

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET NO. 99-1131

B & R WHOLESALE TIRE CO.,

Respondent.

APPEARANCES:

Patrick L. Depace, Esquire
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For the Complainant.

Marshall Buck, Esquire
100 Federal Plaza East
Youngstown, Ohio
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) (“the Act”), to review a citation and notification of penalty issued by the Secretary of Labor (“the Secretary”). On April 12, 1999, an accident occurred at a work site in Youngstown, Ohio, where a roofing addition was being built between two existing buildings owned by Respondent, B & R Wholesale Tire Company (“B&R”); the accident took place when a crane was setting trusses on steel beams at the site and the trusses collapsed. The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of the site from April 12 through 15, 1999. As a result of the inspection, OSHA issued B&R a serious citation alleging violations of section 5(a)(1) of the Act and 29 C.F.R. §§ 1926.20(b)(2) and 1926.602(c)(1)(viii)(A) and proposing a total penalty of \$5,250.00.

B&R filed a timely notice of contest, and an administrative trial was held in Youngstown, Ohio on March 20, 2000.¹ Both parties have filed post-trial briefs in this matter.

Testimony of Ken Weeks

Ken Weeks testified that he has worked for Valley Crane (“Valley”) as a crane operator for 16 years and that he has operated all types of cranes, ranging from 6 tons to 75 tons; he further testified that Valley rents cranes and operators, that B&R rented a crane and operator from Valley in April of 1999, and that his boss, Fred Comparato, assigned him to the B&R project. Mr. Weeks said he arrived at the site with his crane at about 8 a.m. on April 12, 1999, that Ray Starr, B&R’s owner, came up to him, and that they had a brief conversation about hooking up the lifting beam and where the trusses were; Mr. Weeks did not know who Mr. Starr was then, but he later concluded he was “the boss” as he was “running around giving orders” and “more or less directing everyone.” However, Mr. Weeks noted that while the renting company tells him what they want done he makes his own decisions about how to operate the crane, that he had no supervisor on the B&R job, and that he worked somewhat like an independent contractor at the site. (Tr. 7-13, 35-42, 52-57).

Mr. Weeks stated that the project involved setting 45 to 50 85-foot trusses in order to construct a new building between two existing buildings at the site.² He also stated that the trusses were located to the left of his crane and that his job involved picking them up, swinging them over and setting them down on the building. (Tr. 13-14). He described the process more fully as follows:

Well, I would swing over to my left ... lower the cable down with the lifting beam on it; the pulleys’s would hook it up. I would pick it up and start swinging back to my right; and then there’s a man on a tag line who more or less guides the truss as we’re going up; and then when I would get up and clear the existing building that was there, then I would swing over to my right at 180 degrees and start lowering the truss down....I would lower it down so far, but carpenters or whoever was on the building would reach down, and they would have marks that they set the truss on. They would more or less guide me to swing it right, left, in or out. They actually handled the truss once I got it to them. (Tr. 14-15).

¹At the trial, B&R moved for a directed verdict with respect to Items 1 and 2 of Citation 1, the alleged violations of section 5(a)(1) and 29 C.F.R. 1926.20(b)(2). I denied the motion at the trial but agreed to reconsider it after reviewing the record. In my opinion, B&R’s argument was not persuasive, and I affirm my denial of the motion for directed verdict. (Tr. 202-05).

²Other evidence in the record indicates the trusses were 80 feet long. (Tr. 65-67; R-6).

Mr. Weeks said the day of the accident was “fairly sunny” with a “slight wind” that was “nothing unusual.” (Tr. 15-16). He also said that he had set about 30 trusses at the time of the accident, which he described as follows:

I swung over ... the top of the building. I was in the process of setting it back down when I heard ... a noise, like a cracking sound; and I looked back to my left, and the trusses were starting a domino-effect falling down. So I was just -- stayed there with the truss. I never lowered it down. I didn't do anything with it; and the trusses fell within a matter of a minute or so. (Tr. 16).

