UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Modern Building Solutions, LLC, Respondent.	OSHRC Docket No. **10-2559** **Simplified Proceedings**

Appearances:

Charna Hollingsworth-Malone, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

James E. Bacon, *pro se*, General Contractor, Modern Building Solutions, LLC, St. Augustine, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Modern Building Solutions, LLC (MBS) is a general construction company located in St. Augustine, Florida. On November 2, 2010, MBS was constructing a new church in St. Augustine when the project was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the OSHA inspection, MBS received a serious citation on November 10, 2010, alleging a violation of 29 C.F.R. § 1926.501(b)(11) for a worker on a steep roof without fall protection. The citation proposed a penalty of $ 2,400.00. MBS timely contested the citation.

The case was designated for Simplified Proceeding pursuant to 29 C.F.R. § 2200.200 *et. Seq*. The Secretary's motion to amend the citation to plead in the alternative a serious violation of 29 C.F.R. § 1926.501(b)(13) for the lack of a fall protection system on residential construction was granted on February 18, 2011 (Tr. 3). The Simplified Proceeding Conference Call Order, dated February 24, 2011, identified the issues in dispute.

The hearing, held on March 9, 2011, was in St. Augustine, Florida. MBS was represented *pro se* by its owner, James Bacon (Tr. 4). The parties filed post-hearing position statements on April 4, 2011.

MBS denies the alleged violation and that it is an employer engaged in a business affecting commerce. MBS claims that the employee on the roof was not required to wear fall protection because he was inspecting the sheathing pursuant to the exception at §1926.500(a)(1). Also, MBS argues that the worker was protected from a fall hazard because of the placement of the horizontal slide guards[1] and the hose of the pneumatic nail gun. MBS maintains that the project was residential construction because of the construction materials used in building the church (Tr. 9, 156).

For the reasons discussed, MBS's arguments are rejected. The serious violation of § 1926.501(b)(11) is affirmed. A penalty of $1,000.00 is assessed.

The Inspection

MBS is a small general construction contractor of commercial and residential projects with its office in St. Augustine, Florida. MBS was started in 2007 by James Bacon who has more than 20 years of construction experience. Other than Mr. Bacon, MBS has no regular employees. For the project at issue, it hired workers through a temporary staffing agency (Tr. 18, 28-29, 145).

In September 2010, MBS started construction for a new church, First Coast Metropolitan Community Church, in St Augustine, Florida. The church, a single-level, 3,000 square foot structure containing a sanctuary, offices, break room, restrooms, and a gift shop, was completed on February 11, 2011 (Exhs. C-1, C-15; Tr. 147-148).

By October 29, 2010, the church walls, made of wooden logs from a North Carolina company, and roof trusses were installed and approximately 90 percent of the roof's sheathing was complete. The pitch of the roof was 8 in 12 (vertical to horizontal). The roof's eave was 10 feet, two inches, above the ground and its peak was 24 feet above the ground (Exhs. C-7, C-8; Tr. 32-33, 42-43, 65, 71, 108).

[1] Throughout the hearing, the parties referred to the 2x4 boards nailed to the sheathing as toeboards. However, the record shows the 2x4 boards were intended to be used as slide guards under Appendix E to Subpart M, Fall Protection, standards.

Pursuant to a worker's complaint regarding the lack of fall protection while installing the roof's trusses, the project was inspected by OSHA Compliance Officer (CO) Jeffrey Lincoln on October 29, 2010.[2] When CO Lincoln arrived at approximately 4:00 p.m., no one was on the project. CO Lincoln took photographs and left the site (Tr. 40-41, 46-47).

