

SECRETARY OF LABOR,

Complainant,

v.

BOH BROTHERS CONSTRUCTION CO.,  
LLC

Respondent.

OSHRC Docket No.09-0239

APPEARANCES:

Tina D. Juarez, Esquire  
Lindsay A. Wofford, Esquire  
Office of the Solicitor  
U. S. Dept of Labor  
Dallas, Texas  
For the Complainant.

Walter W. Christy, Esquire  
Jacob Credeur, Esquire  
Coats Rose, P.C.  
New Orleans, Louisiana  
For the Respondent.

BEFORE: G. Marvin Bober  
Administrative Law Judge

**DECISION ON REMAND**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (“the Act”). On October 4, 2010, I issued a decision and order affirming a citation issued to Boh Brothers Construction Co., LLC (“Boh Brothers”) alleging a violation of 29 C.F.R. § 1926.502(d)(8). On November 30, 2010, the Commission remanded this case to determine the credibility of two Boh Brothers’ employees’ testimony regarding the number of workers tied off at one time to the horizontal lifeline and any issues that may be affected by these credibility determinations. On remand, a second administrative trial was held at which Assistant Area Director (“AAD”) Stephen Devine, the person who conducted the Occupational Safety and Health Administration (“OSHA”) inspection, was the sole witness. After the second trial, the parties submitted post-trial briefs. For the following reasons, and the reasons stated in my original decision, I find that the Secretary failed to meet her burden of proving that Boh Brothers did not comply with the cited standard. Therefore, the citation is now vacated.

### **Credibility of Witnesses**

In my first decision, I stated that Manuel Perez Muniz and Jesus Padron were not discredited based on name changes or pending lawsuits. (J. Dec. at 9.) However, I failed to clearly state that based on their demeanor, I considered Muniz and Padron less than credible witnesses. I observed the demeanor of both of these witnesses on the stand as they testified. While some of their testimony was credible, other of their testimony was hesitant and evasive. I therefore found them unreliable witnesses. *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978) (“[i]t is the policy of the Commission to ordinarily accept [the Judge’s] evaluation of the credibility of witnesses, for it is the Judge who lived with the case, heard the witnesses, and observed their demeanor.”) Therefore, the testimony of Muniz and Padron that they observed more than five individuals tied off to the same lifeline will only be credited if supported by other evidence. (Tr. 105-07; 494.) Initially, I found that Devine’s testimony that “during his investigation, he learned that ten employees were tied off to one lifeline on the morning of the accident” supported the testimony of Muniz and Padron. (J. Dec. 10.) However, in light of the Commission’s remand order, the factual basis for Devine’s conclusion must be examined. Therefore, I granted the Secretary’s motion to reopen the record to allow both parties to provide additional information regarding the factual basis for Devine’s conclusion.

### **Admissibility of Interview Statements**

Devine explained that he relied on the interviews he conducted with five Boh Brothers employees and one Boh Brothers manager, Vic Gremillion, in reaching his conclusion that ten individuals were tied off to a single lifeline. Devine did not rely on information collected from Muniz and Padron. At the beginning of the second trial, Devine stated that he could not recall the exact questions and answers from these interviews and therefore, the Secretary provided copies of the interview statements to aid his testimony.<sup>1</sup> (Exs. SR-1-5.)

Boh Brothers timely objected to the admission of these interview statements. During the trial, I admitted interview statements from Broderick Perryman, Maximo Arguelles, and Fredy Garcia. I excluded interview statements from Andrew Coston and Miguel Garcia. I requested, however, that the parties brief the issue in their post-trial briefs for further consideration.

After further consideration, I reject Boh Brothers’ challenge to the admissibility of all except one interview statement. Statements by employees to OSHA compliance officers

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<sup>1</sup> The Secretary did not seek to introduce an interview statement from Gremillion.

concerning their workplace activities are not hearsay but rather “admissions,” which are admissible in Commission proceedings under Federal Rule of Evidence 801(d)(2)(D) and 29 C.F.R. §2200.71. *See Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2185 (No. 90-1747, 1994) (explaining that employee statements are admissions and not hearsay). Here, all of the declarants were employees at the time of their interviews, and the statements relied upon concerned their work activities, which were within the scope of their employment. Therefore, I admit the interview statements from Perryman, Arguelles, Fredy Garcia, and Andrew Coston. (Exs. R-1-4.)

While Miguel Garcia’s statement is admissible under Rule 801(d)(2)(D), I am excluding his statement because neither party identified Miguel Garcia on its witness list. (Ex. SR-5.)

Finally, while Coston’s interview statement is admissible, I find his statement unreliable.<sup>2</sup> (Ex. SR-3.) *See Regina Constr. Co.*, 15 BNA OSHC at 1048 (explaining that admissibility and reliability are separate issues). When asked “[h]ow many people fell into the water,” Coston responded that “[t]hey said ten. The news media and people on the job said 10 employees went into the water.” (Ex. SR-3.) Without an opportunity for me to assess his credibility, and Boh Brothers to cross-examine Coston regarding his interview statement, it is difficult to determine which statements were actually based on his personal knowledge. Although Coston testified at the initial trial, he was not questioned about the statement set out above.

