



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

BENSON ASSOCIATES,

Respondent.

OSHRC DOCKET NO. 04-1283

APPEARANCES:

For the Complainant:

Kim Prichard Flores, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

William J. Benson, Benson Associates, Denver, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Benson Associates (Benson), at all times relevant to this action maintained a place of business at 4561 Highline Place, Denver, Colorado, where it was engaged in construction, a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Benson is, therefore, subject to the requirements of the Act.

On June 6, 2004, an anonymous caller phoned OSHA's after hours hotline, complaining that workers at 4561 Highline Place were working unsafely on roofs and make-shift scaffolding (Tr. 6-7; Exh. C-2). In response, on June 7, 2004, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the Highline Place work site. As a result of that inspection, Benson was issued a citation alleging violations of 29 CFR §1926.451 of the Act. By filing a timely notice of contest Benson brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On January 21, 2005, a hearing was held in Denver, Colorado. The parties have been provided with an opportunity to submit briefs, and this matter is ready for decision.

FACTS

Compliance Officer (CO) Jack Seybert arrived at the Highline work site, a single family wood-framed dwelling, on June 7, 2004 (Tr. 8). CO Seybert spoke with Scott Harding, the superintendent for the general contractor, Exedra Construction, and Tom Lovell, owner of the framing company, All Decked Out (Tr. 8-9). Tom Lovell told CO Seybert that he installed the cited scaffolding around the front of the house on Friday, June 4, 2004 (Tr. 17). Lovell told Seybert that he put the scaffold up for another subcontractor, Benson Associates, which used it over the weekend to install soffit and fascia on the house (Tr. 9, 48).

The scaffolding was constructed with a pump jack and two 2 x 14 inch microlam planks (Tr. 14; Exh. C-1, C-3, C-9). The pump jack consisted of two aluminum poles, a metal walking surface, and triangular brackets to brace the poles, or legs, against the roof (Tr. 16). The height of the walking surface could be adjusted by means of pumping devices connected to the poles (Tr. 16). The two additional microlam planks were supported by the pump jack on the front end of the house, where the CO measured their heights at between 13 and 14 feet (Tr. 30-31; C-8). The back ends of the planks were supported by a 12-foot high roof towards the rear of the house (Tr. 14-15; Exh. C-1, C-6, C-9). When CO Seybert arrived on the site on June 7, 2005, one leg of the pump jack rested partially on a 2 x 6 board (Tr. 17; Exh. C-4). The second leg did not have any kind of base plate, and sat on the bare ground (Tr. 19; Exh. C-5). CO Seybert testified that there were no marks or gouges in the earth to indicate that there had ever been a base plate under that pole (Tr. 21; Exh. C-5).

Seybert contacted William Benson later on June 7, and conducted a telephone interview (Tr. 10; Exh. C-7). At the hearing, Seybert testified that Benson told him he worked on the Highline site Saturday and Sunday with two of his employees, Shane Beatty and Jeff Stoltz (Tr. 12). Benson told Seybert that he worked from the planks on the pump jack (Tr. 21; Exh. C-7). Benson, however, told Seybert that he provided fall protection for his employees by adding brackets and attaching an "Alumibench" onto the pump jack approximately three feet above the walking surface (Tr. 33). The Alumibench is an attachment for a pump jack that can be used as a working surface for holding tools and materials (Tr. 33). Benson also told Seybert that employees working on the microlam planks were protected by 2 x 6s, which were attached to the Alumibench with Romex (three strand electrical wire), and supported on the other end by the roof (Tr. 34; Exh. C-7). Benson took the Alumibench and the 2 x 6s with him when he left the site (Exh. C-7).

According to CO Seybert, the cited scaffold should have had a top rail at 42 inches and a midrail at 21 inches (Tr. 29, *see also*, §1926.451(g)(4)). Although an Alumibench is sometimes substituted for a mid or top rail, in this case, the bench and 2 x 6s, both at three feet, did not meet the height requirements set forth in the standard (Tr. 34-35). In addition, Seybert felt that the three strand electrical wire would not withstand 200 pounds of downward or horizontal force (Tr. 39-40; *see also*, §1926.451(g)(4)).

At the hearing Benson stated that his employees never used the scaffold CO Seybert found at the Highline work site (Tr. 54, 57). Benson admitted that he and two of his employees installed the soffit and fascia for the dwelling at the Highline work site over the weekend of June 5-6, 2004 (Tr. 55-56). However, Benson testified, on Saturday, June 5, 2004, he and his men dismantled the scaffold that Lovell had erected on Friday and set up their own Aluma Pole scaffolding system (Tr. 58). After their work was completed, they dismantled their scaffolding and took it away with them, leaving the pump jack and metal planking leaning against a construction fence (Tr. 59). Benson could not explain why the scaffolding was back in place on Monday June 7, 2004 (Tr. 59).

Benson called no witnesses to corroborate his story, stating that his men were working that day, and so could not be in court to testify (Tr. 55).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.451(c)(2): Supported scaffold poles, legs, posts, frames and uprights did not bear on base plates, mud sills or other adequate firm foundation(s):

- (a) **Benson Associates, at 4561 Highline Place, Denver, CO 80222:** On June 5 and 6, 2004 the exposing employer did not ensure the legs of a pump jack scaffold rested on an adequate firm foundation in that the pump jack scaffold legs did not rest on base plates. This condition exposed the employees to a fall hazard of approximately 13 feet.

