
SECRETARY OF LABOR,

Complainant,

v.

MICHAEL J. GRESH PAINTING CO., INC.

Respondent.

OSHRC DOCKET
NO. 95-1794

Appearances:

Gail E. Glick
Office of the Solicitor
U.S. Department of Labor
For Complainant

Carole W. Briggs
Siegel, O'Connor, Schiff & Zangari, PC
Hartford, Connecticut
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On October, 30, 1995, Michael J. Gresh Painting Co., Inc. ("Gresh") was issued a citation stemming from inspection of a worksite located at the Cox Bridge in Lowell, Massachusetts. At the time of the OSHA inspection, Gresh was working on the bridge in preparation for paint removal (Tr. 9, 70). The Secretary alleges Gresh committed serious violation of 29 CFR § 1926.501(b)(15), which requires that each employee on a walking/working surface six feet or more above lower levels be protected from falling by a guardrail system, safety net system, or personal fall arrest system; a \$2,500 penalty is proposed by the Secretary¹.

Responding to a referral from another contractor working at the same site, the compliance

¹ The citation contained two items. The first item was withdrawn by the Secretary (Tr. 4)

officer arrived at the worksite on August 22, 1995 (Tr. 8-10; Exhibit R-1).² Upon approaching the bridge, the compliance officer observed three Gresh employees working on the superstructure of the bridge about 25 to 30 feet above the bridge roadway; they were attempting to secure containment tarps to a center static line (Tr. 10-11; Exhibit C-1). According to the compliance officer, none of the employees were tied off, and only two of them were wearing safety belts and lanyards (Tr. 10-11; Exhibit C-1). The compliance officer later learned that the employee who was neither tied off nor wearing a safety belt or harness was Gresh's foreman (Tr. 12-13).

Gresh does not deny that these three employees, in addition to three others, were not tied off at the time of the inspection (Tr. 100-01; Exhibit R-7). One of the employees appeared as a witness for Gresh and candidly admitted that he was not tied off that day (Tr. 117-18, 122). Gresh's superintendent for the bridge project testified that all six employees violated company safety policy in failing to tie off and were issued written warnings (Tr. 77, 81-83, 101; Exhibit R-7). Gresh does not dispute that it was feasible for these employees to tie off while securing the containment tarps on the day of the inspection (Tr. 78, 101). According to the project superintendent, brackets and cables were installed along the main beam of the bridge's superstructure in order to provide employees with the ability to tie off to a static line system (Tr. 72-73, 95-97).³

Because no fall protection was being used, Gresh's employees were exposed to a potential fall of at least 25 feet which could have resulted in serious injury or even death (Tr. 12, 23-24; Exhibit R-2). It is well-established that a supervisor's knowledge of the violative conduct may be imputed to his employer. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807 (No. 87-692, 1992). Here, Gresh's foreman was neither tied off nor wearing a safety belt or harness, but admitted to the compliance officer that he should have been using fall protection while working at this height (Tr. 14). Moreover, he was supervising five employees who were also

² The compliance officer was accompanied by an intern who videotaped the conditions observed at the worksite (Tr. 9, 12; Exhibit C-1).

³ Despite these measures, as well as the use of lift equipment where possible, both the project superintendent and one of the employees working at the site testified that due to the design of the bridge, it was infeasible to have complete fall protection available for employees at all locations (Tr. 73-75, 77-79, 97-99, 118).

not tied off.

In its post-hearing brief, Gresh challenges the claim that it had knowledge of the violation simply because its foreman participated in the violative conduct (Brief at 4). In order “[t]o rebut prima facie proof that the knowledge of a supervisor should be imputed to it, the cited employer must offer evidence that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated.” *Id.* at 1815. These elements are identical to the criteria required to establish the unpreventable employee misconduct defense, also alleged here by Gresh. *Id.* at 1816. *See also P. Gioioso & Sons, Inc.*, 115 F.3d 100, 109-10 (1st Cir 1997). The following analysis is dispositive of both arguments.⁴

As a bridge painting contractor, Gresh is engaged in a high-risk business that demands a heightened awareness of fall protection requirements. Although the foreman and at least one of the employees understood that they should have been using fall protection on the day of the inspection, their failure to do so demonstrates that Gresh failed to adequately convey this message to its employees (Tr. 118). While the compliance officer described Gresh’s written program as “very good”, the program comes up short with regard to fall protection (Tr. 34; Exhibit R-1). Gresh’s safety policy covers fall protection in a very general manner, simply repeating the language of several standards set forth at Subpart M, the fall protection section of the construction standards (Tr. 82; Exhibit R-4 at 4-6). The fall protection policy, which is supplied to all employees, contains no specific work rules or directives mandating the use of fall protection (Tr. 82, 116-17).

In terms of training, Gresh’s project superintendent testified that Gresh conducts an annual safety meeting attended by all employees, as well as weekly onsite safety meetings (Tr. 67-68, 71,

⁴ It should be noted that where a supervisory employee is involved, proof of unpreventable employee misconduct is more rigorous and the defense more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶ 29,317 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (DC Cir 1992).

