UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. OUTBACK STEEL SERVICES, LLC Respondent.	DOCKET NO. 17-1603

Appearances:

Gregory W. Tronson, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO
For Complainant

Benjamin J. Ross, Esq., Kristin R.B. White, Esq., Jackson Kelly, PLLC, Denver, CO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

OSHA began an inspection of an Outback Steel Services worksite in Colorado Springs, Colorado on June 21, 2017. (Tr. 257). OSHA was responding to a report that two plumbers were injured the day before, when steel joists fell from overhead during the construction of a new Kum & Go convenience store. (Tr. 257). As a result of his investigation, Compliance Safety and Health Officer ("CSHO") Shane Lane concluded that Respondent violated 29 C.F.R. § 1926.757(a)(6) [failure to secure steel joists landed on a structure] and 29 C.F.R. § 1926.761(a) [employee training not provided by a qualified person].

CSHO Lane recommended, and Complainant issued, a *Citation and Notification of Penalty* ("Citation") to Respondent, which alleged two serious violations of the Act with a total

proposed penalty of $8,692.00. Respondent timely contested the *Citation*. This brought the matter before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act").

A trial was conducted in Denver, Colorado on August 27-28, 2018. Six witnesses testified at trial: (1) Adam Vuksta, Project Superintendent, Hudspeth & Associates; (2) Shane Overlee, Plumber/Foreman, Bruno/Fenton Plumbing; (3) Tristin Winfrey, Iron Worker/Foreman, Outback Steel Services; (4) CSHO Shane Lane, Occupational Safety and Health Administration; (5) John Treadway, Iron Worker/Leadman, Outback Steel Services; and (6) Brad Gunter, Respondent's owner. Both parties timely submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 28). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

Multiple contractors were involved in the construction of a new Kum & Go gas station/convenient store in Colorado Springs, Colorado in June 2017. (Tr. 45-46, 48). Respondent, a small steel erection company, was one of those contractors with employees on the job. (Tr. 58, 278). Respondent was responsible for erecting the steel columns, beams, and joists which would serve as the frame/structure for the building. (Tr. 49, 216). Respondent's structural steel erection work on the project was supposed to be completed in 4-5 days. (Tr. 58, 60). Once the vertical

columns and horizontal I-beams of the structure were erected (which was completed by the time-frame relevant to this case), Respondent's crew was tasked with setting and welding horizontal, steel, roof joists across the I-beams. (Tr. 247-248; Ex. C-7, p.5). The process involved setting bundles of steel joists up on the I-beams ("flying them up"), separating the bundles, setting individual joists in place ("shaking them out"), then welding the ends of each joist to the I-beams ("setting them in their forever home"), progressively moving along the tops of beams to create a roof support structure. (Tr. 60, 73, 216, 247-248; Ex. C-7, p. 5). The "foot" on each end of a joist was a steel 5-inch plate that was welded to the horizontal I-beam when each joist was individually set. (Tr. 232, 246, 276-277, 347; Ex. C-7, p. 2, 16). Each steel joist weighed approximately 300-400 pounds.[1] (Tr. 228, 441). No one ever worked underneath Respondent's crew while they were lifting bundles, or spreading and welding individual joists. (Tr. 67,194, 223, 225).

The General Contractor for this project was Hudspeth & Associates, represented by Superintendent Adam Vuksta. (Tr. 40). He was responsible for overseeing the contractors, and the progression of the work, including enforcement of basic safety rules. (Tr. 45-46, 55-56, 227). Hudspeth controlled and directed subcontractor work on the jobsite. (Tr. 433-435). The third on-site employer relevant to this case was Fenton/Bruno's Plumbing ("Bruno's plumbers") who were tasked, at this point in the project, with excavating the soil under the steel structure so that underground plumbing could be installed. (Tr. 69, 72).

The Kum & Go convenience stores are "cookie cutter" building designs, which are supposed to be completed in 120 days. (Tr. 30, 53). By June 19, 2017, Superintendent Vuksta had become frustrated with the fact that the Bruno's plumbers were far behind schedule, had not consistently shown up for work, and when they did, often worked for only a few hours a day. (Tr.

[1] One witness testified that each joist weighed 250-300 pounds, another testified that it was closer to 400 pounds. The issue was never clarified.

68, 89, 165). He testified that project delays caused by the Bruno plumbers were causing the entire project to fall behind. (Tr. 91-93). He estimated that, by the date of the accident, Bruno's plumbers were about 2 weeks behind schedule. (Tr. 52, 91).

On that same day, June 19, 2017, Supt. Vuksta coordinated and directed a meeting between Respondent's foreman, Triston Winfrey, and Shane Overlee, foreman for the Bruno plumbers crew. (Tr. 69, 72). At that time, Respondent's crew was in the process of setting bundles of joists along the overhead roof portion of the building, breaking apart the bundles, setting the joists at their individual locations, and welding them down. (Tr. 74). The purpose of the meeting between Hudspeth, Outback Steel, and Bruno was: (1) to make sure that Bruno's plumbers' excavation backhoe would fit inside/under the partially erected steel structure; (2) to ensure that Bruno's plumbers would not be working on the ground level underneath any areas that Respondent's steel workers would be setting and welding iron joists; and (3) to address Respondent's concerns that the plumbers' excavation backhoe might hit the steel structure. (Tr. 71, 78-79, 82). The backhoe used by Bruno's plumbers was a 17,000 pound "mini" excavator, on tracks, with a bucket in front and a blade in back, capable of digging 15-18 foot excavations. (Tr. 82; Ex. C-7, p.7). Respondent's crew and Bruno's plumbers agreed to monitor each other so that neither was working over/under one another. (Tr. 72, 89).

At approximately 3:00 p.m., Bruno's plumbers decided to leave the jobsite because they were uncomfortable with their proximity to Respondent's crew, as well as the nearby welding sparks being created by Respondent's work. (Tr. 89). Normally, there is a logical progression of contractor work on a job. "After the ironworkers come, everybody follows behind. You just don't get near the ironworkers." (Tr. 164). Bruno's foreman, Overlee, and Respondent's foreman, Winfrey, confirmed that, at no time, were the steel workers working directly above the plumbers.

(Tr. 194, 223, 225). After the Bruno plumbers left, Hudspeth Supt. Vuksta telephoned their home office, to complain to their supervisor about the plumbers leaving the worksite. (Tr. 91).

The next day, Tuesday, June 20, 2017, Bruno's plumbers returned to the jobsite, although it was late in the morning (Tr. 93). They immediately demanded that every other contractor, including Respondent, get out of their desired work area or they threatened to leave the jobsite again. (Tr. 147, 351). According to Supt. Vuksta, Bruno foreman Shane Overlee told everyone to "get out or I'm leaving. Everybody has to go or we're leaving." (Tr. 147).

Respondent's crew, who had already been working for 2-3 hours that morning, setting and welding individual roof joists in place, was working directly above the area where the Bruno's plumbers wanted to work. (Tr. 93, 351). (Tr. 228, 441). There were four joists, bundled together, but not individually set out or welded yet, directly above the area where the plumbers wanted to work. (Tr. 96, 352-353; Ex. C-7, p. 12). The bundle of joists had been set up on the I-beams the afternoon before. (Tr. 353, 364, 382, 386).[2]

By the time the Bruno's plumbers arrived, Respondent's foreman, Shane Overlee, was no longer at the jobsite. He had gone to Denver earlier that morning to pick up some materials. (Tr. 225). He left Luis Rodriguez, one of two Lead Men onsite, in charge while he was gone. So Respondent's entire crew, led by Leadmen Luis Rodriguez and John Treadway, met with Bruno's plumbers and Hudspeth Superintendent Adam Vuksta to discuss who would get to work in the area. (Tr. 97, 143, 225, 362-363).

Supt. Vuksta told Respondent's crew that Bruno's plumbers needed to work on the ground underneath the area Respondent's crew was already working. (Tr. 225). Leadmen Rodriguez and

[2] Foreman Winfrey testified that the bundle of joists was set on the structure the morning of the accident. Leadman Treadway testified that the bundle was set on the structure the afternoon before. Given that Winfrey was gone most of the day June 20, 2017, and Treadway testified with more detail about this specific bundle of joists, as well as the events of June 20, 2017, the Court credits Treadway's testimony on this point.

Treadway told Bruno's plumbers and Supt. Vuksta that if Respondent's crew could just be allowed 40 minutes, they could weld down the bundle of four joists immediately above the area. (Tr. 96, 356-358). However, Bruno's plumbers refused to agree to the 40 minute delay, started yelling and cussing at everyone, demanded that Respondent's crew and anyone else in the area immediately relocate, or they would again leave the jobsite. (Tr. 97-98, 143, 357-358). Since Bruno's plumbers were already two weeks behind schedule, Superintendent Vuksta denied Respondent's request for 40 minutes to weld down the overhead joists, and ordered them to move to another area of the building so Bruno's plumbers could go to work. (Tr. 97-99, 144).

Respondent's Leadman Treadway testified that they protested again, and asked Supt. Vuksta repeatedly if they could just be allowed to weld down the overhead joists first, before moving to work on another part of the building. (Tr. 364). However, their repeated request for additional time was denied by Supt. Vuksta. (Tr. 363-364). According to Treadway, in denying Respondent's request for a few minutes to weld the overhead joists to the structure, Supt. Vuksta told everyone at the meeting that: "I'll take the responsibility of [*sic*] anything." (Tr. 364). Respondent's crew complied with the instructions and decision by the Hudspeth superintendent and immediately relocated 40-50 feet away, to work on another part of the building. (Tr. 99-100, 123, 227, 372). Treadway testified that even though they asked for 40 minutes to weld down the four overhead joists, they probably could have gotten it done in about 20 minutes. (Tr. 358, 382, 392).

A few hours later, the Bruno plumber who was operating the excavator backhoe hit one of the steel structural beams with the excavator, right underneath the joists Respondent had requested an opportunity to weld down. (Tr. 101, 104, 127, 141; Ex. C-7, pp. 4, 22). Witnesses testified that upon impact, the excavator continued to push against the beam, spreading the structure apart by

approximately 6 inches. (Tr. 233, 374, 391). As a result, two of the joists fell to the ground, striking and injuring two of the plumbers. (Tr. 184, 387; Ex. C-7, pp. 12-13).

Bruno foreman Overlee did not know at trial whether the joists above them were bundled together when the excavator hit the structure. (Tr. 197). He acknowledged testifying during a pre-trial deposition, however, that he saw wire rope hanging off the outside edges of the structure where the joists had been. (Tr. 198). Supt. Vuksta, similarly, did not know at trial whether the bundle of steel joists setting on I-beams above Bruno's plumbers were bound or strapped together. (Tr. 77, 95). Respondent's Foreman, Winfrey, also did not know whether the bundle of joists above the plumbers had been wired together. (Tr. 233, 236-237). The only witness with direct knowledge of the joists' pre-accident condition was Respondent's Leadman, John Treadway. He testified that Respondent's crew had set the bundle of joists above that area before the shift ended the afternoon before, and had wire-roped the bundle together, anticipating that they would be spread out and welded down the following morning. (Tr. 353, 401).

OSHA Compliance Safety and Health Officer Shane Lane arrived at the worksite the day after the accident, on June 21, 2017. (Tr. 257). The condition and location of the equipment and materials were not preserved at all. He testified that "the site was totally different when I arrived." (Tr. 258). Therefore, CSHO Lane did not have any personal knowledge of any of the events discussed above, nor the location, condition, or stability of the joists before the accident.

Discussion

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge

of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Citation 1, Item 1

> Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:
>
> 29 CFR 1926.757(a)(6): When steel joist(s) were landed on a structure, they were not secured to prevent unintentional displacement prior to installation:
>
> (a) On or about June 20, 2017, Outback Steel Services, LLC as the creating contractor, failed to secure steel joists that were placed on top of the steel structure under construction, resulting in employees of Bruno's Mechanical, Inc. suffering from serious injuries after being struck by the steel trusses when they fell on them while working underneath the unsecured steel trusses.

