



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1244 North Speer Boulevard

Room 250

Denver, CO 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

BURCH CONSTRUCTION, INC.

Respondent.

OSHRC Docket No. 07-0663

APPEARANCES:

For the Complainant:

Susan Seletsky, Esq., U.S. Department of Labor, Office of the Solicitor,
Binghamton, New York

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. §§651-678 (“the Act”).

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

On February 21, 2007, 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 a serious violation of 29 C.F.R. §1926.451(e)(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 December 11, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §1926.451(e)(1)

Serious Citation 1, item 1 alleges:

29 CFR 1926.451(e)(1): When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface were not used. Crossbraces shall not be used as means of access:

a) Employees were using the scaffold crossbraces as a means of access from the scaffold to the top of the building.

Facts

Burch employees were working from a scaffold that extended more than two feet above the roof. (Tr. 35). From the parking lot, OSHA compliance officer, Marion Francis Moore (CO), observed Manual Garcia, an employee of Burch, who was on the scaffold level just below the roof, lift himself onto the roof of the building by standing on the scaffold's guardrail rather than by using a ladder. (Tr. 30-31, 165 Ex. C3) He then pulled himself from the roof to the top plank of the scaffold (Tr. 167 Ex. C5) He climbed back down, by again stepping on the scaffold guardrail (Tr. 168, Ex C9). The roof of the adjacent building was more than two feet above the scaffold level where the employee began climbing and the upper scaffold level was more than two feet above the roof. (Tr.

35) The scaffold was approximately 14 inches from the building, but because of the roof's slope, the roof was very close to the scaffold. (Tr. 178) The CO took several photos of the employee from the parking lot, which were admitted into evidence. (Exs. C1-C10) The CO testified that by climbing the scaffold guardrails, Garcia was exposed to a the hazard of breaking a bone or falling 25 feet from the top of the scaffold to the ground. (Tr. 57)

A ladder on the scaffold provided access to the various scaffold levels, but did not provide access to the roof. (Tr. 13) In order for an employee to gain access to the roof from the scaffold in an OSHA compliant manner, the employee would have had to climb down the scaffold ladder, walk about 30-36 feet to a ladder inside the building, climb the ladder in the building, and exit through a hatch in the roof. (Tr. 153) This process would have taken approximately five minutes. (Tr. 182)

The CO talked with Jim Kruse, foreman for Burch. Kruse identified the employee on the scaffold as Manuel Garcia. (Tr. 48) According to the CO, Kruse stated that he was aware that employees used the guardrails to access levels of the scaffold rather than using the ladder. (Tr. 49) However, at the hearing, Kruse denied making the statement. (Tr. 147-148, 154) He admitted telling the CO that stepping on a scaffold guardrail to access the roof is unsafe and that the practice was wrong. (Tr. 147, 152) However, Kruse also testified that he had seen people slip going up and down the ladder, and that he had slipped on the ladder himself. (Tr. 159) He testified that when it was dewy, the ladders could be "really slippery," especially on work boots and when employees are carrying their tool belts (Tr. 159) He also testified that employees could get their tool belts snagged on the ladder rungs. (Tr. 136-137)

Garcia testified that he climbed to the top scaffold level because he left something behind. (Tr. 168) The CO testified that, at the inspection, Garcia told him that he climbed the scaffold to the roof rather than use the ladders because he was in a hurry. (Tr. 54) However, Garcia denied making the statement to the CO and testified that the CO only

asked him his name. (Tr. 170-171) Garcia testified that he climbed the scaffold because he thought it was more of a hazard to use the ladders. (Tr. 169)

As a result of the CO's observations, the Secretary issued a citation for one violation of the Act on the grounds that Burch failed to comply with the OSHA standard at 29 C.F.R. 1926.451(e)(1) which states:

1926.451 General requirements.

* * *

(e) Access

* * *

(1) When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The citation stated that "Employees were using the scaffold cross braces as a means of access from the scaffold to the top of the building." The citation was characterized as Serious and a penalty of \$375 was proposed.

