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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant v. International Fire Protection, Inc., Respondent.	OSHRC Docket No. **18-0643**

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Before the court is Respondent's *Motion for Summary Judgment* filed February 1, 2019. In it, Respondent, International Fire Protection, Inc. (IFP), argues the Secretary cannot meet his burden to establish either of the two alleged violations at issue. IFP contends the undisputed facts establish it did not violate the terms of the standard cited in Item 1, Citation 1. Regarding Item 2, Citation 1, IFP contends the undisputed facts establish the applicability of the exception to the cited standard. In addition, IFP contends it has established, as a matter of law, the affirmative defense of unpreventable employee misconduct.[1] The Secretary counters material facts remain in dispute as to whether IFP violated the cited standards. The Secretary contends the facts pled by IFP do not meet its burden with regard to the applicability of the exception to the standard alleged in Item 2, Citation 1, or the affirmative defense of unpreventable employee misconduct. For the foregoing reasons, Respondent's *Motion for Summary Judgment* is **DENIED**.

BACKGROUND

IFP installs, inspects, and replaces sprinkler systems. In 2017, IFP had a contract with Gulf Power to repair and replace a portion of a sprinkler system in a cooling tower at Gulf Power's James F. Crist Generating Plant (Plant Crist) in Pensacola, Florida. The cooling tower

[1] Respondent filed a motion to amend its Answer February 27, 2019, to plead the affirmative defense of unpreventable employee misconduct. The Secretary opposed the motion. By separate order, the Court granted that motion.

was approximately 50 feet tall ([redacted] Deposition[2] at 25). The submissions of the parties included photographs of the inside of the cooling tower. It consists of a crisscross of beams. The parts of the sprinkler system on which IFP employees were working were attached to the topmost beams, almost 50 feet above the ground ([redacted] Deposition at 21).

On October 2, 2017, three weeks into the project, a crew of IFP employees were working on the sprinkler system when [redacted], one of IFP's foremen, fell. To access the overhead sprinkler system, the crew was using commercially available wooden boards as working platforms or what Mr. [redacted] referred to as "walk boards." ([redacted] Deposition at 30, 37). According to Mr. [redacted], the crew would also stand on the beams from time to time ([redacted] Deposition at 31). Just before he fell, Mr. [redacted] had been sliding the walk board down as he moved along the work area. The beam slipped; Mr. [redacted] and the beam both fell.

Fortunately, Mr. [redacted] had been using a personal fall arrest system. The system consisted of a strap, a "retract," and the safety harness Mr. [redacted] was wearing ([redacted] Deposition at 68). The strap was looped around the overhead beam ([redacted] Deposition at 69). The retract was a retractable lanyard attached to the strap on one end and onto a D-ring on the back of Mr. [redacted]'s harness on the other ([redacted] Deposition at 69). Mr. [redacted] explained the retract expands and retracts as the worker moves along the work area ([redacted] Deposition at 69). As he fell, Mr. [redacted] believes his arm first hit one of the beams on the level at which he had been standing ([redacted] Deposition at 72). He then came to rest, hanging from the personal fall arrest system, somewhere between the level on which he had been standing and the level below. Mr. [redacted] was severely injured from the fall ([redacted] Deposition at 71-72).

Upon receiving a report of the accident, the Jacksonville, Florida, OSHA Area Office conducted an inspection of the worksite. Compliance Safety and Health Officer (CSHO) Esley Chester was assigned to conduct the inspection. As a result of his inspection, he recommended a serious citation be issued to IFP alleging two violations of § 5(a)(2) of the Act. Item 1,

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[2] Both parties submitted portions of the transcripts from depositions taken in this proceeding. For ease of reading, the court refers to this testamentary evidence by the name of the deponent and not the designation in the parties' submissions.