Citation and Notification of Penalty at 6.

The Standard Applied

There was no dispute over the applicability of the cited standard. Respondent's crew was engaged in steel erection work, setting joists on a structure for placement and welding. The standard applied.

Complainant failed to prove the standard was violated

Respondent was cited in this case as a "creating employer," purportedly responsible for creating a hazard to which another employer's employees, Bruno's plumbers, were exposed. *Flint Engineering*, 15 BNA OSHC 2052 (No. 90-2873, 1992). The parties spent a considerable amount of time during the trial, and in post-hearing briefs, addressing the specific circumstances and cause of the accident that occurred in this case. However, determining whether a regulation was violated is not dependent on the cause of an accident. *Central Florida Equipment Rentals*, 25 BNA OSHC 2147 (No. 08-1656, 2016); *American Wrecking Corp*., 19 BNA OSHC 1703 (Nos. 96-1330 & 1331, 2001); *Cleveland Consolidated* 13 BNA OSHC 1114 (No. 84-696, 1987). The occurrence

of an accident is more relevant to the elements of employee exposure to a hazardous condition, and whether a violative condition was properly characterized as "serious." *Id.*

As an initial matter, the Court is gravely concerned by the fact that Respondent's crew, who was already working in the particular area of the project on the morning of June 20, 2017, with no evidence of anyone working underneath them, repeatedly asked the General Contractor and Bruno's plumbers for a few minutes to weld down (and therefore, permanently secure) the four overhead joists before the plumbers began working underneath the area. Their repeated requests were denied by the G.C. and the plumbers, and they were ordered by the G.C. to immediately relocate to another part of the project. It is entirely inequitable to hold an employer responsible for violating a safety regulation, on a "creating employer" theory of liability, when the cited employer specifically alerted the third-party employer and the G.C. of a possibly unsafe condition *before anyone was exposed*; repeatedly requested an opportunity to quickly fix the condition; and yet was denied that opportunity. Without passing any judgment on the legality of the comment, the troubling situation was further compounded by the G.C. Superintendent's statement to Respondent's crew that he would "take responsibility." (Tr. 364).

Second, notwithstanding the circumstances discussed above, the Court finds that Complainant failed to prove, by a preponderance of the evidence, that the cited regulation was violated. The cited standard requires that steel joists be "secured to prevent unintentional displacement prior to installation." The term "secured" is not defined in the regulation. (Tr. 273). Additionally, the parties did not reference, and the Court could not locate, a single published case addressing or interpreting 29 C.F.R. § 1926.757(a)(6).

As Respondent points out, the Preamble to the cited regulation provides additional information on the intent of the standard and use of the term "secured." "…Paragraph (a)(7) of

the final rule addresses the hazard that arises when a single steel joist or a bundle of joists are placed on the structure and then left unattended and unattached." 66 F.R. 5196-01. "This provision requires that, when steel joists are landed on structures, they be secured to prevent unintentional displacement, ***i.e., the bundles must remain intact prior to installation until the time comes for them to be set***." *Id.* [emphasis added]. The Court agrees with Respondent that the language in the Preamble certainly implies that joists placed on a structure, still in a bundle, would be considered "secured" even though they have not been individually welded down yet.

Four witnesses testified about the condition of the four overhead joists before the accident: Vuksta, Overlee, Winfrey, and Treadway. As discussed above, Vuksta, Overlee, and Winfrey had no knowledge of whether the bundle of joists was wired together before the accident. John Treadway testified, without contradiction, that they remained interlocked in a bundle, and were wrapped with wire rope. (Tr. 353). Shane Overlee, Bruno's plumbers' foreman, also acknowledged seeing wire rope at the ends of the joists after the accident. (Tr. 197-198).

Complainant's prosecutorial theory seemed to be that since two of the four overhead joists fell, they must not have been adequately secured. However, it was Complainants burden to prove, by a preponderance of the evidence that they were *not* secured. The only witnesses with direct knowledge of the condition of the joists testified that the joists were bundled (interlocked together), (2) that they were resting on 5 inches of overlapping steel plates on each end of the bundle, (3) that the bundle was wire-roped together, and (5) that the plumbers' excavator struck the steel structure, moving the supporting steel beams apart 6 inches.

