

Secretary of Labor

Complainant

v.

Burch Construction, Inc.

Respondent.

OSHRC Docket No. 07-1131

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 engaged in metal stud framing and hanging dry wall at the Security Forces Armory, Travis Air Force Base, California. Burch admits that it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On June 18, 2007 OSHA compliance officer Paul Leary (“CO”) inspected Burch’s worksite. As a result of his observations, the Secretary issued a citation for an other than serious violation of 29 C.F.R. 1926.404(f)(6). By filing a 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 § 1926.404(f)(6)

Other than Serious Citation 1, item 1 alleges:

The path to ground from circuits, equipment, or enclosures was not permanent and continuous:

a. Travis Air Force Base Security Forces Armory Project: The Hampton Bay metal framed portable electric fan was not grounded, in that it was missing its ground pin, potentially exposing employees to the hazard of electric shock.

No penalty was proposed for the violation.

Facts

Compliance Officer Leary conducted the June 18, 2007 inspection of a worksite at the Security Forces Armory, Travis Air Force Base, California where Respondent, Burch Construction, Inc. was engaged in metal stud framing and dry wall in a men's bathroom. (Tr. 57). During the inspection, the CO observed a metal frame portable fan being used to circulate air. The CO testified that the fan was in the hallway, just outside the door where Burch employees were working (Tr. 32) and was being used by Burch employees. (Tr. 15) An inspection of the fan revealed that the grounding prong was broken off, and therefore that the fan was not properly grounded. (Tr. 16, 18)

Burch does not dispute that the fan was improperly grounded. However, it argues that its employees did not use the fan. Rather, it asserts that the fan was used¹ by another company at the site.

At the hearing, the CO testified that Burch foreman, Thomas Thompson, discussed the fan with him and told him that he was using the fan for 30 minutes before the CO came upon the scene. (Tr. 43) Thompson denied having any conversation with the CO. Rather, he testified that, except for a brief introduction, he had no discussion with the CO. (Tr. 64). Thompson also denied that either he or any of his employees used the fan. (Tr.58, 65)

¹The parties agree that Burch did not own the fan. (Tr. 51-52). The dispute centers on whether the fan was being used by Burch employees.

Steve Aulabaugh, project superintendent for general contractor R.A. Burch² (Tr. 87), testified that, prior to the inspection, the foreman for Accelerated Electric, Dan Porges, asked him about obtaining a fan. (Tr. 81, 84) Accelerated Electric was doing electrical work in the woman's restroom, adjacent to the men's restroom, where Burch was working. (Tr. 82, 91, Ex. R2) Aulabaugh did not respond to the request because he did not which believe it was sufficiently hot in the restroom to require a fan. (Tr. 81)

Aulabaugh's testimony was supported by Dan Porges who testified that he was using the fan that was placed in the vestibule outside the bathrooms in the direction away from the men's room. (Tr. 9 1-92, Ex. RI) He specifically stated that Thompson was working in another room. (Tr. 91) He further testified that when the CO asked him who owned the fan, he told him that it was his belief that the fan belonged to R.A. Burch (Tr. 87). Further confirmation came from William Porges, owner of Accelerated Electric. He testified that he apologized to the owner of Burch because they got into trouble over a fan that was being used by Accelerated's employees. (Tr. 99)

The Secretary argues that the testimony of the CO should be credited because he has 16 years of experience as a compliance officer, and that his job is to inspect workplaces, determine if violations occurred and prepare citations. The Secretary further notes that Thompson should not be credited because he would not want to admit the violation to protect himself and his employer. 'The Secretary notes that if Thompson is to be believed, the CO must not be telling the truth. That, she concludes, "is simply not possible."

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

²The record does not disclose whether there is any corporate relationship between Respondent and R.A. Burch.

violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

Burch does not dispute that the standard applied to the fan and that the fan was not properly grounded. The record also demonstrates that the fan was in the vicinity of Burch's work area and that its employees had access to the fan's "zone of danger." *S & G Pac/wging Co.*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) However, the record fails to establish, by a preponderance of the evidence that Burch knew or, with the exercise of reasonable diligence, could have known of the violation.

At the outset, I would observe that there is a difference between "not telling the truth" and being wrong. A witness may testify what to him/her is the truth that, upon closer investigation, turns out to be in error. Compliance officers may be honest, well-trained, and well-intentioned. They are, however, also human. Under the Secretary's theory, the testimony of a compliance officer must always be credited over that of a foreman who almost always has an interest in being vindicated. While the Secretary's faith in her compliance officers is laudable, whether a compliance officer's testimony is credible depends on the evidence and surrounding circumstances. *See Evansville Materials, Inc.*, 3 BNA OSHC 1741, 1742 (No. 3444, 1975)

Here, I find the testimony of Thompson to be more credible than that of the CO. As Burch properly points out, the CO's testimony was problematic, which raise questions about the accuracy of his memory of events. For example, the CO testified that he knew that Burch employees were painting because he saw them with paint equipment. (Tr. 15, 41) The evidence, however, is clear that Burch was involved in metal stud framing and hanging drywall. (Tr. 57, 70) They did no painting. (Tr. 57) Moreover, the CO testified that he recollected that Dan Porges told him that the fan was being used by Burch and owned by Accelerated (Tr. 37). Porges, however, testified that he told the CO that he worked for Accelerated and that the fan was owned by R.A. Burch, the general contractor (Tr. 87) It is possible that the CO confused R.A. Burch with Respondent, Burch Construction and misinterpreted Porges statement to be that the fan was being used by Respondent.

The CO also testified that he could identify Thompson, with whom he remembered having a conversation (Tr. 37-38) However he failed to identify him in the courtroom (Tr. 43-44) even though he was seated next to Respondent's representative. Although the CO later asserted that he couldn't see Thompson from the witness chair (Tr. 104), the CO was also seated at the Secretary's table. It was not until after Thompson testified that the CO could positively identify the CO. (Tr. 104)

In sum, the testimony of the CO was inconsistent with the testimony of other witnesses, most of whom did not stand to gain by prevarication. Thompson's testimony, on the other hand was consistent with the facts as they developed. Therefore, I credit the testimony of Thompson over that of the CO. Accordingly, I find that the fan was not used by Burch employees, and hold that the Secretary failed to establish that Burch knew or, with the exercise of reasonable diligence, could have known of the violation.

ORDER

- 1. Other** than serious citation alleging violation of 29 C.F.R. 1926.404(f)(6) is VACATED.

/s/ _____
Benjamin R. Loye
Judge, OSHRC

Dated: April 14, 2008
Denver, Colorado