Citation 1, alleges a violation of 29 C.F.R. § 1910.140(d)(2)(ii) for failure to ensure employees using a personal fall arrest system could not free fall more than 6 feet. CSHO Chester based this recommendation on his conclusion Mr. [redacted]'s personal fall arrest system had allowed him to fall more than 6 feet. Item 2, Citation 1, alleges a violation of 29 C.F.R. § 1926.451(b)(2) for failure to ensure platforms or walkways of scaffolds were at least 18 inches wide. CSHO Chester based this recommendation on his conclusion the boards on which IFP employees were working were no more than 12 inches wide. IFP timely contested the citations.

Prior to the scheduled hearing, IFP filed its motion for summary judgment. The Secretary timely filed his response. IFP was given leave to file a reply. On March 11, 2019, the court heard oral arguments on IFP's motion. The undersigned has considered all the submissions of the parties as well as arguments presented at oral argument.

ANALYSIS

Standard on Summary Judgment

Summary judgment is properly granted only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In *Ford Motor Company—Buffalo Stamping Plant*, 23 BNA OSHC 1593 (No. 10-1483, 2011), the Commission set forth the standards for judges considering summary judgment motions:

> In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . Rather, the role of the judge is to determine whether any such disputes exist. . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them.

Id. (citations and footnote omitted.)

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the

evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). Because the Secretary has the burden of proof, Respondent need only come forward with evidence that undermines one element of the Secretary's case or "demonstrate that the evidence in the record falls short of establishing" that element of the Secretary's case. *International Shortstop, Inc. v. Rally, Inc*., 939 F.2d 1257, 1264 (5th Cir., 1991). In response, the Secretary must come forward with evidence from which a fact finder could return a verdict in its favor. *Id*.

IFP has raised the affirmative defense of unpreventable employee misconduct with regard to both alleged violations. IFP has the burden to establish this affirmative defense. With regard to Item 2, Citation 1, IFP contends the exception to the strict requirements of the standard found at § 1926.451(b)(2)(ii) applies. It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show it qualifies for that exception. *C.J. Hughes Construction, Inc.,* 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). IFP has the burden to establish the lack of any material fact with regard to each element of its affirmative defense and the applicably of the exception to § 1926.451(b)(2)(ii).

Item 1, Citation 1: Alleged Violation of 29 C.F.R. § 1910.140(d)(2)(ii)

In Item 1, Citation 1, the Secretary alleges IFP failed to ensure the personal fall arrest system used by IFP employees installing the sprinklers in the cooling tower prevented a free fall of greater than 6 feet. The cited standard at § 1910.140(d)(2)(ii) requires personal fall arrest systems be "rigged in such a manner that the employee cannot free fall more than 6 feet (1.8 m) or contact a lower level…"[3] IFP takes issue with only one element of the Secretary's burden. IFP contends the Secretary cannot establish IFP failed to comply with the terms of the standard because the undisputed facts show the injured employee did not fall more than 6 feet. The Secretary responds witness statements taken during the inspection contrary to IFP's evidence

[3] The standard provides an exception IFP does not claim applies.

create an issue of fact that requires weighing of evidence, necessitating denial of summary judgment.

IFP was in violation of the cited standard if the personal fall arrest system used by any of its employees allowed a free fall of more than 6 feet. The evidence presented by IFP in support of its position falls short of establishing the lack of a material fact regarding that issue. Neither Mr. [redacted], nor Sam Gilchrist, IFP's other supervisor on site, could testify as to the length of the strap or retractable lanyard used by the employees at the site ([redacted] Deposition at 69; Gilchrist Deposition at 57). Information obtained by CSHO Chester indicates Mr. [redacted]'s strap was 12 feet long and the retractable lanyard was 10 feet long (Exhibit D of Respondent's Motion at Bates Label Secretary_ 000160). IFP contends the system is designed to catch before an employee falls more than 6 feet. It did not present facts to support that contention.

