

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

METRO STEEL CONSTRUCTION CO.,

Respondent.

OSHRC Docket No. 96-1459

DECISION

Before: WEISBERG, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

This case arises from a citation issued by the Occupational Safety and Health Administration (“OSHA”) to Metro Steel Construction Co., Inc. (“Metro”). Items 2a and 2b of that citation alleged that Metro had violated the construction safety standard at 29 C.F.R. § 1926.105(a),¹ which requires the use of fall protection when employees are exposed to a fall of more than 25 feet. Metro contested the citation, and a hearing was held before Chief Administrative Law Judge Irving Sommer. The judge’s decision has been directed for review pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of

¹That standard provides:

§ 1926.105 Safety nets.

(a) 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.

1970, 29 U.S.C. §§ 651-678 (“the Act”) to determine whether he erred in affirming items 2a and 2b of the citation. For the reasons below, we reverse the judge and vacate both items.

Item 2a

Metro was erecting the skeletal structural steel for a two-story shopping mall that was under construction in Westbury, Long Island, New York. An OSHA compliance officer arrived one afternoon to conduct an inspection of the worksite. He spoke to Metro’s project superintendent, Charles O’Leary, who informed him that Metro’s safety director was not at the site. O’Leary telephoned the safety director, who was in New Jersey. Because he could not get to the site before the end of the workday, the safety director requested that the compliance officer meet him there the next morning. When the compliance officer arrived the next day, he spoke with O’Leary and the safety director. He subsequently interviewed two Metro employees, Brathwaite and Snow, ironworkers who were performing structural steel erection.

Near the end of that workday, the compliance officer was in the parking lot next to his automobile, getting ready to leave the site, when he observed Brathwaite on the roof level of the structure, walking along the side of the building closest to the parking lot where the compliance officer was standing. It appeared to the compliance officer that Brathwaite was walking along the exterior beam, in which case he would be exposed to a fall to the outside of the building forty feet to the ground, in violation of section 1926.105(a). The compliance officer did not see any decking in the area where Brathwaite was walking and testified that he had no reason to believe that there was decking there. He stated that he could see Brathwaite stepping over the joists. At that point, O’Leary approached, and the compliance officer called to him that he was going to cite Metro for Brathwaite’s actions. The compliance officer then got into his car and left the site.

O’Leary testified that, when the compliance officer pointed to the employee on the building, he recognized Brathwaite, and that he could see Brathwaite from the knees up. O’Leary testified that he immediately investigated the situation and saw as he approached the building that Brathwaite was walking along a stack of metal decking that had been laid

across the joists that ran perpendicular to the exterior beam. According to O'Leary, the stack of decking, which would ultimately be spread out to form a solid surface, had been placed there a day or so earlier to provide a safe three-foot-wide walkway for the ironworkers performing the steel erection. He estimated that it was set back 3 - 5 feet from the exterior beam and indicated that it was not visible from the compliance officer's location in the parking lot because the height of the exterior beam concealed it. O'Leary testified that, as soon as he discovered the situation, he went to Metro's construction trailer, got his camera, and took photographs showing the conditions.

Snow also testified. He said that he and Brathwaite worked as partners, and that each of them must know where the other is at all times in order not to do anything that would cause his partner to be injured. When Snow was placing a beam or joist, Brathwaite would be at the other end. Snow testified that, to his knowledge, Brathwaite walked on the decking placed for that purpose and never walked along the exterior beam. Snow testified that he, Brathwaite, and the other ironworkers routinely walk on the decking because it provides a safe walkway. He explained that, although it may have appeared to the compliance officer that Brathwaite was stepping over joists, he probably was stepping over the metal bands that held the stacks of decking together. Snow also corroborated O'Leary's testimony that the decking was not visible from the location in the parking lot where the compliance officer had been standing because it was concealed behind the exterior beam, and that it was necessary to get much closer to the building in order to see the decking.

The judge relied on the compliance officer's testimony, stating that the compliance officer was an experienced veteran who was "adamant" that he had not seen any decking and that he had seen Brathwaite stepping over the joists. The judge examined the photographs taken by O'Leary and did not accord them any weight because he concluded that they did not all represent the same location. Having considered the totality of the evidence and weighed the testimony of the compliance officer against that of O'Leary and Snow, we reverse the judge.

