

United States Court of Appeals For the First Circuit

No. 11-2372

R. ALEXANDER ACOSTA, Secretary of Labor,
Petitioner,

v.

LESSARD ROOFING & SIDING, INC.; LESSARD BROTHERS CONSTRUCTION, INC.,
and their successors and/or alter egos,

Respondents.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: May 16, 2018

The Petitioner's unopposed motion for sanctions for failure to comply with our Judgments of December 19, 2011 and August 24, 2015 is allowed saving that, rather than direct the parties to execute the proposed stipulation, we order Respondents Stephen Lessard, Lessard Roofing and Siding, Inc., Lessard Brothers Construction, Inc., and their successors and/or alter egos to take the following steps to comply with the Court's Judgments:

A. Compliance with OSHA Standards

In order to satisfy the terms of Item 3 of the Court's Judgment dated December 19, 2011, ordering Respondents to "cease and desist from violating in any like or related manner OSHA standards or the General Duty Clause, Section 5(a) of the OSH Act, 29 U.S.C. § 654(a)," Mr. Lessard shall take the following actions to cure Respondents' contempt:

1. Develop a Written Comprehensive Safety and Health Program

(a) Within sixty (60) days of the date of this Order, Respondents shall contact the "Safety Works!" program at the Maine Department of Labor, 45 State House Station, Augusta, Maine

04333, telephone number (207) 623-7900, or an equivalent provider, and arrange for a comprehensive review of Respondents' operations, as well as for a consultation in order to develop and implement a written Comprehensive Safety and Health Program. To the extent Respondents consult with a provider other than the "Safety Works!" program, Respondents shall notify the OSHA Augusta area office of the identity and qualifications of the provider. The Comprehensive Safety and Health Program shall include, at a minimum:

(1) Clear identification of the person(s) assigned overall safety and health responsibilities for Respondents, together with a clear definition of the authority and resources given to that assignment;

(2) A description of the safety and health responsibilities of managers and supervisors;

(3) A description of the methods to be used to identify, evaluate and control safety and health hazards;

(4) Provision for employee involvement in safety and health matters to take advantage of their knowledge of their jobs and work environment and to assure adequate full communication in regard to safety and health issues and their resolutions;

(5) A system for performing a Worksite Analysis of every jobsite that Respondents, their employees, independent contractors and subcontractors work on as set forth below;

(6) A system for investigating all accidents and reported near misses to identify all contributing causes and implement protections;

(7) A procedure to encourage employees, independent contractors or subcontractors to report hazards to Respondents as soon as possible and to require Respondents to address such hazards promptly; and

(8) A comprehensive training program to ensure that:

(i) All employees understand the hazards to which they may be exposed;

(ii) All employees know the means to prevent harm to themselves and others from exposure to hazards;

(iii) All managers carry out their safety and health responsibilities effectively;

(iv) Supervisors are trained to understand the key role they play in job site safety and to enable them to carry out their safety and health responsibilities effectively. Training programs for supervisors shall include the following topics:

* Analyzing the work under their supervision to anticipate and identify potential hazards

* Maintaining physical protection in the work area, and

* Reinforcing employee training on the nature of potential hazards in their work and on needed protective measures through continual performance feedback and a disciplinary program through which enforcement of safe work practices is implemented.

(b) The written comprehensive safety program must cover all hazards that may reasonably be encountered on any of Respondents' jobsites.

(c) Respondents shall provide a copy of the written Comprehensive Safety and Health Program to the OSHA Augusta Area Office Area Director within sixty (60) days of the date of this Order.

2. Develop a Comprehensive Training Program

(a) Respondents shall establish and implement a comprehensive training program that covers all potential hazards Respondents, their employees or any other individuals working on its jobsites may encounter, including but not limited to, training with respect to: appropriate use of fall protection and installation and use of fall protection systems including guardrails, guardrail systems, toe boards, safety net systems and personal fall arrest systems; exposure to high voltage power sources; machine guarding; appropriate placement, implementation and use of ladders; appropriate installation, guarding and use of scaffolding; appropriate installation and use of ramps or stairways; ground conductor programs; appropriate use of personal protective equipment such as hard hats and traffic vests.

(b) Respondents shall provide each of their employees with a copy of Respondents' written Comprehensive Safety and Health Plan and shall provide each employee with training as set forth above and in accordance with Respondents' written Comprehensive Safety and Health Plan. Thereafter, each time Respondents hire a new employee, Respondents shall provide each new employee with a copy of Respondents' written Comprehensive Safety and Health Plan and with said Comprehensive training.

(c) Respondents shall provide re-training to all their employees at least once annually. In the event Respondents determine that any individual employee requires safety or health re-training (on account, for example, of such employee's failure to follow one or more safety rules), Respondents shall immediately provide remedial training to that individual.

(d) Respondents shall keep a record of all training and re-training they provide to any individual. Said records shall be provided to OSHA upon request without the need for a subpoena for the records.

3. Acceptance of Responsibility as Employer, General Contractor or Supervisory Contractor

(a) Respondents shall recognize and accept their responsibility as an employer, general contractor or supervisory contractor on any jobsite, to provide frequent and regular inspections of each and every jobsite on which they, their employees or individuals with whom they contract as independent contractors or subcontractors, work, including inspections of all materials and equipment on any such jobsite.

(b) Respondents shall recognize and accept their responsibility as an employer, general contractor or supervisory contractor to ensure that all employees, independent contractors or subcontractors are required to use all appropriate safety equipment and/or devices, including but not limited to, all appropriate fall protection, personal fall protection systems, equipment guarding protection and personal protective equipment.

(c) Respondents shall recognize and accept their responsibility as an employer, general contractor or supervisory contractor to ensure that employees, subcontractors or independent contractors who violate OSHA rules and regulations and/or Respondents' own safety and health program, at a minimum, are required to remove workers from the hazards, are informed of the appropriate rules, regulations and safety steps that need to be taken and necessary steps are taken to correct the violation.

4. Safety Equipment

(a) Respondents shall ensure that they are in possession of all appropriate safety equipment and/or devices for their employees necessary to ensure their safety and health while working for Respondents. Respondents may not charge their employees for the cost of purchasing or using such equipment or devices.

(b) Respondents shall ensure that all necessary fall protection apparatus or devices are present and appropriately utilized on all jobs where fall protection is mandated by OSHA regulations and/or where otherwise appropriate.

(c) Within thirty (30) days of the date of this Order, Respondents shall provide the Augusta Area OSHA office with a written description of all fall protection devices and personal protective equipment it owns or leases as of the date of submission.

5. Conduct Worksite Safety Analyses

(a) Job Hazard Analysis

For each job on which Respondents or their employees work, or jobsites in which they contract with independent contractors or subcontractors to perform work, Respondents shall perform a Job Hazard Analysis ("JHA") to identify the tasks that will be performed during the conduct of the job, determine the hazards associated with those tasks and ensure that all safety equipment necessary to perform such tasks safely are present and utilized on the job site.

(b) Competent Person

Respondents shall employ a "competent person" to ensure that work performed by Respondents' employees, independent contractors, subcontractors or other individuals working on Respondents' jobsites is done in accordance with Respondents' safety program and all applicable OSHA regulations. On each jobsite where Respondents or their employees work, or where Respondents have contracted for work to be performed by bona fide independent contractors or subcontractors (i.e., those deemed to be independent contractors or subcontractors, and not employees, under proper application of the governing law) or other individuals, Respondents shall have designated a "competent person" and each such competent person shall have received safety training prior to the work at the jobsite's being commenced. Such safety training shall address any and all potential safety hazards that might arise at the particular worksite, as identified in the JHA performed by Respondents prior to work being performed on any job. The competent person shall be responsible for ensuring that all employees comply with Respondents' safety program and all applicable OSHA regulations. In the event that any individual working on a job site fails, or refuses, to comply with Respondents' safety program and/or any OSHA regulation, the competent person shall take all steps necessary to ensure that all appropriate safety directives and regulations are followed.

(c) Daily Safety Meetings

Respondents shall establish and implement a system of pre-work briefings ("daily safety meetings") to review the work to be performed on the anticipated job, the hazards associated with those tasks and to ensure that all training, equipment and materials necessary for the safe performance of the job have been provided. On each jobsite where Respondents or their employees work, or where Respondents have contracted for work to be performed by bona fide independent contractors, subcontractors or other individuals, the competent person employed by Respondents shall conduct a daily safety meeting prior to any work starting.