Mr. Weeks was adamant he had not hit the building with his load, although Mr. Starr accused him of doing so, and it was his opinion that a lack of bracing caused the collapse. Mr. Weeks said he had worked on “hundreds” of projects involving truss setting, that in his experience trusses were braced with wooden 2x4's set in a diagonal pattern, and that at the B&R site metal strips were put between the trusses instead of using wooden 2x4's as bracing. He also said he did not know what the metal strips were called, although he assumed they were some sort of bracing, and that while workers could have been putting up 2x4's on the interior side of the trusses, which he could not see, no 2x4's were being put up on the exterior side of the trusses.³ Mr. Weeks had never seen a truss fall before in his 32 years of experience, and it was his belief that using 2x4's to brace the trusses was “a necessary component of the system so they don't fall down.” (Tr. 16-20, 29-35, 43-50).

Testimony of Don Hall

Don Hall testified he has been the chief building official for Mahoning County for over two years, that before this position he had been in the building industry for 40 years, including the position of vice-president with Bucheit Company for 25 years, and that he is a civil engineer and licensed in eight to ten states, including Ohio. He further testified that his duties include administering all of the building permits issued in Mahoning County and that he had inspected the B&R project after the accident.⁴ (Tr. 61-65). Mr. Hall described what he learned as follows:

³Mr. Weeks indicated he had seen “somebody putting something up” on the “back side” of the trusses but that he didn't “see exactly what it was.” He also indicated there could have been some bracing on the interior side of the trusses, despite his statement to the police on April 12, 1999, that there were no “wooded braces set in the trusses, only metal tabs.” (Tr. 20, 31, 35, 39).

⁴Mr. Hall stated that after he arrived he saw Ray Starr driving a backhoe into the debris; he
(continued...)

All he [R. J. Starr, Ray Starr's son] told me was that Valley Crane was -- they were installing these 80-foot-long trusses. I got to tell you, I've been in the -- in this erection business with Bucheit for 25 years, and we did a lot of erection. We did everything from wood trusses like this to large beams to -- to highway beams, everything. And we -- we were general contractors. We did our own erection; and I have never seen anybody erect -- if I had anybody erecting trusses in that kind of wind, or any type of thing, I would have fired them; because it was -- it was -- the gusts were so high that it was terrible. I have to say that first. It was really that bad, the wind conditions that were down there. And when I got there and talked to R. J., he said his dad was around somewhere, and he'll try to get ahold of him; but he did see the crane people, when they were erecting the trusses, they hit the one on the -- the farthest one on the east, and that all just dominoed the truss collapse. (Tr. 67-68).

Mr. Hall said that the wood trusses were 80 feet long and that they were supported on either side by masonry columns; he also said the trusses sat on steel beams that were on top of the masonry columns. (Tr. 65-66). When asked about temporary bracing, Mr. Hall responded:

Q: Were you able to discern any temporary bracing?

A: Yes; it looked like there was some temporary bracing along the bottom -- across the bottom, and that was -- that was in there, that was -- that would meet temporary bracing standards. I didn't see anything on the end. I would have expected temporary bracing at the first -- that would have stopped all of this from any crane dislodgement or anything like that; so I didn't see anything -- but that doesn't mean it wasn't there. I just didn't see it. It could have been ... pushed off and into the mess. It looked like most of the vertical were just -- were just metal bracing, which weren't continuous units on the top bracing.

Q: Is that sufficient to be adequate with industry guidelines?

A: No; it's supposed to be continuous bracing across. There should be ... 2x4's across there. All I saw was the -- was the metal. I didn't see any 2x4's up on top. That doesn't mean that they didn't slide off or anything. That's what I say, it's tough to see in a mess like that ... what was left.

Q: What is the purpose of temporary bracing?

A: That's just to stabilize those trusses entirely until permanent bracing is put in and -- all the way around the perimeter, so just exactly ... what did happen, won't happen.⁵ (Tr. 71-72).

⁴(...continued)

told Mr. Starr he could not alter the site before OSHA's inspection, and Mr. Starr said OSHA had already been there. Mr. Hall further stated that Mr. Starr's son was also telling him to stop, due to the danger of one of the columns collapsing, and that at that point the CO arrived. (Tr. 68-70).

⁵Mr. Hall indicated the bracing he did see was done correctly. He also indicated that even if braced properly trusses could still fall "like a stack of cards" if hit hard enough. (Tr. 82-83, 98-99).

Testimony of David Hunter

David Hunter, the OSHA compliance officer (“CO”) who conducted the inspection, testified that prior to his employment with OSHA he had been a co-owner of a health and safety consulting firm and that he had also had many years of experience in the construction industry as a carpenter; his construction experience had included both truss erection and installing temporary truss bracing. (Tr. 101-07, 154-59). CO Hunter described the B&R project as follows:

The project was -- they virtually were bridging between two buildings. If you can imagine, in a figure of an H. The new construction being between two existing buildings. The dimensions were about 110 feet in length and approximately 80 or 85 feet in width. The construction was -- there was a concrete driveway -- actually, the whole area was concreted in at this point. There were some cinder block columns that were built, and then there were I-beams attached to the columns....The project was to create, I guess, a clear-span area, and that’s the reason for the trusses; so they didn’t have to put any interior bracing; and when I got there, it appeared that they were in the process of setting the trusses when ... the accident occurred. (Tr. 109).

The CO said that when he arrived at the site, Ray Starr was driving a backhoe into the rubble; after identifying himself as an OSHA CO, he asked Mr. Starr to stop using the backhoe because of the danger of the possible collapse of the beams and columns, and Mr. Starr did so.⁶ The CO also said that upon viewing the scene, as shown in GX-2-35, he saw evidence of some temporary bracing used but also instances of no bracing and insufficient bracing used; he noted that the temporary bracing holds each truss in a vertical position and makes the trusses a solid unit and keeps them from falling over until permanent bracing can be installed. The CO additionally saw insufficient nails going through the 2x4’s. (Tr. 110-36). He explained the problem with this as follows:

Well, to adequately use temporary bracing, it’s industry standard; it’s directed by the Trust Plate Institute and accepted by OSHA, that every piece of temporary bracing shall have no less than two nails from 12 to 16-penny, attaching each truss piece to the next. You can’t use one nail; you can’t skip it for the temporary bracing to be sufficient to keep the trusses up. (Tr. 124).

CO Hunter further testified that as a result of his inspection, he concluded that there was insufficient temporary bracing in place and that it was inadequately nailed. He pointed out that he saw no evidence of ground bracing, which is required for virtually all trussing jobs. He also pointed out

⁶The CO said that Mr. Starr first told him OSHA had already left; however, the CO reiterated that he was from OSHA, after which Mr. Starr complied with his request. (Tr. 110).

that the first truss, which lends support to all subsequent trusses, was itself insufficiently supported, particularly since it had no ground bracing; he determined this by observing the concrete pad below that area and seeing no penetrations where supporting braces could have gone, and he said that while the truss being attached to the existing building provided some support it was not a substitute for the required bracing. The CO said that another problem was that metal spacers were used to achieve the requisite spacing between the trusses, rather than using a more accurate method, which can cause trusses to be out of plumb and put additional stress on the bracing. The CO considered it “miraculous” that only one person had a minor injury, in his experience, truss collapses usually cause serious or fatal injuries.⁷ (Tr. 135-38, 145-51, 197).

CO Hunter stated that knowledge about what bracing is required for a particular truss job can be gained through extensive prior experience or from the layout provided by the truss manufacturer. He noted that every set of trusses has a layout explaining how much and what type of bracing to use, as well as where to put it; he further noted that the Truss Plate Institute (“TPI”) has instructions that give its recommendations on how to install and brace trusses, that TPI booklet HIB-91 applied to the trusses on the B&R project, and that Montgomery Truss (“Montgomery”), the manufacturer of the subject trusses, provided in this case both the booklet and a summary of its provisions. The CO said that Ray Starr told him that he was in charge of the truss erection project because of his previous experience, that he was the competent person on the job, and that all of the employees at the site were working for him. (Tr. 136-44, 152; G-36-37). However, the CO did not consider Mr. Starr a competent person on the subject project, and he explained why:

[F]rom the few times that Mr. Starr and I spoke, I ... don’t believe that he was fully aware of the level of hazard that’s involved with utilizing these trusses and the sheer forces that the trusses themselves apply....This was also evidenced when I got to the job site that when Mr. Starr was on the front loader and was attempting to move the trusses that were fallen out of the way while they were still suspended up against the steel beams -- the concrete columns were damaged; and it could have been a really terrible scene if he possibly would have continued. I don’t believe he was aware of the sheer magnitude of the force that these things exert. (Tr. 144-45).

Testimony of Ray Starr

⁷The person was Joe Conti of Conti Construction, who injured his ankle as he was running away when the trusses began to collapse. (Tr. 138, 151, 197).