The deposition testimony of Mr. [redacted] and Mr. Gilchrist relied upon by IFP do no more to definitively resolve the issue. Both Mr. [redacted] and Mr. Gilchrist testified they estimated Mr. [redacted] fell 5 to 6 feet. The cited standard prohibits the use of equipment that allows for a "free fall" of 6 or more feet. The standard defines "free fall distance" as

> the vertical displacement of the fall arrest attachment point on the employee's body belt or body harness between onset of the fall and just before the system begins to apply force to arrest the fall. This distance excludes deceleration distance, lifeline and lanyard elongation, but includes any deceleration device slide distance or self-retracting lifeline/lanyard extension before the devices operate and fall arrest forces occur.

29 C.F.R. § 1910.140(b). Nothing in the deposition testimony of Mr. [redacted] or Mr. Gilchrist confirms either used this definition of free fall when testifying Mr. [redacted] fell 5 to 6 feet. Mr. [redacted] was unable to provide an explanation of how he determined he fell 5 to 6 feet. He later conceded he did not know how far he free fell ([redacted] Deposition at 94). Mr. Gilchrist's prior statement to CSHO Chester was that Mr. [redacted] fell 8 to 10 feet. In his deposition he stated that prior statement was incorrect but did not explain why. Importantly, although both estimated the identical fall distance, they gave meaningfully different accounts of Mr. [redacted]'s position when he came to rest ([redacted] Deposition at 73; Gilchrist Deposition

at 24).[4] IFP's own evidence fails to establish the absence of a factual dispute regarding whether the personal fall arrest system used by IFP employees prevented a free fall of more than 6 feet.

In his response, the Secretary points to two statements contained in CSHO Chester's investigation file in which the witnesses estimate Mr. [redacted] fell either 7, or 8 to 10 feet. IFP counters this testimony is not based on first-hand knowledge because the two witnesses did not see Mr. [redacted] fall. There is no dispute the two witnesses were at the worksite. The fact they did not witness the fall does not render their testimony immaterial to a factual issue in dispute. The witnesses would be familiar with the configuration of the worksite. The signed witness statement indicates the witness did see Mr. Gilchrist assisting Mr. [redacted] after the fall, such that he would be able to establish where Mr. [redacted] had come to rest (Exhibit D of Respondent's Motion at Bates Label Secretary_ 000204-05). Contrary to IFP's assertion, disregarding this evidence entirely would require the court to consider its probative value and give it little or no weight. Such is not appropriate on summary judgment.

Given the evidence presented fails to resolve a material fact in issue, IFP's motion for summary judgment on Item 1, Citation 1, is denied.

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1926.451(b)(2)

In Item 2, Citation 1, the Secretary alleges a violation of § 1926.451(b)(2) which requires "each scaffold platform and walkway shall be at least 18 inches (46 cm) wide." The standard provides for two exceptions specified in §§ 1926.451(b)(2)(i) and (ii). The Secretary alleges IFP employees working in the cooling tower stood on boards that were less than 18 inches wide. In its motion, IFP does not dispute the standard applies to the cited condition, it failed to comply with the terms of the standard, employees were exposed to a fall hazard, or that it was aware it was using boards as work platforms that were not 18 inches wide. IFP contends the exception to the mandatory provisions of the cited standard at § 1926.451(b)(2)(ii) applies.

The exception at § 1926.451(b)(2)(ii) states:

> Where scaffolds must be used in areas that the employer can demonstrate are so narrow that platforms and walkways cannot be at least 18 inches (46 cm) wide,

[4] Mr. [redacted] testified when he came to rest the beam at the level on which he had been standing was above him, but he could reach it ([redacted] Deposition at 73). He later conceded he did not know how high above him the beam was ([redacted] Deposition at 94-95). Mr. Gilchrist testified the connection point of Mr. [redacted]'s harness was above the beam at the level on which Mr. [redacted] had been standing (Gilchrist Deposition at 24).

> such platforms and walkways shall be as wide as feasible, and employees on those platforms and walkways shall be protected from fall hazards by the use of guardrails and/or personal fall arrest systems.

