UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. BME & Sons, Inc., Respondent.	OSHRC Docket No. **10-0248**

Appearances:

Leon Pasker, Esquire, Office of the Solicitor, U.S. Department of Labor, San Francisco, California
For Complainant

Lawrence J. Teker, Esquire, Teker, Torres & Teker, P.C., Hagåtña, Guam
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

BME & Sons, Inc. (BME), a general construction contractor, water-blasts and paints buildings and parking lots for the U. S. Navy in Guam. After receiving a referral from the Naval Facilities Engineering Command (NAVFAC) on October 29, 2009, regarding two BME employees not securing their personal fall arrest equipment while working on concrete canopies (ledges) at Building 4175, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the incident on November 9, 2009. As a result of the OSHA inspection, BME received serious and willful citations on February 2, 2010. BME timely contested the citations.

Serious Citation no. 1 alleges BME violated 29 C. F. R. § 1926.20(b)(2) (item 1) by failing to conduct frequent and regular inspections of the job site; 29 C. F. R. § 1926.95(d)(1) (item 2) by failing to provide personal protective equipment (PPE) at no cost to employees; 29 C. F. R. § 1926.502(d)(8) (item 3) by failing to install and use horizontal lifelines under the supervision of a qualified person; 29 C. F. R. § 1926.502(d)(15)(ii) (item 4) by failing to install and use anchorages under the supervision of a qualified person for attaching personal fall arrest equipment; 29 C. F. R. §

1926.502(d)(21) (item 5) by failing to inspect personal fall arrest equipment prior to each use; and, 29 C. F. R. § 1926.503(b)(1) (item 6) by failing to have written certification of an employee's fall protection training. The serious citation proposes a penalty of $1,200,00 for each alleged violation for a total penalty of $ 7,200.00.[1]

Willful Citation no. 2 alleges BME violated 29 C. F. R. § 1926.501(b)(1) (item 1) by failing to protect each employee on walking/working surfaces six feet or more above the lower level by the use of guardrail systems, safety net systems, or personal fall arrest systems. The willful citation proposes a penalty of $ 44,000.00.

The hearing was held on October 5 - 6, 2010 in Hagnata, Guam. BME stipulated jurisdiction and coverage (Exh. J-1; Tr. 23). OSHA withdrew items 3 and 4 of serious Citation no. 1 (Tr. 9). The parties filed post hearing briefs on January 7, 2011.

BME does not dispute the violative conditions as described in the OSHA citations. BME argues that the inspection was improper and that the OSHA standards were preempted under §4(b)(1) of the Occupational Safety and Health Act (Act), 29 U.S.C. §653(b)(1), by the NAVFAC's contract incorporation of the safety guidelines in EM 385-1-1. BME, also, asserts unpreventable supervisory employee misconduct as to the alleged violations (Tr. 8).

For the reasons discussed, the violations in Citation no. 1, item 1 and Citation no. 2, item 1 are affirmed as serious. Citation no. 1, items 2 and 6 are affirmed as other than serious. Total penalties of $ 7,00.00 are assessed. The remaining items are vacated or withdrawn by the Secretary.

BACKGROUND

BME is a commercial general construction contractor. Its business includes water blasting and painting buildings and parking lots on Naval bases in Guam. BME has a five-year painting contract with the U.S. Navy. In business for 25 years, BME's principal place of business is Guam. BME employs approximately 60 employees (Tr. 265-266).

On October 25, 2009, BME began work under a contract with NAVFAC to water blast and paint a parking lot and the exterior of four, three-story concrete buildings on U. S. Navy property in

[1] Although the proposed penalties for each alleged serious violation was omitted from the citation, the total amount was identified (Tr. 140-141). BME does not assert prejudice and the issue of penalties is properly before the Commission on BME's contest of the citation.

Apra Heights, Guam. The project was completed in February 2010. Danny Natividad, BME's corporate safety officer and chief superintendent, Zhernie Zacarias, project superintendent, and Erano Manalo, site safety officer, were in charge of the project (Tr. 233, 266).

