United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. NCS, LLC, Respondent.	OSHRC Docket No. 06-0699

Appearances:

Dane L. Steffenson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Thomas Benjamin Huggett, Esq., Morgan, Lewis & Bockius, LLP, Philadelphia, Pennyslvania
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

NCS, LLC (NCS) is a Ft. Myers, Florida, limited corporation. NCS is one of 28 subsidiaries of its parent corporation Dycom Industries, Inc. NCS provides support services for the telecommunications industry, such as installing and maintaining overhead telephone cables. In the aftermath of Hurricanes Wilma and Katrina, NCS contracted almost exclusively with BellSouth to assist in repairs and reconstruction (Tr. 17-18). On December 1, 2005, NCS assigned new employee Brean MacKenzie to remove and reinstall overhead telephone cables leading to an apartment building at 1402 N. Dixie Highway in Lake Worth, Florida. MacKenzie fell while performing the assignment and died from his injuries. Occupational Safety and Health Administration (OSHA) compliance officers Miguel Leorza and Angel Diaz investigated the fatality. As a result of the inspection, the Secretary issued to NCS a two-item citation on April 5, 2006.

On August 11, 2006, the undersigned held a hearing in West Palm Beach, Florida. The Secretary withdrew item 1 (alleging a violation of § 1910.268(h)(1)) (Tr. 7). Remaining at issue is item 2, an alleged violation of § 1910.268(h)(7), which requires users to securely lash a ladder to a pole, unless the ladder is "specifically designed to prevent movement." The Secretary presented

witnesses. NCS rested after the Secretary's case. The parties have submitted briefs, and the case is ready for decision. For the reasons that follow, the Secretary established her prima facie case. NCS failed to prove the exception.

Background

Post hurricanes, NCS repaired damaged overhead telephone cables and reconnected electrical service to residences from the BellSouth facility. NCS hired a significant number of new employees to assist in the disaster reconstruction. During hurricane relief efforts most employees worked alone for long hours (Tr.18, 34). NCS sought experienced telecommunication workers and required all new employees to provide their own equipment, including a "28 foot ladder – (non-conductive)" (Exh. C-2, p.3; Tr. 28). Brean MacKenzie had a 28-foot extension ladder with a top "v-rung" (a rung angled out in the shape of a horizontal "v" with rubber padding partially filling the indentation where the "v" would rest against a rounded object) and hooks which protruded from the top of the sides of the ladder (Exh. C-4; Tr. 26).

On December 1, 2005, supervisor-for-technicians Loren Fritz assigned Brean MacKenzie to relocate a cable from a broken pole to a newly-set pole in a residential area of Lake Worth. The telephone cable was 12 to 15 feet above the ground and at least 30 inches below the overhead electrical power lines (Exh. R-3; Tr. 71-72). After receiving the assignment, MacKenzie worked alone. No one observed him performing his assigned duties that day. At some point, Brean MacKenzie and the extension ladder from which he worked fell away from the pole. He died as a result of injuries from the fall. It is unknown why or exactly how Mr. MacKenzie fell.

Discussion

The Secretary asserts that NCS violated § 1910.268(h)(7) when its employee worked at heights from a ladder which he failed to lash to the pole. The standard requires:

> When a ladder is supported by an aerial strand, and ladder hooks or other supports are not being used, the ladder shall be extended at least 2 feet above the strand and shall be secured to it (*e.g.* lashed or held by a safety strap around the strand and ladder side rail). *When a ladder is supported by a pole, it shall be securely lashed to the pole* ***unless the ladder is specifically designed to prevent movement when used in this application*****.** (Emphasis added)

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was

noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Tele. Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Applicability

The standards at § 1910.268 apply to the telecommunications industry and subpart (h) covers the use of ladders in the industry. MacKenzie was engaged in telecommunication activities when removing and installing telephone lines while working from a ladder. The standard applies to the conditions cited.

Were the Terms of the Standard Met?

The standard addresses the hazards of working from a ladder which moves or falls, potentially causing the employee to fall. It does not speak to falling from a stationary ladder.

The parties stipulate that (Agreed Pre-Hearing Statement, p.4, ¶s 6, 7):

6. On December 1, 2005, at the time of the accident, [Brean MacKenzie] was relocating a cable from a broken pole to a new pole that had previously been set.

7. The ladder Brean M[a]cKenzie was using to access a box on the utility pole was a 28 foot fiberglass extension ladder with a rubber lined V-rung as the top rung of the ladder.

Early in the morning on December 1, 2005, Fritz assigned Brean MacKenzie to relocate the telephone cable to the new pole. MacKenzie was then to place "a drop" from the terminal box on the new pole to an adjacent apartment building (Tr. 39, 74). At both poles the cable was located 12 to 15 feet above the ground. The job required MacKenzie to use his extension ladder. Fritz believed the work "would have been performed directly in front of [MacKenzie] or just slightly off to the side of the pole" (Tr. 63). Fritz was across town when the police summoned him to the accident site. He saw the 28-foot extension ladder lying on the pavement. MacKenzie had already been transported to the hospital. When the compliance officers observed the site the day after the accident, the area remained cordoned off. The terminal box had been attached to the new pole (Exhs. C-3, R-3; Tr. 64, 69, 72, 74). MacKenzie had not lashed his ladder to the pole.

NCS asserts there is no direct proof of how, or indeed if, Brean MacKenzie fell with or from a ladder. Although the Secretary cited the accident as the specific exposure, the cause of the accident, or especially whether a violation of the standard caused the accident, is not directly relevant to whether a violation existed. However, the circumstances of an accident may provide probative evidence of a violation. *See e.g., Georgia-Pacific Corp.*, 16 BNA OSHC 1171, 1176 (89-2806, 1993), *rev'd on other grounds*, 25 F.3d 999 (11th Cir. 1994); *Cleveland Consol. Inc.*, 13 BNA OSHC 1114, 1116 n.1 (No. 84-696, 1987).

The Secretary did not present direct evidence of the occurrence of the accident. She chose not to authenticate and introduce the death certificate or photographs and other information the compliance officers reviewed at the police department which may have clarified the placement of the ladder and details of the exposure. She did not present the testimony of a neighbor who observed the result of the accident and the locations of MacKenzie and the ladder.

Nevertheless, the record contains information accepted by knowledgeable management witnesses and offered by the compliance officers based on their investigation of the accident.[1] Foreman Fritz, who arrived at the site shortly after the accident, observed the extension ladder laying on the ground and assumed MacKenzie had been on it when he fell. He also assumed the ladder moved, "otherwise he wouldn't have been involved in the accident" (Tr. 64-65, 69). Dycon's corporate Director of Safety Phillip Mullins was told MacKenzie was found lying on the ground with the ladder on top of him, and Mullins had no reason to believe MacKenzie had not fallen from the ladder (Tr. 50). OSHA's compliance officers reviewed police photographs of the accident and interviewed neighbors the day after the accident. They understood from the police report that MacKenzie died because he fell and that the ladder and MacKenzie were near each other on the ground after the fall (Tr. 104, 107, 146).

Based on the above, on the fact the ladder was not lashed, and on MacKenzie's stipulated activities at the time of the accident, the undersigned judge draws the reasonable inference that MacKenzie and the extension ladder fell more or less together. *See North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1469 (No. 96-0721 2001) (circumstantial evidence may be a sufficient basis

[1] Hearsay evidence, which was the basis of an objection, was excluded from the record and is not considered.

to support reasonable inferences). Respondent's attorney noted, "the true question is: Did the ladder move?" (Tr.167). Regardless of the cause of the accident, the ladder did fall. When MacKenzie "relocated and reattached" the telephone cable, he failed to securely lash the ladder to the pole in contradiction of the standard. Unless the exception applies, the Secretary establishes non-compliance with the terms of the standard.

Exception in standard: The standard specifies the method of complying, *i.e.*, securely lashing the ladder to the pole. The standard contains an exception for a ladder "specifically designed to prevent movement." The Review Commission consistently holds that "when a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception." *Finnegan Construction Co.*, 6 BNA OSHC 1496, 1497 (No. 14536, 1978). NCS bears the burden of proof. The purpose of the standard is to protect telecommunications workers from hazards associated with moving ladders. The terms of the exception cannot be liberally construed.

What does "to prevent movement" mean?

