



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

C. D. SMITH CONSTRUCTION,

Respondent.

OSHRC DOCKET NO. 06-0019

APPEARANCES:

For the Complainant:

Lisa R. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:

Daniel A. Kaplan, Esq., Ann Peacock, Esq., Foley & Lardner LLP, Madison, Wisconsin

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 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, C. D. Smith Construction (Smith), was engaged in the removal of concrete forms at the Microbial Science Building at the University of Wisconsin (UW), 1550 Linden Drive, Madison, Wisconsin. Respondent Smith admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On October 10, 2005, a Smith employee, Jason Vogds, fell down a two story stairwell, suffering serious injury. Following the accident, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Smith's UW worksite. As a result of its inspection, OSHA issued a citation alleging violations of the OSHA construction standards. By filing a timely notice of contest Smith brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Madison, Wisconsin on May 24-25, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

FACTS

On October 10, 2005, stairwell #2 at the Microbial Science Building consisted of an empty shaft measuring 9'-10" x 17'-6" (Tr. 78). Concrete had been poured on three sides of the stairwell, on the north and portions of the east and west sides. The previously poured concrete walls prevented access to the stairwell shaft from the second floor except on the south side and on the southern portions of the east and west sides. The open portion of the stairwell was guarded on the second floor with guardrails and warning tape (Tr. 104, 143; Exh. C-9, C-2A through C-2D, C-2K, C-2L). Patrick Smith, Smith's safety director, (Tr. 363), testified that Smith's employees were instructed that guardrails indicate a fall hazard on the back side (Tr. 378-79; Exh. R-23). They were further instructed that red and yellow tapes are used to distinguish controlled access zones (Tr. 379-80, 393; Exh. R-24). Only authorized employees utilizing fall protection may access the area behind a taped guardrail (Tr. 399; Exh. R-24). Kevin Engel, Smith's carpentry foreman, testified that red warning tape signifies danger; only the people who are working in that area and are tied off are allowed into the area (Tr. 228, 462). OSHA Compliance Officer Chad Greenwood agreed that red danger tape typically means that workers should not pass (Tr. 148). The injured employee, Vogds, recognized that guardrails and warning tape signal a fall hazard (Exh. C-20, p. 7; R-24, R-35).

In the morning of October 10, Engel started removing concrete formwork from stairwell #2 (Tr. 217). The hardware securing the vertical formwork is typically removed by employees climbing directly onto, and working from the formwork itself (Tr. 411, 466). Engel, Tony Wise and Chris Bushke hooked onto a lifeline secured to the east side formwork before crossing the second floor guardrail and climbing onto the forms (Tr. 92-93, 218-19; Exh. C-2A, C-2B; Exh. C-14). After Engel and his crew removed all but the two top bolts on the east side form, and the bolts holding the pull shore turnbuckle¹ to the formwork, Engel radioed the crane operator to fly out the formwork from the west side of the stairwell (Tr. 92-93, 217-19, 225, Exh. C-14, C-15).

During this operation, Engel inadvertently stepped on an unsupported 3' x 12' sheet of plywood that extended across the south side of the stairwell approximately 30 inches below the second floor level (Tr. 78, 93, 221-22, 417, 443-44; Exh. C-14). The plywood was part of the horizontal concrete formwork that had been erected by another subcontractor, Gateway Contractors (Tr. 182, 423-24). Earlier in the construction project, Gateway's formwork had been equipped with guardrails and utilized as a work

¹ The pull shore turnbuckle is a diagonal brace that extended from high on the east shoring down to the west side of the shaft near a first floor opening. The turnbuckle provided the only support for the east side shoring, and could not be removed until the crane was hooked up to the shoring on that side. (Tr. 224-25, 467-69, 474; Exh. C-2L).

surface by Smith employees (Tr. 182-83, 425, 478). The guardrail was removed around the same time Gateway removed the supports beneath the horizontal sheet of plywood. Engel testified it was no longer considered a work surface (Tr. 182-83, 472).² Engel noted that the plywood felt soft, and so did not put his full weight on it (Tr. 222, 229). He told the other employees in his crew to be careful, and to avoid the area (93, 222, Exh. C-14).

Later that day, Engel instructed Vogds to go up to the second floor, call for the crane, check for and remove the two top bolts (Tr. 223-24, 466, 474). Though Engel knew Vogds would have to cross the guardrail to access the formwork in the stairwell, it did not occur to him to advise Vogds about the unsupported plywood, as he believed Vogds would only be working on the top of the east form, above the guardrail (Tr. 223, 471). Engel and the rest of his crew intended to follow Vogds up (Tr. 224, 466). After Vogds called for the crane and hooked it onto the form, someone from Engel's crew would lean out the first floor opening and, using a crescent wrench, loosen the bolts on the pull shore turnbuckle (Tr. 224-25, 467-69, 474; Exh. C-2L). After the lower bolts were loosened, the turnbuckle would swing down flush with the east side formwork and would be brought out along with the form (Tr. 469-70, 482). Vogds was not responsible for loosening the bottom of the turnbuckle (Tr. 481). According to Engels it would have been "ridiculous" for him to attempt to do so prior to calling in the crane, as the form could come away from the east wall without the diagonal bracing (Tr. 470-71, 482). Engel had no reason to believe Vogds would utilize the plywood sheet as a walking or working surface, as he had no work to perform either on the lower portion of east side formwork, or on the west side of the shaft (Tr. 471). CO Greenwood agreed that Vogds could have performed his assigned task without stepping on the plywood sheet (Tr. 168).