Ray Starr testified that he has been in the tire and wheel business since 1972 and that he does not operate a construction company or employ carpenters. He further testified that he retained an architect to design the addition, that he hired Conti Construction (“Conti”) to do the woodwork part of the project, and that Conti obtained the necessary permits for the job.⁸ Mr. Starr said he had used Conti for previous projects and that Conti had over 30 years of experience in setting trusses and was “more than competent” for the job; he also said Conti was responsible for putting up the addition and that when it had problems or questions it went to the architect. Mr. Starr noted that Conti provided the labor while he provided the materials, that Conti had about eight employees on the job and used its own tools and supervisors on the project, and that Conti, not B&R, controlled the job; however, B&R employees took nails and lumber to the Conti employees as needed, he provided his impact gun to Conti so that it could bolt the first truss to the masonry of the addition, and on two or three occasions on the day of the accident he had helped out by using his forklift to lift one of the B&R supervisors up to release a truss from the crane. (Tr. 206-10, 216, 229-31, 239, 242-54).

Mr. Starr stated that he and representatives of Conti and Montgomery had a meeting about a month before the project and that the Montgomery representative provided Conti with information about how to install and brace the trusses; he further stated that he himself was aware that bracing was necessary to put up the trusses and that he had purchased approximately 2400 feet of 2x4’s, 2x6’s and 2x8’s to be used for the bracing.⁹ Mr. Starr watched the first truss being set and braced, and although he watched the progress of the job after that point on a “hit or miss” basis, he observed “tons of braces” put on the trusses and believed they met the TPI standards in view of what the Conti and Montgomery representatives had said at the meeting. (Tr. 210-18, 256-61). He also believed that the crane operator hit the building and caused the accident, which he described as follows:

Well, there was approximately three hits on the building by the crane operator. The first hit shook the building, and the steel beams ... just tremored ... I think my son, R. J. came down and notified me the second hit....But when the whole building tremored, I knew ... that the building had been hit, and I went to the driver, and I said, You’re going to kill somebody....[T]he last final blow -- I’ll call it truss number one ... took

⁸Mr. Starr said that another company performed the masonry part of the job. (Tr. 209).

⁹Mr. Starr identified RX-3 as his receipts for the lumber he had purchased for the project and RX-4 as some of the information the Montgomery representative had given Conti. (Tr. 214-15, 233).

the blow....The truss that he was laying ... he was swinging up over the building, and he hit the lead truss ... [and] ... that truss broke loose from the building [and] they all went with the domino effect. (Tr. 222-23).

Mr. Starr said that after determining there were no injuries, he looked over the site and saw that when the lead truss collapsed it had broken the cement block on the wall of the existing building to which it had been bolted; he then began using his backhoe to clear up the debris as there was shipping to be done and the area in front of his shipping department was blocked. Mr. Starr also said that OSHA arrived at about that time and that the CO told him to proceed because, with the amount of debris and the state the site was in, no one could tell what had happened. (Tr. 224-226). When asked why Conti was not in charge of cleaning up the site after the accident, Mr. Starr responded:

Because, he wasn't in charge of nothing. He was just in charge of the construction. The construction wasn't going to be finished, so he walked off the job. He asked me to pay him for his time and his men; and ... I think I gave him 1200 bucks. I'd have to check ... because he showed me that particular time what he had -- how many men he had and what he felt....I said, well; you were going to get 10,000 for two days. You ain't going to get 5,000 for one day. So we bartered ... and ... it just seems to me 1200 bucks is what I paid him for his day's ... work. I don't even know how long he was there, to be honest with you ... that whole day was a disaster. (Tr. 254-55).

Whether B&R was Properly Cited for the Alleged Violations

At the hearing, B&R's counsel elicited testimony from Ray Starr to the effect that Conti controlled the work at the site and was the employer with respect to the construction project. (Tr. 206-16). The Secretary objected to this testimony at the hearing, and she objects in her brief to B&R raising this defense, noting that Commission Rule 34(b)(4) requires affirmative defenses to be raised in the employer's answer and that B&R failed to do so. *See* 29 C.F.R. 2200.34(b)(4). *See also A/C Elec. Co. v. OSHRC*, 956 F.2d 530 (6th Cir. 1991). While the Secretary is correct that B&R did not assert this defense in its answer, I nonetheless conclude that it is appropriate to address this matter; however, for the following reasons, I find that B&R was properly cited in this case.