Discussion

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

There is no dispute that the cited standard applies and that its terms were violated when Garcia stepped on the guardrail to access the roof. The evidence also establishes that Burch knew or with the exercise of reasonable diligence could have known of the

violation. Garcia denied telling the CO that he climbed the scaffold because he was in a hurry. (Tr. 170-17) Rather, he testified that he climbed on the scaffold because he believed it to be safer than using the ladders. (Tr. 169, 177) This sentiment was echoed by his foreman, Jim Kruse, who similarly testified that he believed that climbing the scaffold was less hazardous than using the ladders. (Tr. 158) Moreover, the evidence established that using the ladders would have taken Garcia approximately 5 minutes while climbing the scaffold took about a minute. (Tr. 182) Considering that Garcia and Kruse both considered using the ladders to be a greater hazard, together with the time saved by climbing the scaffold, I find it foreseeable that Garcia would access the roof by climbing the scaffold. Furthermore, the evidence establishes that Garcia's violative conduct was in plain view (Tr. 156-157) and could have been discovered by the foreman. The foreseeability of the violative conduct and the readily observable nature of the violation warrants a finding that, with the exercise of reasonable diligence, Kruse knew or could have known of the violation. *Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). As foreman, Kruse's knowledge is imputed to Burch. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996) Accordingly, Burch had constructive knowledge of the violation. *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003)

Although Burch does not dispute that Garcia climbed the scaffold in violation of the standard, it raises two affirmative defenses: (1) Climbing the ladder to access the roof was a greater hazard than gaining access by stepping on the guardrail of the scaffold; and (2) Garcia's use of the scaffold's guardrail was an incident of unpreventable employee misconduct.

Greater Hazard

To establish the "greater hazard" affirmative defense, the employer must prove (1) that the hazards caused by complying with the standard are greater than those encountered

by not complying; (2) that alternative means of protecting employees were either used or were not available; and (3) that application for a variance under section 6(d) of the Act, 29 U.S.C. §655(d), was not available or would be inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159 (Nos. 90-1620 and 90-2894, 1993)

Burch argues that accessing the roof by climbing the scaffold's guardrail presented a greater hazard than climbing down the scaffold ladder to the ground, entering the building, walking to then climbing up the ladder to the roof hatch. While the compliant method was inconvenient and more time consuming than climbing the scaffold, the record does not establish that using the ladders constituted a greater hazard. Central to Burch's argument is that ladders can be slippery, especially under dewy conditions, and that employees could get their tool bags snagged on the ladder. First, there is no evidence to suggest that the ladders were wet at the time of the violation. According to the time stamps on the Secretary's photographic exhibits, which were confirmed as correct by the CO (Tr. 37-38), the violations occurred at approximately 11:15 a.m., long after sunrise and after any morning dew would evaporate. Accordingly, any suggestion that the ladders were hazardous due to wet conditions is mere speculation.

Furthermore, as Kruse admitted, while it is possible for an employee to slip on a ladder, it can also get slippery on a scaffold. (Tr. 159) The record also provides no suggestion that dewy conditions that could make a ladder slippery would not similarly affect a scaffold guardrail. Indeed, a slippery scaffold crossbrace would pose a serious hazard since, unlike ladders, they are not designed to be climbed. Similarly, tool belts that could get snagged on a ladder could similarly get snagged as employees lift themselves to the scaffold's guardrail¹.

¹I would observe that if Garcia were concerned about getting his tool belt snagged on the ladder, he could have removed the belt since he was going to the roof only to retrieve something he left behind.

Foreman Kruse also recognized that climbing the scaffold was an unsafe practice (Tr. 152), and Don Woford, head estimator for the company that erected the scaffold, testified that stepping on the guardrail could cause it to bend². (Tr. 19) Moreover, in this instance, the ladders were climbed regularly since they provided the means of access from the ground to the roof and to employees work stations on the scaffold, and from the scaffold or roof to the ground. (Tr. 13, 151, 176-177, 179)

Accordingly, Burch failed to establish that using the ladders presented a greater hazard to employees than climbing on the scaffold's guardrails.

Burch also failed to satisfy the second element of the defense which requires the employer to establish that alternative means of protecting employees either were used or were inappropriate. The cited standard sets forth several methods to access a building from a scaffold. For example, the standard specifically states that employers can use portable ladders, hook-on ladders, or attachable ladders. Again, Burch produced no evidence to suggest that access from the scaffold to the roof could not have been provided by one of these methods.