On November 2, 2011, CO Lincoln returned to the site at approximately 9:00 a.m. When he arrived, he observed a worker near the roof's peak. The worker was not wearing a safety harness. There were no guardrails or safety nets at the roof's eave. When interviewed, the worker confirmed that he was on the roof without personal fall protection. There were horizontal 2x4 boards nailed flat, at 3 ½-foot intervals, to assist the worker on the roof. The worker stated that he was on the roof to replace missing nails in the sheathing. The worker carried a pneumatic nail gun and a claw hammer. He said that he had been on the roof for approximately 20 minutes (Exhs. C-11, C-13, R-1; Tr. 47, 49-50, 51, 149)

Mr. Bacon testified that he had instructed the worker to inspect the sheathing to ensure it was completely nailed down for the county inspection. Mr. Bacon had nailed down the sheathing and did not anticipate that he missed any nails. If not completely nailed, Mr. Bacon expected the worker to complete the nailing. The worker was also instructed to remove the toeboards in preparation for laying the tar paper. Mr. Bacon agreed there were no guardrails and safety nets on the roof. He agreed the worker was not utilizing a safety harness and lanyard (Tr. 33-34, 35-36, 119).

As a result of the OSHA inspection, the serious citation was issued to MBS on November 10, 2010.

Discussion

The Secretary has the burden of proof.

> 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).

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[2] The employee's complaint is not part of the citation's allegation at issue.

MBS concedes the worker on the roof was not utilizing a guardrail system, safety net system, or a safety harness and lanyard for fall protection on November 2, 2010. The fall hazard was more than 10 feet.

MBS denies it is a covered employer under § 3(5) of the Occupational Safety and Health Act, 29 U.S.C § 652(5) (Act). MBS also denies the alleged violation because the worker was conducting an inspection pursuant to the § 1926.500(a)(1) exception. The worker was protected from a fall by the hose of the pneumatic nail gun and the 2x4 boards nailed horizontal across the sheathing.[3]

MBS Is An Employer Engaged in Commerce

Section 3(5) of the Act defines a covered employer as a person engaged in a business affecting commerce who has employees. The Act defines a "person" to include individuals, partnerships, associations, and corporations such as MBS. "Commerce" is defined as trade, traffic, commerce, transportation, or communications among the several States or between a State and any place outside thereof. Sections 3(3) and 3(4) of the Act.

The nature of its business and the use of materials and equipment in the stream of commerce establishes MBS was engaged in a business affecting commerce within §3(5) of the Act. MBS's construction activities affect commerce. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (construction work is within the class of activities Congress intended to regulate and thus an employer engaged in construction activities is in a business affecting commerce).

The record also shows that the church project used logs and lap siding from "Log Cabin Home," a Rocky Mount, North Carolina business (Exhs. C-3, C-4; Tr. 24). MBS installed the wooden logs and siding. MBS used a leased forklift from Sunbelt Rental (Exhs. C-2; Tr. 22, 147). According to its website, Sunbelt Rentals is one of the largest equipment rental companies in the United States, based in Fort Mill, South Carolina.

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[3] Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991). During the hearing, Mr. Bacon alluded to the defense of employee misconduct. This defense was not raised prior to the hearing or tried by consent of the Secretary (Tr. 138-139). During the conference call on February 24, 2011, MBS did not offer any information upon which the defense could be inferred. Therefore, the defense is deemed waived. However, even if properly claimed, the record fails to show an established a work rule communicated to employees which was monitored and the subject of a disciplinary program by MBS. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

To establish MBS as an employer with employees, it is noted that its owner, James Bacon was an employee who worked at the project and drove the leased lull (a forklift) (Tr. 18, 22). To assist in constructing the church, Mr. Bacon hired and supervised temporary workers from a temporary staffing agency. The worksite was contracted to MBS to build the church. MBS provided most of the tools and equipment to the workers. Mr. Bacon supervised and directed the workers' activities while on the project. He had the authority to hire and fire the workers, set their hours of work, and direct their work (Tr. 28-29, 136-137). MBS through Mr. Bacon controlled the worksite. *Vergona Crane Co*., 15 BNA OSHC 1782 (No. 88-1745, 1992). The workers hired through a temporary staffing agency are considered employees of MBS.

MBS was an employer with employees engaged in business affecting commerce within §3(5) of the Act.

SERIOUS CITATION NO. 1

Alleged Violation of § 1926.501(b)(11) or in the alternative §1926.501(b)(13)

The citation alleges that "[O]n or about November 2, 2010, on the 8:12 pitch roof, employees installing roof sheathing were exposed to a 10-foot fall hazard in that they were not protected by a fall protection system."