As set out above, the CO testified Ray Starr told him that he was in charge of the project due to his prior experience, that he was the competent person on the job, and that all the employees at the site were working for him.¹⁰ The CO also testified that no one ever mentioned Conti or said

¹⁰The CO said that Mr. Starr told him that he had built one of the other buildings at the site,
(continued...)

anyone was working for Conti and that the three employees he talked to stated they were working for Mr. Starr; one was Joe Conti, the injured person, who told the CO he and the others were working for and under the direction of Mr. Starr.¹¹ (Tr. 144, 151-52, 169-70, 183, 187-88, 192-94, 197-99). The CO stated that he saw Mr. Starr using a backhoe to clean up the debris and instructing employees which saws to use to cut up the debris, and he further stated that he learned during his inspection that Mr. Starr had been using a forklift in order to lift an employee up to the structure to release the trusses from the crane; to do so, the employee stood on the end of the forklift on top of pallets that had been “shrinkwrapped” together.¹² (Tr. 110, 115-16, 144-46, 164-67).

It is clear from the above that the CO’s testimony about the site was markedly different from that of Mr. Starr. In his testimony set out *supra*, Mr. Starr indicated he had minimal involvement with the project, such as purchasing materials, observing the work, and having B&R employees take materials to the Conti workers and allowing Conti to use his impact gun. (Tr. 213-17, 239-46, 249, 253). However, he admitted he operated the forklift to lift a B&R supervisor up to release trusses from the crane and that he cleaned up the debris after the accident. (Tr. 225-26, 229-31, 239, 244, 254). He also admitted he told the CO that the employees on the job were working for him, although, as he explained it, they were working for him only in the sense that he was the owner and Conti was the contractor and he paid them to do the work. (Tr. 226, 239). Regardless, the CO’s testimony is credited over that of Mr. Starr. First, as noted *supra*, the CO’s testimony was supported by that of Messrs. Hall and Weeks. Second, parts of Mr. Starr’s testimony were simply not believable. For example, his testimony that the CO told him to proceed with cleaning up the site before the inspection, besides being contrary to the testimony of the CO and Mr. Hall, was highly implausible. (Tr. 68-71, 110, 225). As another example, Mr. Starr testified that although he had had a contract

¹⁰(...continued)
including operating a crane and setting trusses. (Tr. 165-66).

¹¹The CO noted R. J. Starr told him he and his father were building the addition. (Tr. 164-65).

¹²The testimony of Mr. Weeks and Mr. Hall was consistent with that of the CO. Mr. Weeks testified about Mr. Starr “more or less directing everyone” at the site and using the forklift to raise the employee up to release the trusses from the crane, while Mr. Hall testified about Mr. Starr cleaning up the debris; in addition, GX-1, Mr. Hall’s report, states that R. J. Starr told Mr. Hall that “all the people who were doing the erection worked directly for Ray Starr.” (Tr. 12, 20-22, 68-71).

with Conti and photos he had taken showing the bracing, he had not brought either the contract or the photos to the hearing; he then testified that he might not have kept the contract because he wasn't "too good at keeping things." (Tr. 218, 247-48). Third, I observed the respective demeanors of these two witnesses on the stand, and I found the CO's testimony to be convincing and credible and the more reliable evidence in regard to the circumstances at the site.

In view of the foregoing, I conclude that Mr. Starr was the employer with respect to the truss erection project. I further conclude that even if he was not, he exercised sufficient control over the site to abate the hazards relating to the project, based on the Commission's long-standing precedent setting out the multi-employer work site doctrine; according to that doctrine, an employer that creates or controls a hazardous condition while engaged in a common undertaking will be liable under the Act, regardless of whether its own employees or those of other employers were exposed to the cited hazard. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1722-23 (No. 95-1449, 1999), and cases cited therein. Finally, I conclude that, to the extent that B&R may be asserting the multi-employer work site affirmative defense, it has not met the elements of that defense. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976). Consequently, B&R was properly cited in this case.

Citation 1, Item 1 - Section 5(a)(1) - Proposed Penalty: \$2,500

This item alleges that B&R was in violation of the general duty clause, section 5(a)(1) of the Act, in that it did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees. Specifically, the citation alleges that:

On 4/12/1999, employees were installing wood trusses with a span of 80 feet and weighing 635 lbs each onto 2 column supported steel beams. The trusses were not adequately braced laterally or diagonally resulting in the trusses collapsing, injuring one employee.

