Secretary of Labor,
Complainant,

v. OSHRC Docket No. **00-2331 (E-Z)**

BSE Industrial Contractors, Inc.,
Respondent.

Appearances:

Carla Gunnin, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

A. Joe Peddy, Esq.
Smith, Spires & Peddy, P.C.
Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

BSE Industrial Contractors, Inc. (BSE), is a steel erection contractor in new construction, plant maintenance, and plant renovation. In response to notice of a fatality, Occupational Safety and Health Administration (OSHA) compliance officer Michael Leeks investigated BSE at the USX steel production facility in Fairfield, Alabama. As a result of the investigation, the Secretary issued a three-item citation on November 27, 2000. Item 1 of the citation alleges that BSE's employee was working on an elevated vertical working surface without fall protection in violation of § 1926.501(b)(1). Items 2a and 2b assert that BSE failed to have a training program for employees exposed to fall hazards and failed to certify that training had been provided in violation of §§ 1926.503(a)(1) and (b)(1). BSE contends that its employee was not on a walking/working surface, that he was engaged in employee misconduct, and that employees were properly trained.

The case was assigned for E-Z Trial proceedings. The parties presented testimony and argument at the March 14, 2001, hearing in Birmingham, Alabama. The case is ready for decision. For the reasons stated below, the Secretary failed to establish the elements of her case for item 1. She proved that BSE violated the training standard cited in item 2a but failed to establish that BSE violated the certification standard cited in item 2b.

Background

Stephen Cummings worked as an ironworker in Shreveport, Louisiana. During the week of May 15 and May 23, 2000, he sought and secured employment with BSE through Local Union 92 in Birmingham, Alabama. Cummings's May 15, 2000, application stated that he had been classified as a journeyman with the structural ironworkers union for 6 months; and his May 23, 2000, application stated that he had been a union journeyman ironworker for 1 year (Exh. R-1, R-2; Tr. 53, 56). Typically, an apprentice ironworker receives both on-the-job training and formal training over a 3-year period before being classified as a journeyman ironworker. Unbeknownst to BSE, Cummings never had apprenticeship training but "bought a book" from another local union which gave him full union membership (Tr. 58-60, 91-92). On May 23, 2000, BSE assigned Cummings to work with foreman Barry Tipton. Tipton observed that Cummings did not have the overall skill of the other ironworkers but that he was a good welder (Tr. 110-111).

On May 28, 2000, Tipton's crew was one of 25 BSE crews at the USX site (Tr. 101). Tipton's crew installed one noise baffle into a 50 to 60-foot high smoke stack and was just finishing its part of installing a second baffle before the shift ended. The baffle was 21 inches wide, 14 feet 6 inches high, and 13 feet long (Tr. 72). In order to maneuver the baffle into the stack, the crew made an opening in the guardrails wide enough to accommodate the 21-inch width of the baffle as it extended beyond the work platform (Exh. R-8; Tr. 79). Tipton assigned the various crew members, including Stephen Cummings, to their tasks. Tipton then walked about 50 feet to his vehicle to complete his end-of-shift paperwork (Tr. 108, 114).

On the north side of the baffle Stephen Cummings worked from a platform using a come-along to help "dog" the baffle further into the stack. Cummings was not wearing a body harness but was protected from falling off the work platform by the guardrails (Exh. R-9, R-13; Tr. 118). On the south side of the baffle, employees worked from the platform or from a scaffold which extended to the top of the baffle on that side. As the work progressed, Cummings began to climb up the rain-slicked louvered face of the baffle. He then moved over to the baffle's side as he continued to climb. The side of the baffle extended beyond the work platform. While in the process of either continuing to climb or beginning to descend the baffle side, Cummings slipped and fell 40 feet to the ground below and died (Exh. R-10, R-11).