A significant factor in our decision is the limited nature of the compliance officer's testimony. He made his observations from only one location in the parking lot as he was getting ready to leave the site, yelled to Metro's project superintendent that Brathwaite's actions constituted a violation, then immediately left. Had he remained, or had he approached nearer to the building, he would either have seen the decking or have been able to testify with certainty that there was no decking in place. Because he did not do this, his testimony is open to contradiction by the more specific testimony of Metro's witnesses, who have presented sufficient evidence to create critical ambiguity about what the conditions actually were. Both O'Leary and Snow testified that Brathwaite was walking along decking that had previously been laid for that purpose. Snow worked closely with Brathwaite and never knew him to walk along an exterior beam without fall protection. According to O'Leary, when the compliance officer pointed to Brathwaite, Brathwaite was visible from the knees up. This suggests that his lower legs were hidden by the beam he was supposedly standing on and that he was standing behind the beam, on the decking. In addition, Snow's explanation that the ironworkers had to step over the steel bands holding the stacks of decking together casts doubt upon the compliance officer's conclusion that Brathwaite was stepping over the joists.

The Secretary argues that the judge's reliance on the compliance officer's testimony amounts to a credibility finding by the judge. We do not agree. When findings of fact are based on the credibility of witnesses, they must be clearly stated as credibility determinations and the reasons must be set out. *E.g.*, *P&Z Co.*, 6 BNA OSHC 1189, 1192, 1977-78 CCH OSHD ¶ 22,413, p. 27,024 (No. 76-431, 1977); *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297-98, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978); *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1953-54, 1978 CCH OSHD ¶ 23,033, p. 27,841 (No. 16162, 1978). The Commission will ordinarily defer to credibility determinations by a judge that are properly explained, but it need not defer to findings that are not based on the demeanor of the witnesses or on other factors that are peculiarly observable by the judge who presides over the hearing. *Waste Mgt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10, 1995-97 CCH

OSHD ¶ 30,841, p. 42,891 (No. 93-128, 1995). Where a judge's finding is not based on such factors, the Commission is in as good a position as the judge to determine the facts. *C.J. Hughes Constr.*, 17 BNA OSHC 1753, 1755, 1995-97 CCH OSHD ¶ 31,129, p. 43,475 (No. 93-3177, 1996). That is the case here.

Considering the totality of the evidence, and keeping in mind the respective ability of each witness to observe the incidents that were the subject of his testimony, we cannot find that the compliance officer's testimony that he saw Brathwaite on the exterior beam outweighs the testimony of Metro's two witnesses and must resolve this ambiguity against the Secretary.² We therefore conclude that the Secretary has not carried her burden of proving that Brathwaite was exposed to an exterior fall of more than twenty-five feet. Accordingly, we reverse the judge and vacate item 2a of the citation.³

Item 2b

The compliance officer returned to the Westbury worksite one morning almost three months later. From a location in the parking lot, he videotaped various employees performing construction activities on the worksite. A videotape that has been introduced into

²The Commission bases its determination on the sworn testimony of Snow and O'Leary. Chairman Weisberg believes that the photographs introduced by Metro, although not dispositive, support the testimony of O'Leary. Commissioner Rogers, on the other hand, believes that the photographs do not necessarily all represent the same location, and, therefore, do not add credence to the testimony.

³The Secretary has filed a motion to strike that portion of Metro's brief in which the company argues that, if Brathwaite did walk on the exterior beam, his actions constituted unpreventable employee misconduct. In view of our disposition of this item, Metro's argument that it has established an affirmative defense is moot, and we need not reach the Secretary's motion.

evidence shows someone walking along an exterior beam without fall protection, exposed to a fall of 40 feet to the ground. That individual is clearly in violation of section 1926.105(a). The question before us is whether the Secretary has established that the individual in question was a Metro employee.

The videotape depicts three situations that were deemed by the compliance officer to be relevant because he believed that the same person was shown in each of the three scenes. The first situation shows an individual dressed in a black shirt and dark pants sitting astride a beam, welding. It appears that the welder's safety lanyard is tied to a beam, protecting him from falling. This segment of the videotape is significant only because the compliance officer believed that the welder was the person depicted in the other two segments of the videotape and that his welding activity was part of the steel erection being performed by Metro, which would establish that the welder was a Metro employee.

The second section of the videotape depicts the violation. It shows a man wearing a black T-shirt and dark pants, as was the welder, walking the exterior beam without fall protection. After walking the length of one beam, thirty feet, he turned onto an interior beam and walked to the interior of the floor. The compliance officer testified that the man then descended a ladder. The compliance officer did not go onto the site to ascertain the individual's identity because he believed that it was the welder, and because Metro's safety director had requested him not to interview Metro employees without the safety director present.

The third segment of the videotape also shows a man wearing a black T-shirt and black pants. He is sitting near the "barrel" area of the construction astride a beam near where it is connected to an upright column. He appears to be working in concert with another person, who is astraddle another beam, facing him, on the other side of the column. These employees straddling the beams appear to have been driving a pin or a bolt into a hole in the beam. The compliance officer testified that he believed that they were performing a steel erection activity called "bolting up."

In affirming this item, the administrative law judge credited the compliance officer's testimony that the individual who performed the welding, the person who committed the violation, and the person straddling the beam were all the same person, and that the work being performed was steel erection activity, which meant that the person was a Metro employee.

We do not agree with the judge. We find that the Secretary has failed to show by a preponderance of the evidence that the person who walked the exterior beam without fall protection in the second segment of the videotape was a Metro employee. The Secretary attempted to establish this by showing that the welder in the first segment was a Metro employee and that he was also the person shown committing the violation in the second segment as well as the person shown working in the third segment. The compliance officer admitted on cross-examination, however, that the welder appeared to be wearing dark green pants, while the pants worn by the person who walked along the outer beam were black. This testimony suggests that the welder in the first segment and the individual videotaped committing the violation in the second segment were not the same person.

Nor can we conclude that the person in the third section of the videotape is the same person who committed the violation. Having viewed the videotape, we cannot determine that the second and third segments of the videotape involve the same person. In addition, several factors cast doubt on the compliance officer's testimony that the individual shown in the second segment of the videotape was a Metro employee: both O'Leary and Snow testified that they knew all the Metro employees on the worksite and that they did not recognize the person who walked the beam without protection as a Metro employee; and there were a number of other trades working on the site at the same time as Metro, including ironworkers who worked for another company that was performing "ornamental ironwork" or "light iron" work, as distinguished from the heavier skeleton steel or structural steel work being performed by Metro. The individual in the third segment of the videotape was working in an area where a stairway would be located. He appears to be banging a pin or a bolt into a hole in the beam, but we are not able to determine on the record presented to us whether

he was performing part of the skeleton steel erection or whether he was putting in brackets to hold the stairway. We cannot, therefore, find that he was a Metro employee either.

On this record, we find that the Secretary has not carried her burden of proving that the person who committed the violation was a Metro Steel employee and that Metro Steel should be held liable for the violation. Accordingly, we reverse the administrative law judge and vacate item 2b of the citation.

Conclusion

For the reasons above, we reverse the administrative law judge and vacate items 2a and 2b of the citation and the penalty proposed for those items.

/s/
Stuart E. Weisberg
Chairman

/s/
Thomasina V. Rogers
Commissioner

Date: April 14, 1999

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
: :
Complainant, : :
v. : : OSHRC DOCKET NO. 96-1459
: :
METRO STEEL CONSTRUCTION : :
COMPANY, INC., : :
Respondent. : :

APPEARANCES:

Alan L. Kammerman, Esquire
New York, New York
For the Complainant.

Richard L. Slavitt, Esquire
Parsippany, New Jersey
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 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 construction site in Westbury, New York, from June 25, 1996, until September 25, 1996; as a result of the inspection, Respondent Metro Steel Construction Company (“Metro”) was issued a citation alleging two instances of violations of 29 C.F.R. § 1926.105(a), the OSHA standard requiring nets or other fall protection where work places are over 25 feet from the ground or other surfaces.¹ Metro contested the citation, and the hearing in this matter was held on May 1, 1997, and July 23, 1997. Both parties have submitted post-hearing briefs.