James Rusch, a carpenter with Bechtel Construction Company, was pouring concrete on the third floor at the Microbial Center on October 10, 2005 (Tr. 324-25). Rusch testified that immediately prior to the accident he saw Vogds on the east formwork in stairway #2 (Tr. 325-36; Exh. R-19; R-20). Shortly after, Rusch testified, there was a loud bang (Tr. 334). Upon investigation, Vogds was found at the bottom of the stairwell along with pieces of plywood and guardrail (Tr. 52-54, 334). No one witnessed the accident. Based on his own and UW police interviews with Smith employees, CO Greenwood speculated

² When Vogds access stairwell #2, the remnants of another work platform extended out from the east side formwork below the level of the unsupported plywood. Three planks rested atop two metal arms extending from the formwork. Two sheets of plywood leaned at an angle against the formwork (Tr. 175; Exh. C-2A, C-2L). Engel's crew had used this platform, and a matching platform extending out from the west side formwork to remove the bottom bolts from the forms before dismantling the platforms to allow the west form to be flown out (Tr. 217-18).

that Vogds climbed over the railing, stepped onto the unsupported plywood and fell 48 feet to the bottom of the shaft (Exh. C-1, C-7, C-14, C-15).

It is undisputed that Smith has a written safety and health program, which is effectively communicated to its employees and adequately enforced (Tr. 138-39; Exh. C-17; R-36, Complainant's responses to Respondent's requests for admissions, Admission Nos. 2, 4, 5). Smith had a full-time on site safety supervisor who conducted daily inspections (Exh. R-36, Admission No. 3). Smith provides employees with harnesses and retractable lifelines, and requires employees to use them to protect from fall hazards (Exh. R-36, Admission Nos. 6, 11). Jason Vogds had received training in Smith's fall protection policy, and was wearing a harness and retractable lifeline at the time of the accident (Tr. 42, 56, 141, 143; Exh. R-36, Admission No. 13, 14).

Alleged Violation of §1926.501(a)(2)

Serious Citation 1, item 2 alleges:

29 CFR 1926.501(a)(2): The employer did not determine if the walking/working surface on which employees were to work had the strength and structural stability to support employees safely. Employees were allowed to work on surfaces when the surfaces did not have the requisite strength and structural integrity:

On or about October 10, 2005, an employee worked from formwork in stairwell #2 that did not have the strength and structural stability to support the employee safely.

The cited standard provides:

Duty to have fall protection. . . . (2) The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

Section 1926.500(b) states:

Walking/working surface means any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence; (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). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

Smith argues §1926.501(a)(2) is inapplicable in this case because the cited sheet of plywood was not a walking/working surface as defined in the fall protection standards. This judge agrees. The record establishes the cited plywood formwork had been utilized as a walking/working surface at an earlier phase in the construction project. At that point it had been treated as an unprotected edge, and had been equipped with guardrails. After the floor was poured, however, Gateway began stripping out the formwork and the guardrails were removed. A new guardrail was erected around the entire stairwell shaft and marked with red danger tape. The guardrail and tape gave clear notice to employees that the enclosed area was hazardous and should only be accessed by authorized employees using fall protection. Though removal of the vertical formwork would require employees to cross the guardrail, the work to be performed within the shaft was customarily accomplished by employees climbing directly from the guardrail onto the formwork itself. Smith did not intend and had no reason to believe Gateway's partially dismantled floor pan would be utilized by its employees as a working surface. The mere fact that Kevin Engel knew the cited plywood sheet was unsupported does not change this conclusion. Neither Engel nor his crew utilized the plywood as a working surface; all were working from the form itself, as was the usual procedure. Vogds' assigned task, to call in the crane and then remove the remaining two bolts holding the formwork in place, could and should have been accomplished by climbing over the guardrail directly onto the east formwork. He was not expected to, and did not need to use the horizontal plywood as a work surface. Indeed, it can be inferred from the testimony of James Rusch that Vogds did, in fact, climb directly onto the east formwork, contacting the plywood only as he fell.

The Secretary has failed to show that the cited plywood decking was utilized as a walking/working surface, or that Smith knew or could have known that it might be utilized as such. Citation 1, item 2 must be dismissed.

Alleged Violation of §1926.21(b)(2)

Serious Citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

On or about October 10, 2005, an employee was not informed that formwork he may step on would not be able to support him.

The cited standard provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Discussion

The Commission has held that, pursuant to §1926.21(b)(2), employers must inform employees of safety hazards which would be known to a “reasonably prudent employer.” *N&N Constructors Inc.*, 18 BNA OSHC 2121, 2128, 2000 CCH OSHD ¶32,101, p. 48,244 (No. 96-606, 2000), *affd.*, 255 F.3d 122 (4th Cir. 2001); *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2016-18; 1991-93 CCH OSHD ¶29,902, pp. 40,811-13.

Based on the facts in this case, it cannot be found that a reasonably prudent employer would have provided additional training to employees in general, or to Jason Vogds in particular. Smith employees, including Vogds, were trained to recognize that guardrails indicate a fall hazard, and that where a guardrail is taped, only authorized employees utilizing fall protection were allowed to cross the guardrail. Vogds was authorized to perform work that required him to position himself, while utilizing fall protection, at the top of the east form. Given his assigned task, Smith could not reasonably have anticipated that he would use the residual horizontal plywood located 30 inches below the second floor level as a walking/working surface. Smith, therefore, had no duty to warn him that the plywood was not suited as such.

Because adherence to customary procedures and to the general fall protection training provided to all Smith’s employees was adequate to prevent employee exposure to the fall hazard posed by the unsupported plywood formwork, citation 1, item 1 is dismissed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
3. Serious citation 1, item 2, alleging violation of §1926.501(a)(2) is VACATED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: August 16, 2007