things, that at all times relevant hereto, Backes was not his employee, but rather an independent subcontractor. If that assertion is determined to be correct, then defendant would be an independent contractor with no employees, and not subject to OR-OSHA jurisdiction. Therefore, before I determine whether a violation has been established and whether the penalties assessed were reasonable, I determine whether, at the time of the alleged violation, defendant was subject to OR-OSHA jurisdiction.

I begin that determination by noting that Backes has not been actively licensed by the CCB since 2004. Consequently, he is not conclusively presumed to be an independent contractor under ORS 656.027(7)(b). Rather, Backes status as either an employee, as defined in ORS 654.005(4), or an independent contractor is determined by the “economic realities test” under the Fair Labor Standards Act.

See Loomis Cabinet Co. v. OSHRC, 20 F.3d 938 (9th Cir. 1994); *Griffin & Brand of McAllen, Inc.*, 6 OSHC 1702 (1978).¹

The factors to be considered in applying the “economic realities test” are: (1) whom do the workers consider their employer; (2) who pays the workers’ wages; (3) who has the responsibility to control the workers; (4) does the alleged employer have the power to control the workers; (5) does the alleged employer have the power to hire, fire, or modify the employment conditions of the workers; (6) does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment, and foresight; and (7) how are the workers’ wages established. (*Id.*) No single factor is controlling. Rather, determination of the issue is based on consideration of all the aforementioned factors.

The record established that at the time of the alleged violation, Backes knew he was not actively licensed by the CCB, and consequently believed he was defendant’s employee. Therefore, the first factor of the economic realities test favors an employment relationship between Backes and defendant.

Turning to the second factor of the economic realities test, I note that Backes was to be paid by defendant and not PMP, the general contractor for the Eastman Parkway project. The fact that Backes was to be paid directly by defendant favors an employment relationship between Backes and defendant.

The third factor to consider is the responsibility to control the worker. Under the terms of defendant’s contract with PMP, defendant had the responsibility to control Backes. Thus, the responsibility factor favors an employment relationship.

The fourth factor to consider is the power to control. Here, the record established that 95 percent of the time, Backes worked when defendant worked. The record further established that if Backes was alone on the job site, it was only for very short periods of time, and that the work that he performed was specified by defendant as the project went along. Based on the evidence presented regarding the power to control, I conclude that defendant did, in fact, control what work Backes performed. Consequently, the fourth factor favors an employer/employee relationship between defendant and Backes.

The fifth factor to consider is whether the alleged employer had the power to hire, fire, or modify the employment conditions of the workers. Here, the record is silent as to whether defendant had the power, without potential liability, to

¹ Under ORS 654.005(4), an “employee” includes “any individual” who engages to furnish services for a remuneration, subject to the direction and control of an employer.

terminate/modify the agreement with Backes. Consequently, I can make no determination as to whether the fifth factor favors the existence of an employer/employee relationship between defendant and Backes or one involving independent contractors.

The sixth factor to consider is whether the workers ability to increase their income depends on efficiency rather than on initiative, judgment, and foresight. No evidence was presented on Backes' ability to increase his income. Consequently, I can make no determination as to whether the sixth factor favors the existence of an employer/employee relationship between defendant and Backes or one involving independent contractors.

The seventh and final factor to consider is how the workers' wages were established. Here, the record established that the rate of \$55 per square charged by Backes was not a "standard fee," but rather was based on "a lot of variables," like the pitch of the roof. The manner of establishing Backes' compensation suggests an independent contractor relationship between defendant and Backes.

Having weighed all of the factors enumerated above, I find the record supports the conclusion that at the time of the alleged violations, Backes was engaged to furnish services for remuneration subject to the direction and control of defendant. In other words, I find that Backes was defendant's employee as defined under ORS 654.005(4). Accordingly, at the time of the alleged violation, defendant was subject to OR-OSHA jurisdiction.

I turn to the merits of the alleged violations.

Citation 1 Item 1:

Here, OR-OSHA alleges that defendant used a slide guard system of fall protection where the ground-to-eave height was greater than 25 feet. SCO Stapleton testified that she witnessed Backes working on a roof where the only type of fall protection being used was a slide guard system. The photographs taken by SCO Stapleton support her testimony. Moreover, defendant acknowledged that a slide guard system was the only fall protection in use at the time of the inspection. The record establishes that the ground-to-eave height on the roof where Backes was working was 30 feet 2 inches. Accordingly, on this record, I conclude that OR-OSHA established a violation of the cited regulation.

OR-OSHA rated the severity of the violation as "serious." A "serious violation" is a violation in which there is a substantial probability that death or serious physical harm could result from a condition which exists in the place of

employment. OAR 437-001-0015(62)(a)(A). “Serious physical harm” are injuries that could shorten life, or significantly reduce physical/mental efficiency by inhibiting the normal function of a part of the body. OAR 437-001-0015(56). Examples of such injuries are amputations, fractures, cuts involving significant bleeding or extensive suturing, disabling burns, concussions, and internal injuries. (*Id.*)

SCO Stapleton testified that the type of harm Citation 1, Item 1 was directed at was the type of harm of likely to result in a fall from a height of 30 feet onto hard ground; *i.e.*, fractures, concussions, internal injuries, and possibly death. Based on my review of the record, I conclude the rating of “serious” was appropriate.

OAR 437-001-0135(1) requires that the probability of an accident which could result in an injury from a violation be determined by the Compliance Officer and be expressed as a “probability” rating. A “low” probability rating is appropriate if the factors considered indicate it would be “unlikely” that an accident could occur. A “medium” probability rating is appropriate if the factors considered indicate it would be “likely” that an accident could occur. A “high” probability rating is appropriate if the factors considered indicate it would be “very likely” that an accident could occur.

After considering the duration of the exposure that she had witnessed, and further considering that Backes was the only employee to be exposed, SCO Stapleton assigned a “low” probability rating. The record contains factual support for the factors relied upon by SCO Stapleton. Accordingly, I am persuaded that the “low” probability rating was appropriate.

Penalties are addressed by OAR 437-001-0135 through OAR 437-001-0203. OAR 437-001-0145(1) provides that a penalty shall be assessed for any serious violation by considering the penalty established by the intersection of the probability and severity ratings in Table 1 of the rule. Under that table, a serious violation with a low probability of death has a penalty of \$1,500. After applying various applicable reductions, OR-OSHA assessed an \$825 penalty.

Based on the record presented, I am satisfied that the assessed penalty is reasonable. Accordingly, Citation 1, Item 1, is affirmed.

Citation 1 Item 2a

Here, OR-OSHA alleges that the defendant failed to insure that the side rails of a portable ladder used for access to the roof extended at least three feet above

the surface of the roof. SCO Stapleton testified that the ladder in question was the only access to the roof and that the ladder's side rails extended only a few inches above the surface of the roof. The photographs taken by SCO Stapleton support her testimony. Based on the record presented, I conclude that OR-OSHA had established a violation of the cited regulation.

Citation 1 Item 2b

Here, OR-OSHA alleges that defendant failed to provide Backes with fall protection when he was walking/working on surfaces with holes through which he could fall more than six feet to a lower level. SCO Stapleton testified that the ladder which Backes used to gain access to the roof was placed on loose plywood on deck joists with numerous holes between the deck joists exposing him to a fall of 18 to 22 feet to the ground. SCO Stapleton witnessed Backes using the ladder and that no fall protection was used. The photographs taken by SCO Stapleton support her testimony. Based on the record presented, I conclude that OR-OSHA has established a violation of the cited regulation.

Citation 1 Item 2c

Here, OR-OSHA alleges that the ladder used to gain access to the roof was not secured to prevent accidental displacement. SCO Stapleton testified that the ladder used to gain access to the roof was not resting upon a stable/level surface. She also testified that when defendant and Backes came down the ladder, she saw the ladder, which had been tied off with bungee cord, displace several inches. The photographs support SCO Stapleton's testimony. Based on the record presented, I conclude that OR-OSHA has established a violation of the cited regulation.

Because Citation 1 Items 2a, 2b, and 2c were grouped, the penalty is to be based on the probability and severity of the entire group. OAR 437-001-0145(5). SCO Stapleton explained that the severity rating for the group (serious) was based upon the likely injuries flowing from a fall of 18 to 22 feet onto hard ground. Based on my review of the record, I conclude a group rating of "serious" was appropriate.

Based on the same reasoning she explained with Citation 1 Item 1, SCO Stapleton assigned the group a "low" probability rating. The record contains factual support for the factors relied upon by SCO Stapleton. Accordingly, I am persuaded a group rating of "low" probability was appropriate.

OAR 437-001-0145(1) provides that a penalty shall be assessed for any serious violation by considering the penalty established by the intersection of the

probability and severity ratings in Table 1 of the rule. Under Table 1 of OAR 437-001-0145(1), a serious violation with a low probability of death has a penalty of \$1,500. After applying applicable reductions, OR-OSHA assessed a \$1,375 penalty, which I am satisfied is reasonable. Accordingly, Citation 1, Items 2a, 2b, and 2c are affirmed.

ORDER

Citation 1 Item 1 and Citation 1 Items 2a, 2b, and 2c are affirmed.

Entered at Portland, Oregon, November 4, 2010

Workers' Compensation Board

/s/Emerson G. Fisher
Emerson G. Fisher
Administrative Law Judge