Among other feasible and acceptable methods to correct this hazard are:

1. Install lateral and diagonal bracing as required.
2. Follow the Truss Plate Institute Summary Sheet, HIB-91 (Handling, Installation, and Bracing Metal Plate Connected Wood Trusses) during the erection and/or installation of all wood truss systems.
3. Follow the commentary and recommendations as supplied by the manufacturer.

To show a 5(a)(1) violation, the Secretary must prove that: (1) a condition in the workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Well Solutions, Inc.*, 17 BNA OSHC 1211, 1213 (No. 91-340, 1995); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986).

As to the first element, B&R contends the trusses were properly braced and that the reason for the collapse was the crane operator striking the first or lead truss with his load.¹³ As noted *supra*, Mr. Weeks was adamant he had not hit the addition. (Tr. 43-44). On the other hand, Mr. Starr testified he had, and R. J. Starr, Mr. Starr's son, evidently told Mr. Hall this was what had happened. (Tr. 67-68, 222-23; GX-1). Further, while Mr. Weeks indicated there was only a "slight wind" that was "nothing unusual" that day, Mr. Hall testified to the effect that the wind at the site was such that erection should not have been taking place. (Tr. 15-16, 68; GX-1). However, whether the crane's load actually struck the building need not be resolved because I find, based on the record, that the trusses were not properly braced and that that condition represented a hazard for employees.

The CO's testimony, set out above, was that insufficient temporary bracing was used, that the bracing that was used was inadequately nailed, and that he saw no evidence of ground bracing, which is required for all truss projects; he also testified that the first truss, which gives support to the other trusses, was inadequately supported because it had no ground bracing. The CO's determination that insufficient bracing was used and that it was inadequately nailed was based on his inspection, and he fully explained the reasons for his conclusion on the record; he also discussed the photos he had taken and how they supported his conclusion. (Tr. 110-36, 145-49). In addition, the CO's conclusion was bolstered by Messrs. Weeks and Hall. Mr. Weeks indicated that although there could have been bracing on the interior side of the trusses, which he could not see, there was no exterior bracing. (Tr.

¹³In support of its position, B&R notes Mr. Starr's testimony that the lead truss was bolted to the cement block wall of the existing building and that the force of the crane's load hitting the truss broke the block. (Tr. 218-19, 224, 248-54). The CO said the lead truss was bolted to the studs of the wall, and he did not believe it was bolted to the cement block; he opined that even if it had been this would not have been sufficient to support the truss, and he said Mr. Starr never mentioned this, even though they discussed how the truss was attached to the wall. (Tr. 171-73).

20, 30-31, 35, 39). Mr. Hall indicated that he saw some temporary bracing but did not see the amount of bracing he would have expected to see to meet industry guidelines. (Tr. 71-72).

Mr. Starr testified that “tons of bracing” were put on the trusses and that he had taken photos of the site showing the bracing. He also testified about RX-3, the receipts for his purchase of 2x4’s and other lumber in March and April of 1999, and RX-6, a receipt showing his donation of trusses and bracing to a local school in May of 1999. (Tr. 214, 217-18, 226-28). However, as noted above, the photos were not presented at the hearing. (Tr. 247). Further, the CO testified that temporary bracing can also be used for permanent bracing after the trusses have been erected. (Tr. 120). In any case, Mr. Starr’s testimony about the bracing used at the site is not credited, for the reasons set out *supra*, and I find that the Secretary has met the first element of her burden of proof.

I also find that the Secretary has met the second element, that is, that the employer and/or the industry recognized the cited hazard. Mr. Starr testified that he and representatives of Conti and Montgomery met about a month before the project and that the Montgomery representative gave Conti information about how to install and brace the trusses; Mr. Starr also testified that he knew that bracing was necessary for the project and that he had bought 2400 feet of lumber to be used as bracing. (Tr. 210-16). Moreover, RX-4, the instructions Montgomery gave Conti, and GX-36-37, the TPI HIB-91 booklet and summary, respectively, which the CO discussed, clearly demonstrate industry recognition of the cited hazard. Finally, I find the Secretary has met the third and fourth elements of her burden. It is apparent from the record that inadequately braced trusses can cause serious injuries or death, and RX-4 and GX-36-37 contain detailed instructions as to the proper erection and bracing of trusses. This citation item is affirmed as a serious violation.

The Secretary has proposed a penalty of \$2,500 for this item. Upon giving due consideration to the requisite factors, that is, the size, history and good faith of the employer, and the gravity of the violation, I conclude that the proposed penalty of \$2,500 is appropriate for this item.

