

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

BURCH CONSTRUCTION, INC., and its
successors,

Respondent.

OSHRC DOCKET NO. 01-1165

APPEARANCES:

For the Complainant:

Jason G. Vorderstrasse, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Robert P. Stricker, Stricker & Ball, San Diego, California

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Burch Construction, Inc., and its successors (Burch), at all times relevant to this action maintained a place of business at Miramar Marine Air Station, San Diego, California, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 23-25, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Burch's Miramar work site. As a result of that inspection, on June 15, 2001 Burch was issued a citation alleging a repeat violation of §1926.501(b)(1) of the Act together with a proposed penalty. By filing a timely notice of contest Burch brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 8, 2002, a hearing was held in San Diego, California. At the hearing, Complainant admitted that Burch had not previously been cited for a violation of §1926.501(b)(1), and that the subject citation should not have been classified as a "repeat" violation. The classification and proposed

penalty were adjusted accordingly (Tr. 95-101; Exh. C-9). As no amended Complaint was filed, Complainant's representations at hearing are construed as a motion to amend the June 15, 2001 citation. Said citation is amended to conform to the understanding of the parties. The parties have submitted briefs on the issues as amended and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1, as amended, alleges that:

29 CFR 1926.501(b)(1): Each employee engaged in roof activities on low slope roofs, with unprotected sides or edges 6 feet or more above lower levels was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems.

a) Building 5534 & 5535 Miramar Marine Air Station: Employees working on roof 35 feet high and within one foot of edge was not protected by a guard rail system, or personal fall arrest system.

Facts

On the morning of April 23, 2001, OSHA Compliance Officer (CO) Marion Moore arrived at Burch's Miramar work site, the rooftop of barracks 5534 and 5535 (Tr. 17-19). Moore testified that when he arrived, he parked his car 50 to 75 feet from the barracks. From his location he could see two Burch employees working on the roof, which was approximately 35 feet above the ground (Tr. 20, 32, 70). One of the men, Gilberto Ribera, remained within two to three feet of the edge for approximately 20 minutes while Moore watched (Tr. 33). The other, Adan Baltazar, was bringing materials out from the center of the roof, and was exposed to the edge for only about five minutes of that time (Tr. 33-34). Moore testified that though the men were wearing harnesses, it did not appear that the two men had lanyards attached to the D rings on the back on their harnesses (Tr. 21). Between 8:27 and 8:29 a.m. Moore took three photographs in which no lanyards are visible (Tr. 24, 39, 43, 107; Exh. C-3 through C-5). At 8:29 and 8:30 Moore took two more pictures, in which there do appear to be lanyards attached to the workers' harnesses (Tr. 22, 44-51, 107). Nonetheless, Moore met with Ribera and Baltazar, together with Burch's supervisor, James Kruse (Tr. 55, 59). Moore testified that he asked the workers why they were not tied off. According to Moore, the men told him that they forgot to hook up (Tr. 59).

On cross-examination, Moore admitted that his testimony was inconsistent with his written report of the incident, recorded on May 7, 2001. In his written report Moore wrote that "[i]mmediately when the employees saw me they reached down and hooked their restraint lanyard to the fall protection cable on top of the building" (Exh. C-1). At the hearing Moore admitted that he never saw the

employees hooking up their lanyards (Tr. 118-20). Moore wrote that the employees hooked up their lanyards to explain the appearance of lanyards in the photos taken after 8:28 a.m. (Tr. 120). In addition, in his report, Moore wrote that the two employees who were not tied off were observed moving from one part of the building to another, in direct contradiction to his testimony at trial, in which he stated that one of the unrestrained men, Ribera, remained on the edge of the roof for the entire 20 minutes Moore observed him (Exh. C-1).

James Kruse testified that he observed both Ribera and Baltazar on the roof until approximately 7:15 a.m. the morning of the inspection (Tr. 179, 182). According to Kruse, both were tied off (Tr. 179). Kruse did not understand why Baltazar told Moore he forgot to tie off. Kruse stated that there was a lot of confusion, and that Baltazar did not speak much English (Tr. 181-82).

Jeff Sullivan, the Project Superintendent on the Miramar job (Tr. 139), testified that he inspected the roof of barracks 5534 and 5535 at 7:15 a.m. on the morning of the OSHA inspection (Tr. 149). Sullivan testified that the Burch employees on the roof were all tied off to the lifeline at that time (Tr. 149). Sullivan stated that the lifelines might not have been immediately visible to the naked eye, or have shown up in photographs because of the glare from the sun (Tr. 162). Sullivan was present when Moore questioned the Burch laborers, and stated that he told Moore that Adan Baltazar was not a native English speaker (Tr. 157). Sullivan did not believe that Baltazar understood Moore's questions (Tr. 157-58).

Adan Baltazar, a Spanish speaker, testified, through an interpreter, that he was tied off the morning of the OSHA inspection (Tr. 136). Baltazar admitted that there were times when he unhooked his lanyard to move away from the edge of the building to get materials, but stated that he was always tied off when he was near the edge (Tr. 137). Baltazar could not recall telling Moore that he forgot to tie off (Tr. 136).

Gilberto Ribera testified that he was attached to his lifeline the entire morning of the OSHA inspection (Tr. 172). Ribera confirmed that Baltazar was tied off except when he moved away from the edge of the building to get materials (Tr. 172-75).

Discussion

The cited standard provides:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991). In this case Complainant failed to carry its burden of proof.

The photographic evidence in this case is inconclusive at best. Complainant's CO, Moore, admits that in his later photographs, which were taken within a minute of the earlier photographs, the cited employees are tied off. Moore admits that he never saw either of the cited employees hook up their lanyards during those unrecorded seconds. The most plausible explanation for Moore's failure to observe the men hooking up is that the men were, in fact, hooked up the entire time. That the lanyards are indiscernible in the earlier photographs was reasonably explained by the project superintendent, Jeff Sullivan, who pointed out that the lanyards are difficult to see with the sun behind them. Additional portions of Moore's testimony at the hearing did not correspond to his notes of the inspection. At the hearing, Moore stated that one of the unrestrained employees remained at the edge of the roof for 20 minutes; in his notes he stated that both unrestrained employees were moving about the roof. Finally, though Sullivan, Kruse, and Ribera agreed that Baltazar told Moore he forgot to tie off, all pointed out that Baltazar's English is poor. At the hearing, Ribera and Baltazar both testified that they were tied off whenever they were near the roof's edge.

Given the inconsistent nature of Moore's account and employee Baltazar's poor English, this judge cannot find, by a preponderance of the evidence, that the cited standard was violated. Citation 1, item 1 is, therefore, dismissed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is VACATED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: May 22, 2002