

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
Guamcell Communications,
Respondent.

OSHRC Docket No. **07-1551**

Appearances:

Isabella M. Del Santo, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California
For Complainant

Thomas M. Tarpley, Esq., The Thomas McKee Tarpley Law Firm, Hagatna, Guam
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Guamcell Communications (GC) installs cell phone communication antennas. On June 5, 2007, a GC crew was installing antennas and making adjustments atop the Bank of Guam Building on the Island of Guam. As Occupational Safety and Health Administration (OSHA) compliance officer David Hyongsu Moon was driving past the Bank of Guam Building, he observed GC acting supervisor Sonny Mitchell standing at the edge of the ten-story building without any form of fall protection. Moon parked his car and conducted an inspection of GC's worksite atop the building. As a result of his inspection, the Secretary issued a one-item citation to GC on August 21, 2007.

The citation alleges GC committed a serious violation of § 1926.501(b)(1) for failing to provide fall protection for employees on a walking/working surface with an unprotected edge 6 feet or more above a lower level. The Secretary proposed a penalty of \$4,000.00. At the hearing, the Secretary noted that, due to a clerical error, she had neglected to reduce the penalty by 10% based on GC's history factor. The Secretary amended the proposed penalty to \$3,600.00.

The undersigned held a hearing in this matter on June 26, 2008, in Hagatna, Guam. GC concedes jurisdiction and coverage. GC also admits § 1926.501(b)(1) applies to the cited condition,

its acting supervisor violated the terms of § 1926.501(b)(1), and its acting supervisor exposed himself to the risk of death or serious physical injury. GC contends, however it had no knowledge of its supervisor's conduct, and his conduct was not reasonably foreseeable or preventable. It also asserts the affirmative defense of unpreventable employee misconduct. The parties have filed post-hearing briefs.

The Secretary established her *prima facie* case. The undersigned finds GC proved its employee misconduct defense. Item 1 of the citation is vacated.

Facts

On June 5, 2007, compliance officer Moon was driving on a two-lane road, heading towards the Bank of Guam Building. The building is ten stories, approximately 100 feet high. Moon observed someone standing at the immediate edge of the building. Moon stopped his car and, using his binoculars, observed the man more closely. Moon took several photographs with a digital camera (Exhs. C-1, C-2, and C-3; Tr. 13-15). Moon observed the man standing on a parapet wall holding onto what Moon took to be an antenna. Moon could see the man was not wearing personal fall protection (Tr. 16-17). The man was wearing a blue shirt with "Guamcell" written on its front (Tr. 17).

Moon drove his car to the Bank of Guam parking lot, got out, and entered the building. Moon met with the bank's security officer and its facility manager. Moon then went up to the roof (Tr. 18). By the time they arrived, no one was on the parapet (Tr. 77).

On the roof, Moon encountered five GC employees, including Sonny Mitchell. Mitchell admitted he had been on the parapet wall without fall protection. Moon also met with Mark Manglona, who was the crew supervisor (Tr. 26). GC's crew was on the roof that day to assemble a "three-sectored cellular site and to run the transmission lines inside of the parapet wall, to get the material to the rooftop, meaning the pipes and . . . brackets . . . , and assemble them on the rooftop" (Tr. 98). The work plan was to assemble the various components on the floor of the roof, and then erect it while standing on the floor (Tr. 156). The work plan did not require any employees to stand on the parapet wall (Tr. 131).

The parapet wall was approximately 30 inches wide (Tr. 44). On the inside of the parapet wall, there is a second lower wall, referred to as a "bench" at the hearing. The bench is 18½ inches

high. The distance from the top of the bench to the top of the parapet wall is approximately 38 inches (Tr. 136). The total height of the parapet wall measured from the floor of the roof is approximately 4 feet, 8 inches.

