Secretary of Labor,	*	
Complainant,	*	
	*	
v.	*	OSHRC Docket No. **97-1603**
	*	
Ruscilli Construction Co., Inc.,	*	
Respondent.	*	

APPEARANCES

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

Patrick H. Boggs, Esq.
Lane, Alton & Horst
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Ruscilli Construction Co., Inc., (Ruscilli) contests a seven-item citation issued on September 8, 1997. The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Steven B. Medlock on April 17 and 18, 1997. Medlock conducted the complaint inspection of Ruscilli at a large warehouse project in Tipp City, Ohio, where Ruscilli was engaged as the steel erection subcontractor.

The citation alleges that Ruscilli committed serious violations of the following standards of the Occupational Safety and Health Act of 1970 (Act):

Item 1: Section 1926.20(b)(2)--failure to perform frequent and regular inspections of the job site;

Item 2: Section 1926.105(a)--failure to use safety nets when other methods of fall protection were impractical;

Item 3: Section 1926.302(b)(7)--failure to have a pressure-reducing device on a compressed air hose.

Item 4: Section 1926.453(b)(2)(iv)--allowing employees to stand on the midrail of an aerial lift basket;

Item 5: Section 1926.453(b)(2)(v)--failure to ensure that employees attached their lanyards to the inside of the basket of an aerial lift;

Item 6: Section 1926.104(b)[1]--failure to provide adequate anchorage for personal fall arrest systems; and

Item 7: Section 1926.104(d)[2]--failure to rig the fall arrest system so that employees could not fall more than 6 feet.

Ruscilli stipulated jurisdiction and coverage. A hearing was held on May 12 and 13, 1998. The parties have filed post-hearing briefs. For several of the alleged violations, Ruscilli argues that the cited standards do not apply. Ruscilli also asserts the affirmative defenses of unpreventable employee misconduct, infeasibility, and greater hazard.

For the following reasons Items 1, 3 and 4 are affirmed and Items 2, 5, 6 and 7 are vacated.

Background

Meijer Construction Management hired Steelox Systems, general contractor, to oversee the construction of a 530,000 square foot warehouse distribution center in Tipp City, Ohio. Construction on the project began in March, 1997, and was completed in February, 1998. The center included a single-tiered steel structure which was 1,300 feet long and 700 feet wide, with a 32-foot high wall and a 40-foot high ridge (Tr. 67-68, 85-86, 89-90, 121).

Tim Layfield was Steelox's steel erection supervisor. He was the only Steelox employee on the site. Layfield reported to Jim Ohanesian of Meijer. Steelox hired Ruscilli as a subcontractor to perform the steel erection on the project. Layfield had no supervisory authority over Ruscilli's steel erection employees (Tr. 68-69).

Norman Harris was the steel crew foreman for Ruscilli (Tr. 119). Harris supervised two other Ruscilli foremen, Bob Solomon and Bob Sweetman, who headed separate work crews. All

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[1] The Secretary originally cited Item 6 as a violation of § 1926.502(d)(5). The court granted the Secretary's motion to amend the cited standard to § 1926.l04(b).

[2] The Secretary originally cited Item 7 as a violation of § 1926.502(d)(16)(iii). The court granted the Secretary's motion to amend the cited standard to § 1926.104(d).

three foremen had the authority to direct how the work was performed and to reprimand employees (Tr. 168, 174-175).

Ruscilli supplemented its own workforce on the project with employees hired from Tradesmen International. Approximately 25 of the steel erection employees on the site were employed directly by Ruscilli, and another 8 to 12 employees came from Tradesmen International (Tr. 122, 214-215).

On April 17 and 18, 1997, OSHA compliance officer Medlock conducted a complaint inspection of the Meijer project (Tr. 254-255). Medlock made a walk-around inspection and interviewed employees. As a result of Medlock's observations and interviews, the Secretary issued the citation in this proceeding.

The Citation

> The Secretary has the burden of proving her case by a preponderance of the evidence.
>
> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's 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).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 89-2253).

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that Ruscilli committed a serious violation of § 1926.20(b)(2), which provides:

> Such [accident prevention] 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.

Section 1926.32(f) defines "competent person" 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."

Ruscilli designated foreman Norman Harris as its competent person on the site (Tr. 122-123). Harris testified that he was on the site daily and that "[i]nspections are a constant" (Tr. 123). Harris had never received training in the requirements of the OSHA standards, nor had he received instruction on how to conduct an inspection (Tr. 123, 150).

