

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

CB&I Constructors, Inc.,

Respondent.

OSHRC Docket No. 03-1357

Appearances:

Suzanne F. Dunne, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois
For Complainant

Carl B. Carruth, Esq., McNair Law Firm, Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

CB&I Constructors, Inc., erects structures, such as elevated water tanks, out of prefabricated metal plates. On December 24, 2002, a CB&I employee fell to his death while working on a water tower under construction in Smithton, Illinois. On December 26, 2002, Occupational Safety and Health Administration (OSHA) compliance officer Cynthia Wagner began an investigation of the fatality. As a result of her investigation, the Secretary issued a citation to CB&I on June 24, 2003.

Item 1 of the citation alleges a serious violation of § 1926.20(b)(2) for failing to have a designated competent person make frequent and regular inspections of the job site, materials, and equipment. CB&I did not contest item 2, which alleged a serious violation of § 1926.1051(b) for failure to install a fall protection device for use by employees while ascending and descending a fixed ladder. Item 2 subsequently became a Final Order of the Commission.

A hearing was held on item 1 of the citation on October 23, 2003, in St. Louis, Missouri. CB&I contends that the Secretary failed to prove that CB&I violated the terms of § 1926.20(b)(2).¹ CB&I also asserts the affirmative defense of unpreventable employee misconduct.

For the reasons discussed below, it is determined that CB&I committed a serious violation of § 1926.20(b)(2). Item 1 is affirmed.

Background

On December 24, 2002, CB&I had a crew of five men working on the water tower construction site in Smithton, Illinois (Tr. 12-14). The water tower consists of a bottom section (the bell) shaped like a cone. At the top of the bell is a solid metal platform called the “condensate ceiling.” Above the condensate ceiling is a shaft that extends vertically to the upper shaft platform. Above the upper shaft platform is the ball (which actually holds the water) and an access tube that extends through the center of the ball and opens into the roof of the water tower. The ball was constructed to hold 300,000 gallons of water. The overall height of the water tower is approximately 180 feet. The distance from the ground floor to the bottom of the ball is approximately 137 feet (Exh. C-1; Tr. 10-11, 24, 34-35, 57).

The water tower contains three fixed metal ladders. The lowest ladder is used to gain access to the condensate ceiling from the floor of the bell. It extends from the bell’s floor at an angle up to the manhole opening in the condensate ceiling. The middle ladder (which is the ladder at issue in this case) is a vertical ladder that extends up the shaft from the condensate ceiling to the upper shaft platform. The highest ladder is a vertical ladder that extends up the access tube from the upper shaft platform to the roof of the water tower. Employees had to climb the shaft ladder to gain access to the access tube and the roof (Tr. 15, 34-35).

During the construction of the water tower, CB&I employees installed scaffolding inside the shaft at vertical intervals of 8 feet (Tr. 16). Approximately one week prior to the December 24 fatality, CB&I removed the scaffolding. On Wednesday morning, December 19, CB&I supervisor

¹ CB&I also asserts that the Secretary failed to properly promulgate the cited standard, rendering it invalid. CB&I concedes that Commission precedent precludes the undersigned from considering its argument (*see Daniel Construction Co*, 5 BNA OSHC 1005 (Nos. 7734 & 7672, 1977) and *General Motors Corporation*, 9 BNA OSHC 1331 (No. 79-4478, 1981), but raises it “to assure that this issue will be preserved for a possible appeal to the Review Commission and/or the Fifth Circuit Court of Appeals if such an appeal becomes necessary” (CB&I’s brief, p. 21).

Todd Little instructed employees Dustin Nelson and Gary Giddings to install a safety cable that the employees would use as a vertical lifeline when ascending or descending the ladders. Little had left the safety cable to be installed on the upper shaft platform. In order to install it, the employees would have to fasten one end of the cable to an anchorage point and drop it down the shaft (Tr. 133). Little later asked the employees if they had installed the safety cable as instructed. They informed Little that they had done so. Later it was discovered that Nelson and Giddings had not, in fact, installed the safety cable (Tr. 16, 127-129, 143-144).

On Monday, December 24, 2002, the crew was returning to work after their lunch break. Pusher Shawn Stromquest climbed the shaft ladder to the upper shaft platform, followed by Giddings. Little was outside the tower running a mobile crane. At some point Giddings fell approximately 130 feet from the middle ladder. He died as a result of injuries he sustained in the fall (Tr. 24-25).

