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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 97-0360
	:	
WINDHAM CONSTRUCTION CORP.,	:	
	:	
Respondent.	:	

APPEARANCES:

Luis A. Micheli, Esquire
New York, New York
For the Complainant.

Michael Mazzucca
Bronx, New York
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site of Respondent Windham Construction Corporation ("Windham") on February 6, 1997, which resulted in the issuance of a five-item serious citation and a one-item "other" citation. Windham contested the citations, and a hearing was held November 21, 1997.

The Inspection

Windham's job at the site involved repairing the structural steel underneath a 4-mile portion of the Gowanus Expressway in Brooklyn, New York. Steven Wilkes, the OSHA compliance officer ("CO") who inspected the site, testified that while driving by he saw an individual climbing from an aerial lift to the top of a shoring tower under the expressway without fall protection; the CO called his office for approval to conduct an inspection and proceeded to the site, where he met with Bruce Greenburg, who identified himself as Windham's foreman. The CO told Greenburg why he was there,

and as they were talking, Wilkes saw the same individual going back up in the lift; he was not tied off and did not have on a safety belt, and after climbing up on the top railing of the lift basket he put one foot on top of the shoring tower and the other foot on the flange of a beam, bent over and then proceeded to work in that position.[1] The CO learned that the employee was Danny Mazzucca, that there was another worker in the same area named Derrick Greenburg, who also had no fall protection, and that both were engaged in drilling holes in beams; the CO also learned that the tower was about 24 feet high, that Bruce Greenburg had not inspected the site to ensure the availability of fall protection equipment or instructed the employees in the hazards at the site, and that he was unaware of a company safety program. CO Wilkes asked Greenburg to provide the employees with safety belts or harnesses, but when Greenburg looked in the truck at the site there were none. The CO held a closing conference with Greenburg that day and a telephone closing conference the next day with Paul Mazzucca, the project manager.[2] Based on the inspection, Windham was cited for serious violations of 29 C.F.R. §§ 1926.20(b)(2), 1926.21(b)(2), 1926.501(b)(1), 1926.556(b)(2)(iv) and 1926.556(b)(2)(v), and for an "other" violation of 29 C.F.R. § 1904.7. (Tr. 30-71).

Serious Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.20(b)(2), which requires employers to have accident prevention programs that "provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." The CO's testimony, as noted above, was that Bruce Greenburg told him that he had not inspected the site for fall protection equipment; the CO also testified that neither of the two employees working on the beams was wearing a safety belt and that when he asked that they be given safety belts or harnesses Greenburg could not find any in the truck at the site. (Tr. 33-36; 40; 47). Greenburg denied these events. He testified that he inspected the site daily, that there were safety belts and harnesses in the truck, and that he showed them to the CO; he further testified he told the CO that employees were issued either safety belts or harnesses and wore them and that while he watched the employees when

[1]Wilkes videoed this scene, and C-1-3 are stills from his video. (Tr. 36-39).

[2]Paul Mazzucca worked out of a field office that Windham had set up about 1.5 miles from the site. (Tr. 51).

he was in their vicinity he could not watch them every minute. Greenburg said that the employees the CO saw were wearing safety belts but were not tied off as there was nothing above them to which they could tie off, and that he had tried to explain this to the CO. (Tr. 10-14; 142-47).

I observed the respective demeanors of CO Wilkes and Bruce Greenburg as they testified and found the testimony of Wilkes to be clear, convincing and credible. The testimony of Greenburg, on the other hand, in addition to often being directly contrary to the testimony of Wilkes, was evasive and/or equivocal on many of the points relevant to the citation items in this case. (Tr. 10-19; 136-37; 142-47). It is my conclusion that the testimony of CO Wilkes is the more reliable account of what transpired at the site, and his testimony is therefore credited over that of Greenburg. Based on the CO's testimony, I find that Windham did not conduct inspections as required and that it violated the cited standard.[3] This item is consequently affirmed as a serious violation. The company's contention that the use of fall protection was infeasible under the circumstances is addressed in item 3, *infra*, and the penalty assessment discussion for all of the serious items is set out following item 5.

Serious Citation 1 - Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.21(b)(2), which requires the employer to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." The CO testified that Bruce Greenburg told him that he had not instructed the employees in the hazards of working at the heights presented by the work at the site, including the need for fall protection when working in aerial lifts, and that he was unaware of a company safety program. (Tr. 41; 47). Greenburg denied making these statements, and testified that he had instructed the employees in fall protection and that he had tried to explain to the CO that the workers could not tie off in the circumstances at the site that day. Greenburg also testified that the company safety program consisted of tool box safety meetings, as well as the showing of safety videos from time to time, and that he told the CO he held tool box meetings at the site. (Tr. 11-17; 24-26; 136-38; 143).