6. Cooperate with OSHA

(a) For a period of one (1) year from the date of this Order, Respondents shall provide to OSHA advance notice, in writing, regarding each and every jobsite where Respondents or their employees work, or where Respondents have contracted for work to be performed including work to be performed by bona fide independent contractors or subcontractors. Notice shall be provided to the OSHA Area Office having jurisdiction over the particular worksite and such notice shall include the date and location of the jobsite, the duration of the job and a description of the work (type of repair or new work, etc.). Notice shall be provided at least seven (7) days in advance of the beginning of any work. In the event of an emergency situation, or where exigencies exist that make it impossible for Respondents to provide notice seven days in advance of work commencing, Respondents shall notify the OSHA Area Office within twenty-four (24) hours of work commencing.

(b) For a period of one (1) year from the date of this Order, OSHA may enter Respondents' premises or any jobsite where Respondents or their employees work, or where Respondents have contracted for work to be performed by independent contractors or subcontractors, without the need to obtain a warrant to do so; and further, during this one (1) year period, OSHA shall have

full and free access to documents related to abatement and compliance with the terms of this Order without the need to serve a subpoena for the production of such documents.

(c) Respondents shall cooperate with OSHA in any future investigation and with respect to providing proof of abatement of any violations; proof of training of its employees, independent contractors or subcontractors that they contract with; and in any other way to ensure the safety of workers.

B. Abatement of Violations

In order to satisfy the terms of Item 1 of the Court's Judgment dated December 19, 2011 regarding abatement of the violations described in citations issued under Lessard inspection numbers, Respondent Stephen Lessard, for himself personally and on behalf of Lessard Roofing and Siding, Inc. and Lessard Brothers Construction, Inc. and their successors, assigns or alter egos, shall certify under the pains and penalties of perjury, based upon personal knowledge, information and belief, that the specific violations observed in Inspection No. 314960857 conducted on December 9, 2010, Inspection No. 314840828 conducted on November 4, 2010, Inspection No. 112527346 conducted on July 12, 2010, Inspection No. 112526975 conducted on May 12, 2010, Inspection No. 112526264 conducted on January 6, 2010, Inspection No. 112520952 conducted on November 17, 2008, Inspection No. 309984714 conducted on July 13, 2006, Inspection No. 309673523 conducted on January 11, 2006, Inspection No. 112515507 conducted on May 6, 2005, Inspection No. 307475657 conducted on June 28, 2004, and Inspection No. 112802046 conducted on July 21, 2003 have been abated. Such abatement must include development of a written comprehensive safety and health program and development of a comprehensive training program as set forth above, as Respondents have previously been cited by OSHA for failure to train its employees regarding safety.

C. Payment of Penalties

In order to purge Respondents' contempt of the terms of Item 2 of the Court's Judgment dated December 19, 2011 regarding payment of penalties, within twenty (20) days of the date of this Order, Mr. Lessard shall provide the U.S. Department of Labor with the following documentation: all personal and corporate bank statements for the period April 1, 2015 through the date of this Order, all personal and corporate federal and state tax returns for tax years 2012 through 2016, company balance sheets for years 2012 through 2016, company income statements and cash flow statements for years 2012 through 2016, and company profit and loss statements for years 2012 through 2016. The Department shall review material submitted by Mr. Lessard and may request that he provide additional documentation or explain the contents of the documents submitted. The Department shall provide Mr. Lessard and the Court with its evaluation of Mr. Lessard's ability to remit payment toward the penalties within sixty (60) days after the production of all documents by Mr. Lessard to the Department. The Department shall have the right to request that Mr. Lessard be subject to a financial examination as a result of the materials he submits to the Department.

The Respondents continue to be liable for penalties in the amount of \$389,685. Should the Respondents fail to comply with this Order, we will consider additional coercive sanctions up to

and including the incarceration of Stephen Lessard and any other individual who, with notice and knowledge of our judgments or this Order, may be found responsible for noncompliance.

So ordered.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Lisa A. Wilson
Maureen L. Canavan
Stephen Lessard