



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

SECRETARY OF LABOR, :

Complainant, :

v. :

THOMAS LINDSTROM & CO., INC., :

Respondent. :

OSHRC DOCKET NO. 04-0528

Appearances:

Judson Dean, Esquire
 U.S. Department of Labor
 Philadelphia, Pennsylvania
 For the Complainant.

James F. Sassaman
 General Building Contractors Assn.
 Philadelphia, Pennsylvania
 For the Respondent.

Before: Covette Rooney
 Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On January 9 and 12, 2004, the Occupational Safety and Health Administration (“OSHA”) inspected a construction site, located in Philadelphia, Pennsylvania, where Respondent, Thomas Lindstrom & Co., Inc. (“Lindstrom”), was engaged in steel erection. As a result of the inspection, OSHA issued Lindstrom a citation and notification of penalty alleging a serious violation of 29 C.F.R. § 1926.760(b)(1) and a “repeat” violation of 29 C.F.R. § 1926.760(a)(1). Lindstrom contested the citation and proposed penalties, and the hearing in this matter took place in Philadelphia, Pennsylvania, on September 17, 2004. Both the Secretary and the Respondent have filed post-hearing briefs in this matter.

Background

James Touey is the OSHA compliance officer (“CO”) who conducted the inspection in this case. He testified that on January 9, 2004, his supervisor, the assistant area director (“AAD”) of the Philadelphia OSHA office, informed him that there were ironworkers working right across the street from the OSHA office who were exposed to fall hazards. CO Touey and the AAD went down to the stairwell just below the second floor of their office building, where they could see the construction site and the ironworkers through a window. They observed the ironworkers, and CO Touey videoed what they saw.¹ CO Touey saw one employee, who he later learned was James Kelly, approach the edge of the fifth level of the building under construction; Kelly tied off once he was 2 to 3 feet from the edge, but he was unprotected up to that time and was exposed to a fall of 60 feet. The CO saw another employee, who he found out later was Edward Baker, approach the fifth level edge where Kelly had begun welding; Baker handed some angle iron to Kelly, and Baker, who was 4 to 5 feet from the edge at that point, did not tie off at that location. The CO saw a third employee, who he subsequently learned was David Treude, on the fifth level of the building; Treude was standing 2 to 3 feet from the edge of the fifth level to give signals to the crane operator, and although Treude was wearing a harness he was not tied off to anything. (Tr. 28-47, 55, 59-60).

CO Touey further testified that, after videoing the workers, he went to the site. He met with the general contractor, who told him Lindstrom was the steel erector. The CO then met with Bill Hicks, Lindstrom’s general foreman, and held an opening conference with him, after which the CO and Hicks proceeded to the area where the fall hazards had been observed. The CO reviewed what he had seen with Hicks and said he would return on Monday to interview the employees. After the inspection, as Lindstrom was disputing what the CO stated he had seen, James Spangler, a Lindstrom representative, went to the OSHA office with the CO to view the video. (Tr. 30-31, 39, 60-61).

¹The CO testified the site was about 60 yards away and that he could see it clearly through the window. (Tr. 29-30, 55, 59-60). Exhibits C-1 and R-1 are both the video the CO took; however, C-1, the Secretary’s version, has only the first six minutes of the video with the audio omitted, while R-1, Respondent’s version, has the full 16 minutes of the video along with the audio. At the hearing, the parties agreed to the admission of a transcript of the audio of the video that Respondent would provide. (Tr. 6-14). Respondent has submitted, along with its brief, a transcript of the audio and a motion for its admission as Exhibit R-2. Respondent’s motion is granted.

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, 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 condition).² *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Serious Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.760(b)(1), which provides as follows:

Each connector shall ... [b]e protected in accordance with paragraph (a)(1) of this section from fall hazards of more than two stories or 30 feet (9.1 m) above a lower level, whichever is less.