The NAVFAC contract with BME incorporated EM 385-1-1, a compilation of safety guidelines for all construction work on Navy bases (Exh. R-1). Under EM 385-1-1, BME prepared and provided to the contracting officer an Accident Prevention Plan (APP) and an Activity Hazard Analysis (AHA) prior to starting the work. The AHA, dated October 16, 2009, provided that BME would use a manlift to water blast and paint the four buildings (Exhs. C-1, C-2; Tr. 237-238).

On October 29, 2009, project superintendent Zacarias instructed two employees, Jason Saspa and Richard Dimatatac, to install horizontal lifelines on the second and third levels in the back of Building 1475 so that BME could perform its work. The manlift, as provided for in the AHA, could not be used because a railing between the two buildings prevented it from driving to the back of the building (Exh. J-1; Tr. 72-73).

After the two employees began working in the back of Building 4175, Jack Ary, the safety security officer with DZSP 21 (the base operations support contractor), whose office was on the second floor, observed an employee on the concrete canopy outside his window. The employee was wearing a safety harness but his lanyard was not attached to an anchor. The canopy, a 5-inch concrete slab, was approximately 3-feet wide, 8-feet long, and 8-feet above the ground. Similar canopies were located over each window to provide shade. When Mr. Ary went to his window, he saw a second BME employee on another canopy (third level) without attaching his lanyard. This employee was approximately 16 feet above the ground (Exhs. C-3, C-4; Tr. 32, 34-35, 44-45, 62, 130-131).

Mr. Ary contacted Patrick Rivera, safety specialist for NAVFAC Marianas. Mr. Rivera came to Building 4175 and stopped BME's work in the back of the building. He issued BME an official stop work order because the AHA identified that manlifts were to be used to perform the work. Mr. Rivera referred the incident to his superior who contacted OSHA (Exh. R-5; Tr. 37, 55, 87, 119).

Because of the stop work order and BME's inability to drive its manlift behind the building, Mr. Natividad hired a structural engineer to design a lifeline system. Mr. Natividad submitted a new AHA, incorporating the lifeline system to the Navy on November 3, 2009 (Exh. R-6; Tr. 243)

On November 9, 2009, OSHA compliance officer (CO) Dan Mooney initiated an inspection into the October 29, 2009 incident (Tr. 120). As a result of the OSHA inspection, the alleged violations were issued to BME.

The parties agree to the following stipulations of fact (Exh. J-1):

1. "BME" refers to respondent, BME & SONS, INC.
2. The worksite or job site was located at Exterior Painting Bldg. 4175, 4177, 4178, and 4179, Apra Heights, Guam on or about October 29, 2009.
3. The term "fall protection" refers to equipment used to protect against falling, or break a fall, from a surface above ground.
4. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.), subject to exemption under §653(b)(1).
5. Respondent uses tools, equipment and supplies, which were not manufactured in Guam.
6. On October 14, 2009, the Naval Facility Engineering Command (NAVFAC) held a pre-construction conference with Danny Natividad, Zhernie Zacarias and Erano Manalo, BME's site safety and health officer, at which time BME was informed it must comply with OSHA and EM 385-1-1 rules, and the most stringent rules apply.
7. In May 2007 Zacarias took a 30-hour OSHA course that covered 29 C.F.R. §1926, Subpart M - Fall Protection.
8. On or about October 16, 2009, BME's quality control/project superintendent was Zhernie Zacarias.
9. On or about October 16, 2009, BME's operations manager safety director was Danny Natividad.
10. On or about October 16, 2009, Natividad was BME's competent person as defined by 29 C.F.R. §1926.32(f).
11. On or about October 16, 2009, BME submitted an Accident Prevention Plan ('APP') for the building 4175 work to NAVFAC.

12. On October 29, 2009, Zacarias assigned two BME employees, Jessen Saspa and Richard Dimatatac, to install anchors, eyebolts and horizontal lifelines on the back of building 4175 on the second and third levels.
13. Natividad did not design or supervise installation of the horizontal lifelines and anchorages.
14. Natividad wanted to wait for manufacturers' data and the structural engineer's design before the horizontal lifeline and anchorages were installed.
15. The anchor points were 20 to 30 feet apart on the third level.
16. The second and third levels of building 4175 were approximately 8.25 feet and 16.5 feet from the ground respectively.
17. The employees used an extension ladder to access the second level canopy of building 4175.
18. Employees used an extension ladder on the second level canopy to access the third level canopy.