Moon held an opening conference with Manglona. After a discussion on the rooftop, Moon instructed the GC employees to descend to the ground floor.¹ There they met with Greg Gibbons and Mark Sepeta, two of GC's managers who Manglona had called when Moon arrived at the scene. Gibbons and Sepeta agreed to go to Guam's OSHA office later that afternoon. Gibbons and Sepeta arrived at the OSHA office with a full-body harness and retractable lanyard. Moon examined the equipment and held a closing conference with the managers (Tr. 41).

As a result of Moon's inspection, the Secretary issued the instant citation on August 21, 2007.

The Citation

The Secretary has the burden of proving the violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, 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 conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

¹ Moon testified that when he asked Manglona if GC had protective fall equipment, Manglona told him it was in his truck in the parking lot. Moon stated that it was then that he told Manglona to accompany him down to the parking lot to look at the protective equipment. Once in the parking lot, Moon and Manglona looked in the truck and "didn't find it" (Tr. 37). At that point, Moon said, Gibbons and Sepeta approached them and introduced themselves as managers for GC. According to Moon, Gibbons expressed surprise the protective fall equipment was not in the truck and he offered to bring it by Guam's OSHA office later that day (Tr. 39-40).

Manglona and Mitchell both contradicted Moon's account. They stated the GC crew had brought three body harnesses and lanyards to the rooftop of the building. The work plan for the day did not require them to work at the edge of the building, so they stored the harnesses and lanyards in an equipment room on the roof where they stored their radio and other equipment (Exh. R-7, photo 6; Tr. 99, 131, 144, 154, 162). Manglona testified Moon instructed the entire crew to descend from the rooftop in order to further talk about the case, not to look for safety equipment (Tr. 145). Manglona stated they did not go to his truck, but met with Gibbons and Sepeta, "[b]y the time we got out of the elevator" (Tr. 137).

Item 1: Alleged Serious Violation of § 1926.501(b)(1)

Section 1926.501(b)(1) provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Prior to the hearing, GC admitted the first three elements of the Secretary's burden of proof: Section 1926.501(b)(1) applies to GC's work activities on the roof of the building; Sonny Mitchell violated the terms of § 1926.501(b)(1); and his conduct exposed Mitchell to the hazard of falling approximately 100 feet to the ground below. The Secretary established these elements with photographic exhibits (Exhs. C-1, C-2, and C-3) and the testimony of Moon (Tr. 43-44), as well as the testimony of Mitchell himself (Exh. R-6; Tr. 154-156). The only remaining element the Secretary must establish is knowledge.

Knowledge

At the time of the hearing, Sonny Mitchell was a foreman for GC. GC named him as foreman in February 2008 (Tr. 152, 167). At the time of the inspection, Mitchell was second in command of the five-man crew, after Manglona. If Manglona had to leave the site, Mitchell was left in charge as the acting supervisor (Tr. 167).

The day of the inspection, the crew met on the roof of the building and Manglona held a tailgate safety meeting. Manglona then left the roof of the building to get water for the crew (Tr. 132). As he returned several minutes later, Manglona saw Mitchell on the parapet wall from his truck as he entered the bank building parking lot (Tr. 133, 156). Manglona rushed to the rooftop. Seconds after he arrived, Moon showed up (Tr. 133).

When Manglona left, Mitchell became the acting supervisor (T. 140). GC's work plans for the day in question did not call for any of GC's crew to stand atop the parapet wall. Manglona had instructed the crew, "We don't need to get on the parapet" (Tr. 131). After Manglona left, however, Mitchell noticed an installed "down tilt" for one of the antennas needed to be adjusted (Tr. 154-155). Mitchell stated, "After we erected it, I noticed we didn't do the down tilt. . . . The whole thing is supposed to be done on the ground. It's something we missed" (Tr. 168). To adjust the down tilt,

Mitchell needed to “loosen four screws, pull the antenna down and tighten it back up,” using a speed ratchet. He estimated he completed this adjustment “under a minute or so” (Tr. 158).