Section 1926.501(b)(11) provides:

> *Steep Roofs*. Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrails systems with toeboards, safety net systems, or personal fall arrest systems.

Section 1926.501(b)(13) provides:

> *Residential construction.* Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

The standards require that the prescribed fall protection precautions be fully implemented before an employee is exposed to the fall hazard. *Phoenix Roofing Inc.,* 17 BNA OSHC 1076, 1079 (No 90-2148, 1995), *aff'd, without published opinion,* 79 F.3d 1146 (5thCir. 1996). Employers must consider the elimination of fall hazards on each work site. Infeasibility and greater hazards are exceptions to the requirement. There is a presumption that conventional fall protection is feasible and not a greater hazard.[4]

MBS has not claimed that conventional fall protection was an infeasible or a greater hazard. On the contrary, MBS utilized conventional fall protection during installation of the roof trusses, sheathing, tar paper, and shingles (Tr. 27, 120, 124, 128, 142).

The parties do not dispute that the worker was on the roof during the OSHA inspection without the §1926.501(b)(11) prescribed fall protection systems; guardrails, safety nets, personal fall arrest (Tr. 33-34, 149). The worker acknowledged the failure to utilize fall protection (Exh. C-11). MBS, through its owner Mr. Bacon, knew the conditions on the roof and the worker's lack of fall protection. Mr. Bacon assigned the worker that morning to replace any missing nails and remove the toeboards. He did not make any provision for the worker to utilize the prescribed fall protection systems and instead considered the use of toeboards and a hose as adequate (Tr. 34, 149). The worker while on the roof was in clear view of Mr. Bacon working on the ground, driving the lull (Exh. R-1). Mr. Bacon conceded that he "could see the employee" (Tr. 98). The worker was exposed to a fall hazard of at least 10 feet to the ground without the standard's prescribed fall protection. The slope of the roof was steep at 8 in 12 (vertical to horizontal). See §1926.500(b), *Definitions.*

A violation of §1926.501(b)(11) is established and applicable to the church's roof unless MBS is entitled to the inspection exception.

Section 1926.501(b)(13), Residential Construction, Not Applicable

Section 1926.501(b)(13), which was plead in the alternative by the Secretary, is not deemed applicable. Section 1926.501(b)(13) applies to residential construction. The standard does not define

[4]In the *Note* following §1926.501(b)(13), there is a presumption that it is feasible and will not create a greater hazard to implement one of the identified fall protection systems and the employer has the burden of showing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for the particular workplace, in lieu of the identified fall protection systems.

what projects are considered residential construction. The church was not intended for residential or dwelling purposes. As identified in the building permit from the local zoning authority, the church was a commercial project and therefore designated as nonresidential (Exh. C-15). When completed, the church consisted of a sanctuary for worship, church offices, restrooms, a break room and a gift shop (Tr. 147). It was for nonprofit commercial purposes.

OSHA, however, has small commercial projects within the definition of residential if the construction techniques were similar to that used in residential construction. OSHA Instruction, Directive STD 3-0.1A, effective June 18, 1999, defines residential construction "where the working environment, materials, methods, and procedures are essentially the same as those used in building a typical single-family home or townhouse." Also, it applies where "the construction of a discrete part of a large commercial building (not the entire building), such as a wood frame, shingled entranceway to a mall" (Exh. R-4). Such construction would not be considered residential if it was constructed with precast concrete floors, structural steel, or other materials not traditionally used in stick frame home construction. OSHA Standards Interpretation and Compliance Letter, May 25, 2000, 2001 CCH Employment Safety and Health Guide, Developments ¶ 14,337.

Although the church project included the use of wood logs for walls which are used in home construction, there is no showing the methods and procedures were generally the same as used in building a single family home. Based upon the photographs of the project, the floor appears a concrete slab and there are two sets of structural steel beams (Exhs. C-1, C-5). Despite the use of wood siding during construction, the STD references only a "discrete" part of commercial buildings for consideration as residential construction.