Paragraph (a)(1), in turn, provides in pertinent part as follows:

[E]ach employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

The basis of this citation item is the allegation that David Treude, a connector employed by Lindstrom, was standing 2 to 3 feet from the edge of the fifth level of the building, without being tied off, in order to give signals to the crane operator. (Tr. 32-34, 44-48). The parties have stipulated to essentially all of the facts that support the alleged violation, except for the allegation that Treude was not tied off when he was near the edge of the fifth level. *See* Exhibit C-12, Stipulations of Fact Nos. 5-10. The issue requiring resolution, therefore, is whether Treude was in fact tied off when he was near the edge of the fifth level of the building under construction.

David Treude testified that he used a "beamer" to tie off to when he was at the edge of the fifth level to signal the crane operator. He explained that a beamer is a safety device that sits on the

²Whether an employer was reasonably diligent involves a number of factors, including the employer's obligation to have adequate rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations. Lack of reasonable diligence may also be shown by evidence of an employer's failure to take measures to prevent the occurrence of violative conditions. *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003) (citation omitted).

top flange of a beam and that a worker can tie his lanyard onto it, such that, as the worker walks along the beam, the beamer goes along behind the worker. He further explained that he got the beamer from the center area of the fifth level, that there were beamers “all over” the beams at the site, and that a beamer was also something he could carry in his bolt bag. Treude said the closest he had been to the edge without tying off was 15 feet, and he indicated two points on the video where that had been the case. However, he also said he might have been 8 feet from the edge without being tied off but that he was always tied off when he was 6 feet or less from the edge. (Tr. 91-101).

Edward Baker, who worked on the safety team of Lindstrom at the subject site, testified that fall protection on the job was required, that employees used beam clamps and retractable lanyards to tie off to, and that the general foreman had told them at the beginning of the job that it was a “100 percent tie-off condition” because of the location of OSHA’s office. He further testified that he was on the fifth floor level when Treude was there and that he himself saw that Treude was tied off to a beamer on a beam. He denied that the video showed Treude’s lanyard as just dangling and not tied off to anything, and he stated that that item appeared to be a crescent wrench. He agreed, however, that it could not actually be seen on the video that Treude was tied off. (Tr. 67-70, 82-84).

To rebut the testimony of Treude and Baker, the Secretary recalled CO Touey as a witness. CO Touey testified that the beamer Treude referred to is actually a beam clumper, which wraps around a beam and is secured and then rolls along the beam. He noted that a beamer has a “leash” attached to it that can be seen when an employee is tied off to it. He also noted that fall protection has three components, that is, a harness, a lanyard and an attachment point, and that no attachment point could be seen on the video with respect to Treude. CO Touey further testified that Treude was standing on decking at the edge, not on a beam, and that he could not have been standing on decking and been attached to a beamer.³ Finally, CO Touey testified that if Treude had in fact been using a beamer, he would have had to stop at each column to detach the beamer and then reattach it to the next beam or detach himself from the beamer and then reattach himself to another beamer on the next beam; the CO noted that Treude had to go around three columns to get to the point where he

³The CO pointed out that when he was at the site, the employer’s argument had been that Treude had been “recessed on a deck.” The CO also pointed out that no one at the site told him that Treude had been using a beamer. (Tr. 105-06).

began giving signals and that there was nothing on the video to indicate that Treude bent down to detach the beamer or himself when he went around the columns. (Tr. 103-08).

In view of the foregoing, I conclude that Treude was not tied off when he was standing at the edge of the fifth floor giving signals to the crane operator. I base this conclusion primarily on the testimony of the CO. I observed the demeanor of CO Touey, including his body language and facial expressions, and I found him to be a sincere, credible and convincing witness. In addition, his testimony is supported by the video he took, which, upon my review, does not reflect that Treude was tied off when he was near the edge of the fifth level. In reaching my conclusion, I have considered the testimony of Treude and Baker that Treude was tied off to a beamer. However, their testimony is simply not believable, given the video, the testimony of the CO, and the other evidence of record. In light of the record as a whole, I find that the Secretary has met her burden of proving the alleged violation; that is, she has shown the applicability of the cited standard, noncompliance with the standard's terms, and employee access to and employer knowledge of the violative condition. *See* Exhibit C-12, Stipulations of Fact Nos. 5-10.⁴ This item is accordingly affirmed as a serious violation, as it is apparent that a fall from the edge of a fifth-level floor could result in serious injury or death.⁵