Citation 1, Item 2 - 29 C.F.R. 1926.20(b)(2) - Proposed Penalty: \$1,000

This item alleges a violation of 29 C.F.R. 1926.20(b)(2), which provides as follows:

(b) *Accident prevention responsibilities....*(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

This item is based on the CO's conclusion that site inspections were not done as required. The CO testified Ray Starr told him that he was the competent person at the site and that he was doing continuous inspections of the job. However, the CO further testified that he saw no evidence that site inspections by a competent person were done. He said that while Mr. Starr might have been qualified to oversee general construction work, he was not qualified to oversee a job as specific and unique as installing trusses the size of those on the subject site. He also said this was evidenced by the fact that when he arrived, Mr. Starr was attempting to move the fallen trusses with a backhoe, which could have resulted in the steel beams or cement columns coming down on him. CO Hunter stated that other factors, such as insufficient bracing and an inadequate number of nails in the bracing, also persuaded him that Mr. Starr was not qualified to oversee the job. (Tr. 110, 143-148).

Based on the foregoing, the Secretary has established a violation of the cited standard.¹⁴ This item is accordingly affirmed as a serious violation, and, in light of the penalty factors set out *supra*, I conclude that the proposed penalty of \$1,000 is appropriate for this item.

Citation 1, Item 3 - 29 C.F.R. 1926.602(c)(1)(vii)(A) - Proposed Penalty: \$1,750

This item alleges a violation of 29 C.F.R. 1926.602(c)(1)(viii)(A), which states as follows:

(c) *Lifting and hauling equipment....*(1) Industrial trucks shall meet the requirements of 1926.600 and the following: ... (viii) Whenever a truck is equipped with vertical only, or vertical and horizontal controls elevatable with the lifting carriage or forks for lifting personnel, the following additional precautions shall be taken for the protection of personnel being elevated. (A) Use of a safety platform firmly secured to the lifting carriage and/or forks.

The basis of this item was the B&R supervisory employee who stood on pallets on the end of the forklift, which Mr. Starr raised up so that the employee could release the trusses from the crane. CO Hunter testified that this was unsafe; any platform should have been designed by an engineer and attached to the forklift, and the platform also should have had a basket or guardrails to which the employee should have been tied off. The CO further testified that, although there was a

¹⁴To establish a violation of a specific standard, the Secretary must show: (a) the applicability of the standard; (b) noncompliance with the standard's terms; (c) employee access to the violative condition; and (d) the employer's actual or constructive knowledge of the violative condition. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The Secretary has met her burden here.

manila rope tied to the forklift and Mr. Starr told him the employee tied the rope around his waist when standing on the pallets, the rope was not acceptable as fall protection. He said if the employee fell the force of the fall would be concentrated in a small area around the employee's body, such that injuries even more serious than those from a fall could result. He also said that a full body harness and a lanyard were needed and that the rope was inadequate because it did not have forged metal ends on it with the hooks. The CO noted that it was his understanding that at times the forklift was moved in a raised position with the employee on the pallets. (Tr. 115-17, 145-46, 166, 189-90).

Mr. Starr testified to the effect that the employee had worn a safety harness and lanyard and had been in an OSHA-approved bucket when he was lifted up to release the trusses. (Tr. 229-30, 239-40, 243-45). However, the CO himself viewed the forklift with the pallets and the rope on it, and he discussed the rope with Mr. Starr. (Tr. 115). In any case, Mr. Starr's testimony is not credited for the reasons set out *supra*, and, based on the CO's testimony, the Secretary has established the alleged violation. This item is affirmed as a serious violation, and, in view of the penalty factors discussed above, I conclude that the proposed penalty of \$1,750 is appropriate for this item.

ORDER

Based on the foregoing decision, the disposition of the citation items, and the penalties assessed, is as follows:

<u>Citation 1</u>	<u>Violation</u>	<u>Disposition</u>	<u>Classification</u>	<u>Penalty</u>
Item 1	5(a)(1)	Affirmed	Serious	\$2,500
Item 2	1926.20(b)(2)	Affirmed	Serious	\$1,000
Item 3	1926.602(c)(1)(viii)(A)	Affirmed	Serious	\$1,750

G. Marvin Bober
 Administrative Law Judge

Dated: 22 DEC 2000
 Washington, D.C.