Given the purpose of the standard, the term "to prevent movement" does not refer to micro-movements of the ladder, but rather to the type of movement which presents a fall hazard.

A v-rung manufacturer might be expected to have highly relevant information regarding the purpose or effect of the v-rung design. The Secretary, not NCS, attempted to offer information from a manufacturer of v-rungs, but the evidence was not admissible as offered.[2] Even assuming arguendo NCS proved a "v- shaped" rung was designed to lean into a rounded object to *reduce* lateral movement and enhance the ladder's stability, the standard requires proof the v-rung was "designed to *prevent* movement."

In addition to mandating how employees are protected on a pole-supported ladder, § 1910.268(h)(7) addresses working from a ladder supported by a strand (an aerial line). When working from a strand (and not using ladder hooks or other supports), the standard specifies the ladder be "secured" to the strand. The standard defines "secured" by example: "*e.g.* lashed or held by a safety strap around the strand and ladder side rail."(§ 1910.268(h)(7)). The use of hooks, lashes,

[2] The Secretary did not authenticate a document and information from a well-known ladder manufacturer (the manufacturer of MacKenzie's ladder is unknown). NCS's objection to their introduction was sustained.

and safety straps makes movement of a ladder on the strand far fetched. The common sense meaning of the term "to prevent movement" should not be less stringent than that of "secured."

The Secretary presented the testimony of four witnesses, and NCS rested. The limited evidence on the issue consists of non-expert opinions. The two compliance officers opined that even if the v-rung aided stability, its use would not prevent the lateral or backwards movement of a pole-supported ladder. Lashing would be "an extra security to keep the ladder from falling" (Tr. 111, 117-118, 144-145). Dycon's Mullins acts as a safety consultant for NCS and the other Dycon subsidiaries. He believed if a ladder were properly angled into the pole at a 4:1 ratio, the v-rung would be "nestled into the cylindrical portion of the pole,"obviating lateral movement (Tr. 42). Mullins appeared confused as to NCS's requirements concerning the v-rung, and his opinion about industry use was non-specific (Tr. 28, 46-48).

Fritz was the only witness with practical work experience using a v-rung ladder. Fritz considered it would normally be sufficient to use a v-rung without lashing the ladder to the pole (Tr. 62). His assessment, and that of Mullins's, regarding the alleged stability of a v-rung ladder may have been affected by NCS's practice of requiring employees to wear safety belts with lanyards tied around the pole (Tr. 43-44, 61, 76). Although use of safety belts and lanyards serves a different fall protection purpose, tying the lanyard to the pole provides additional stability for the ladder. Fritz stated that even using a lanyard and safety belt with the v-rung ladder, he would lash the ladder to the pole if working for "extended" periods (Tr. 76). As he clarified (Tr. 81):

> Q. Why does it make a difference, the extended period of time versus a short period of time?
>
> A. It would be because – it would be personal preference, I would guess. I guess I am referring to that's what I would do if I was working up there. I would just do it, from a personal preference, if I was going to be up there for an extended period of time.
>
> Q. What would the purpose of attaching the ladder to the pole at that point do?
>
> A. Because there would be more movements, I would be shifting more. It would just be a personal preference. It really depends on the terrain that you are in, too.

Implementing the safety standard should not be dependent on the length of the exposure. It is determined the v-rung would not prevent a ladder from moving in response to lateral or backward movement caused by exaggerated shifting of weight, reaching for objects, responses to the environment, etc. NCS cannot ignore the possibility of an employee experiencing a shock or making an unexpectedly quick movement on the ladder, either laterally or backwards. A hypothetical safety feature designed to prevent movement should afford substantially the same degree of fall protection as provided by securely lashing the ladder. Alternatively, the feature should clearly come within the terms of the exception. The record does not support a conclusion that the v-rung was designed to or could prevent the ladder from moving at the pole. NCS failed to establish the exception.

Exposure or Access

Exposure is established by a showing of actual exposure or that with reasonable predictability employees had access to the hazard. *See e.g., Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (90-2148, 1995). As discussed, the Secretary established actual exposure since employee Brean MacKenzie worked at heights on a pole-supported ladder which was not lashed to the pole. NCS expected its employees to use v-rung ladders. It is unknown if NCS required its employees to lash any ladder to a supporting pole, but NCS customarily did not expect its employees to lash a v-rung ladder to the pole (Tr. 43). It was thus reasonably predictable that an employee NCS assigned to relocate and reattach telephone cables would fail to lash the ladder and would have access to hazards associated with a moving ladder.