⁴With respect to the Stipulations of Fact, No. 10 states that “[a]t least one foreman or other agent of Respondent was aware of the facts set forth in ¶¶ 5-9 above,” and No. 7 states that “[d]uring the period of time that Mr. Treude was on a walking/working surface with an unprotected side or edge, he stood and/or walked right at the edge of (*i.e.*, less than one foot from the edge of) the walking/working surface.” In addition, the CO testified that Hicks told him that he had sent Treude up to the fifth level to signal the crane operator because they were having radio communication problems; the CO also testified that the crane was “in snug next to the building,” that Treude had to be right at the edge so the operator could see him, and that he concluded that Hicks would have known that Treude would have had to be right at the edge to signal the operator. (Tr. 40, 44-48). Finally, not only Treude but also Kelly and Baker, a member of the safety team, were working near the fifth level edge without fall protection. *See* Citation 2, Item 1, *infra*. Due to these facts, and the fact that Treude's actions were in plain view, I find that the Secretary has shown that Respondent did not exercise reasonable diligence in regard to fall protection at the site. *See* footnote 1, *supra*.

⁵In affirming the violation, I have considered Respondent's arguments as set out in its brief and have found them unpersuasive. The arguments as to Citation 2, Item 1 are equally unpersuasive.

The Secretary has proposed a penalty of \$1,125.00 for this item. As the final arbiter of penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. As to the gravity of this item, I find the severity high, in that, if an employee working near the edge of a fifth-level floor were to fall, the result would most likely be serious injury or death. I find the probability of an injury occurring as lesser, due to the short time of exposure of the employee. The record indicates that an adjustment for size and good faith is appropriate; however, no adjustment for history is warranted due to Respondent's history of previous OSHA violations. (Tr. 49-50). *See also* Exhibit C-4. I find the Secretary's proposed penalty appropriate. A penalty of \$1,125.00 is accordingly assessed for this citation item.

“Repeat” Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.760(a)(1), the terms of which are set out *supra*. The basis of this item is the allegation that James Kelly and Edward Baker, two ironworkers employed by Lindstrom, were engaged in installing stanchions for a wire rope guardrail system near the edge of the unprotected fifth level of the building without using fall protection. As in the previous item, the parties have stipulated to essentially all of the facts supporting the alleged violation, except for the allegation that the two employees were exposed to the hazard of falling from the fifth level edge without utilizing fall protection. *See* Exhibit C-12, Stipulations of Fact Nos. 11-19.

CO Touey testified that as he videoed the site, he saw Kelly go to the edge of the fifth floor; once Kelly was 2 to 3 feet from the edge he hooked up to a retractable lanyard that was on a column at the edge, but before then he had not been tied off. The CO also testified that he next saw Baker go out to the area where Kelly was located; Kelly was welding by then, and Baker, who was 4 to 5 feet from the edge and not tied off, handed some angle iron to Kelly. The CO noted that in the area where Kelly and Baker were there was only one retractable lanyard and Kelly was using it; he also noted that

there was another retractable lanyard that was recessed further back on the fifth level, but, as the line from that lanyard was hanging straight down, it was not being used. (Tr. 34-38, 41-45).

I conclude that James Kelly was exposed to the hazard set out in the Secretary's citation. Kelly testified that he walked along the edge of the fifth floor before reaching the column where he tied off, as shown in the video, and he admitted that, although he did not remember, it was "possible" that he had not been tied off when he walked along the edge. (Tr. 102-03). Based upon the CO's testimony and Kelly's own admission, the Secretary has shown the exposure element as to James Kelly.⁶

I also conclude that Edward Baker was exposed to the cited hazard, despite his testimony to the contrary. While viewing the video, Baker at first denied he was 5 to 6 feet from the edge when he handed the angle iron to Kelly, but he then admitted he was within a foot or two of Kelly when he gave him the angle iron. (Tr. 71-72). Baker next testified that he was attached to a retractable lanyard that was further back on the fifth level. He explained that a retractable lanyard "feed[s] out as you go out" and then "retract[s] back into its return." However, when asked why the video did not show that he was attached and why the retractable lanyard hung down, Baker testified that the retractable lanyard hung down and ran along the deck. (Tr. 72-75). It is clear from the foregoing that Baker's testimony, besides being internally inconsistent, is contrary to that of the CO. In addition, the CO's testimony is supported by the video, which, upon my review, does not indicate that Baker was tied off.⁷ Moreover, based on my credibility determination set out *supra*, the CO was the more believable of these two witnesses. The CO's testimony is consequently credited over that of Baker, and the Secretary has demonstrated the exposure element with respect to Edward Baker.⁸

⁶In finding that Kelly was exposed to the cited hazard, I have considered the testimony of Baker that Kelly was tied off before he got to the edge. (Tr. 76-81). Based on the record as a whole and on my credibility determination regarding Baker, as set out *supra* and in the next paragraph, I conclude that Baker's testimony that Kelly was tied off before reaching the edge was not believable.

⁷Also persuasive was the CO's testimony that, when he spoke to the employees at the site, no employee informed him that he had in fact been tied off at all times and that the CO was mistaken. (Tr. 110).

⁸In so finding, I have noted that the Secretary did not pursue the alleged violation as to Baker in her brief. Regardless, I find that the record supports the alleged violation in regard to Baker.

Based on the above, the Secretary has met her burden of proving the alleged violation; that is, she has shown the applicability of the cited standard, noncompliance with the standard's terms, and employee access to and employer knowledge of the violative condition. *See* Exhibit C-12, Stipulations of Fact Nos. 11-19.⁹ This item is accordingly affirmed as a serious violation, as it is apparent that a fall from a fifth-level floor could result in serious injury or death.

This item is also affirmed as a "repeat" violation. A violation is properly classified as repeated if, at the time of the alleged repeated violation, there is a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary presented Exhibit C-4, a citation issued to Lindstrom on September 27, 2002 that alleged a violation of the same standard cited herein; C-4 also establishes that the parties entered into a stipulated settlement in regard to the citation, that the settlement was approved on January 29, 2003, and that the order approving the settlement became a final order of the Commission on February 18, 2003. Based on C-4, this item is properly classified as repeated.

The Secretary has proposed a penalty of \$3,000.00 for this item. Upon considering the penalty factors set out in the preceding discussion, I find the severity of the violation high, as a fall from the edge of a fifth-level floor would most likely result in serious injury or death. I find the probability of an injury occurring as lesser, due to the short time the two employees were exposed. An adjustment for size and good faith is appropriate, but no adjustment for history is warranted due to Respondent's prior history of OSHA violations. (Tr. 51-52). Based on these considerations, and on the fact that the violation has been affirmed as repeated, I conclude that the Secretary's proposed penalty is appropriate. A penalty of \$3,000.00 is therefore assessed for this citation item.

⁹In regard to the Stipulations of Fact, Nos. 14 and 19 state that at least one foreman or other agent of Respondent was aware of the facts relating to the respective exposures of Baker and Kelly. Further, the CO testified that Hicks told him that Kelly and Baker were installing stanchions for the guardrail system on the fifth level, and the CO concluded that Hicks would have known that this work would have required them to be right at the edge. (Tr. 47). Finally, Treude as well as Kelly and Baker, who was on the safety team, were seen working near the fifth level edge without fall protection. *See* Citation 1, Item 1, *supra*. Due to these facts, and the fact that the actions of all three employees were in plain view, I find that the Secretary has shown that Respondent did not exercise reasonable diligence with respect to fall protection at the site. *See* footnote 1, *supra*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.760(b)(1), is AFFIRMED as a serious violation, and a penalty of \$1,125.00 is assessed.

2. Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1926.760(a)(1), is AFFIRMED as a “repeat” violation, and a penalty of \$3,000.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: November 29, 2004
Washington, D.C.