DISCUSSION

The OSHA Inspection

BME's argument, regarding an improper inspection because there was no work being performed at the time of OSHA's inspection, is rejected (Tr. 21-22). BME argues that by the time of the inspection, the violative conditions had been corrected.

Section 9(c) of the Act, 29 U.S.C. § 658(c), provides for a six-month statute of limitation and does not bar citations for matters which occurred prior to the initiation of an OSHA inspection as long as the violative condition occurred within six months of the issuance of the citation. *Central of Georgia*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977) (the instance of noncompliance and employee access to the unsafe condition must occur within six months of the issuance of the citation).

The alleged violations, here, occurred on October 29, 2009. The citations were issued on February 2, 2010, well within the six-month statute of limitations.

Preemption under § 4(b)(1)

BME disputes the application of the OSHA standards to its job site based upon § 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1). BME argues that the EM 385-1-1 safety manual incorporated into its NAVFAC contract preempts OSHA's jurisdiction. BME claims the manual sets out the safety and health requirements on job sites to which NAVFAC contractors must comply. BME notes that the

safety requirements of EM 385-1-1 are, in some matters, more stringent than the OSHA standards (Tr. 83). If unsafe conditions are discovered, the Navy safety officer, as done in this case, has the authority to stop the specific unsafe condition/practice based upon EM 385-1-1 (Tr. 86).

The EM 385-1-1 manual, which is published by the Department of the Army, U.S. Army Corps of Engineers, November 3, 2003, prescribes the safety and health requirements for all Corps of Engineers activities and operations and is applicable to, among others, contracts with NAVFAC (Exh. R-1). EM 385-1-1 states that "the provisions of this manual implement and supplement the safety and health standards and requirements contained in 29 CFR 1910, 29 CFR 1926. . . ."

Section 4(b)(1) of the Act provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

To establish the affirmative defense that OSHA's jurisdiction has been preempted under § 4(b)(1), an employer must show that (1) another federal agency has the statutory authority to regulate the cited working conditions, and (2) the other federal agency has exercised that authority by issuing regulations having the force and effect of law. *Rockwell International Corp.*, 17 BNA OSHC 1801, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996). In describing "exercise," the Supreme Court stated:

> Congress' use of the word 'exercise' makes clear that . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions . . . does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated, and if such regulations affect occupational safety or health.

Secretary of Labor v. Mallard Bay Drilling, Inc., 122 S.Ct. 738, 19 BNA OSHC 1721, 1723 (No. 00-927, 2002).

In this case, BME fails to show the Navy exercised authority over the working conditions at issue. The NAVFAC contracts mandate that its contractors such as BME comply with OSHA requirements including regulations at 29 C.F.R. Part 1926, governing construction standards. The EM 385-1-1 manual specifically references compliance with OSHA standards and tracks those standards unless the manual's requirements are more stringent. The EM 385-1-1 guidelines are contractual provisions between the NAVFAC and BME (Tr. 112-113). Such guidelines are not evidence that the Navy by regulations or standards is exercising safety and health jurisdiction over job sites.

The safety and health provisions of Government contracts such as the NAVFAC contract with BME do not trigger the application of 4(b)(1). *MEI Holdings, Inc.,* 18 BNA OSHC 2025, 2027 (No. 96-740, 2000), *aff'd,* 247 F.3d 247 (11th Cir. 2001); *Ensign-Bickford Co. v OSHRC,* 717 F.2d 1419 (D.C. Cir. 1983), *cert denied*, 466 U.S. 937 (1984) (a contractual obligation to comply with the Defense Department's safety manual does not have the effect of preempting OSHA's jurisdiction because it would allow any federal agency to dilute, without congressional approval, the safety standards and remedies contained in the Act).

The EM 385-1-1 is not codified, and as such, is not "statutory authority" having the force and effect of law. The EM 385-1-1 refers to implementing the OSHA regulations at Part 1926 (Tr. 112). NAVFAC refers violations of workplace safety to OSHA for enforcement under the Act (Tr. 119). In this case, NAVFAC, by issuing a stop work order, was enforcing the AHA prepared by BME. The AHA required BME to perform its work by use of a manlift, not personal fall arrest systems. NAVFAC was not enforcing the working conditions regarding the OSHA standards on fall protection. NAVFAC's recourse was to stop the specific work on the contract and refer issues of unsafe working conditions to OSHA for enforcement. No enforcement mechanism by NAVFAC was shown to require a contractor to correct the hazards.

In deciding another agency's authority, considerable weight is given to the other agency's representation as to its authority to regulate the cited working conditions. *JTM Industries, Inc.,* 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001). Here, the U.S. Navy has not claimed enforcement authority over employee safety. As evidence of its lack of enforcement authority, NAVFAC referred the matter to OSHA for inspection and enforcement. A representative of NAVFAC participated and

testified in the OSHA proceedings and denied its enforcement authority. Even BME recognizes NAVFAC's lack of enforcement authority. BME's safety officer testified to receiving prior OSHA inspections and citations at other NAVFAC projects (Tr. 266).

OSHA's jurisdiction is not preempted under § 4(b)(1) of the Act.

Alleged Violations

> 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).

BME does not dispute the noncompliance with the cite standards as described in the serious and willful citations. BME disputes its knowledge of the cited conditions and claims supervisory employee misconduct.

Citation No. 1

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

The citation alleges that "near building 4175, on or about October 29, 2009, the competent person did not inspect the fall protection harnesses and lanyards worn by employees that installed horizontal lifeline fall protection system on the second and third levels, exposing employees to the hazard of falling from elevations that varied in height from 8.25 to 16.5 feet."

Section 1926.20(b)(2) provides:

> Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employer.

According to OSHA, BME's lack of frequent and regular inspections is shown by the NAVFAC safety specialist's observation on October 29. 2009, that one employee's lanyard did not have a tag, identifying it as acceptable. The security officer testified the lanyard was the same lanyard which lacked a tag during his inspection in July 2009. According to the security officer, the lanyard without a tag should have been removed from service (Tr. 100).

BME does not dispute that Mr. Natividad, its competent person, did not inspect the fall protection harnesses and lanyards used on October 29 by the two employees (Resp. Brief p. 11). The APP prepared by BME provide for frequent inspections of safety equipment such as lanyards (Exh. C-1).

BME argues that it lacked knowledge of the violation. Mr. Natividad did not know or should have known whether the employees were using personal fall arrest equipment since the AHA provided for the use of the manlift.

BME's argument is rejected. In order to show employer knowledge of a violation, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun-Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986).

In this case, project superintendent Zacarias assigned the employees to perform the work in the back of Building 4175. He knew the manlift could not be used and should have known the employees needed to utilize personal fall arrest equipment including lanyards while performing their assigned work. Mr. Zacarias also knew the employees would be exposed to a fall hazard of more than 8 feet. The employees' work was performed in plain view. Mr. Zacarias, as project superintendent, was in charge of the job site and had the responsibility to ensure a safe workplace (Exh. J-1; Tr. 270).

Mr. Zacarias' knowledge, as a supervisor in charge of the job site, is imputed to BME. The violative condition was foreseeable. Other than the stipulation that Mr. Zacarias had completed the OSHA 30 hour safety course, BME failed to present evidence it took reasonable measures (a work rule, other training programs, monitoring, and enforcement) to prevent the occurrence of the violation. *The Haskell Company*, 19 BNA OSHC 1268, 1270 (No. 99-2191, 2000).

BME's violation of § 1926.20(b)(2) is properly classified as serious under § 17(k) of the Act, 29 C.F.R. § 666(k). BME's failure to inspect the personal fall arrest equipment prior to use on October 29, may have resulted in serious injury or death to the employees. As discussed, BME should have known the equipment had not been inspected.

Item 2: Alleged Serious Violation of § 1926.95(d)(1)

The citation alleges that "on or about October 29, 2009, the employer did not provide safety harnesses and lanyards at no cost to employees, exposing employees to the hazard of falling from heights that varied in height from 8.25 to 16.5 feet from the second and third level canopies on building 4175."

Section 1926.95(d)(1) provides:

> Except as provided by paragraphs (d)(2) through (d)(6) of this section, the protective equipment including personal protective equipment (PPE) used to comply with this part shall be provided by employer at no cost to the employees.

