



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

Complainant,

v.

BURCH CONSTRUCTION, INC.,

Respondent.

OSHRC DOCKET NO. 06-1068

APPEARANCES:

For the Complainant:

Satoshi Yanai, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For the Respondent:

Robert P. Stricker, Esq., Law Offices of 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 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Burch Construction, Inc. (Burch) was installing architectural foam molding from scaffolding at the Marine Corps Recruit Depot in San Diego, California. Burch Construction admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On June 21, 2006, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Burch's San Diego worksite. As a result of that inspection, OSHA issued a citation alleging violation of 29 CFR §1926.451(b)(1). By filing a timely notice of contest Burch brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in San Diego, California on October 2, 2006. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §1926.451(b)(1)

Serious Citation 1, item 1 alleges:

29 CFR 1926.451(b)(1): Scaffold platforms were not fully planked between the front uprights and guardrail supports:

- a. The scaffold platform was not fully planked on the level where the employee was working, exposing the employee to a 20 foot fall to the ground.

Facts

Compliance Officer (CO) Marion Moore conducted the June 21, 2006 inspection of Burch's San Diego worksite. During the inspection CO Moore photographed Burch employees, including one Rubin Carillo, climbing from the roof onto scaffolding that was not fully planked (Tr. 17, 19-22, 37; Exh. C-1 through C-10). CO Moore photographed Carillo traversing a single plank on the top level to reach his work place on a platform at a "mid-level" platform three or four feet below (Tr. 34; Exh. 1, 2, 7, 8). He also speculated that employees had been working from top scaffold level, based on the presence of a bucket and toeboard on the single plank located there (Tr. 29). Moore estimated the gap between the mid-level scaffold platform and the uprights was approximately 10 inches wide (Tr. 25). The gap between the single plank and the uprights was large enough for a man to climb through (Tr. 26-28). CO Moore testified employees working from the platforms could step back and fall through the unguarded gaps, falling to the pavement over 20 feet below (Tr. 44). Moore testified that a fall from that level would result in serious injury or death (Tr. 40, 43).

Greg Rodgers, Burch's supervisor for lath and plastering (Tr. 82), testified that the cited scaffolding was erected in front of the dormitory under construction by a scaffolding company, Sunrize Staging, Inc., two months prior to the inspection (Tr. 87). On June 21, 2006, Burch employees began the installation of an architectural foam shape at the top of the front wall (Tr. 93). However, the existing working surfaces on the scaffold were either too high or too low for the installers to work from (Tr. 94-95). To install the foam, Burch employees had to kneel or lie down on the top planked level (Tr. 94-95, 116). Burch, therefore, altered the scaffold, moving planks so that they were supported by the "half rung," an intermediate level of crossbars between the standard scaffold levels (Tr. 94-95, 114, 120-21). Because diagonal supports intersected the intermediate crossbars, only two of the standard 10-1/2 inch planks would fit on the half rung (Tr. 95-96, 117). A third plank would not fit into the approximately 9-inch gap that remained between the planks and the outer scaffold supports (Tr. 97, 119, 127).

Both Greg Rodgers and his brother, Ben Rodgers, who was certified in scaffold erection, testified that the intermediate platforms were temporary; they were erected on the half rung the morning of the

inspection, and would remain only until the foam molding was installed (Tr. 114, 120-21, 126). A third plank would not fit on the half rung, and when placed in the gap a third plank sat at a 45° angle (Tr. 97, 105). Neither Greg nor Ben Rodgers believed the employee working on the intermediate platform was exposed to a hazard (Tr. 123, 131). The extra 10-1/2 inch board from the standard platform level remained in place, at approximately the waist level of any employee working from the half rung (Tr. 104, 123; Exh. C-5). According to Greg and Ben Rodgers, the plank acted as a guard, preventing the employee from stepping backwards into the gap (Tr. 123, 131).

Discussion

29 CFR §1926.451(b)(1) provides:

Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:

(i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform.

(ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9-1/2 inches (21.1 cm).

Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways . . .

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).

Respondent does not contest the applicability of the standard, but argues that it was in compliance with the standard's terms.

The evidence in this case establishes that it was necessary for Burch to reconfigure the pre-erected scaffolding to install the foam molding on the subject dormitory. It would be neither reasonable nor safe for Burch's employees to work on the molding from their knees or while lying down. As a masonry subcontractor, Burch did not own the scaffold on site. It did not, therefore, have either permission or the