Having found that Burch failed to establish either that compliance with the cited standard would have constituted a greater hazard, or that alternative means of protection were not available, I need not reach whether a variance would have been appropriate.

Employee Misconduct

As noted, *supra*, I find that the evidence establishes that Burch knew or with the exercise of reasonable diligence could have known of the violation. Burch however,

²In its brief, Burch argues that Wofford testified that an employee would have to weigh 300 pounds before his weight could damage the scaffold. It is clear, however, that he was referring only to the crossbraces. (Tr. 19-20, 22) Wofford placed no such weight limit on employees standing on the scaffold guardrail. (Tr. 19) In any event, I note that a 300 pound weight limit provides scant margin of error for an employee garbed in work clothes and carrying a tool belt.

contends that Garcia's actions were the result of unpreventable employee misconduct. To establish the affirmative defense of "unpreventable employee misconduct, the burden is on the employer to establish that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *S & G Packaging Co.*, 19 BNA OSHC 1503, 1507 (No. 98-1107, 2001)

Foreman Kruse testified that he knew that Garcia's activities were improper. (Tr. 147) He also testified that it was a violation of safety rules for an employee to get to the top level of the scaffold by pulling himself up by his hands and descending from the scaffold by pulling himself down by holding on to the scaffold (Tr. 152-153) However, he never testified that there was a safety rule specifically prohibiting an employee from standing on the crossbracing of a scaffold. Similarly, Burch production and safety manager, William Doelman, testified that, while the company includes guardrails in its scaffold safety training, there was no specific line item regarding using scaffolding to transfer to a building. (Tr. 114) Also, although Burch introduced a signed statement by Garcia that he received and agreed to comply with the company's safety manual (Ex. R-16), the manual was not introduced and there was no evidence that it specifically prohibited climbing on scaffold crossbraces.

Although Burch failed to establish that it had a formal safety rule prohibiting employees from climbing the crossbraces of a scaffold, Burch produced a signed report from a safety meeting conducted in August 2006, signed by Garcia, which contained the admonition: "Don't climb the cross braces on a scaffold; access the scaffold using a ladder, stair tower, or built-in ladders." (Ex. R-18) However, Garcia could not remember what was discussed at the meeting and there is no evidence to indicate whether communication of the prohibition consisted of anything more than a single line on a single meeting report (Tr. 172) Moreover, Garcia testified that, although he knew that he

was not supposed to climb the guardrails, he did so because he believed that using the ladders constituted a greater hazard. This demonstrates that any instructions given to Garcia were not sufficient to imbue them with a sense of urgency. *Pressure Concrete Construction Co.*, 2011, 2016 (No. 90-2668, 1992) Accordingly, the record establishes that, even if there was an appropriate rule, it was not adequately communicated to employees. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000)

Finally, to prevail on the defense of “unpreventable employee misconduct” the employer must present evidence concerning the manner in which it enforces its safety rules. *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1040, 1042 (No. 90-945, 1995). Burch produced no evidence to establish that it has an effective method of enforcing its safety rules. Therefore, the affirmative defense must fail.

CHARACTERIZATION AND PENALTY

The Secretary characterized the violation as serious. Under section 17(k) of the Act, 29 U.S.C. §666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992). The evidence demonstrates a substantial probability that an injury result from climbing the scaffold guardrail could result in a broken bone or worse if Garcia fell to the ground. (Tr. 57) Accordingly, the violation was properly characterized as serious.

I also find the \$375 penalty proposed by the Secretary to be appropriate. When considering the propriety of the Commission must give due consideration to the size of the employer’s business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *R.G. Friday Masonry Inc.*, 1070, 1075 (No. 91-2027, 1995)

The evidence establishes that the likelihood of an accident was low (Tr. 57) It also establishes that, with 15 employees, Burch is a small employer. (Tr. (Tr. 58, Ex. C11). Burch has also demonstrated good faith in this matter. (Tr. 58) Finally, Burch has a good safety history, with no serious or willful violations within the last three years. (Tr. 58). Considering these factors, I find that the \$375 penalty proposed by the Secretary to be appropriate.

ORDER

Serious citation 1, item 1, alleging a violation of 29 C.F. R. §1926.451(e)(1) is AFFIRMED and a penalty of \$375 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: April 14, 2008
Denver, Colorado