It is undisputed that BME did not provide fall protection harnesses and lanyards used by employees on October 29, 2009 at no charge to the employees. According to CO Mooney, employees, Saspa and Dimatatac, said that BME made them pay for personal protective equipment used on October 29, 2009 (Tr. 157, 222). The cost was deducted from their paychecks (Tr. 156). Project superintendent Zacarais confirmed the deductions (Tr. 155).

BME's safety officer Natividad testified that BME provides harnesses and lanyards at no cost to employees. When the issue was brought to his attention during the OSHA inspection, Natividad discovered that BME's accounting department had inadvertently charged the employees in October because of an error (Tr. 252-253). After discovering the error, Natividad testified that BME reimbursed the employees except for Mr. Saspa (Exh. R-8; Tr. 253-254). He explained that Saspa had borrowed his personal harness. When Saspa quit he took it with him and Natividad had to send someone to his house to retrieve the lanyard (Tr. 261-262). BME's records show that prior to the October invoice, the equipment was provided at no costs to the employees (Exh. R-9; Tr. 255).

BME does not dispute that it did not provide safety harnesses and lanyards at no cost to employees on October 29, 2009 (Resp. Brief p. 11). BME's argument that it lacked knowledge is rejected. BME deducted the costs from the employees' paychecks. BME's knowledge is imputed even if caused by an accounting error.

BME violation of §1926.95(d)(1) is affirmed as other than serious. BME's representation is accepted that the violation occurred because of an accounting problem and that it was corrected immediately upon discovery. There is no showing that it was BME's regular practice to charge employees.

Item 5: Alleged Serious Violation of § 1926.502(d)(21)

The citation alleges that "near the backside of building 4175, personal fall arrest lanyards were not removed from service when the labels were missing, exposing employees that installed horizontal lifelines on the second and third level to the hazard of falling from heights that varied from 8.25 to 16.5 feet."

Section 1926.502(d)(21) provides:

> Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service.

It is undisputed that BME failed to remove from service the personal fall arrest equipment used on October 29 because of the lack of a label/tag showing it had been inspected and was safe for use (BME Brief, p. 11). The NAVFAC safety officer found one employee's lanyard did not contain a tag. CO Mooney did not see the lanyard and was unable to identify that it was defective except for failing to have a tag (Tr. 185). OSHA standards do not require tags. However, the fact the lanyard did not have a tag shows that the lanyard was not inspected before its use.

NAVFAC Safety Specialist Rivera testified that when he had visited the site on October 29, 2009, he observed the fall protection lanyard used by the employee (Tr. 67). Rivera determined that the lanyard had no tag in accordance with EM 385-1-1. Rivera testified that he had viewed the identical lanyard during a BME contract compliance inspection at a different job site on July 24, 2009 (Tr. 68-69). The employee told Rivera that the lanyard was the same. The lanyard was used for less than two hours (Tr. 136). Natividad testified that as competent person he had not inspected the lanyard and he had not removed it from service (Tr. 259).

As discussed, BME's lack of knowledge claim is rejected. BME's project superintendent had assigned the employees to perform the work in the back of building 4175 and he knew the employees would be utilizing personal fall protection equipment.

However, BME's violation of §1926.502(d)(21) is not established. There is no evidence that the lanyard was defective. CO Mooney did not see or touch the lanyard. Mr. Rivera did not identify any defect. The fact that there was no tag/label does not show it was defective. It shows that it had not been inspected which is the basis for BME's serious violation of § 1926.20(b)(2) (Citation no.

1, item 1). OSHA's allegation under §1926.502(d)(21) is duplicative of its allegation under § 1926.20(b)(2). See *Flint Engineering & Construction, Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1992) (violations are considered duplicative where they require the same abatement conduct).

Item 6: Alleged Serious Violation of § 1926.503(b)(1)

The citation alleges that "the employer failed to prepare a written certification record for fall protection training for every employee that was exposed on the backside of building 4175, exposing employees that worked from the second and third level canopies to the hazard of falling about 8.25 to 16.5 feet."

