



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 04-1149
	:	
ZICHELLE STEEL ERECTORS, INC.,	:	
	:	
Respondent.	:	

Appearances:

Kevin Sullivan, Esquire
 U.S. Department of Labor
 Boston, Massachusetts
 For the Complainant.

Peter Zichelle, President
 Zichelle Steel Erectors, Inc.
 Leominster, Massachusetts
 For the Respondent, *pro se*.

Before: G. Marvin Bober
 Administrative Law Judge

DECISION AND ORDER

This matter 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”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, Zichelle Steel Erectors, Inc. (“Zichelle”), on April 14 and 15, 2004; the site was located in Lowell, Massachusetts, and Zichelle was engaged in steel erection at the site. As a result of the inspection, OSHA issued to Zichelle a Citation and Notification of Penalty alleging a willful violation of 29 C.F.R. 1926.760(a)(1).¹ Zichelle timely

¹The citation also alleged a serious violation of 29 C.F.R. 1926.757(b)(3). However, the Secretary withdrew that item at the inception of the administrative trial in this matter. (Tr. 7-8).

contested the citation and the proposed penalty. The administrative trial in this matter was held on December 15, 2004, in Boston, Massachusetts. Only the Secretary has filed a post-trial brief.

The OSHA Inspection

Joseph LaRose is the OSHA compliance officer (“CO”) who inspected the site. He testified he noticed the steel erection as he was driving to his office on the afternoon of April 14, 2004, and that he saw two employees working on the fourth floor of the building, one of whom was standing on the outside edge; the fourth floor was about 44 feet from the ground, and the employee on the edge had no fall protection and was not even wearing a harness. The CO pulled over, took some photographs of the employee, and then entered the site and took further photographs.² He attempted to meet with the supervisor of Jackson Construction Company (“Jackson”), the general contractor, but learned the supervisor was out for lunch; he then proceeded to where the crane was lifting steel and met with Christopher LeMay, Zichelle’s job site foreman. The CO explained why he was there, and Mr. LeMay had the one worker, James Snyder, come down. The CO asked Mr. Snyder why he did not have on fall protection, and Mr. Snyder said he and the other worker had only gone up to do a couple of things and then it had stopped raining so they had stayed; he also said it would “bother my back if I had to attach every time I was connecting steel.” At that point it began raining hard, so the CO told Mr. LeMay he would get back in touch with him later. (Tr. 37-50, 77; Exhs. C-13(a)-(f)).

CO LaRose returned to the site the next day. After parking his car, he saw two employees on the fourth floor who were landing and placing decking and exterior steel; they had on harnesses but were walking freely on the steel without being tied off to anything, and, as the CO watched, they landed a bundle of decking right at the edge of the building and then walked back into the interior of the building.³ The CO took several photographs of what he saw, including one showing Mr. LeMay on the ground with his back to the camera; according to the CO, Mr. LeMay was watching the crane’s load as it went up to the employees on the fourth level. CO LaRose then entered the site,

²The CO explained that OSHA has a local emphasis program for fall hazards, which requires him to inspect a site whenever he observes a fall hazard. (Tr. 39, 76-77).

³The CO noted that when he first saw them, the workers were within 2 feet of the edge; they then walked out to the edge, back into the building, back to the edge again and along the edge for 3 to 4 feet, and then back into the interior of the building. (Tr. 52).

spoke to Mr. LeMay, and asked him to have the employees, who were Mr. Snyder and Daniel Sweet, come down. When they did, the CO photographed Mr. Snyder with his harness and lanyard on and a “beamer” attached to the lanyard; the CO noted, however, that Mr. Snyder should have had two lanyards and two “beamers” to have 100 percent fall protection.⁴ The CO indicated that the willful classification was based on the fall exposure occurring for two days, on Mr. LeMay’s awareness of the condition, and on Zichelle’s prior citations for fall protection violations. (Tr. 51-65, 84-85, 88-93, 97-101; Exhs. C-13(g)-(j), (l)-(m), (o)).

Willful Citation 2 - Item 1

This item alleges a violation of 29 C.F.R. 1926.760(a)(1), which is a provision of Subpart R, OSHA’s steel erection standard. The cited regulation states as follows:

Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

Paragraph (a)(3), in turn, states that:

Connectors ... shall be protected from fall hazards as provided in [paragraph] (b) ... of this section....

Finally, paragraph (b)(1) states that:

(b) *Connectors*. Each connector shall:

(1) Be protected in accordance with paragraph (a)(1) of this section from fall hazards of more than two stories or 30 feet (9.1 m) above a lower level, whichever is less.

The foregoing provides, and the CO testified, that connectors exposed to falls of more than two stories or 30 feet, whichever is less, must be protected by one of the systems described in the standard. (Tr. 75, 87). The record shows that on both days of the inspection, Zichelle employees James Snyder and Daniel Sweet were working as connectors on the fourth floor of the building, which was approximately 44 feet above the ground. (Tr. 31, 184). In addition, as set out *supra*, the

⁴The CO explained that a beamer is an item that straddles a beam and that, after a worker has tied off to it, drags along behind the worker as the worker walks the steel. He also explained that 100 percent fall protection is accomplished by the worker putting another beamer on the next piece of steel and tying off to it before untying from the first beamer. (Tr. 60-61, 81-82).

CO testified that the employees were exposed to falls to the outside of the building.⁵ (Tr. 38, 51-52). Based on this evidence, the Secretary contends that she has met all four elements of her burden of proof in this case in that she has shown that (1) the cited standard applies, (2) the standard was not met, (3) employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Zichelle, on the other hand, contends that the Secretary has not demonstrated that employees were exposed to falls to the outside of the building. Zichelle also contends that it did not have the requisite knowledge in this matter.

As to the first day of the inspection, the CO testified that he saw Mr. Snyder standing on the outside edge of the fourth floor of the building without fall protection. (Tr. 38). The CO also testified that Mr. Snyder was not even wearing a harness when he saw him. (Tr. 41). According to the CO, Mr. Snyder told him, when asked why he did not have on fall protection, that he and the other worker had only gone up to do a couple of things and then it had stopped raining so they had stayed. (Tr. 43). Zichelle does not dispute this particular testimony, based on Peter Zichelle's statement at the trial that "it's clear that the gentleman in question didn't have his harness on." (Tr. 209). Zichelle does dispute that the Secretary proved that Mr. Snyder was exposed to a fall hazard as alleged.⁶ However, I observed the CO's demeanor as he testified, including his body language and facial expressions, and I found him a credible and convincing witness. Further, the CO's photographs support his testimony; in particular, Exhibits C-13(b) and (c) are close-up shots showing Mr. Snyder standing on the outside edge of the building. I find that Mr. Snyder was exposed as the CO described.

As to the second day of the inspection, the record shows that Mr. Snyder and Mr. Sweet were again working on the fourth floor of the building. The CO testified that while both employees were wearing harnesses that day, they were walking freely on the steel and were not attached to anything; he further testified that he saw them at the edge of the building landing a bundle of decking, after which they walked back into the building's interior. (Tr. 51-52). Again, Zichelle does not dispute

⁵Falls to the interior of the building are not relevant in this matter, as the distance from the fourth floor level to the third floor deck was 14 feet. (Tr. 31).

⁶At the trial, for example, Zichelle objected to the CO's photographs, arguing they were not an accurate depiction of the job site; however, the photographs were admitted. (Tr. 44, 49).

that the employees were not tied off, but it does dispute that the Secretary proved that the employees were exposed as alleged.⁷ In this regard, the CO discussed the photographs he took of what he observed.⁸ In particular, he testified that he took Exhibit C-13(g) right after seeing the employees land the bundle of decking at the edge of the building; he said that it could not be determined from C-13(g) if the employees were 6 feet from the edge, but that, when he entered the site and walked up to the building, he could see that the bundle was about 2 feet from the edge.⁹ He also testified that Exhibits C-13(h)-(j), which were close-up shots, showed the employees walking in towards the building's interior after being at the edge; he said that although it could not be determined from the photographs, the employees were less than 6 feet from the edge. (Tr. 51-55, 89-91).

Christopher LeMay, Zichelle's job site foreman, testified that he could not tell, upon viewing Exhibits C-13(g)-(j), exactly where the employees were standing, and it was his opinion that their exposure was to the third floor deck below, which was 13 to 14 feet. (Tr. 190-91). The CO, on the other hand, was emphatic that he saw the employees at the edge landing a bundle of decking and that C-13(g) was taken right after that had occurred; he was also emphatic that when he walked up to the building after entering the site, he looked up at the bundle and saw that it was about 2 feet from the edge. (Tr. 53-54, 90). As set out *supra*, I found the CO to be a credible and convincing witness. Moreover, his photographs, while not conclusive, support his testimony. Finally, the fact that he looked up at the bundle after entering the site lends further weight to his testimony concerning the location of the employees when he saw them. Based on the testimony of CO LaRose, and on my credibility determination above, I find the employees were exposed as the CO described.¹⁰

⁷Even if Zichelle did dispute that the employees were not tied off, I note the testimony of Timothy Pineau, Jackson's site supervisor, who was present when the two employees came down from the building on April 15, 2004, that he heard one say he had not been tied off. (Tr. 27, 31).

⁸Zichelle again objected to the CO's photographs, but the photographs were admitted. (Tr. 64-67).

⁹The CO noted that while it is not set out in the standard, OSHA has interpretation letters that state that workers must be protected when within 6 feet of an edge. (Tr. 75).

¹⁰With respect to my credibility determination, *see Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000).

In support of its contention that it did not have knowledge of the violations, Zichelle points to the testimony of Mr. LeMay that he was the foreman at the site on April 14 and 15, 2004, and that he was also performing ground man duties, which involved “hooking up pieces [to the crane] and sending them up onto the building.” He explained that certain employees had not shown up, due to the rainy weather, and that he therefore had to act as both foreman and ground man, which prevented him from walking around as he normally would. He further explained that he could not see the workers on the fourth floor due to the two floors of decking below them, and also due to the “galvanized brick shelf” that was on the second level. Mr. LeMay testified that he was not aware that Mr. Snyder did not have on his harness on April 14; however, he then stated that he could see from his vantage point that day that Mr. Snyder had on his tool belt but that he could not see anything else and just assumed that Mr. Snyder also had on his harness. He also testified that while he could not tell what he had been looking at in photograph C-13(l), which showed him with his back to the camera and facing the building, he could have been looking at many things, including where he had to lay the next bundle of decking. Mr. LeMay said that he had never had a problem before with Mr. Snyder not wearing a harness, that he had seen no violations at the site, and that he had had no trouble with employees not conforming because he laid them off if they did not follow the rules; in addition, he said that he and everyone else at the site had had training in Subpart R. Mr. LeMay stated that he talked to Mr. Snyder and Mr. Sweet at the end of the day on April 14 and that the next morning he held a tool box meeting with all of his employees that covered the use of harnesses, lanyards and beamers. (Tr. 178-79, 183-91, 196).

I observed Mr. LeMay’s demeanor as he testified, including his facial expressions and body language, and I found him to be a less than candid witness. Moreover, in considering the foregoing, I note that some of Mr. LeMay’s testimony does not “add up.” For example, he testified that he could tell that Mr. Snyder had on his tool belt on April 14 but that he could not tell if he had on his harness, which, in my view, is simply not believable.¹¹ Mr. LeMay further testified that he could not see the workers on the fourth floor because of the two floors below them that were decked, but he also

¹¹This finding is consistent with the CO’s testimony that Mr. LeMay was rigging the crane “directly below” Mr. Snyder, that Mr. Snyder was in “direct sight” of Mr. LeMay, and that Mr. LeMay was looking “right at” the exposed employee. (Tr. 42, 186).

testified that, in photograph C-13(l), he could have been looking at where he had to lay the next bundle of decking; if he could see where the decking was going to be set down on the fourth floor, then it would seem that he could also see the employees.¹² (Tr. 191, 195-96). Mr. LeMay's testimony regarding being unable to see the employees due to his location under the "galvanized brick shelf" on the second level is also not credible. (Tr. 195-96). The shelving was in place in two locations, in a section on the far left of the building and in another section approximately in the middle of the building, as shown in photographs C-13(e) and (g), and it is clear from photographs C-13(g) and (l) that Mr. LeMay was not standing underneath the shelving.

Other evidence in the record supports a conclusion that Mr. LeMay knew the employees were working without tying off. In my opinion, Mr. Snyder's statement to the CO on April 14 that it would "bother my back if I had to attach every time I was connecting steel" is a strong indication that Mr. Snyder often worked without tying off. (Tr. 43). In addition, Mr. LeMay's testimony that he had had no problems with employees not conforming because he laid them off if they did not follow the rules is inconsistent both with Mr. Snyder's statement to the CO and the fact that Mr. Snyder was at work the next day. (Tr. 189). It is also inconsistent with the statement of Mr. Zichelle, during his closing argument, indicating that Zichelle did have discipline problems with its ironworkers but that it did not generally fire employees for not following safety rules because it did not want to "cause a problem for a particular employee." (Tr. 207-08).

Based on the foregoing, I find that Mr. LeMay was aware that the employees were working at the edge without fall protection on April 14 and 15, 2004. The Secretary has shown all of the required elements set out above, and, accordingly, has established the alleged violation.

Classification of the Violation

The Secretary has classified the violation in this case as willful. According to Commission precedent, a violation is willful if it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). In *Williams Enter., Inc.*, 13 BNA

¹²This conclusion is consistent with the CO's testimony that he could see the bundle of decking on the fourth floor as he walked up to the building on April 15. (Tr. 90).

OSHC 1249, 1256-57 (No. 85-355, 1987), the Commission elaborated upon what must be shown to demonstrate a willful violation:

It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation....A willful violation is differentiated by a heightened awareness—of the illegality of the conduct or conditions—and by a state of mind—conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard.

In addition to the foregoing, a willful violation can also be established by showing that the employer had been cited previously for the same condition or had failed to correct the condition after being informed it was a violation. *See, e.g., Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1891-94 (No. 92-3684), and cases cited therein. Further, where the employer has long familiarity with the standard, and only insubstantial reasons for not complying with its terms, the violation is willful. *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987).

Mr. LeMay testified that Zichelle made the decision to unionize in January of 2002 and that it became a union shop in January of 2003.¹³ He also testified that during 2002, he and Zichelle's other employees took union training in the OSHA construction standards; the topics included Subpart R and safety training in connecting, lifting and rigging. Each employee who took the training received a certification in that regard and a copy of Zichelle's safety program, which contained Subpart R as well as other OSHA standards relevant to Zichelle's work. (Tr. 178-80, 194; Exh. R-1). Mr. LeMay stated that the union training had made him more aware of safety. (Tr. 183).

The record also shows, based on my findings *supra*, that employee James Snyder was standing at the edge of the fourth floor of the building without any fall protection on April 14, 2004, and that he was not even wearing his safety harness at the time. The CO spoke with Mr. LeMay, and when Mr. LeMay called Mr. Snyder down, Mr. Snyder told the CO that it would bother his back if he tied off every time he was doing connecting work. When the CO returned the next day, he saw Mr. Snyder and another employee, Daniel Sweet, standing about 2 feet from the edge of the fourth floor of the building; both had on safety harnesses, but neither was tied off. Mr. LeMay thus failed to take effective measures to remedy the situation the CO had told him about on April 14.

¹³Exhibit R-2, the agreement that Zichelle signed with the union, is dated August 4, 2001.

Finally, the record shows that Zichelle had received prior citations for violations of fall protection standards and that all of those citations were resolved by settlement agreements signed by representatives of OSHA and the company. ZSE Incorporated (“ZSE”) was cited in May 2000 for a violation of 29 C.F.R. 1926.105(a), for failure to use fall protection when employees were exposed to falls of 26 to 36 feet. ZSE was also cited in June 2000 for a violation of 29 C.F.R. 1926.1053(b)(1), for use of a ladder that did not extend 3 feet beyond the second floor landing employees were accessing. Zichelle was cited in May 2001 for a violation of 29 C.F.R. 1926.105(a), for failure to use fall protection when an employee was exposed to a fall of 36 feet.¹⁴ Peter Zichelle signed the settlement agreements relating to the May 2000, June 2000 and May 2001 citations. ZSE was cited a third time, in October 2002, for a violation of 29 C.F.R. 1926.760(a)(1), when an employee working without fall protection fell 26 feet to his death.¹⁵ Zichelle was cited a second time, in February 2004, for a violation of 29 C.F.R. 1926.501(b)(1), for employees walking on steel 28 feet from the ground without fall protection. James Bedard signed the settlement agreements relating to the October 2002 and February 2004 citations. (Tr. 103-08, 118-25, 143-46; Exhs. C-1, C-3-5, C-7).

At the trial, Peter Zichelle objected to the settlement agreements relating to ZSE, stating they were irrelevant as it was a different company.¹⁶ (Tr. 108). However, evidence in the record indicates that Zichelle and ZSE are essentially the same company or are at least very much interrelated. Exhibit R-2, the union agreement that Peter Zichelle signed in August of 2001, shows the company as “Zichelle Steel Erectors, Inc. (Z.S.E., Inc.).” Further, that Peter Zichelle signed settlement agreements for both ZSE and Zichelle is proof of his involvement in both companies. *See* C-3, C-4,

¹⁴This citation alleged various violations, all of which were included in the settlement agreement. Two items alleged violations of 29 C.F.R. 1926.453(b)(2)(v) and (iv), for employee exposure to falls for not tying off in boom lifts and for climbing the rails of boom lifts.