### **Testimony from Second Trial**

Devine interviewed Broderick Perryman on November 12, 2008. On the day of the accident, Perryman was working on the barge that was floating in the lake below the bridge. Devine testified that the following statements from Perryman’s interview helped him determine that more than five people were tied off to the same lifeline: (1) “I viewed the girder crash down onto the bottom past the [C-]caddy, and I saw men upside down attached to the girder safety cable”; (2) “I looked back under the bridge and saw Eric [Perryman] semi-submerged and struggling to stay afloat. Instantly, I knew that he was still attached to the girder...The driver got me close enough to Eric to grab him and cut his safety harness from under his safety vest” and; (3) “To my recollection, I was unaware that no more than five men could attach to the girder safety cable. Typically with our crew there would be between five and six guys, at times

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<sup>2</sup> Given that Coston’s interview statement is unreliable and will not be considered in my decision, Coston’s deposition submitted by Boh Brothers to rebut his interview statement is now irrelevant. (RR-1.)

additional men, retrieving material and passing through close to the edge. They would hook off to the cable that my crew tied off to.” In addition to his responses, Perryman was given a picture of the bridge to indicate on it where the employees were standing on the day of the accident.<sup>3</sup> (RTr. 18-23; Ex. SR-1.)<sup>4</sup>

Devine interviewed Maximo Arguelles on November 6, 2008.<sup>5</sup> (SR-2 at 1; RTr. 32.) On the day of the accident, Arguelles was working on the barge with Perryman. (SR-1 at 1; SR-2 at 1.) Devine testified that the following statements from Arguelles’ interview helped him determine that more than five people were tied off to the same lifeline: (1) “I noticed Troy, instead of falling like the rest he was being pulled doubled over with his hands almost touching his toes”; (2) “One person on the right side of the girder was thrown into the water away from the girder”; (3) “The second person on the right side of the girder was being pulled away, doubled over, nearly touching his toes. The person after that was being pulled with his back to the water and was tied off. The next two people I saw, one was Jesus, they were falling head-first. There was a jumble of guys falling together at odd angles.” (RTr. 37-38.)

Devine interviewed Fredy (or “Freddie”) Garcia on January 6, 2009 with the assistance of a translator.<sup>6</sup> Devine testified that the following statements from Garcia’s interview helped him determine that more than five people were tied to the same lifeline: (1) “There was about nine to 11 employees who fell into the water, three African American and seven Latinos. No one was tied off. There was also three persons on top of the girder who were not tied off, either because we were going out to lunch already”; (2) “My brother was the only one who was tied off because of working underneath. Usually seven people tied off to the same girder. This is very common

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<sup>3</sup> At the initial trial, Perryman testified that he could not see how many people were tied off to the lifeline. His testimony does not conflict with his interview statement or his drawing. From Perryman’s view on the barge, it is possible that he could see where people were standing on the bridge without knowing whether they were tied off to the safety line which was lying on the girder. Moreover, Perryman told AAD Devine that he saw men hanging upside down attached to the lifeline but did not state how many people he saw attached. (RTr. 60.)

<sup>4</sup> “RTr.” refers to transcript pages from the second trial, and “Tr.” refers to transcript pages from the first trial.

<sup>5</sup> Arguelles did not testify at either trial but was listed on the Secretary’s witness list.

<sup>6</sup> Fredy Garcia, who fell in the water with the girder, testified at the initial trial. At the time of the accident, Garcia was working on the top of the bridge.

because some guys go underneath and get unhooked until they come back up”; and (3) “The supervisor who died at the scene would always tell us to be tied off. If we were not, he would tell us and get mad, but never gave us any type of written statements or anything like that.” (RTr. 50-51.)

Devine also testified that no one ever mentioned to him during his investigation that employees tied off to the mudhooks. Kenny Solis, the senior construction manager at Boh Brothers who helped design the fall protection system, told Devine that the mudhooks were used to tie the lifeline to the girder. (RTr. 57.)

### **Noncompliance With Cited Standard**

The only issue on remand is whether the Secretary established that Boh Brothers complied with the cited standard.<sup>7</sup> The parties stipulated that Boh Brothers’ lifeline could support up to five persons and still maintain the safety factor of two as required by § 1926.502(d)(8). I find the evidence that the Devine relied on does not rise to the level necessary to establish that more than five people were tied off to the same lifeline at one time.

During the second trial, Devine initially testified that Gremillion told him that the employees were tied off to the lifeline. (RTr. 79.) However, Devine contradicted himself later by admitting that “none of the management employees that [he] talked to at Boh Brothers told [him] that 10 employees were tied off to the [life]line at one time.” (R.Tr. 81.) Moreover, none of the non-management employees Devine relied on specifically stated that they observed more than five individuals tied off to the lifeline on the day of the accident. The Secretary argues that the only place that employees could tie off to was the lifeline and therefore Gremillion must have been referring to the lifeline when discussing how many employees were tied off. However, Boh Brothers presented rebuttal testimony from Perryman, a highly credible witness, that employees could tie off directly to the mudhooks on the girder if they were working close by. (Tr. 205, 210.) Although Solis, the Boh Brothers construction manager, did not consider tying off directly to the mudhooks, he believed it was possible if employees were stationary. (Tr. 452.) As such, I now find that Devine’s testimony does not corroborate the testimony of Muniz and Padron that they

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<sup>7</sup> To prove a violation of a standard, the Secretary must show by a preponderance of 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 either knew or could have known of the violation with the exercise of reasonable diligence. *Atlantic Battery*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

observed more than five individuals tied off to one lifeline. With no evidence to corroborate their testimony, the Secretary has failed to meet her burden of establishing that Boh Brothers did not comply with the cited standard.

**ORDER**

Based on the foregoing decision on remand, it is hereby ordered that Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.502(d)(8), is VACATED.

/s/  
G. Marvin Bober  
Judge, OSHRC

Dated: December 8, 2011