Section 1926.503(b)(1) provides:

> The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

It is undisputed that BME failed to have a certification of Mr. Saspa's training on fall arrest systems. Project superintendent Zacarias produced written certifications for Dimatatac and other employees (Tr. 161). BME's safety officer Natividad admitted that BME did not have a certification for Mr. Saspa's fall protection training. He believed that Mr. Saspa had previously received the training but he could not find the record (Tr. 259).

At the hearing, BME submitted copies of certifications for other employees concerning fall protection training (Exh. R-7). However, it concedes that there was no certification for Mr. Saspa (Resp. Brief p. 12).

BME's violation of §1926.503(b)(1) is established as other than serious. BME has training certification records for all employees but one employee. The lack of written certification does not mean the employee had not received training in fall protection. OSHA offered no evidence to show

that Mr. Saspa was not trained in fall protection by other employers. The failure to utilize personal fall protection on October 29, 2009 does not establish his lack of training.

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.501(b)(1)

The citation alleges, in pertinent part, that "on or about October 29, 2009, a BME manager assigned two BME employees to install anchors, eyebolts and horizontal lifelines on the back of building 4175 on the second and third levels. Each employee had a fall protection harness and a lanyard, but there were no anchor points to tie the lanyard to on the second level and the anchor points were 20 to 30-feet apart on the third level. The employees had no fall protection while on the second level canopy and had no fall protection when walking and working between the columns on the third level canopy."

Section 1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

It is undisputed that two employees were working and walking on the second and third level canopies without securing their fall protection lanyards on October 29, 2009 (Tr. 164, 169, 247). The canopies were approximately 8 and 16 feet above the ground (Tr. 131). BME's project superintendent Zarcarias and its site safety officer Manalo knew the two employees were working in the back of building 4175. They were in charge of the job site. Although Manalo reported to Zacarias, both had supervisory responsibilities including maintaining a safe job site for employees. They reported to Mr. Natividad regarding the progress on the project (Tr. 269-270).

Project superintendent Zacarias assigned the employees to work on the canopies because the manlift could not be used (Tr. 165). To perform the work, he should have known the employees needed to use personal fall arrest equipment. As discussed, the employees' equipment was not inspected and there is no showing their work, which was in plain view, was monitored to ensure adequate safety precautions. The project superintendent failed to exercise reasonable diligence. His knowledge is imputed to BME.

BME's violation of §1926.501(b)(1) is established.

Supervisory Employee Misconduct

BME asserts supervisory employee misconduct by project superintendent Zacarias in allowing the two employees to work in the back of building 4175 without fall protection. The AHA prepared by BME required the use of a manlift. BME argues it never contemplated that there would be any requirements for lifelines, lanyards or harnesses because of the AHA. Mr. Zacarias acknowledged that he made a mistake in directing the two employees to go on the canopies in back of building 4175 (Exh. R-2). He stated that "[T]his was my mistake to do this without Danny's approval . . . I wanted to finish the job without consulting a qualified person." Natividad denied knowing that Zacarias had directed the employees to perform the work (Tr. 246). After the incident on October 29, 2009, site safety officer Manalo was removed from the site and replaced on the project (Tr. 248).

In order to establish unpreventable employee misconduct, an employer is required to show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). It is the employer's burden to show that the misconduct was unpreventable. *V.I.P. Structure, Inc*., 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). Also, "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax" *United Geophysical Corp.,* 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981), citing *Jensen Construction Co.,* 7 BNA OSHC 1477 (No. 76-1538, 1979). Also see, *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

BME's supervisor employee misconduct defense is rejected. As required by the defense, BME made no showing of Mr. Zacarais training in fall protection other than the general OSHA 30-hour safety course, BME's monitoring, if any, of his projects, and its disciplinary program involving an employee's violation of company safety rules. There is no showing of any action taken against Zacarias such as a verbal admonishment, a written reprimand letter, a demotion, or the lose of pay.