IFP has the burden to establish the applicability of the exception. *C.J. Hughes,* 17 BNA OSHC at 1756. To do so, IFP must show the area inside the cooling tower was so narrow 18-inch platforms would not fit, that the platforms they used were "as wide as feasible," and it protected employees working on the narrower platforms from falls by either guardrails, a personal fall arrest system, or both. The Secretary did not dispute IFP used a personal fall arrest system for employees working in the cooling tower.

To establish applicability of the exception, and prevail on summary judgment, IFP would need to show the absence of a dispute of material fact with regard to whether 18-inch platforms fit in the space and that the boards it used were "as wide as feasible." IFP focuses exclusively on the issue of whether 18-inch boards would have fit through the opening at the top of the cooling tower. The evidence relied upon by IFP does not establish that fact. IFP presented the deposition testimony of Dylon McKeough in support of its contention 18-inch boards did not fit in the space. Mr. McKeough testified after the accident he rented scaffold boards and his attempts to fit those through the opening at the top of the cooling tower was unsuccessful (McKeough Deposition at 113).[5] He describes the boards as 12 feet long. He did not testify as to the relevant measurement for the boards – the width. All this evidence establishes is that a commercially available scaffold board that was 12 feet long did not fit.[6] Mr. McKeough's testimony focuses on why the length of the board posed a problem (McKeough Deposition at 25). Even assuming the board used by Mr. McKeough was 18 inches wide, there is no explanation in the materials provided why it was necessary for the board to be 12 feet long. IFP's own evidence suggests it was not. The boards used by the crew were 8 feet long

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[5] IFP initially relied on the declaration of Melinda McKeon, its corporate safety director, in which she attests to what she recalled Mr. McKeough's deposition testimony had been. The Secretary's response includes portions of the deposition transcript and IFP included portions of the deposition transcript with its Reply. I have relied on the deposition transcript and not the hearsay statements contained in Ms. McKeon's declaration.

[6] In its memoranda, IFP repeatedly refers to the boards as "OSHA-approved." In oral argument IFP conceded Mr. McKeough did not use that term. The undersigned takes judicial notice the Act does not include as part of OSHA's mandate the testing and approval of commercial products and, as a regulatory agency, OSHA does not do so. *https://www.osha.gov/laws-regs/standardinterpretations/1993-09-15*. IFP leaves to speculation the meaning of that term.

(McKeough Deposition at 26). IFP has not presented evidence supporting its contention the exception to the cited standard applies.

IFP also failed to present evidence in support of its burden to establish the remaining element of the exception. IFP repeatedly states, without citing to any factual support, the boards it was using were "as wide as feasible." The evidence presented does not definitely establish the size of the boards IFP used. Mr. [redacted] testified the boards were either 2 x 6 or 2 x 8 ([redacted] Deposition at 30-31). Mr. Gilchrist testified the boards were 2 x 8 or 2 x 10 (Gilchrist Deposition at 16, 27). Mr. McKeough, who supplied the boards, testified they were 2 x 8 (McKeough Deposition at 26). None of the testamentary evidence provided by IFP supports the contention the boards used were the widest boards that feasibly fit in the space. To the contrary, Mr. McKeough's testimony was that a board as wide as 29 inches might fit if it were shorter (McKeough Deposition at 26). He later testified he could not say what the widest possible board would be (McKeough Deposition at 27). IFP has not provided undisputed factual support for its assertion it used boards that were "as wide as feasible."

Having failed to present undisputed facts in support of its burden to establish the applicably of the exception to the cited standard, IFP's motion for summary judgment on Item 2, Citation 1, is denied.

Unpreventable Employee Misconduct Affirmative Defense

To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2218 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).

IFP contends the uncontroverted evidence establishes it has met all elements of its burden of proof. The Secretary contends IFP has failed to address the elements necessary to establish its higher burden given the misconduct was that of a supervisor. The Commission has long held, and recently reiterated,

> Where, as here, an employer defends against an alleged violation on the ground of unpreventable *supervisory* misconduct, "the employer's burden of proof [is] 'more

> rigorous' and the defense 'more difficult to establish …" because "supervisory involvement in asserted misconduct is strong evidence that the employer's safety program is lax." *CBI Serv's, Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001) (citing *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-0945, 1993)).

Florida Gas Contractors, 27 BNA OSHC 1799, 1807 (No. 14-0948, 2019). In its Reply, IFP did not dispute Mr. [redacted] was a supervisor at the worksite and the evidence presented tends to support that contention. Applying either burden, IFP has failed to establish the absence of material facts with regard to at least three elements of its burden of proof.

IFP presented evidence it has written safety rules within its safety manual that mirror the language of the cited standards. IFP failed to present evidence it effectively communicated those rules to its employees. Although provided with the company's safety manual, Mr. [redacted] testified he could not recall having read it and IFP never tested his understanding of it ([redacted] Deposition at 34-35, 87). IFP presented evidence it conducted safety training in a variety of ways, including daily toolbox talks, monthly safety meetings, annual safety meetings, and formal OSHA classes. However, when specifically asked about his understanding of the free fall distance afforded by his personal fall arrest system, Mr. [redacted] testified he was unaware of such a rule and none of his training covered that issue ([redacted] Deposition at 75, 78-79). He similarly was unaware of any rule regarding the requirements that scaffold boards be a minimum width ([redacted] Deposition at 83-84). Mr. Gilchrist, the other supervisor onsite, testified his scaffold training consisted of watching a video on building scaffolds (Gilchrist Deposition at 21). Mr. Gilchrist's deposition testimony and prior statement failed to show an understanding of the requirements for the width of a scaffold's platform or walkway (Gilchrist Deposition at 26-28). Facts remain in dispute whether IFP effectively communicated its work rules to its employees.

IFP's evidence regarding its attempts to discover violations and to discipline those who violated its rules also fails to meet of its burden. IFP included in its submission over 100 completed forms it purports represent safety audits.[7] It is impossible to discern from the face of these forms who conducted the audits or what the audits entailed. None reference Plant Crist in Pensacola, Florida. Mr. [redacted] testified he never saw anyone from management inspect the

[7] The forms were attached to the affidavit of IFP's counsel, Aaron Dean, as Exhibit G.

site ([redacted] Deposition at 86). There is no evidence either supervisor onsite performed inspections of the worksite for safety violations. Material facts remain in dispute whether IFP took steps to discover safety violations at Plant Crist.

Material facts remain in dispute whether IFP effectively enforced its rules. The only evidence of any disciplinary action taken was the vague recollection of Mr. [redacted] that someone had been "written up" for not wearing his hard hat or safety glasses at another worksite ([redacted] Deposition at 88-89). The Secretary counters there is no evidence anyone was ever disciplined for the alleged violations on this worksite. IFP has failed to establish the absence of a factual dispute with regard to its unpreventable employee misconduct defense.

Application for Legal Fees

In its motion, IFP seeks "legal fees and costs under the Equal Access to Justice Act." IFP's request is premature. Commission rules prescribe specific procedures implementing the Equal Access to Justice Act, 5 U.S.C. § 504. See 29 C.F.R. part 2204. Under these rules, "[a]n application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding…" 29 C.F.R. § 2204.302(a). Because IFP has not yet prevailed, its application for fees is premature and, therefore, denied.[8]

CONCLUSION

For the foregoing reasons, Respondent's *Motion for Summary Judgment* is **DENIED**.

SO ORDERED.

/s/

Date: March 20, 2019

Judge Heather A. Joys
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[8] The undersigned notes IFP's request for fees fails to conform to multiple requirements in part 2204. Nothing in this ruling is intended to preclude IFP from filing an application for fees that complies with the requirements of the Commission's rules should it ultimately prevail in this proceeding or a portion thereof.