Citation No. 1

Item 1: § 1926.501(b)(1)

The Secretary asserts that BSE violated § 1926.501(b)(1) by failing to assure that an employee on a vertical walking/working surface was protected from falling. The standard provides:

> (b)(1) *Unprotected sides and edges*. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more about a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

In order to establish a violation, the Secretary must prove (1) that the standard applies, (2) that the employer did not comply with the standard's terms, (3) that the employee had access to the violative conditions, and (4) that the employer had actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *E.g., Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The primary issue for item 1 is whether the Secretary established the element of knowledge.[1] She contends that BSE's foreman Tipton had constructive knowledge of the violation, *i.e.,* that with reasonable diligence he would have known of the violation. The existence of constructive knowledge is a factual determination. *See Goltra Castings, Inc.*, 15 BNA OSHC 1163 (No. 90-9517, 10th Cir. 1991). The Secretary points to the fact that Cummings was in plain sight as he climbed the baffle, something which the foreman could have seen had he looked. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1094, 1097 & 1098 (No. 88-1720, 1993) (the supervisor could have seen what the compliance officer did see). Reasonable diligence includes implementation of safety rules to ensure safe procedures. *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2197 (No. 90-329, 1993). Further, even if a supervisor was without knowledge of the specific instance of violative conduct at the time it occurred, the supervisor may have known how the work was generally performed and, thus, could anticipate the action or the existence of an unexpected event.

---

[1] BSE also contends that the baffle face was not a walking/working surface. Because of the disposition on the issue of knowledge, it is unnecessary to address whether the standard applied.

In this case, however, the evidence shows that the violative conduct was not the result of a failure to take adequate steps or to exercise reasonable diligence. BSE had a work rule requiring fall protection when employees worked 6 feet above the ground. Although the crew generally brought their own body harnesses and lanyards with them to the job, BSE provided the personal fall protection if they did not do so (Tr. 64-65). Previously, the crew tied off or performed their work while protected by guardrails. Cummings had not shown himself to be reckless or unwilling to conform to safety requirements. Cummings had worn his safety harness and used it (Exh. R-10; Tr. 111-112).

At the time of the incident, Cummings's duties should have kept him on the guardrailed platform on the north side of the baffle. The baffle provided no tie-off points for a body harness and lanyard. There was no work related reason for anyone to climb the baffle, and BSE could not have anticipated that anyone would climb it. The only work being performed at the top of the baffle was performed by employees working from a scaffold to hook and unhook the crane cable. Cummings could not physically have helped with that task, even had he been able to reach the top of the baffle (Tr. 89, 113). Shortly after the accident, BSE took statements from Tipton's crew. These statements reflect the crew's puzzlement as to why Cummings climbed the slippery baffle. They variously speculated that Cummings "did a dare devil thing" (R-3), that he "just wanted to climb" (R- 9), and that he felt "perky" since the shift was almost over (R-10). Some had called to Cummings to stop climbing (Tr. R-9, R-10).

BSE did not ignore the potential fall hazard which reasonably and logically should not have existed. It is concluded that BSE was without actual or constructive knowledge of the violative conduct. The Secretary failed to establish an element of her prima facie case, and item 1 is vacated.

Item 2a & 2b: § 1926.503(a)(1) and (b)(1)

The Secretary asserts that BSE did not provide training for its ironworker employees who were subjected to fall hazards. She also asserts that if BSE relied on the union to conduct the fall protection training, BSE failed to prepare a written certification record of the training.

Section 1926.503(a)(1) provides:

> *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each

> employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.
>
> Section 1926.503(b)(1) provides:
>
> *Certification of training*. (1) The employer shall verify compliance with ¶ (a) of this section by preparing a written certification record. The certification record shall contain [the specified elements]. If the employer relies on training conducted by another employer . . . , the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

As stated above, BSE's fall protection procedures were sufficient to defeat a finding of constructive knowledge for item 1. A different, although related, inquiry applies to item 2. Were BSE's fall protection procedures sufficient to comply with the training specified in the Fall Protection Standards of Subpart M? It is concluded that BSE did not sufficiently train the employees to recognize and avoid fall hazards as the Subpart M training standard mandates. When the ironworker crew was hired, they read and signed the ten page "BSE Sign-Up Package 2000" (Exh. R-2). That document contained only a few references to fall protection. The most specific reference stated (¶ 13):

> Body harnesses are required to be worn anytime you are over six (6) feet off the ground, working in a confined space, working in a JLG manlift or lifting manbasket.