Natividad testified that Zacarias and Manalo were negligent in allowing BME employees to work on the canopies (Tr. 247). However, even if a work rule is inferred from the AHA, BME fails

to show that a manlift requirement was communicated to the two supervisors, their compliance was monitored or violations were enforced through a disciplinary program. Mr. Natividad testified that Mr. Zacarias was still the project superintendent on November 9, 2009, at the same worksite. Mr. Manalo was also working in the same capacity (Tr. 261). Natividad identified that the only discipline was the transfer of site safety officer Manalo to another jobsite after the OSHA inspection (Tr. 247-248). Although Manalo was no longer the site safety officer, he was still a supervisor and there was no indication he loss pay or work days (Tr. 258). It was not shown that such transfer to another supervisory position constituted discipline. Also, the transfer was not because of a BME rule but because of the contracting officer's direction (Tr. 258-259).

Willful Classification

OSHA classified BME's violation of §1926.501(b)(1) as willful. A "willful" violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Continental Roof Systems, Inc*., 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). "[T]he Secretary must not only show that the employer had knowledge that a hazardous condition existed but must also adduce evidence that the employer intentionally disregarded or was indifferent to employee safety with respect to the hazard in question." *Ho*, 20 BNA OSHC 1361, 1378 (Nos. 98-1645, 98-1646, 2003), *aff'd,* 401 F.3d 355 (5th Cir. 2005). Willfulness is characterized by a state of "heightened awareness" of the illegality of the conduct.

BME's violation of §1926.501(b)(1) is reclassified as serious. OSHA failed to establish a willful classification. BME's failure to properly ensure the employees were utilizing fall protection does not establish BME's heightened awareness sufficient for a willful violation. There is no showing the employees failed to secure fall protection equipment on previous projects. Although not secure, the employees at least had their safety harnesses and equipment on October 29, 2009. Project superintendent Zacarias was not shown to have actual knowledge the employees were not securing their equipment. The testimony indicates there was a horizontal lifeline on the upper level and anchorage bolts at the columns between the canopies which could have been used for anchorage. The project superintendent admitted he made a mistake (Exh. R-2). Although Zacarias ignored the AHA manlift requirement, there is no evidence of heightened awareness that the employees were not securing their fall protection equipment.

Penalty Consideration

In determining an appropriate penalty, consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation is required. Gravity is the principal factor.

BME is entitled to credit for size as an employer with 60 employees (Tr. 265). It also is entitled to credit for good faith because of its written safety program. BME is not entitled to credit for history because it had received serious citations in the preceding three years (Tr. 145-146).

A penalty of $ 1,000.00 is reasonable for serious violation of § 1926.20(b)(2) (Citation no. 1, item 1). As evident by the lack of tag, BME's inspection of fall protection was inadequate. One employee was exposed for approximately 2 hours. The same lanyard lacked an inspection tag in July 2009.

A penalty of $ 500.00 is reasonable for the other than serious violation of §1926.95(d)(1) (Citation no. 1, item 2). Because of an accounting problem, BME admits the employees were improperly charged for the fall protection equipment. If not for the OSHA inspection, the accounting error may never have been corrected.

A penalty of $500.00 is reasonable for the other than serious violation of § 1926.503(b)(1) (Citation no. 1, item 6). BME admits failing to have a certified fall protection training record for one employee. BME's safety officer believes the employee had received such training. The employee had worked for BME off and on.

A penalty of $ 5,000.00 is reasonable for serious violation of §1926.501(b)(1) (Citation no. 2, item 1). Two employees were not securing their fall protection equipment while working on cement canopies, 8 and 16 feet above the ground. Their exposure was approximately 2 hours.

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) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

Serious Citation No. 1

Item 1, serious violation of § 1926.20(b)(2), is affirmed and a penalty of $1,000.00, is assessed.

Item 2, serious violation of § 1926.95(d)(1), is affirmed as other than serious and a penalty of $500.00, is assessed.

Item 3, serious violation of § 1926.502(d)(8), is withdrawn by the Secretary and no penalty is assessed.

Item 4, serious violation of § 1926.502(d)(15)(ii), is withdrawn by the Secretary and no penalty is assessed.

Item 5, serious violation of § 1926.502(d)(21), is vacated and no penalty is assessed.

Item 6, serious violation of § 1926.503(b)(1), is affirmed as other than serious and a penalty of $500.00, is assessed.

Willful Citation No. 2

Item 1, willful violation of §1926.501(b)(1), is affirmed as serious and a penalty of $5,000.00, is assessed.

/s/
KEN S. WELSCH
Judge

Date: March 1, 2011