

TRAYLOR BROTHERS, INC.,
OSHRC Docket No. 96-595

APPEARANCES:

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Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Joseph W. Annakin
Administrative Vice-President
Traylor Brothers, Inc.
Evansville, Indiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Traylor Brothers, Inc. (Traylor), as general contractor, is expanding a bridge across the St. Johns River in Jacksonville, Florida. The project began in 1993 and is continuing. In October 1995, a piece of 30-foot track fell from the bridge during form-setting operations. A subcontractor's employee, whose lanyard was attached to the track, was pulled into the river and drowned. As a result of an inspection, the Occupational Safety and Health Administration (OSHA) cited Traylor for failing to properly anchor fall protection equipment as required by 29 C.F.R. §1926.502(d)(15)(i) and proposed a penalty of \$5,600. Traylor timely contested the citation (Tr. 5).

Traylor stipulates that it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (Act) (Tr. 4). The facts surrounding the accident are not in substantial dispute.

The Accident

Traylor, a national construction company with its principal place of business in Evansville, Indiana, contracted with the State of Florida to enlarge the Buckman Bridge carrying I-295 traffic across the St. Johns River in Jacksonville, Florida. The project involves constructing two new bridges and rehabilitating the existing bridge. Each bridge is 16,500 feet long (Exhs. R-1, R-2; Tr. 13, 115). Except for a few jobs, Traylor, with 200 employees working on the project,

performs most of the work (Tr. 12, 116).

In July 1993, Traylor subcontracted the deck-forming work¹ on the project to Modern Bridge Forming Company, Inc. (Modern). Modern began work in December 1993. Modern was to place and strip the formwork for the bridge deck (Exh. R-1; Tr. 14, 24). To set the forms, Modern used a specially developed form-setting machine (Tr. 28, 50). The machine, 40 feet long, ran on tracks welded inside 6-inch channel iron, which were placed on the concrete girders.² The track permitted the form-setting machine to roll across the bridge setting the individual form panels between the concrete girders (Exhs. C-1, R-15; Tr. 15, 50-51, 156).

To lay the track, the form-setting machine used its jib crane to lift a piece of 30-foot track, weighing 1,600 pounds, and place it on the concrete girder in front of the machine. The track was lifted by nylon chokers or metal clamps attached to the ball of the jib crane (Exhs. C-1, C-2, C-3). With the track suspended above the concrete girder, an employee straddling the track walked out on the girder to the end of the track. He positioned the shoes³ attached to the track on the girder. Once the track was positioned, another employee at the form-setting machine set the track down on the girder and bolted the track. The track was released from the crane (Exh. R-15; Tr. 32, 55, 57, 70, 133). The process was repeated each time a 70-foot span of the bridge was fitted with tracks. Each span took approximately one hour to complete (Tr. 54-55).

Eighty percent of the bridge is approximately 10 feet above the river. At the lower level, employees were required to wear personal floatation devices (Tr. 31, 129). However, over the intercoastal waterway, the bridge rises to over 65 feet above the river. As the decking work reached the intercoastal waterway, Traylor and Modern discussed fall protection (Exh. R-6; Tr. 16-17). During the track-laying operation, the employee positioning the track on the girder in front of the form-setting machine was not protected from falling by guardrails or safety nets (Tr. 30, 60). Traylor and Modern decided to attach a cable along each piece of track so that

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Robert Quinn, Traylor's project manager, testified that Traylor was capable of doing the deck-forming work itself (Tr. 116).

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Concrete girders are parallel supporting members of the bridge that support the roadway. The girders are 18 inches wide and approximately 9 feet apart (Tr. 31, 51, 61).

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Shoes or blocks are attached to each track to support the track above the rebar in the concrete girder.

the employee could tie off with a safety lanyard (Tr. 16, 32-33, 66). Traylor thought that two 6-foot nylon chokers attached to the ball on the jib crane would hold the track until it was bolted into place (Tr. 144, 155).

In the spring of 1995, Modern began using this fall protection system when laying track for its form-setting machine (Tr. 133). Modern brought a second form-setting machine to the project. Instead of using nylon chokers to hold the track, the second machine used metal clamps (Tr. 57-58).

On October 23, 1995, both form-setting machines were being used by Modern. In the lead machine, form-setters Maurice Shipman and his brother-in-law, Alex Crews, were setting track approximately 40 feet above the river. Shipman was standing in front of the form-setting machine on the concrete girder positioning the track (Tr. 39). His safety lanyard was attached to the cable installed along the track. Metal clamps were used to hold the track by the crane. It was approximately 11:00 a.m. For reasons unknown, the track tipped up, slipped from the metal clamp, and fell from the bridge. With his lanyard attached, Maurice Shipman was pulled into the river and drowned (Tr. 69-70, 78-79, 92-93).