Section 1926.501(b)(13) residential construction requirements are not applicable.[5]

MBS's Claimed Inspection Exception Not Applicable

MBS claims its worker was inspecting the roof at the time of the OSHA inspection and therefore was excepted from utilizing fall protection systems. Pursuant to the *Scope and application* of the fall protection requirements, § 1926.500(a)(1) states that:

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[5]Even if §1926.501(b)(13) was applicable, MBS failed to provide any of the required fall protections systems including monitoring and controlled access zones under §1926.502(k). As discussed, the reliance upon the horizontal 2x4 boards and hose were not adequate and properly installed.

> Exception: The provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed.

As identified, this is an "exception." The party (MBS) seeking the benefit of an exception has the burden to show that it is in compliance. *Kasper Wire Works, Inc.,* 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), aff'd 268 F.3d 1123 (D.C. Cir. 2001). Also, exceptions are narrowly construed. *See Armstrong Steel Erectors, Inc*., 17 BNA OSHC 1385 (No. 92-262, 1995).

The inspection exception at § 1926.500(a)(1) did not apply to work performed by MBS's worker on the roof. His work activities were a continuation of MBS's roofing construction work. Although the worker was examining the sheathing to ensure it was completely nailed down, he was responsible for replacing any missing nails and removing the horizontal 2x4 boards before laying the tar paper(Tr. 36, 119). Also, the sheathing had not been completely installed. According to Bacon, sheathing was installed on approximately 90 percent of the roof at the time of the OSHA inspection (Tr. 32). After installing the sheathing and removing the 2x4 boards, tar paper and shingles needed to be installed before MBS completed its roof construction (Tr. 33, 63, 123, 127).

As stated in the preamble to Subpart M *Fall Protection* standards:

> Therefore, OSHA has decided to reword the provision to make it clear that the exclusion only applies when the employer establishes that employees are inspecting, investigating, or assessing workplace conditions prior to the actual start of work or after the work has been completed. It was OSHA's intent when it proposed this provision that the exclusion would only apply at the two times stated above, not during the period when construction work is being performed. As explained in the preamble to the proposed rule, the exception would apply where an employee goes onto a roof in need of repair to inspect the roof and to estimate what work is needed. During such an inspection, guardrails, body belts, body harnesses, safety nets, or other safety systems would not be required. However, if inspections are made while construction operations are underway, all employees who are exposed to fall hazards while performing these inspections must be protected as required by subpart M. (Exh. C-16, p. 4, 59 FR 40675, Aug. 9, 1994).

At the time of the OSHA inspection, MBS's construction/roofing operations were ongoing. The worker was assigned to complete the nailing of the sheathing and to remove the 2x4 boards. The

worker's additional inspecting activities were not performed after construction work was complete. The worker needed to utilize fall protection.

The § 1926.500(a)(1) exception was not applicable.

Employee Lacked Fall Protection

MBS's reliance on the "OSHA Standards for the Construction Industry," an AAA Construction Manual, to argue that the employee was protected because of its horizontal rows of 2x4 boards at 3-foot intervals which exceeded OSHA's requirement, is misplaced. The manual excerpt relied upon by MBS is a redrafting of Appendix E to the Subpart M standards (Exh. R-4). Appendix E which is the non-mandatory guideline for complying with §1926.502(k), applies to employers engaged in leading edge work, precast concrete construction work and residential construction work who can demonstrate that it is infeasible or creates a greater hazard to use conventional fall protection systems.

As discussed, MBS's work on the church project was not leading edge work, precast concrete work or residential construction. Also, MBS has not argued nor does the record show that the use of conventional fall protection was a greater hazard or infeasible when the worker replaced missing nails or removed the boards. The record shows that safety harnesses and lanyards were used to install the roof trusses, sheathing, and tar paper.

Further, under §1926.502(k), MBS failed to show that it created or implemented a fall protection plan in the manner required by the standard. The standard requires the fall protection plan conform with ten specific requirements including its preparation and modifications approved by a qualified person, implementation under the supervision of a competent person, documentation why not utilizing conventional fall protection systems, and the designation of controlled access zones in compliance with § 1926.502(g). MBS has not claimed and failed to show it implemented or utilized a fall protection plan. There was no evidence of a plan in place, the designation of a controlled access zone, or any of the ten requirements under § 1926.502(k).