Knowledge

NCS asserts it did not know failure to lash a v-rung ladder presented a hazard. It misunderstands the element of knowledge. Knowledge of the physical conditions, not of the legal requirements which pertain to them, is the germane inquiry. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000) (knowledge of the element does not involve awareness of being in violation of a cited standard, just awareness of the physical conditions which constitute a violation).

When Fritz gave MacKenzie his assignment on December 1, 2005, Fritz presumed MacKenzie would use the v-rung extension ladder to do the assigned work. Fritz had no expectation McKenzie would lash the ladder. Fritz's actual knowledge could be imputed to NCS. Further, as company policy,

NCS did not require employees to lash v-rung ladders to poles during elevated work (Tr. 42-43, 61). MacKenzie performed the work as NCS intended; at his option he could forego lashing the ladder to the pole. Nothing in the record suggests MacKenzie used the ladder incorrectly (other than failing to lash it); contrary to what NCS suggests, the Secretary need not show NCS had a reason to believe he would. NCS knew the violative conditions existed. The Secretary established the element of employer knowledge.

Is the Standard Unconstitutionally Vague?

NCS argues the standard is so vague it could not be expected to interpret it as the Secretary suggests *i.e.*, a v-rung does not fit within the terms of the exception to the standard. "When considering remedial legislation such as the OSH Act and its implementing regulations, the purported vagueness of a standard is judged in the light of its application to the particular facts of the case." *Georgia Pacific Corp., supra,* 25 F.3d at 1004 (11th Cir., 1994) (OSHA's varying interpretation of the standard might require forklifts to trail all loads, making it unreasonable and void for vagueness). Here, the language of § 1926.268(h)(7) unambiguously requires an employer to securely lash all ladders, which includes v-rung ladders, to the supporting pole. If some ambiguity exists, it is in the exception, which allows an employer the alternative of not lashing if the ladder was "designed to prevent movement" at the pole. A standard is not vague simply because it requires an exercise of judgment. *N&N Contractors, Inc., supra,* 18 BNA OSHC at 2129. It is well understood that manufacturers of design features provide manuals, literature, instructions and other information related to its intended use. These may be consulted by users, employers, and the general public. As discussed, the standard itself provides approved examples of safety features and thus parameters for interpreting the term "to prevent movement." NCS's vagueness argument is rejected.

Conclusion

The Secretary's prima facie case was unfocused. The appraisal of the evidence was similar to that made by the reviewing court in *Astra Pharmaceutical v. OSHRC,* 681 F.2d 69, 74 (1st Cir. 1982), where it stated:

> The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case . . . where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See e.g., Noranda Aluminum Inc. v. OSHRC,* 593 F.2d 811,

> 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation") . . . Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

The violation of § 1910.268(h)(7) is affirmed.

Penalty

The Commission must give "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of past violations in determining an appropriate penalty. 29 U.S.C. § 666(j). The gravity of the violation is the primary element in the penalty assessment. Considerations of gravity include such factors as the number of employees exposed, the duration of exposure, precautions taken against injury, and the degree of probability that an accident would occur. *E.g.*, *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 87-0922, 1993).

Although it is a subsidiary of a large corporation, NCS is afforded credit for its smaller size. NCS is entitled to credit for past history because it did not have serious OSH Act violations within the previous 3 years. Contrary to the Secretary's recommendation, NCS should be afforded some credit for good faith. NCS has a safety program, even if the program does not cover securing a pole-supported ladder. It cooperated with the investigation. One employee was exposed to the fall hazard as he worked from the small foothold of a ladder which could move. The severity of a potential accident is high because the 15-foot fall would likely result in death or serious physical harm (Exhs. R-1, p 25-27, R-2; Tr.124-126). A penalty of $3,500.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Item 1, Citation No. 1, is withdrawn by the Secretary and is vacated.
2. Item 2, Citation No 1, is affirmed as serious and a penalty of $3,500.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: June 18, 2007