¹The citation also alleged violations of 29 C.F.R. §§ 1926.20(b)(1) and 1926.501(b)(1); however, the Secretary has withdrawn items 1 and 3, the items alleging these violations, leaving only item 2, alleging the instances noted above, to be resolved.

The Inspection

Metro was erecting the structural steel of the two-story building under construction at the site. On June 25, 1996, Norman Sebbesse, the OSHA compliance officer (“CO”) who conducted the inspection, met with the general contractor of the job and with Charles O’Leary, Metro’s on-site superintendent; he also spoke with Chad Snow and Lindley Bratwaite, two Metro steel workers. CO Sebbesse went back to the site the next day, and that afternoon he saw Snow and Bratwaite proceed to the building with safety belts in hand. Bratwaite put a ladder against an interior column and climbed up to a beam on top of the second story; he walked that beam to the outside of the building, and after proceeding along an exterior beam for about 30 feet he sat down, tied off to the beam, and began working on a joist. The CO left after this occurrence, but returned to the site on September 20, 1996, to further observe Metro’s work. In the morning he saw an employee in a black shirt welding on joists. That afternoon he saw the same employee walk an interior beam to an outside beam, where he and another worker sat down, tied off, and did some bolting work; the employee in the black shirt then unbuckled his belt, stood up, and walked about 30 feet along the outside beam, after which he turned to the inside, walked on an interior beam, and climbed down a ladder. CO Sebbesse videoed this event, and based on his determination that both this employee and Bratwaite had been exposed to falling to the exterior from the second story of the building, a distance of 40 feet, OSHA cited Metro for violating 29 C.F.R. § 1926.105(a), which provides as follows:²

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.

Citation 1 - Item 2a

This item is based on CO Sebbesse’s having seen Lindley Bratwaite walking on an exterior beam. Metro contends that Bratwaite walked on decking that was laying alongside the beam. The testimony of Chad Snow, Bratwaite’s partner, and Charles O’Leary, taken together, was that decking was placed along the edge of the building to provide a walkway so that employees could get to their work stations safely, and that the decking could not be seen from the location in the parking lot where

²No citations were issued for exposures to falls to the interior of the building because the distance from the beams to the decking below was 20 feet.

the CO and O'Leary had observed Bratwaite as the outside beam obscured the decking; they further testified that photos R-4-5 accurately showed the building that day, and that Bratwaite had not walked on the outside beam.³ (Tr. 94-102; 120-25; 134-40; 147-48). CO Sebbesse agreed he had seen Bratwaite from the parking lot, that he had not walked any closer to the building, and that he had not seen any decking like that depicted in R-4-5; however, he indicated on photo R-3 how Bratwaite had walked along the interior and then the exterior beam, and he specifically testified that he had watched Bratwaite stepping over the joists as he walked the beam and that he therefore had had no reason to go any closer to the building. (Tr. 12-14; 37-45; 61; 67; 80).

Based on the record, it is my finding that Bratwaite was exposed to the cited hazard. The CO, who has seven years experience with OSHA and has conducted nearly 400 inspections, was adamant that he had seen Bratwaite walking the beam and stepping over the joists, the ends of which are clearly shown protruding over the tops of the outside beams in photos R-2-5. (Tr. 5-6; 12-14; 80). Snow testified the decking was held together with steel bands such that an employee walking on it would have had to step over the bands, intimating that the CO mistook Bratwaite's walking on the decking for being on the outside beam. (Tr. 102). Regardless, I am not persuaded by Metro's contention with respect to this item, and my conclusion that the standard was violated is supported by Metro's own photos. R-2-3, which show no decking, depict the cited area. (Tr. 40-45). R-4-5, on the other hand, which do show decking, portray either another area or the cited area at a later time on June 26, and that this is so is apparent from a comparison of R-2-3 with R-4-5; in particular, the large pole with a "P" that intersects the crane on the right side of R-2 appears nowhere in R-4-5. This citation item is affirmed as a serious violation. The penalty for this item is set out following item 2b.

Citation 1 - Item 2b

The basis for this item is the employee CO Sebbesse saw walking along an outside beam on September 20, 1996. The CO testified that he first observed the employee, who had on a black shirt, welding on joists in the morning; he further testified that in the afternoon the same employee, after doing some bolting work while tied off to an exterior beam, unbuckled his safety belt and walked the outside beam for about 30 feet before turning to the interior and proceeding along an inside beam.

³O'Leary testified that he took R-1-5, photos of the site parking lot and the building under erection, shortly after the CO's departure; R-1-5 all show a date of June 26, 1996. (Tr. 138-39).

CO Sebbesse described these events as C-2, his video, was shown at the hearing. (Tr. 18-25; 54-56; 62-66; 74-78). Metro contends that the welder was a different employee than the one the CO saw in the afternoon, who, according to Metro, was an ornamental steel worker. The record does, in fact, show that there were about ten other subcontractors on the job, including an ornamental steel contractor, that ornamental steel employees were working on the building that day, and that Metro performed only steel erection at the site. (Tr. 50-52; 66; 78-79; 96-98; 104; 122-23). In addition, Chad Snow and Charles O'Leary testified they did not recognize the person who walked the outside beam on the video, and that Metro's steel workers were all union members who did only one type of job, *i.e.*, connecting, bolting or welding, at the site; O'Leary also testified that the subject employee appeared to be working by himself, while his employees always worked in pairs, that there was a stairway in the area where the subject employee was working, and that he could have been an ornamental steel worker who was welding stairway brackets. (Tr. 104; 107-10; 140-43; 154-55).

CO Sebbesse's testimony, as noted above, was that the employee was welding joists in the morning and that the same employee was performing bolting with another worker in the afternoon. The CO further testified that the specific work the employee and his partner were doing was bolting the connection between the "barrel fascia" of the building and the outside beam and that he considered that work to be steel erection activity. (Tr. 54-55; 63-66). Based on the record, the CO's testimony is credited over that of Snow and O'Leary, and I conclude that the subject employee was a Metro worker and that he was exposed to the cited hazard. In so concluding, I have noted Metro's assertions as to why the employee the CO saw in the morning could not have been the same one he saw that afternoon. However, the CO's testimony, in my view, renders these assertions unpersuasive. (Tr. 54-58; 74-78). Regardless, even assuming *arguendo* that the employee who walked the outside beam was a different worker, the job that he was doing, according to the CO, was that of a steel erector. (Tr. 63-66). I have also noted Metro's assertion that the CO never positively identified the employee as a Metro worker. In this regard, the CO specifically testified that Metro representatives had told him not to speak to its workers, that he had therefore pointed out the individual to O'Leary, who indicated that he would take care of the matter, and that O'Leary never got back with him. (Tr. 19-20; 50; 57-58; 62-63). This item is accordingly affirmed as a serious violation.

Penalty Assessment

The proposed penalty for these two grouped items is \$4,200.00. The Secretary presented evidence to the effect that the initial penalty of \$5,000.00 was increased to \$7,000.00 because of the high gravity of the cited conditions and in order to have the appropriate deterrent effect; a 40 percent reduction was then applied to this amount due to the size of the company, for a total penalty of \$4,200.00, but no reductions for history or good faith were given due to the gravity of the violations and the company's history of previous violations. (Tr. 26-29; 81-83). However, Metro presented evidence to rebut that of the Secretary with respect to previous history. (Tr. 84-90). It is my conclusion that a total penalty of \$3,500.00 is appropriate for item 2; this amount has been derived by subtracting a 40 percent reduction for size and a 10 percent reduction for history from \$7,000.00.

Conclusions of Law

1. Respondent Metro Steel Construction Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. § 1926.105(a).

3. Respondent was not in violation of 29 C.F.R. §§ 1926.20(b)(1) and 1926.501(b)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 3 of citation 1 are vacated.

2. Item 2 of citation 1 is affirmed as a serious violation, and a total penalty of \$3,500.00 is assessed.

Irving Sommer
Chief Judge

Date: