



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

Complainant,

v.

HEIN MASONRY, INC.

Respondent.

OSHRC DOCKET NO. 06-1582

APPEARANCES:

For the Complainant:

Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:

Louis B. Jungbluth, Wisconsin Safety Services, Inc., Neenah, 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, Hein Masonry, Inc. (Hein), was engaged in the construction of a wall at the Cher-Make Sausage Company at 2915 Calumet Avenue, Manitowoc, Wisconsin. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the provisions of the Act (Exh. J-1).

On June 1, 2006, in response to a complaint, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Hein's Manitowoc worksite. As a result of its inspection, OSHA issued a citation alleging violation of 29 CFR §1926.600(a)(6) of the construction standards. By filing a timely notice of contest Hein brought this proceeding before the Occupational Safety and Health Review Commission (Commission). The time allowed for filing briefs has elapsed and this matter is ready for disposition.

Alleged Violation of §1926.600(a)(6)

Serious Citation 1, item 1 alleges:

29 CFR 1926.600(a)(6): Equipment operating in the vicinity of power lines did not comply with requirements of 29 CFR 1926.550(a)(15): 29 CFR 1926.550(a)(15): All equipment shall not be operated within 10 ft. of electrical distribution or transmission lines rated 50 kv or below and/or insulating barriers not part of, or an attachment to, the equipment shall be erected to prevent physical contact with the lines:

(a) At the site, the operator of the rough terrain fork lift due to the location of the new wall and scaffold used to build this wall was within six feet of 13K power lines when raising the load to the scaffold.

FACTS

On May 31, 2006, James Peterik, the electric distribution supervisor for Manitowoc Public Utilities (MPU) received a call from Hein Construction (Tr. 12-15, 27, 39-40). Hein requested MPU “support” in the performance of its construction job at the Cher-Make Sausage Company; specifically, Hein asked whether MPU would place shields or “banana skins” on the live wires at its work site (Tr. 41, 44). At the hearing Peterik testified that it was not MPU’s practice to shield lines for unqualified personnel, *i.e.*, non-MPU personnel (Tr. 44; See also testimony of Allan Biely; Tr. 68, 72).

On June 1, 2006, at approximately 9:00 a.m., Peterik responded to Hein’s call, visiting the site in person (Tr. 12-15, 27). When Peterik arrived at Hein’s work site at the Cher-Make facility, he saw Hein employees on a metal platform atop scaffolding set up alongside the building (Tr. 15). A Lull lift was positioned at the base of the scaffolding, between the scaffolding and a row of electric poles (Tr. 15-19). Hein employees were using the Lull lift to raise mud and concrete blocks up to the scaffold platform (Tr. 15). Two masons were working on an outrigger off the side of the scaffolding closest to the building. A tender was standing on the lift platform, offloading the materials from the Lull to the scaffold platform for the masons’ use (Tr. 15, 19-20, 23). Peterik estimated there was approximately three to five feet between the Lull platform and the primary electric line strung between the poles (Tr. 15-16, 18, 21, 23, 25). The primary line carries 7600 volts to ground and 13,002 volts (13 kV) phase to phase (Tr. 16). The primary line was energized (Tr. 16; See also testimony of Kelly Bubolz; Tr. 103).

Peterik asked the Lull operator to lower the bucket and step out of the equipment (Tr. 27). He met with the project supervisor, Robert Smith, and told him he could not continue using the Lull in the tight space between the power lines and the scaffolding (Tr. 28-29). Smith asked Peterik if the lines could be de-energized or covered up; Peterik told him they could not (Tr. 28). Peterik left the jobsite, but returned 20 minutes later (Tr. 29). When Peterik saw that Hein had recommenced working with the Lull in the same position, he called OSHA (Tr. 29-30).

Kelly Bubolz, an OSHA Compliance Safety and Health Inspector, arrived on Hein's job site at approximately 10:00 a.m. on June 1, 2006 (Tr. 84). Bubolz observed the Lull lift driving in between the scaffold and the electric lines, lifting materials to the laborers on the scaffold platform, and driving off again (Tr. 87). The metal railing at the back of the Lull's lift platform was at the height of the electric wires, which were approximately five feet away (Tr. 88). Bubolz photographed the Lull moving in front of the scaffolding (Tr. 91, 93; Exh. C-2, C-5), and the mason tender offloading supplies for the masons from the Lull platform (Tr. 91; Exh. C-3, C-4).

The mason tender was exposed to the danger of electrocution. The wind or the movement of the lift could have caused the wires to energize the lift platform while the tender was offloading it (Tr. 100, 103, 117). Peterik testified that it would not be necessary for the Lull to actually contact an electric line for current to jump to the metal equipment in its attempt to "go to ground" (Tr. 52, 54-55, See also testimony of Bubolz; Tr. 117-18).

After discussing the problem with Bubolz, Smith agreed to position the Lull on the other side of the wall (Tr. 100-02).

Louis Jungbluth, Hein's representative, testified that on May 30 and May 31, 2006, he phoned MPU to ask about the possibility of having engineering controls, *i.e.*, insulated boots, installed on the high transmission lines (Tr. 138-40, 155). According to Jungbluth, Peterick said he would "respond to the site and look at the situation." (Tr. 140). Jungbluth stated "the job was, basically, at [a] standstill," (Tr. 140-41). When Hein heard nothing from MPU, it proceeded without engineering controls.

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).

The cited standard provides:

Motor Vehicles, Mechanized Equipment, and Marine Operations.

(6) All equipment covered by this subpart shall comply with the requirements of §1926.550 (a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

§1926.550(a)(15) states:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. Or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet; . . .

The undisputed evidence establishes that Hein's crane was operating within 10 feet of energized power lines rated at 13 kV, in violation of the cited standard. Hein not only knew of the violative conditions, but persisted in operating under those conditions after receiving a warning from Manitowoc Public Utilities (MPU) (Tr. 144).

Hein argues that MPU could have installed engineering controls, such as "rubber boots" or "banana skins" for the lines. Hein had been provided with engineering controls at other work sites (Tr. 118, 121), and had requested similar assistance at this site (Tr. 141-42, 155). MPU refused to cooperate with requests for controls; however, forcing Hein to work around the energized lines (Tr. 127).

That MPU failed to cooperate in providing engineering controls for the energized lines is not a defense to the cited violation. After OSHA's appearance on the site, Hein was able to finish its work by using the lift platform between the wall and the existing building. The violation has been established.

PENALTY

A penalty of \$1,250.00 was proposed for this violation. Although only one employee was exposed to the cited hazard, the result of an accident would have been electrocution. The gravity of the violation was, therefore, high. Hein has no history of OSHA violations; however, it failed to demonstrate good faith in continuing to work after being warned by MPU personnel. The proposed penalty is deemed appropriate and will be assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Hein Masonry, Inc. is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Hein Masonry, Inc., at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Hein Masonry, Inc. was in violation of 29 CFR §1926.600(a)(6), and said violation was serious within the meaning of the Act.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.600(a)(6) is AFFIRMED, and the proposed penalty of \$1,250.00 is ASSESSED.

/s/ _____
Benjamin R. Loye
Judge, OSHRC

Dated: May 22, 2007