Complainant failed to meet its burden of proving that the joists were "unsecured." Accordingly, Citation 1, Item 1 will be VACATED.

Citation 1, Item 2

> Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:
>
> 29 CFR 1926.761(a): Training was not provided to employees by a qualified person(s):
>
> (a) On or about June 20, 2017, employees were not trained by a competent person in the recognition of hazards associated with steel erection, including, but not limited to, unsecure steel members.

Citation and Notification of Penalty at 7.

The Standard Applied

The cited standard addresses the qualifications of trainers who provide steel erection training. It is undisputed that Respondent's employees were engaged in steel erection activities at this worksite. Therefore, the cited standard applied.

Complainant Failed to Prove that the Standard Was Violated

OSHA alleged that Respondent's employees Ron White and John Treadway were not adequately trained. (Tr. 325). Although the parties seemed to focus on the amount of training and experience of each employee, the cited standard actually deals with the qualifications of their trainer(s). Separate regulations (not cited in this case), appear to specify the substance of required employee training. *See* 29 C.F.R. § 1926.761(b) & (c).

Ultimately, CSHO Lane explained the two bases for this alleged violation: (1) training records and safety manuals were not provided to him during the investigation, and (2) two steel trusses fell and resulted in an employee-injury-accident, therefore, employees must not have been adequately trained. (Tr. 271, 280, 284). He testified: "I think if an employee was trained in the specialized unique hazardous conditions on the jobsite, especially for steel erection, they can see that that would be a hazard and do something to mitigate it without allowing employees to work underneath the unsecured steel." (Tr. 284:15).

With regard to the first basis, however, safety manuals and training documents were provided to Complainant during litigation. (Tr. 321-322). Second, Respondent's employees involved *did* recognize a potential hazard, requested 40 minutes to weld down the bundle of joists to ensure the area underneath was completely safe for the plumbers, and were repeatedly refused. The fact that Respondent's crew voiced concerns to the G.C. and plumbers, and repeatedly requested an opportunity to make the condition unquestionably safe (by welding the four joists down), demonstrated their training and awareness.

The record also established that the two employees at issue received significant training from Respondent and other previous employers. (Tr. 282). CSHO Lane testified that "employees for Outback were probably trained by their previous employers, just not Outback Steel." (Tr. 285). CSHO Lane also conceded that training from previous employers, as well as on-the-job training, qualified as adequate training. (Tr. 271, 280, 282-283, 325-326, 331).

One of the two employees at issue, John Treadway, testified at trial about his experience and training. (Tr. 340). He began working in steel erection in 1988 as an apprentice, worked for numerous steel erection companies, holds multiple certifications, and received additional formal and on-the-job training from Respondent. (Tr. 269, 341-344). In addition, the record established that Brad Gunter, Respondent's owner, verified Treadway's and White's training and experience when they were first hired, reviewed Respondent safety policies with them, and monitored their work to ensure the adequacy of their training and knowledge. (Tr. 215, 344-345, 407, 411-413, 423-425). Mr. Gunter has over 41 years of experience working in the steel erection industry, personally hires each of his employees, and prefers to hire experienced workers. Since Ron White was not called to testify, Mr. Gunter further explained that White was hired after completing an iron worker apprenticeship, already had a boilermaker and ironworker certification card, and held

multiple welding certifications. (Tr. 414). The record further established that Respondent sent Ron White and John Treadway to multiple safety courses during their employment. (Tr. 422-425).

Ultimately, as is the focus of the cited standard, there was no evidence that anyone who provided training to Treadway or White was not qualified. Complainant failed to prove, by a preponderance of the evidence, that the cited standard was violated. Therefore, Citation 1, Item 2 will be VACATED.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED; and
2. Citation 1, Item 2 is VACATED.

/s/ Brian A. Duncan

Date: March 7, 2019
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission