

August 1, 2017

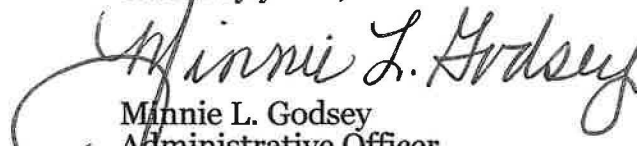
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Re: Jacobs Engineering Group, Inc.
MOSH Case No. C7068-018-12
OAH No. DLR-MOSH-41-12-16282

Dear Sir:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned matter.

Sincerely yours,


Minnie L. Godsey
Administrative Officer
Division of Labor and Industry

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Catherine Bellinger, Assistant Attorney General
MOSH Office of Review

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OFFICE OF THE
ATTORNEY GENERAL

IN THE MATTER OF	*	BEFORE THE
	*	COMMISSIONER OF LABOR
JACOBS ENGINEERING	*	AND INDUSTRY
GROUP, INC.	*	MOSH CASE NO. C7068-018-12
	*	OAH CASE NO. DLR-MOSH-41-
		12-16282

* * * * *

FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. On January 19, 2012, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued two citations to Jacobs Engineering Group, Inc. (“Jacobs” or “Employer”). Citation 1, item 1 was for an other than serious violation of 29 C.F.R 1926.1052(c)(1)(ii) for failure to have a handrail on a stairway having four or more risers and Citation 2, item 1 was for an other than serious violation of 29 C.F.R. 1926.502(b)(9) for failure to have the top rail flagged at 6 foot intervals with high visability material.

Jacobs contested the citations and a hearing was held on July 19, 2012 at the Office of Administrative Hearings in Hunt Valley, Maryland. Geraldine A. Klauber, Administrative Law Judge, presided as the Hearing Examiner (“HE”). HE Klauber issued a proposed decision recommending that the citations be affirmed.

Jacobs requested review and a review hearing was held before the Commissioner of Labor and Industry on January 30, 2013.¹ Based upon a thorough review of the factual record,

¹ The review hearing was heard before then Commissioner Ronald DeJuliis. Mr. DeJuliis is no longer Commissioner of Labor and Industry. Accordingly, this decision is issued by current Commissioner Matthew Helminiak.

the relevant law, and the arguments made by both parties, the Commissioner vacates both citations.

FINDINGS OF FACT

This case arises from a planned inspection at the construction site of the remodeling and the building of an addition to Northeast High School in Anne Arundel County, Maryland. There were 12 subcontractors on the job along with Jacobs who was the construction manager. FF 2 & Tr. at 55. Jacobs' responsibility was limited to monitoring and administering the contract which included the scheduling of contractors and checking the progress of the work. Tr. at 181. Jacobs did not have responsibility for enforcing the safety program, disciplining a subcontractor's employee for a violation of a safety rule or resolving disputes between contractors. FF 2 & Tr. at 187. This is confirmed in the safety and health evaluation form which reflects that the "responsibility lies with the contractors" for safety and health on the job site. MOSH Ex. 10. Jacobs' construction manager Ed Hussung testified that each contractor on the job had a separate contract with Anne Arundel County. Tr. 186.

Finding of Fact 3 is amended to provide as follows: The Employer's employees would routinely survey the work site and if there were concerns, report those concerns to Ed Hussung. Except for isolated imminent danger situations, Mr. Hussung would in turn report any issues to the respective contractor performing the work to correct the issue. Tr. at 287-288 & Employer Ex. 11.

DISCUSSION

On review, Jacobs asserts among other arguments that it should not be cited under the construction standards because it is not performing construction work on this job site and is therefore not subject to the construction standards. MOSH argues that there is substantial

evidence to conclude that Jacobs is the general contractor with authority to oversee work and correct safety violations.