¹⁵This citation alleged several violations, all of which were included in the settlement agreement. One item alleged a violation of 29 C.F.R. 1926.1053(b)(1), for use of a ladder that did not extend 3 feet above the second floor landing employees were accessing.

¹⁶Mr. Zichelle also testified that C-1, the agreement relating to the February 2004 Zichelle citation, was incorrect as the condition was not a fall protection violation; however, as he agreed that Mr. Bedard had signed C-1 as a representative of Zichelle, his testimony in this regard was not persuasive. (Tr. 144-46).

C-7. Another indication of the interrelation is the fact that James Bedard signed the 2002 agreement for ZSE and the 2004 agreement for Zichelle. *See* C-1, C-5. Mr. Zichelle described Mr. Bedard as “half owner of ZSE” and a “supervisor foreman” of Zichelle; he also testified that Mr. Bedard had been the supervisor of the job that resulted in the February 2004 Zichelle citation. (Tr. 143-46). In addition, the CO testified that a truck he observed at the site had “ZSE Inc” on it, as shown in photograph C-13(p). (Tr. 61). Finally, the record shows that a “Joan Membrino” sent transmittals to OSHA on Zichelle letterhead relating to both a ZSE and a Zichelle inspection. *See* C-3, C-5.

Based on the foregoing, I conclude that Peter Zichelle had knowledge of all of the previous citations issued to ZSE and Zichelle and that James Bedard had knowledge of at least the October 2002 ZSE citation and the February 2004 Zichelle citation. I further conclude that Mr. LeMay had knowledge of at least one previous citation. C-3, the settlement agreement for the May 2001 Zichelle citation, includes a copy of the OSHA 1B from that inspection; the second page of the OSHA 1B notes that Mr. LeMay was Zichelle’s foreman at the site and that he was part of the decking crew. In light of these conclusions, and due to the circumstances of the subject inspection and Zichelle employee training in Subpart R, I find that Zichelle’s management had a heightened awareness of the requirements of the cited standard.¹⁷ Despite this heightened awareness, however, the company failed to ensure that the requirements of the standard were met at the subject site.¹⁸ The alleged violation of 29 C.F.R. 1926.760(a)(1) is accordingly affirmed as a willful violation.

Penalty Assessment

The Secretary has proposed a penalty of \$35,000.00 for this citation item. As the final arbiter of penalties, the Commission must give due consideration to the gravity of the violation and to the employer’s size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the

¹⁷Exhibit R-1, Zichelle’s safety program, contains a list of the Zichelle employees who received certifications for having attended the Subpart R training in 2002; the list includes the names of James Bedard, Christopher LeMay and Peter Zichelle.

¹⁸Zichelle’s heightened awareness is also shown by Mr. LeMay’s indicating to Jackson’s safety director, on April 9, 2004, that there would be “100 percent fall protection” at the site. (Tr. 18-19, 28-30). Further, Mr. LeMay admitted the steel was slippery due to wet weather at the time of the inspection, which, in my view, shows plain indifference to employee safety. (Tr. 194-95).

most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). As to the gravity of this item, I find it high, in that, if either of the two exposed employees in this case had fallen 44 feet from the edge of the building, the result most likely would have been death or very serious injury. The gravity of the violation was also exacerbated by the wet weather, which made the steel slippery and a fall more likely. (Tr. 194-95). An adjustment for the employer's size is appropriate, in that Zichelle had had a total of 30 employees in the year before the inspection.¹⁹ (Tr. 172-73). No adjustments for history or good faith are warranted, in light of Zichelle's history of violations and the willful classification of the subject violation. I find the Secretary's proposed penalty to be appropriate. A penalty of \$35,000.00 is therefore assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Serious Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.757(b)(3), is VACATED.

2. Willful Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1926.760(a)(1), is AFFIRMED as a willful violation, and a penalty of \$35,000.00 is assessed.

/s/

G. MARVIN BOBER
Judge, OSHRC

Dated: April 11, 2005
Washington, D.C.

¹⁹The area director of the OSHA office that issued the citation testified that the gravity-based penalty of \$70,000.00 was reduced to \$35,000.00 due to the total number of employees; he also testified about the other factors considered to arrive at the proposed penalty. (Tr. 153-54).