While the record establishes that Harris made frequent and regular inspections of the worksite, it also establishes that he was not a competent person within the meaning of § 1926.32(f). Harris was unfamiliar with OSHA's requirement that the air hoses of pneumatic power tools be equipped with pressure-reducing devices under § 1926.302(b)(7) (Tr. 134, 161, 304). He also allowed employees to work from the midrail of an aerial lift basket, in contravention of § 1926.453(b)(2)(iv) (Tr. 304-305). Harris failed to take a frayed sling out of service, even though he acknowledged that he had observed its condition the day before Medlock began his inspection (Tr. 303, 306).

Harris was not sufficiently conversant with the requirements of the OSHA standards to be able to identify conditions that were hazardous to Ruscilli's employees. Ruscilli was thus in violation of § 1926.20(b).

A violation of § 1926.20(b) increases the possibility that hazardous conditions will remain uncorrected. Ruscilli's employees were working at heights in excess of 30 feet while exposed to fall hazards. Ruscilli's employees were also using pneumatic power tools not equipped with pressure-reducing devices, which could result in the employees being "hose-whipped" should an air hose fail. Ruscilli was in serious violation of § 1926.20(b)(2).

Penalty

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Ruscilli had approximately 200 employees at the time of the OSHA inspection (Tr. 308). The Secretary had cited Ruscilli within the three years prior to the citation in the instant case (Exh. J-11; Tr. 309-310). The Secretary adduced no evidence of bad faith on the part of Ruscilli. The gravity of the violation is high. Failure to detect and correct a number of safety violations exposed employees to several hazards, including falling from a height of over 30 feet. It is determined that a penalty of $4,000 is appropriate.

Item 2: Alleged Serious Violation of § 1926.105(a)

Section 105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The Review Commission has held that the hazards of falling to the exterior of a building during steel erection are regulated by § 1926.105(a). *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1198 (No. 90-2304, 1993). There is no dispute that § 1926.105(a) applies to this case.

The standard requires the use of one of the listed devices. The Secretary establishes a *prima facie* case upon showing that the employees were exposed to falls in excess of 25 feet and that none of the protective measures was used. *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399, 1402-1403 (D.C. Cir. 1993).

Ruscilli argues that the Secretary failed to prove that the Respondent was in noncompliance with the cited standard. The Secretary bases the citation on Medlock's observation during the inspection of two ironworkers who were working atop the 32-foot high structure. Medlock believes that the ironworkers were not using any form of fall protection.

Ruscilli had a 100% tie off policy for employees working at elevated heights (Tr. 129). Ruscilli implemented a fall protection system using a trolley and cable system in the shape of the letter "H." Ruscilli installed a cable perpendicular to the bar joist at each frame, with a transverse cable connecting to each. Ruscilli anchored the cables so the cable to which the employees tied off rests near their feet, directly on top of the steel itself (Tr. 183, 188, 190-194).

Ruscilli asserts that it was feasible to tie off as a method of fall protection, and that it chose that method of complying with § 1926.105(a). After some resistance, Medlock reluctantly conceded in his testimony that it was feasible for employees to tie off (Tr. 324-333). Alan Simon, one of the ironworkers that Medlock believes was not tied off, testified that Ruscilli had a 100% tie off policy and that he personally tied off approximately 95% of the time. He stated that it was not possible to tie off for the 3 to 5 seconds it takes to transfer from the basket of an aerial lift to the steel (Tr. 9-10). Jimmy Allen, the other ironworker that Medlock observed, also testified that he tied off approximately 95% of the time he was on the steel (Tr. 50).

Medlock testified that he observed Simon and Allen working on the steel. Using binoculars, Medlock concluded that the ironworkers were not tied off (Tr. 260). Medlock took a series of photographs of the employees on the steel (Exh. J-26). Despite a close examination of these photographs, the court was unable to determine whether the employees were tied off at the time the photographs were taken.

Steelox supervisor Layfield was with Medlock when Medlock noticed the ironworkers. Layfield estimates that he and Medlock were approximately a quarter of a mile away from the ironworkers (Tr. 82). (Medlock testified that the distance was not that far (Tr. 322).) Layfield could not determine from that vantage point whether the employees were or were not tied off. Layfield got into his truck and drove over to the structure on which the employees were working. Layfield testified that when he got closer, he saw that Allen and Simon were, in fact, tied off (Tr. 82).