The Citation

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that CB&I committed a serious violation of § 1926.20(b)(2), which provides:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The citation alleges that CB&I violated this standard when its designated competent person, "who was on the site daily . . . did not perform frequent and regular inspections of the site whereby he should have discovered a fall hazard due to the lack of installation of a ladder fall protection system on the fixed ladder inside the tower."

Section 1926.32(f) defines “competent person” as “one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.”

It is undisputed that § 1926.20(b)(2) applies to the cited condition. It is also undisputed that the crew of five workers present on December 24, 2002, were exposed to violative conditions occurring on the worksite. It remains for the Secretary to establish that CB&I violated the terms of the standard and that it knew, or with the exercise of reasonable diligence, should have known of the violation.

Did CB&I Violate the Terms of § 1926.20(b)(2)?

Todd Little had day-to-day supervisory authority over the other four crew members (Tr. 12-13). One of the crew members, Shawn Stromquest, was employed as a “pusher.” A pusher hangs steel, fits seams, and helps with the grinding on the prefabricated plates. He also oversees onsite safety (Tr. 114).

Both Little and Stromquest were designated as competent persons on the water tower site (Tr. 113). When asked why CB&I had two competent persons designated for the worksite, Little responded, “Well, there are two different areas in which we work. One man is on the ground normally, and one man is in the air [inside the water tower]. And you can’t readily watch the activities in the air from one area to another” (Tr. 126). Little spent most of his time on the ground, while Stromquest worked inside the water tower (Tr. 114-115).

Little told Wagner that he himself had not inspected the shaft to verify that Nelson and Giddings had installed the safety cable (Tr. 13). Little testified that he did not make a visual inspection of the shaft (Tr. 144). If the cable had been installed, it would have been visible from the shaft ladder (Tr. 22).

James Rhudy is CB&I’s vice president for health, safety, and environmental (Tr. 55). He testified that it is CB&I’s policy to designate two competent persons for each worksite, usually the pusher and the superintendent (Tr. 61). All employees designated as competent persons attend CB&I’s Accident Prevention I course. This course includes the National Safety Council’s 24-hour

supervisor course and OSHA's 10-hour construction course, as well as an overview of CB&I's safety rules (Tr. 62). Pushers and supervisors take the Accident Prevention I course (Tr. 264).

The pusher's duties primarily occur inside the structure being erected. Both the supervisor and the pusher's duties include inspections of the work site. The competent persons complete a weekly written safety questionnaire on the worksite's conditions (Tr. 65). Their inspections are not limited, however, to once a week. Rhudy stated that the competent person "has the authority and the responsibility to continually enforce and inspect for safety during the entire work hours on the job. It's not solely limited to that of once a week. It exists, every day, every hour, everything that the pusher does as well as that of a superintendent" (Tr. 66). Both competent persons "have the authority and the responsibility to take corrective measures immediately. They have the authority and the responsibility to stop work until the issue is resolved" (Tr. 66).

Stromquest had worked for CB&I for 9 years at the time of the fatality. He had completed the Accident Prevention I course in September 2002. The Smithton water tower project was Stromquest's first project as a pusher (Tr. 105). Little had worked for CB&I for 20 years at the time of the fatality. The Smithton water tower project was his first project as a superintendent. Previously, Little had worked as a pusher (Tr. 112-113).

Rhudy testified that the construction of the water tower at issue was considered a routine project for CB&I, and that it was a standard practice to install a safety cable for a lifeline once the scaffolding had been removed from the shaft (Tr. 72-73). Little testified that he relied on Stromquest to assure conditions inside the water tower were safe (Tr. 114).

Exhibit R-3 is a copy of the company's written questionnaire purportedly filled out by Stromquest on December 23, 2002, the day before Giddings's death. CB&I adduced this copy as evidence that Stromquest had conducted an inspection just prior to accident. Unlike the other questionnaires submitted (Exhibits R-2 and R-4), Little did not initial the completed questionnaire, nor did the safety leader of the week. Little stated that the questionnaire had been put on his desk and that he had not gotten around to initialing it (Tr. 117-118). Stromquest did not testify at the hearing. Exhibit R-3, standing alone, is insufficient to show that Stromquest actually conducted an inspection of the worksite.

Rhudy and Little testified that, had Stromquest done a proper inspection, he would have noted the absence of the safety cable (Tr. 77-78, 102, 130-131). The day of the fatality, Stromquest climbed the fixed ladder where the safety cable was supposed to have been installed. Where inspections are insufficient to identify a recognizable hazard, the employer is in noncompliance with the requirement that inspections be conducted by a competent person. *DiGioia Bros. Excavating*, 17 BNA OSHC 1181, 1184 (No. 92-3024,1995). Stromquest was removed from his position as pusher as disciplinary action for failing to assure the safety cable was installed (Tr. 104-105). At the time of the hearing, Stromquest no longer worked for CB&I.

The record establishes that Little and Stromquest were properly trained as competent persons, and that CB&I had a written safety program that provided for frequent and regular inspections. The record also establishes, however, that in the instant case Little and Stromquest together failed to make the frequent and regular inspections necessary to comply with the cited standard. An obvious hazard existed at the worksite for five days without being detected by either of the two designated competent persons.

The Secretary has proven that CB&I failed to comply with the terms of § 1926.20(b)(2). Its designated competent persons failed to make frequent and regular inspections. Both Little and Stromquest were in supervisory positions. Both had the authority to order corrective measures to be taken and both could order the work to be stopped until any hazardous condition were abated. As supervisory employees, their knowledge of the violation is imputed to CB&I. See *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 373 (7th Cir. 1997) (foreman's conduct as the competent person was properly imputed to the employer). CB&I had constructive knowledge of the violative conduct.

Unpreventable Employee Misconduct Defense

CB&I contends that if the undersigned finds a violation, it is the result of unpreventable employee misconduct.² In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that

² CB&I asserted this defense in its answer, but made only a passing reference to it at the hearing (Tr. 104). It does not mention the defense at all in its post-hearing brief.

it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997). However, “[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1989).

CB&I had written work rules designed to ensure regular and frequent inspections. Exhibit R-1 is a copy of CBI’s “Accident Prevention Program.” Section 9.0 of the document (“INSPECTION & AUDIT REQUIREMENTS”) states:

In order to evaluate the effectiveness of any safety program, and evaluation system must be a part of it. CBI requires that our jobsite do a written self-evaluation at least on a weekly basis. The use of the U.S. Safety Questionnaire SAF23 and the Safety Questionnaire for Locations Other Than U.S. SAF23A is required to be completed and submitted each week.

There was also evidence that the work rules were adequately communicated to the employees. Both Little and Stromquest went through CB&I’s extensive competent person training. They both knew that they were required to inspect the worksite, and that a weekly written report was required.

CB&I failed, however, to establish that it took steps to discover violations. Little took no steps other than asking Giddings and Nelson to verify that they had installed the safety cable. There is no evidence he followed up with Stromquest to see if he had inspected the claimed installation. The supervisory personnel at the Smithton site appear to be especially lax in discovering violations. Not only did Giddings and Nelson fail to install the safety cable as instructed, they lied to Little and stated that they had. Giddings and Nelson appeared confident that their failure to install a safety device would go undetected. In a five man crew, there is evidence that two employees disobeyed safety instructions and lied about it, and that a third employee either failed to make the required inspection or that he was so incompetent that he did not notice the absence of the required safety cable. Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors’ duty to protect the safety of employees under his supervision. A supervisor’s involvement in the misconduct

is strong evidence that the employer's safety program was lax. *United Geophysical Corporation*, 9 BNA OSHC 2117, 2122-2123 (No. 78-6265, 1981).

CB&I has failed to establish its employee misconduct defense. Item 1 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. The gravity is the principal factor to be considered.

Wagner testified that CB&I employed a large number of employees at the time of her investigation (Tr. 25). CB&I had no history of previous violations (Tr. 26). CB&I demonstrated good faith in having a written safety program and an extensive training program for its supervisory personnel. CB&I's recordable lost workday rate is .8, compared to the national average of 4.0 (Tr. 75).

The gravity of the violation is high. Failure to conduct the required inspection could have serious consequences since CB&I's employees routinely work at heights above 100 feet. Full implementation of its fall protection methods is essential to its employees' safety.

It is determined that the appropriate penalty is \$4,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a serious violation of § 1926.20(b)(2), is affirmed, and a penalty of \$4,000.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: April 26, 2004