The form also asked if the employee was able to work while wearing a body harness and cautioned that body harnesses issued by BSE must be returned to it (Exh. R-2, pp. 8, 10). In addition, Tipton reminded his crew at a tool box meeting on the morning of the accident "that they needed their harnesses on if they get off the ground or off the platform" (Tr. 120). BSE does not solely rely on this training, which fails to comport with the specific requirements of the training standard. It understands that its ironworker employees will encounter fall hazards. BSE primarily relies on the fact that it secures its non-management workers, including the ironworkers, through the appropriate trades' union halls. BSE could specify to the union that it wanted a certain number of journeymen or apprentices. BSE assigned its apprentice employees to tasks which present fewer fall hazards than those faced by its journeymen employees (Tr. 53, 61-62, 103).

BSE's need for employees is often transitory. It argues that the unions must provide the in-depth training appropriate to the craft, including training in fall hazards since the short time frames make it impracticable for it to do so. Union ironworkers typically receive comprehensive fall protection training during their apprenticeship program. Nevertheless, simply because an employee is experienced does not allow an employer to ignore its available opportunities to instruct in precautionary measures to address hazards inherent in the work. *See Getty Oil Co.*, 530 F.2d 1143, 1147 (5th Cir. 1976).

The Secretary suggests that BSE could have used some method to assess the extent of the employee's training on such topics as the existence of hazards, use of body harnesses, proper tie-off procedures and locations, use of safety net systems, and guardrail requirements (Tr. 126). The Secretary is correct that BSE's training was inadequate and that it failed to determine whether employees previously received appropriate fall protection training.

Section 1926.503(a)(1) clarifies that an employer may rely on another employer's training. The current employer must certify the fact that the earlier training was provided. BSE assumed rather than verified that training occurred. However, the standards cited as items 2a and 2b (§§1926.503(a)(1) and (b)(1)) present an employer with *alternative* options. Either an employer trains and certifies its training, or it certifies its reliance on the training of another employer.[2] If it does neither, § 1926.503(a) (the training requirement) rather than § 1926.503(b) (certification) applies. Because it is concluded that BSE did not provide sufficient training in fall protection, it cannot be found that BSE also violated § 1926.503(b)(1). Item 2b is accordingly vacated.

Penalty

The Commission gives "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and history of past violations in determining an appropriate penalty, with gravity being the primary element. BSE controlled over 300 employees and is a medium-sized company. Unlike for the Secretary's recommended penalty, BSE is afforded credit for good faith based on the existence of a written safety program and its

[2] Even if apprenticeship training by a *union* is not considered training provided by "another *employer*," certification of the union's training could have affected the classification of a violation or an appropriate penalty.

cooperation with the investigation. A credit for history is appropriate since BSE had no previous violations within a 3-year period. The probability of an accident is increased and the severity of such an accident is high when an employer fails to train employees, an unknown number of whom may have had little previous fall protection training.[3] A penalty in the amount of $3,000 is assessed for item 2a (§ 1926.503(a)(1)).

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Item	Standard	Disposition	Penalty
1	§ 1926.501(b)(1)	Vacated	- 0 -
2a	§ 1926.503(a)(1)	Affirmed	$3,000
2b	§ 1926.503(b)(1)	Vacated	- 0 -

/s/
NANCY J. SPIES
Judge

Date: April 20, 2001

[3] While BSE considers the practice of "buying a book" to be rare, BSE is not the union and could have no first-hand knowledge of how the country's various local unions might utilize such a practice.