114-15).⁵ The evidence indicates, however, that Gresh failed to emphasize the importance of fall protection at these safety sessions. For instance, fall protection appears to have been a small part of the agenda for the 1995 annual meeting; according to the project superintendent, the subject was covered in about an hour and a half and seems to have consisted of little more than an equipment demonstration (Tr. 68-70, 85-86; Exhibit R-5 at 1). Although the project superintendent claimed that fall protection was also mentioned at every onsite weekly meeting, it was documented as a topic at only four of the meetings held at the Lowell worksite between June 12, 1995 and August 22, 1995, the day of the inspection (Tr. 71-72, 87-90; Exhibit R-5 at 5-8). It is noteworthy that the employees questioned by the compliance officer on the day of the inspection could not recall any fall protection training beyond that given when they were supplied with safety belt equipment upon their hire by Gresh (Tr. 18).

With regard to enforcement, Gresh's project superintendent testified that unscheduled onsite inspections were performed "periodically" by himself, the safety director, the owner, and/or the vice-president of operations (Tr. 67, 79-80). Once or twice a week, depending upon the type of work being performed, formal safety checklists were completed by the project superintendent; he acknowledged, however, that a formal checklist for fall protection would not have been completed on days when employees were hanging containment tarps (Tr. 105-07). When violations of company safety policy were discovered, the project superintendent testified that disciplinary action was taken pursuant to a 1995 disciplinary policy that provided for a verbal warning upon the first violation, a written warning upon the second violation, and termination upon the third warning (Tr. 69, 83; Exhibit R-5).⁶ Nevertheless, where, as here, a supervisor has engaged in misconduct and violated company safety policy, that is strong evidence of lax enforcement of the employer's safety program. *Baytown Constr. Co.*, 15 BNA OSHC 1705, 1710, 1992 CCH OSHD ¶ 29,741 (No. 88-2912-S, 1992), *aff'd*, 983 F.2d 232 (5th Cir 1993). *See also Archer Western*, 15 BNA at 1017;

⁵ The project superintendent also vaguely mentioned that Gresh had an in-house fall protection safety program that spans eight hours, but failed to provide any information about the program (Tr. 66-67).

⁶ Before 1995, Gresh's enforcement policy allowed employees up to five warnings prior to termination (Tr. 103). According to the project superintendent, the policy was changed to demonstrate that Gresh was "more serious" about safety violations (Tr. 69).

Pride Oil, 15 BNA at 1815. Here, the conduct of Gresh's foreman suggests that he was unconcerned about the likelihood and even the consequences of being observed, together with five employees under his supervision, in violation of company safety policy (Tr. 22, 36, 55; Exhibit R-2).

Gresh's subsequent punishment of these employees also raises serious concerns about the implementation of its enforcement program. As indicated *supra*, all six employees, including the foreman, received written warnings for violating company safety policy on the day of the inspection (Tr. 77, 81-83; Exhibit R-7). This was apparently the second fall protection violation for some of these employees, but the first violation for the foreman (Tr. 78, 81). According to the project superintendent, the foreman was not issued a verbal warning for his first violation "because of the severity of [the violation], because he was supposed to be taking care of [and] making sure everybody else was tied off" (Tr. 81).

It is true that a foreman has the added responsibility of ensuring the safety of his crew (Tr. 65-66). Here, however, the conduct of Gresh's foreman was more egregious for another, more compelling, reason: unlike the other two employees observed by the compliance officer, the foreman was not wearing any fall protection equipment to begin with, let alone not being tied off (Tr. 10-11, 125-26). His actions not only set a bad example for the employees in his crew, but also demonstrate an extremely careless approach to work practices under conditions that demand a conscious regard for safety precautions. This is particularly disturbing given the fact that the foreman was promoted to this position just two weeks prior to the inspection! a period in his job career when interest in safety should be high (Tr. 80-81). A reasonably thorough safety program connotes a program that is an integral part of an employer's operations. A safe work environment may only be achieved through control of the working conditions and control of people's actions. Only management can implement such control. Gresh failed to present any evidence to indicate that, upon assuming his supervisory position, the foreman received any special or augmented safety training, separate and apart from that provided to non-supervisory personnel (Tr. 80). It is not insignificant that just one week after the inspection, two Gresh employees working at another site, one of whom was a foreman, were issued written warnings for fall protection violations (Tr. 83, 111; Exhibit R-6 at 3-4). Gresh has failed to show that the misconduct of its employees was unpreventable.

Where Gresh has failed to prove that the misconduct was unpreventable, knowledge of the

violative conduct may be properly imputed to Gresh and a serious violation of § 1926.501(b)(15) has been established. For the same reasons, Gresh's employee misconduct defense must also fail. The violation therefore is affirmed. In terms of a penalty, the compliance officer testified that a 40% reduction was given for Gresh's size, and a 10% reduction was given for past history (Tr. 24; Exhibit R-2). Due to the serious nature of the violation, which the compliance officer validly assessed as a high gravity-greater probability violation, a penalty reduction for good faith was not allowed pursuant to the Field Inspection Reference Manual (FIRM) (Tr. 24-25, 37-39, 41, 46-48, 127-28; Exhibit R-2). The compliance officer's penalty evaluation is reasonable and in keeping with the penalty assessment criteria of 29 U.S.C.S 666(j). Accordingly, a penalty of \$2,500 is assessed.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1, alleging serious violation of § 1926.20(b)(2), having been withdrawn, is vacated. It is further

ORDERED that item 2, alleging serious violation of § 1926.501(b)(15), is affirmed and a penalty of \$2,500 is assessed.

Richard DeBenedetto, OSHRC Judge

Dated: _____
Boston, Massachusetts