Appendix E which provides non-mandatory guidelines for complying with §1926.502(k), includes sample fall protection plans to be used as guidance to employers and identifies the type of information that is required to be discussed in the plans. In the sample fall protection plan for residential construction which includes a section on roof sheathing operations, it provides for the

installation of slide guards as fall protection when conventional fall protection cannot be utilized. A slide guard however must be constructed with "no less than nominal 4" height capable of limiting the uncontrolled slide of worker" and "extending the width of the roof." Also, with roofs with pitches less than 9 in 12, the slide guards shall be attached at intervals not to exceed 13 feet (Appendix E to Subpart M, *Roof Sheathing Operations*).

MBS's use of horizontal 2x4 boards, even if exceeding the interval distance contemplated by Appendix E and the use of the hose for the pneumatic nail gun does not comply and were not shown to provide a level of fall protection to at least that as required by §1926.501(b)(11). MBS did not provide the worker on the roof replacing missing nails with use of conventional fall protection. Also, as identified in Appendix E, MBS does not claim the worker's task during the OSHA inspection was part of the sheathing operation. The 2x4 boards and hose did not provide adequate personal fall protection for the worker.

Appendix E and STD 3.0-1A identify the use of slide guards as fall protection (Exhs. R-3, R-4). As discussed, these guidelines apply to residential construction which the court has deemed not applicable to the church construction at issue.

Also, to be considered a slide guard, specific provisions must be satisfied which MBS failed to meet by the 2x4 boards utilized on the church's roof (Exh. R-3, p. 5). First, the guidelines require that slide guards may only be used if the roof system is not stable enough to support a conventional fall protection system anchorage. MBS did not provide any evidence as to the instability of the sheathing to support fall protection anchorage. Second, the boards used as slide guards must be at least 4-inch nominal height and extend across the full width of the roof. On the church project, there is no dispute that the 2x4 boards were installed flat and did not meet the four-inch nominal height requirement. Also, the record shows the boards did not extend the full width of the roof (Exhs. C-13, C-14; Tr. 63, 180, 183).

The hose of the pneumatic nail gun carried by the worker was also not shown to provide fall protection. The hose was not secured to the worker to prevent a fall. The roof was steep, 8 in 12, which a worker who had worked on the sheathing, acknowledged was difficult to work on because of the pitch. "A toe board or not, you have to have something to hold your weight" (Tr. 127). He preferred to use a lanyard.

MBS failed to provide an adequate fall protection system as required by §1926.501(b)(11).

Serious Classification

In order to establish that a violation is "serious" under § 17(k) of the Act, 29 U.S.C. § 666(k), the Secretary must establish that there was a substantial probability of death or serious physical harm as the result of the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. In determining substantial probability, the Secretary needs to show that an accident was possible and the result of the accident would likely have been death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.,* 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

MBS's violation of § 1926.501(b)(11) was properly classified as serious. Mr. Bacon knew the conditions of the roof's sheathing and the lack of fall protection utilized by the worker. He assigned the worker the tasks to perform (Tr. 36, 72, 119). The worker performed the task in clear view of Mr. Bacon. If the worker fell from the roof, he was exposed to a fall hazard of at least 10 feet to the ground which could have resulted in serious injury including broken bones or possibly death.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

MBS, as a small employer, is entitled to credit for size. MBS is also entitled to credit for history and good faith. MBS has no history of prior OSHA citations (Tr. 75). According to the testimony of witnesses, MBS held daily half-hour safety meetings at the project and employees regularly utilized fall protection when installing the sheathing, tar paper, and shingles (Tr. 119, 120, 124, 138). CO Lincoln agreed the workers were adequately trained in fall protection (Tr. 90).

A penalty of $ 1,000.00 is reasonable for MBS violation of § 1926.501(b)(11). One employee was exposed to a fall hazard for approximately 20 minutes. There were horizontally installed 2x4 boards, although laid flat, to provide some support to the worker. The roof's pitch was steep and very difficult to work on without adequate fall protection.

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 that

Serious Citation No. 1:

1. Item 1, alleged serious violation of § 1926.501(b)(11), is affirmed and a penalty of $ 1,000.00 is assessed.

/s/ Ken S. Welsch

KEN S. WELSCH
Judge

Date: April 25, 2011