The Secretary has the burden of proving that Ruscilli was not in compliance with the cited standard. The testimony of Medlock conflicts with that of Layfield. Medlock stated that the ironworkers were not tied off. However, the photographs which he took to corroborate this point are inconclusive. Layfield testified that initially he was unable to tell whether or not the

employees were tied off, and that he needed to get closer to find out. Layfield's testimony is credited over Medlock's in this instance. Layfield undertook an additional step that resulted in his having a better view of the ironworkers. Medlock was unable to see the employees' lanyards from where he was standing. Ruscilli's particular system of fall protection resulted in the lanyards being attached at floor level instead of extending horizontally from the safety harnesses of the employees. This would have increased the difficulty of seeing the lanyards.

The Secretary has not shown that Ruscilli was in noncompliance with § 1926.105(a). The Secretary has failed to establish a violation of that standard.

Item 3: Alleged Serious Violation of § 1926.302(b)(7)

The Secretary alleges that Ruscilli violated § 1926.302(b)(7), which provides:

> All hoses exceeding ½-inch inside diameter shall have a safety device at the source of supply or branch line to reduce pressure in case of hose failure.

Ruscilli was using two Ingersoll-Rand air compressors to power pneumatic impact wrenches through ¾-inch inside diameter hoses at the Meijer site (Exhs. J-26Q, J-26T, J-26U; Tr. 300-301). A pressure-reducing device attaches to the air compressor between the service point (where the compressed air comes out) and the hose, to prevent "hose-whip" in the event of line failure or disconnection. If the hose or line fails, the pressure-reducing device eliminates the pressure to the hose, preventing "hose-whip." The compressors that Ruscilli's employees were using were not equipped with a pressure-reducing device (Tr. 301-303). Medlock observed Ruscilli employee Ed Simons using a wrench powered by one of the air compressors (Tr. 277).

Ruscilli obtained the air compressors through a rental company. One compressor was rented, and the other one was purchased on a rent-to-own plan with the same rental company (Tr. 217-218). Ruscilli concedes that the hoses did not have the required pressure-reducing devices, but argues that it relied upon the rental company to ensure that any equipment Ruscilli rented from it complied with the applicable OSHA standards (Tr. 462). This argument is rejected. Ruscilli was responsible for complying with the OSHA standards applicable to any equipment to which its employees had access. Furthermore, the compressors were marked with warning labels that read (Exh. J-26X, Tr. 302):

> Unrestricted air flow through a hose end can result in a whipping action which can cause severe injury or death. Always attach a safety flow restrictor to each hose at the source of supply or branch line in accordance with OSHA regulation 29 C.F.R. Section 1926.302(b).

The Secretary has established that Ruscilli violated § 1926.302(b)(7). Ruscilli's employees had access to and used wrenches attached by ¾-inch inside diameter hoses to compressors that were not equipped with the required pressure-reducing device. Ruscilli should have known of this violation with the exercise of reasonable diligence. The compressors were labeled with a warning that specifically referred to the cited standard.

The hazard created by Ruscilli's violation was that employees could be seriously injured by "hose-whip" should the line fail (Tr. 302). The violation was serious.

Penalty

The gravity of the violation was moderate. The testimony given regarding "hose-whipping" did not indicate that it typically resulted in grievous injuries (Tr. 341-342). It is determined that a penalty of $2,800 is appropriate.

Item 4: Alleged Serious Violation of § 1926.453(b)(2)(iv)

Section 1926.453(b)(2)(iv) provides:

> Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

Ruscilli routinely allowed its employees to stand on the midrail of the aerial lift basket while performing their work (Exhs. J-26F, J-26L, J-26M-J-26P; Tr. 72, 293-294). Employees worked from the midrail in full view of everyone on the site, including Ruscilli's three foremen (Tr. 298). Ruscilli was aware that § 1926.453(b)(2)(iv) prohibited this activity. Ruscilli has a work rule that also prohibited it (Tr. 201).

Ruscilli does not dispute that it was in violation of § 1926.453(b)(2)(iv), but asserts the affirmative defense of infeasibility.

> To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.

V.I.P. Structures, Inc., 16 BNA OSHC 1873, 1874 (No. 91-1167).

Ruscilli has failed to establish this defense. It does not argue that compliance with the standard was economically infeasible, and it has not shown that compliance was technologically infeasible in either its implementation or in performing necessary work operations.