OSHA Compliance Officer Linda Campbell conducted an accident inspection. As a result, Modern⁴ and Traylor received citations. Traylor's citation alleges a violation of §1926.502(d)(15)(i) in that "an employee was attached to a cable that was attached to an unsecured rail that was not capable of supporting at least 5,000 pounds per employee attached, exposing the employee to a fall hazard, on or about 10-23-95."

Traylor terminated Modern's subcontract in the spring of 1996. According to Robert Quinn, project manager, the termination was due to Modern's continued problems with fall protection, its lack of performance, and the lack of safety awareness (Tr. 140-141).

Traylor asserts that, as general contractor, it was not responsible for conditions created by Modern and for which Traylor's employees were not exposed. Traylor argues that the fall protection system discussed with Modern complied with the standard. Any violation was due to employee misconduct because of the use of the metal clamps.

Discussion

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Modern's citation included an alleged willful violation of §1926.502(d)(15)(i) (Exh. R-15).

The Secretary has the burden of proving a violation of a safety standard by a preponderance of the evidence. To establish a violation, the Secretary must show that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Alleged Violation of §1926.502(d)(15)(i)

The standard⁵ requires that “anchorage used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached” Section 1926.500(b) defines “anchorage” as “a secure point of attachment for lifelines, lanyards or deceleration devices.” Traylor does not dispute the application of the fall protection standards at Subpart M, (§1926.500, *et seq.*) to the construction work performed on the Buckman Bridge project. The fall protection system used by Modern during the track-laying operation is also not in dispute. Maurice Shipman was using this fall protection at the time of the accident (Tr. 39). Robert Quinn, Traylor’s project manager, testified that the system was reviewed and accepted by Traylor (Tr. 17, 135). Traylor knew that employees were attaching their lanyards to the track.

Traylor argues that the jib crane using nylon chokers to hold the track was capable of supporting 5,000 pounds per employee as required by the standard (Resp’s. Brief, p. 13). According to Edward Hawkins, Modern’s superintendent, nylon chokers were each capable of supporting 6,000 pounds. The track weighed 1,500 pounds (Tr. 46). Traylor apparently concedes that metal clamps were not suitable.

The issue, however, is not the use of chokers or clamps, but whether the track provided the “anchorage” required by the standard. There is no dispute that prior to bolting the track on

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The standard also provides, as an alternative, the design and installation of a complete personal fall arrest system which maintains a safety factor of at least “2,” and if under the supervision of a qualified person. This alternative is found not applicable to this case.

the concrete girder, the track was suspended by the jib crane. The track was not bolted until the employee walked along the girder positioning the track's shoes. By attaching the employee's safety lanyard to the track before it was bolted, the employee's fall protection equipment was not provided a secure point of attachment. Thus, the track did not meet the definition of "anchorage." Until bolted, there was no anchor for the employee's lanyard.

As defined, anchorage is a secure point of attachment for lifelines, lanyards, or deceleration devices. The unsecured track did not provide the employee a secure attachment point. It was suspended, subject to tipping or swinging. If not properly balanced, the track could pull the employee from the girder and possibly fall, as in this accident. *See RGM Construction Co.*, 17 BNA OSHC 1229, 1232 (No. 91-2107, 1995). The use of the crane to suspend the track also did not take into consideration its possible malfunction. The standard contemplates that the anchorage is separate and apart from the object being moved or positioned.

Therefore, the fall protection system used during the track-laying operation was not shown capable of supporting 5,000 pounds, as evident by the accident. Maurice Shipman, who weighed less than 5,000 pounds, fell from the bridge while still attached to the track. There is no evidence that the fall protection system was tested or approved by a qualified engineer. See Appendix C to the standard.

Accordingly, a violation of §1926.502(d)(15)(i) is established.

Traylor's Responsibility

Traylor acknowledges that a general contractor may be held responsible for the safety of subcontractor employees which it controls by virtue of its supervisory authority over the worksite (Resp's. Brief, p. 4). A general contractor who, as in this case, did not have employees exposed and did not create the violative condition is responsible nevertheless for violations of subcontractors which it could reasonably be expected to prevent or detect and abate. The duty imposed on a general contractor is reasonable. There is a presumption that the general contractor has sufficient control over its subcontractors to require them to comply with safety standards and abate violations. *Gil Haugan d/b/a Haugan Construction Company*, 7 BNA OSHC 2004, 2006, 1979 CCH OSHD ¶ 24,105, p. 29,290 (Nos. 76-1512 & 1513, 1979); *Flount International Ltd.*, 15 BNA OSHC 1987, 1992 CCH OSHD ¶ 29,854 (No. 89-1394, 1992).

It is undisputed that Traylor directed and supervised the work of subcontractors such as Modern. Traylor required Modern to initiate fall protection during the track-laying operation. It specifically reviewed Modern's fall protection plan and approved its implementation. In fact, the record indicates that Traylor directed Modern to install the cable along the track for the employees to tie off their safety lanyards. Traylor recognized the fall hazards associated with the track-laying operation (Exh. R-6; Tr. 16-18, 35, 44, 133).

The fall protection system was implemented in the spring of 1995 and was used for several months prior to the accident (Tr. 34, 93, 133). Traylor observed the track-laying operation on numerous occasions. It was in plain view. Traylor was on the jobsite daily and regularly inspected the work being done by Modern (Tr. 13-15, 34, 95). It conducted unannounced inspections of the project (Tr. 128). Traylor never advised Modern that the fall protection system was inadequate except for a concern about metal clamps (Tr. 35-36, 156-157).

The subcontract with Modern required full compliance with all Federal laws (Exh. R-1; Tr. 117). According to Edward Zalot, general superintendent, Traylor had the authority to terminate Modern's work under the subcontract if it failed to comply with Traylor's safety requirements (Tr. 153-54). Zalot coordinated and checked Modern's work (Tr. 152). In the spring of 1996, Traylor in fact terminated Modern's subcontract (Tr. 141).

Therefore, Traylor reasonably could have been expected to have prevented and abated, by reason of its supervisory capacity, the use of unsecured anchorage to attach fall protection equipment. The record shows that Traylor asserted a high degree of supervisory capacity over Modern. Edward Hawkins, Modern's superintendent, testified that if Modern had not attached the cable to the track within the time specified by Traylor, Traylor would have removed Modern from the project (Tr. 35).

Accordingly, Traylor, as general contractor, is a responsible employer under the Act.

Employee Misconduct

Traylor asserts that if there was a violation, it was due to employee misconduct because steel clamps were used instead of nylon chokers. An employer may defend on the basis that an employee's misconduct was unpreventable. To establish the defense, the employer must show that it has established work rules designed to prevent the violation which were adequately

communicated to employees and effectively enforced. Also, the employer must show steps taken to discover violations. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578, 1994 CCH OSHD ¶ 30,345, p. 41,841 (No. 91-237, 1994).

The employee misconduct defense is not applicable. Modern's employees were not employees of Traylor. Also, the violation was the lack of anchorage and not the use of metal clamps. Nylon chokers and metal clamps were used for the same purpose. Both needed to be attached to the track in a way as to provide proper balance (Tr. 58-59). They did not secure the track to the concrete girder. Traylor instructed Modern to have employees tie off to the track while positioning it on the concrete girder.

There is no showing that attaching a lanyard to the track violated Traylor's work rule. To the contrary, the fall protection system used on this project was in compliance with the system Traylor helped to develop. Even if there were a rule, there is no evidence it was effectively communicated to employees and enforced.

Accordingly, employee misconduct defense is not applicable in this case.

Serious Classification

In determining whether the violation of § 1926.502(d)(15)(i) is serious within § 17(k) of the Act, the Secretary must show that Traylor knew or should have known, with the exercise of reasonable diligence, of the presence of the violation and there was a substantial probability that death or serious physical harm could result from the condition.

The record establishes that Traylor knew of the lack of secured anchorage for fall protection equipment. Traylor reviewed and approved the fall protection system. It observed the track-setting operation on a number of occasions. The track-laying operation was in plain view. Traylor, as general contractor, has an obligation "to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31032 (No. 76-4627, 1981). The measures taken by Traylor did not prevent employee exposure to a fall hazard. The measures were inadequate.

As for the expected injury, the issue is not whether an accident would occur. Rather, the issue is whether the resulting injury would likely be death or serious harm if an accident should

occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 30,148, p. 41,478, n. 5 (No. 91-862, 1993). The failure to provide secure anchorage for fall protection equipment at heights in excess of 40 feet can reasonably be expected to cause serious injury or death. The accident in this case resulted in a fatality.

Therefore, a serious violation of §1926.502(d)(15)(i) is established.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty under §17(j) of the Act, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

OSHA proposed a penalty of \$5,600. Traylor does not dispute the reasonableness of the penalty amount. Traylor has 200 employees on-site (Tr. 13). Also, Traylor was inspected by OSHA during the preceding three years. As for gravity, the employees were working at heights above 25 feet. One employee for each form-setting machine was responsible for positioning the track on the concrete girder and was exposed to a fall hazard. To lay a 70-foot span of track, the process took approximately one hour. The fall protection system was initiated in the spring of 1995, several months prior to the accident.

Accordingly, a penalty of \$5,600 is found reasonable.

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:

Serious Citation No. 1, item 1, in violation of § 1926.502(d)(15)(i), is affirmed and a penalty of \$5,600 is assessed.

KEN S. WELSCH
Judge