The cited standard provides:

Supported scaffold poles, legs, posts, frames and uprights shall bear on base plates and mud sills or other adequate firm foundation.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker*

Towing Corp., 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). Respondent does not question the applicability of the standard. That the scaffold poles on the Highline Place site were not supported by adequate foundations on June 7, 2004 is clear from the evidence. The only question before this judge is whether Benson's employees used the cited scaffold, and so were exposed to the cited hazard on June 5 and 6.

Taking into account both the demeanor and the substance of Mr. Benson and CO Seybert's testimony, this judge finds that the CO's version of the events of June 5 and 6, 2004 is the more credible. At the hearing Benson denied making the statements attributed to him by the CO. Specifically, he denied telling Seybert that his employees used the existing pump jack and planking. Instead, Benson testified, he removed the existing scaffold, and erected his own, leaving the pump jack stacked against a fence. Benson's story fails to explain why the pump jack scaffold was in place when Seybert arrived on the site on Monday. Moreover, Benson failed to call any witnesses supporting his January 21, 2005 version of the story, though he was in contact with both of the employees who were on the site with him on June 5 and 6, 2004. CO Seybert's testimony conform to his contemporaneous notes of Benson's telephonic statement. The statement contains convincing details, including the dimensions of the Alumibench and the use of Romex to attach the 2 x 6s, which attest to its veracity. There appears to be no reason for the CO to have fabricated Benson's statement.

Having discounted Benson's version of events, this judge finds that the violation is established.

Penalty

CO Seybert testified that he considered the severity of the violation to be high (Tr. 22). Two employees, in addition to Benson himself, were exposed to the cited hazard for the approximately 12-1/2 hours they worked at the site over the weekend (Tr. 21, 36). It is clear that should an employee fall 13 to 14 feet from a scaffold, he could sustain serious injury. After taking into account the Respondent's small size, the absence of any history of violations, and Respondent's perceived lack of good faith (Tr. 23), the Secretary's proposed penalty of \$1,500.00 is deemed appropriate for this violation and will be assessed.

Serious citation 1, item 2a alleges:

29 CFR 1926.451(f)(3): Scaffolds and scaffold components were not inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity:

- (a) **Benson Associates, at 4561 Highline Place, Denver, CO 80222:** On June 5 and 6, 2004 the exposing employer did not ensure the fabricated frame scaffold had been inspected for visible defects by a competent person before use. Without the inspections the employees were exposed to scaffold fall hazards of approximately 13 and 14 feet.

The cited standard provides:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

Serious citation 1, item 2b alleges:

29 CFR 1926.451(f)(7): The scaffold was erected, moved, dismantled, or altered without the supervision and direction of a competent person qualified in scaffold erection, moving dismantling, or alteration.

- (a) **Benson Associates, at 4561 Highline Place, Denver, CO 80222:** On June 5 and 6, 2004 the exposing employer did not ensure the fabricated frame scaffold was erected, moved, dismantled, or altered with (sic) the supervision and direction of a competent person qualified in scaffold erection, moving dismantling, or alteration. The lack of direction by a competent person exposed the employees to fall hazards of approximately 13 and 14 feet.

The cited standard provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. . . .

A "competent person" is defined at §192.450(b) as:

. . .one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Discussion

CO Seybert testified that, had a competent person overseen the erection of the cited scaffold and/or inspected it before use, he would have recognized the hazardous nature of the scaffold and taken steps to abate those hazards (Tr. 24). Specifically, Seybert stated that, had Benson been competent, he would not have used the scaffold without base plates and fall protection (Tr. 25). At the hearing, Benson testified that he is experienced and qualified to put up scaffolding (Tr. 54). However, Benson did not demonstrate a familiarity with the scaffolding standards. Benson referenced a requirement that microlam mud sills be attached with 90 penny nails (Tr. 42), and insisted that the standards require guard rails be able to withstand 250 pounds of force (Tr. 49). Neither contention was supported by reference to Subpart L.

The Secretary has established this violation.

Penalty

After taking into consideration the same factors discussed in citation 1, item 1, Seybert proposed a combined penalty of \$1,500.00 (Tr. 26-27). The proposed penalty is deemed appropriate and will be assessed.

Serious citation 1, item 3 alleges:

29 CFR 1926.451(g)(1): Each employee on a scaffold 10 feet above a lower level was not protected from falling to the lower level:

- (a) **Benson Associates, at 4561 Highline Place, Denver, CO 80222:** On June 5 and 6, 2004 the exposing employer did not ensure that guardrails or other suitable fall protection was installed on the working platform of the fabricated frame scaffold. This condition exposed the employees to a fall of approximately 13 and 14 feet.

The cited standard provides:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

Discussion & Penalty

The evidence establishes that the fall protection provided by Benson did not meet the criteria established under paragraph (g). Taking into account the factors discussed under item 1, the Secretary's proposed a penalty of \$1,500.00 is deemed appropriate and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.451(c)(2) is AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.
2. Citation 1, items 2a and 2b, alleging violations of 29 CFR §1910.451(f)(3) and (f)(7) are AFFIRMED, and a combined penalty of \$1,500.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of 29 CFR §1926.451(g)(1) is AFFIRMED, and a penalty of \$1,500.00 is ASSESSED.

/s/ _____
Sidney J. Goldstein
Judge, OSHRC

Dated: April 14, 2005