Ruscilli claims that its employees needed to stand on the midrail on an aerial basket to perform two specific tasks. The first was the installation of bar joists on the large I-beams. The second was welding the flange bracing. As Ruscilli admits in its post-hearing brief (Ruscilli's brief, p. 25):

> Technically, a worker engaged in the welding of flange bracing could do so by sitting on top of the I-beam, tying off to the I-beam and then bending down and performing the welding below his waist. . . . The same is also true of those workers in setting bar joists on I-beams.

Ruscilli's argument is not that compliance with the cited standard was technologically infeasible but that it would have created a greater hazard. The greater hazard defense is separate from the infeasibility defense.

> To establish a greater hazard defense the employer must show that (l) the hazard created by complying with the cited provision would be greater than those due not to complying, (2) other methods of protecting its employees from the hazards were used or were not available, and (3) a variance is not available or that application for a variance is inappropriate.

State Sheet Metal Co., 16 BNA OSHC 1155 (No. 90-1620, 1993).

Ruscilli must fail in this defense because it presented no evidence of either the application for a variance or the inappropriateness of applying for a variance.

The Secretary has established that Ruscilli was in violation of § 1926.453(b)(2)(iv). Compliance with the standard was feasible. The hazard presented by the employees standing on the midrail while tied off is that they could fall the length of their lanyards, resulting in minor

fractures. Medlock observed one employee standing on the midrail who was not tied off, creating the hazard of death or serious physical injury (Tr. 297). The violation was serious.

The gravity of the violation was high. One employee stood on the midrail while not tied off. The employees who were tied off stood on the midrail with Ruscilli's condonation. A penalty of $2,000 is appropriate.

Item 5: Alleged Serious Violation of § 1926.453(b)(2)(v)

The Secretary alleges that Ruscilli violated § 1926.453(b)(2)(v), which provides:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Medlock observed Ruscilli employee Frank Olton working from the midrail on an aerial lift, which was elevated approximately 40 feet. Olton was wearing a full-body harness but he was not tied off with a lanyard (Exhs. J-26F, J-26L; Tr. 293, 356). Ruscilli does not dispute that its employee was exposed to the hazard of falling 40 feet due to noncompliance with § 1926.453(b)(2)(v), but contends that it had no actual or constructive knowledge of this condition.

The testimony of Medlock supports Ruscilli's contention. Medlock testified that when he observed Olton, he did not see supervisory personnel from Ruscilli in the area. Medlock estimated that the nearest management personnel was probably 500 feet away (Tr. 356). When asked how Ruscilli had knowledge of Olton's action, Medlock replied, "They had management somewhere in that area. It's possible that they could have knowledge that the condition existed" (Tr. 358). When pressed as to how a supervisor who was at least 500 feet away could know that an employee was not tied off 40 feet in the air, Medlock responded, "It's possible, but I doubt that they could see him from that distance" (Tr. 358).

The Secretary has failed to establish that Ruscilli violated § 1926.453(b)(2)(v). She has not shown that Ruscilli had actual knowledge of the violation, and she has not argued that Ruscilli had constructive knowledge. Because it is concluded that the Secretary failed to establish a *prima*

facie case for this item, it is not necessary to address Ruscilli's affirmative defense of unpreventable employee misconduct. Item 5 is vacated.

Item 6: Alleged Serious Violation of § 1926.104(b)

The Secretary alleges that Ruscilli committed a violation of § 1926.104(b), which provides:

> Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

The Secretary cited Ruscilli under § 1926.104(b) not because of the location of the lifeline but because, she alleges, the anchorage was not designed to support a minimum dead weight of 5,400 pounds. A crucial element of the Secretary's burden of proof for this item is that Ruscilli's anchorage cannot, in fact, support a minimum dead weight of 5,400 pounds. The Secretary failed to adduce any evidence of the dead-weight capacity of the anchorage points.

Ruscilli general superintendent Steven Rippel designed Ruscilli's fall protection system in 1991, in conjunction with a safety consultant company and Blaaco Equipment, Ruscilli's equipment supplier. Ruscilli uses 5/16-inch "quick links," purchased from Blaaco, to anchor each corner of the system. Detail A of Exhibit J-17 is a diagram of an anchorage point with a quick link. The quick links have a working load limit of 1,780 pounds. The breaking strength of the quick link is between 6,200 and 8,800 pounds (Exh. J-10; Tr. 183-188, 190-194, 364).