Although Mitchell knew he was supposed to wear protective fall equipment while working on the parapet wall, he chose not to do so: “I figured it would be a lot quicker just to change it, instead of getting the belt and putting it on. It would only take me a minute or so” (Tr. 156). The alternative was to remove the entire mount, adjust the down tilt, then erect it again. Mitchell chose not to do this because, he said, “It would take too long” (Tr. 156).

Mitchell, as acting supervisor, had actual knowledge of his violative conduct. Under Commission precedent, Mitchell’s knowledge is imputed to GC. *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (“[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program”).

GC argues Mitchell’s knowledge cannot be imputed to it, and cites *W.G. Yates & Sons v. OSHRC*, 459 F.3d 604, 609, footnote 8 (5th Cir. 2006), which states, “[A] supervisor’s knowledge of his own rogue conduct cannot be imputed to the employer,” but must be established by the Secretary by proving either actual knowledge by the employer or constructive knowledge “based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor.”

The Commission has held, “Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case - even though it may differ from the Commission’s precedent.” *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

The worksite at issue in this case is located in Guam, which is in the Ninth Circuit. *W.G. Yates & Sons* was issued by the Fifth Circuit. It has no precedential value with regard to the instant case. The Ninth Circuit has not directly addressed the issue of whether a supervisor’s knowledge

of his or her own violative conduct may be imputed to the employer.² Therefore, Commission precedent applies. Mitchell's knowledge of his own violative conduct is imputed to GC, and the Secretary has established her *prima facie* case.

Unpreventable Employee Misconduct

GC argues Mitchell's behavior was unpreventable employee misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

Established Work Rule

GC has a written fall protection policy. Mitchell signed a copy of the policy the day he was hired, April 27, 2007 (Exh. R-1). The policy states in pertinent part:

1.2 100% Fall Protection!

All employees shall maintain 100% fall protection at all times as outlined in training. Failure to do so may result in termination from employment. This will be decided by the management team.

2 Training

2.1 Importance

Training is of the up most (sic) importance. You will receive training or have received training in the following areas per OSHA:

2.1.1 Fall Protection Training

OSHA 29 CFR 1910.67, 1926.453 and OSHA 29 CFR 1926.500-503, 29 CFR 1910.66 Appendix C and ANSI Z359.1

² The *Kerns Brothers* decision includes the Ninth Circuit among circuits placing the burden of employer knowledge on the Secretary. *Id.* at 2071, footnote 15. The case the Commission refers to is *Brennan v. OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139, 1145 (9th Cir. 1975), in which the court held employer knowledge to be an element of the Secretary's *prima facie* case when she alleged non-serious, as well as serious, violations of the Act. The case does not address whether a supervisor's knowledge of his or her own violative conduct can be imputed to the employer. A review of Ninth Circuit cases has not uncovered any cases addressing this issue, nor has GC indicated such a case exists.

GC has proven it had an established work rule designed to prevent the violation of § 1926.501(b)(1). GC implemented a 100 percent fall protection rule, specifically referring to § 1926.500-503.

Adequate Communication

GC's fall protection policy states, "You will receive training or have received training" in all protection (Exh. R-1). Greg Gibbons is GC's infrastructure manager and safety officer. It is his responsibility to "make sure that everyone in the company is adhering to the company policy, and ensure that people are trained and refreshed in training as needed" (Tr. 84). Gibbons testified regarding his strong belief in the use of fall protection (Tr. 85): "The equipment today, there's no reason anyone should be unhooked, right?" Gibbons stated he received training (Tr. 85-86):

in the use of full-body harnesses, is the standard today. You've got to have deceleration devices or shock-absorbing lanyards. There are stops. There's positioning devices. There's rope grabs are static ropes that help arrest your fall. There's SRL, self-retracting lanyards. There's all kinds of equipment available today.

Gibbons met Mark Manglona while working for another company in 2000. Gibbons trained Manglona in fall protection safety (Tr. 87-88). Sonny Mitchell had worked for Manglona for approximately four years when Gibbons hired Mitchell for GC, based on Gibbons's understanding that Manglona had instructed him in safety training. Manglona told Gibbons, "I taught him the same way you taught me" (Tr. 90). Gibbons reviewed Mitchell's safety training certificate (Exh. R-2) and verified for himself that Mitchell was familiar with fall protection equipment (Tr. 105):

As far as showing him how to put the belt on and equipment on, I mean, I watched him inspect it. I watched. I said, "Show me how you inspect this." I watched him put it on. I knew that he had been with Mark Manglona for four years, so I know he's trained because I trained Mark and Mark told me that, these guys, he trained them to the way that I trained him.

So, he came to me with training. But, I did, yes. I did, when they first came, I watched them climb and, you know, put their belts on, inspect their gear, just as a precaution for myself. I wanted to see.

Manglona also testified GC had a 100% fall protection rule that was communicated to all employees (Tr. 128). Manglona holds tailgate safety meetings every day before work begins. The day of OSHA inspection, he had told the GC crew there was no reason to get on the parapet wall.

Mitchell corroborated Manglona's statement, and admitted he knew he was violating GC's safety policy when he got on the parapet wall without fall protection (Tr. 157, 160). Mitchell's explanation for his knowing violation of a safety rule is the familiar one of convenience (Tr. 156): "I figured it would be a lot quicker just to change it [the down tilt], instead of getting the safety belt and putting it on. It would only take me under a minute or so."

GC has established it effectively communicated its safety rule, and that Mitchell was aware of the rule even as he was violating it.

Discovery of Violations

Gibbons testified he made "spot inspections" of GC's worksites, both to monitor the progress of the work and to see that all safety rules were being followed (Tr. 111).

Discipline

GC claims that, despite Gibbons's spot inspections, it had never previously discovered an employee violating a safety rule. Mitchell was the first employee found (with the help of OSHA) committing a safety infraction (Tr. 100). The day after the inspection, Gibbons filed an "Incident Report" with GC, documenting Mitchell's violation of company safety policy. Mitchell wrote a statement in the "Employee Response" section of the report: "I Sonny Mitchell apologize for my actions on the day of 6.5.07. My irresponsibilities on the job site was juvenile and without thought" (Exh. R-6; Tr. 92). Gibbons grounded Mitchell for six months, during which time he was on probation. Gibbons instructed Mitchell to undergo retraining. After completing an Omega Safety training course, Gibbons allowed Mitchell to work above ground level again for GC (Tr. 94-95).

Analysis

GC makes a strong case in its employee misconduct defense with regard to the elements of having an established work rule and effectively communicating it. Its record on discipline is thin, but OSHA had never previously cited GC for a violation, so it is possible its employees were exemplary and, until Mitchell's carelessness on June 5, 2007, had not needed to be disciplined. The weakest part of GC's defense is establishing it took steps to discover violations. Gibbons stated he made spot inspections, but he did not document these inspections and his description of them was perfunctory. It does not appear he makes a special effort to discover violations, but generally checks out the worksite when he shows up to monitor the job's progress.

Despite the lack of overwhelming evidence that GC took steps to discover violations and then enforce discipline, the undersigned finds GC barely met its burden of proof on its affirmative defense. Weighing heavily in this conclusion is Mitchell's unequivocal testimony that the work was planned to be completed on the roof floor, he had been trained in using protective fall equipment, he knew he was supposed to wear protective fall equipment if he stood on the parapet wall, and he chose to not wear the equipment despite his training and knowledge. It is possible Mitchell flouted the fall protection rule because he had learned in his few weeks on the job that GC winked at safety infractions or tolerated momentary exposures to fall hazards. Other than Mitchell's misconduct, however, the record does not corroborate such a conclusion or that GC failed to take fall protection seriously.

GC has established its affirmative defense of employee misconduct. Item 1 of the citation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a violation of § 1926.501(b)(1) is vacated, and no penalty is assessed.

/s/
NANCY J. SPIES
Judge

Date: November 17, 2008
Atlanta, Georgia