In determining whether an employer is subject to the construction standards, the OSHA Review Commission has established in case law that the focus should be on the specific employer's relationship to the construction work. *Secretary of Labor v. Fleming*, 18 O.S.H. Cas. (BNA) 1709, 1712 (1999). It is a fact specific inquiry that rests on the responsibilities assumed by the employer in question. *CH2M Hill v. Secretary of Labor*, 18 O.S.H. Cas. (BNA) 1897, 1902 (1999). The rationale of this approach is that it places primary responsibility on employers who have primary control of the work environment and "therefore should insure that it is safe and healthful." *Id.* In determining where the construction standards apply, the OSHA Review Commission has examined whether an employer is "directly and substantially engaged in activities related to safety", whether the employer has defacto authority as well as looked at the contractual obligations between the parties on the job site¹. *Id.* at 1903.

Turning to the specific facts of this case, and whether Jacobs was directly and substantially engage in safety activities, the MOSH Inspector testified that Jacobs was responsible for the hiring of subcontractors, evaluating the work and reporting to the owner, Anne Arundel County. Tr. at 57. The HE Klauber found that Jacobs conducted periodic safety inspections. ALJ Decision at 4. Edwin Hussung, Jacob's construction manager for this project, testified that the protocol for when a safety item was identified during a periodic inspection was for Mr. Hussung to notify the contractor verbally, followed by a written notification. Tr. at 287. Jacobs introduced an example of this process when a Jacobs' employee identified some areas with potential safety issues and communicated the issues to Mr. Hussung by email. *See* Respondent Ex. 6. Mr. Hussung testified that upon receiving the email, he contacted the

contractor and the contractor constructed the appropriate safety measure the next day. Tr. at 217. If an imminent danger situation were to arise and a contractor failed to heed Mr. Hussung's report of a safety issue, Mr. Hussung acknowledged that he had on occasion halted work. Tr. at 287-289 & Respondent Ex. 11. The MOSH Safety and Health Program Evaluation Form completed by Jacobs at the time of the inspection corroborates that each contractor is responsible for safety and health on the job site. MOSH Ex. 10. Additionally, Jacobs did not have the authority to resolve a dispute between contractors or discipline a contractor's employee for a violation of a safety rule. Tr. at 187-188. It is noteworthy that the OSHA Review Commission has held that informing trade contractors of hazards during the course of inspections does not rise to the level of supervisory responsibility of ensuring safety measures are followed. *See Foit-Albert Assocs., Architects & Engrs., P.C.*, 17 O.S.H. Cas. (BNA) 1975, 1979 (1997). Based on the particular facts of this case, the Commissioner finds that Jacobs was not directly and substantially engaged in safety activities on this job site.

As to whether Jacobs had defacto authority on this job site, there is no dispute that Jacobs did not perform any construction work. There also is nothing to support a finding that Jacobs gave general instructions on how the work was to be performed. The MOSH Inspector testified that he "assumed" that Jacob's performed quality control but Keith Chesla, Jacob's project manager for the job, testified that Jacob's role was to make sure work gets done but does not include inspecting the contractor's work. Tr. at 163 & 317. This evidence does not support the conclusion that Jacobs had defacto authority over the job site. As to contractual authority, the contract between Jacobs and Anne Arundel County is not part of this record however the other testimonial and documentary evidence reflects Jacob's limited role on safety.

The Commissioner finds that under the specific facts of this case that Jacobs did not have sufficient control over safety issues and nor did it exercise defacto control. Based upon this evidence, the Commissioners finds that Jacobs' activities do not bring it within the scope of the construction standards. Therefore, the citations are vacated.

Therefore, on this 1st day of August 2017, the Commissioner hereby

ORDERS:

1. Citation 1, Item 1 for an other than serious violation of 29 C.F.R. §1926.1052(c)(1)(i) with no proposed penalty is DISMISSED; and
2. Citation 2, Item 1 for an other than serious violation of 29 C.F.R. §1926.502(b)(9) with no proposed penalty is DISMISSED.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, §5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.



Matthew Helminiak
Commissioner of Labor and Industry

¹ Review Commission cases also have examined contractual authority in the analysis of whether an employer falls under the construction standards. Jacobs did not introduce its contract with Anne Arundel County into the record at the administrative hearing. However, on review, Jacobs seeks to have provisions included as part of the record. The Commissioner declines to consider this additional evidence on review as it has been clear since the request for review that the review is on the record below and the Employer has not provided any reason much less a good reason to allow additional evidence.