The Secretary asserts that the working load limit of a quick link (1,780 pounds) is virtually the equivalent of its minimum dead weight. The Secretary's assertion is based on Medlock's testimony regarding the relationship between the working load limit and the minimum dead weight (Tr. 368):

> There is no good definition for what dead weight is. Dead weight is the weight of something just hanging there. Working load is as close to dead weight or the definition of that as you can get. They're not exactly the same, but that's as close as you can get to them. It's not an actual load and it's not a breaking strength.

Medlock concedes that this correlation between minimum dead weight and working load lift is not found in the OSHA standards (Tr. 368). The Secretary references no cases, and none

are found that support the Secretary's position. Medlock acknowledges that he did not know the dead- weight capacity of the quick links (Tr. 368-369).

The record fails to show the minimum dead-weight capacity of the quick links or corroborate Medlock's claim that the working load limit equates more or less to the minimum dead-weight capacity. Item 6 is vacated.

Item 7: Alleged Serious Violation of 1926.104(d)

The Secretary alleges that Ruscilli violated § 1926.104(d), which provides:

> Safety belt lanyard shall be a minimum of ½-inch nylon, or equivalent, with a maximum length to provide for a fall of no greater than 6 feet. The rope shall have a nominal breaking strength of 5,400 pounds.

The transverse cable, or trolley line, located atop one section of the steel was slack (Exh. J-26H; Tr. 25-26). The Secretary contends that the cable allowed for a fall of more than 6 feet for any employee who tied off to it. Ruscilli concedes that the cable was too slack but claims that the cable was not being used and was going to be moved over to the next bay (Tr. 16-17).

It is puzzling that both parties analyze this standard with regard to the transverse cable. Section 1926.104(d) unambiguously refers only to lanyards. "Lanyard" is defined in § 1926.107(b) as "a rope, suitable for supporting one person. One end is fastened to a safety belt or harness and the other is secured to a substantial object or a safety line." The cable at issue is a safety line to which lanyards are attached. The cited standard is not applicable to the cable. Item 7 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

(1) Item 1, violation of § 1926.20(b)(2), is affirmed and a penalty of $4,000 is assessed;

(2) Item 2, violation of § 1926.105(a), is vacated.

(3) Item 3, violation of § 1926.302(b)(7), is affirmed and a penalty of $2,800 is assessed;

(4) Item 4, violation of § 1926.453(b)(2)(iv), is affirmed and a penalty of $2,000 is assessed;

(5) Item 5, violation of § 1926.453(b)(2)(v), is vacated;

(6) Item 6, violation of § 1926.104(b), is vacated; and

(7) Item 7, violation of § 1926.104(d), is vacated.

KEN S. WELSCH
Judge

Date: February 2, 1999

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,
Complainant,
v
Ruscilli Construction Co., Inc.,
Respondent.

OSHRC Docket No. **97-1603**

Order Amending Decision

Ruscilli Construction Co., Inc., moves for reconsideration of the calculation of the penalty amount for affirmed Items 1, 3 and 4 of the citation in the captioned case.

In calculating the penalties, one of the factors the court relied upon was the compliance officer's initial testimony that the Secretary had cited Ruscilli within the three-year period prior to the citation at issue. As Ruscilli points out in its motion, the compliance officer conceded upon cross-examination that the Secretary had not, in fact, cited Ruscilli during that period (Tr. 388-390).

As the Secretary points out in her opposition to Ruscilli's motion to reconsider, this court is not bound by OSHA's internal guidelines that consider only the previous three years for the purposes of history. However, the court did rely on Ruscilli's lack of citations during this period in calculating the penalties. Therefore, it is appropriate to reconsider the penalties, taking into account Ruscilli's lack of citations in the three years prior to the instant citation.

Ruscilli also moves for reconsideration of its good faith as a factor in calculating the penalty. This factor was duly considered in determining the penalty initially and will not be reconsidered.

Accordingly, it is ORDERED that the penalty amounts for the affirmed items be adjusted as follows:

Item 1: The penalty is adjusted to $3,600.
Item 3: The penalty is adjusted to $2,520.
Item 4: The penalty is adjusted to $1,800.

SO ORDERED.

Date February 16, 1999

Judge Ken S. Welsch
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This notice has been sent to:

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