In addition to Greenburg's testimony, Windham presented R-2, its safety program, R-3, signed statements of various employees that they had been issued and instructed to use fall protection

[3]In light of this finding, Windham's contention that Paul Mazzucca conducted the necessary inspections need not be addressed.

equipment, and R-4, records of safety meetings held from October 16, 1996, to February 12, 1997, showing the topics addressed and the signatures of attendees; Ray Mathison and Paul Mazzucca, the field supervisor and the project manager of Windham for the subject job, respectively, testified in support of R-2-4.[4] (Tr. 72-82; 85; 88-92; 100-08; 120-27). Notwithstanding this evidence, I find that the company was in violation of the cited standard. First, the CO's testimony is credited over that of Greenburg for the reasons given in item 1. Second, nothing in Greenburg's testimony suggests that he was aware of R-2, and none of the statements in R-3 is dated. Third, despite R-4 and the testimony of Greenburg, Mathison and Mazzucca, which indicate that tool box safety meetings were held at the site and that safety meetings were also held in the field office, the evidence set out in items 1, 3, 4 and 5, as well as my disposition of those items, convinces me that employees were not instructed in the use of fall protection to eliminate the hazards of working at the heights presented at the site. Item 2 is accordingly affirmed as a serious violation.

Serious Citation 1 - Item 3

This item alleges a violation of 29 C.F.R. 1926.501(b)(1). That standard states as follows:

> 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.

The basis of this item was CO Wilkes' observation of Danny Mazzucca going up to the top of the shoring tower in the aerial lift, climbing up on the top railing of the lift basket, and then placing one foot on top of the shoring tower and the other foot on the flange of a beam, as shown in C-1-3. The CO testified that Bruce Greenburg told him that the tower was about 24 feet high, and the record as set out in item 1 establishes that neither of the employees drilling on the beams wore a safety belt and that there were no safety belts or harnesses at the site; the CO further testified that a fall from where the employees were working could have resulted in death. (Tr. 33-44). Bruce Greenburg denied the tower was 24 feet high, testifying it was about 16 feet high, and the CO, since he had been unable to measure the tower, did not dispute Greenburg's testimony in this respect. (Tr. 8; 13-15; 20-22; 27-28; 57-58; 62). Regardless, the record demonstrates a violation of the standard, and Windham

[4]According to R-4, the topics included fall protection and scaffold and aerial lift safety, and some of the meetings had video presentations.

does not dispute that the employees performing the drilling work had no fall protection; it contends, rather, that compliance with the standard was infeasible.

To prove the affirmative defense of infeasibility of compliance, an employer must show that compliance with the standard was impractical or unreasonable under the circumstances and either that an alternative protective measure was used or that there was no feasible alternative measure. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225-28 (No. 88-821, 1991). Bruce Greenburg and Paul Mazzucca testified that the employees could not tie off above where they were working due to the netting that had been put between the beams supporting the highway in order to catch any concrete that might fall from the old decking; they also testified that there was nothing else overhead to tie off to, and that tying off below, such as to the shoring tower, was not permitted. (Tr. 12-14; 21-27; 93-98; 116-17; 123; 139-40). However, C-3 plainly shows that the netting was pulled away from the concrete above the employee, and while Mazzucca initially indicated the concrete could not be drilled into at all he later said this related only to the new concrete, which was not put in until after Windham's work was finished. Further, Mazzucca noted that the CO had made several suggestions for tying off, one of which was to install cables. Mazzucca then said there was nowhere on the beams to do this, but Greenburg's testimony shows that the netting was attached to the upper part of the beams the employees were drilling on; his testimony also shows that the beams were being repaired rather than replaced, which, in my view, detracts from his opinion that the beams were "completely rotted and corroded." (Tr. 8; 14; 22-24; 92-98; 116-17; 123; 128). Finally, although 29 C.F.R. 1926.104 indicates that tying off should be done overhead and that falls with lanyards should not exceed 6 feet, I am not persuaded that these requirements could not have been met by means of an anchorage in either the concrete above the employees or the beams on which the employees were drilling, particularly in light of the bent-over position in which the employee in C-3 was working. Based on the record, I conclude that Windham has not met its burden of demonstrating infeasibility of compliance. This item is therefore affirmed as a serious violation.

Serious Citation 1 - Items 4 and 5

Item 4 alleges a violation of 29 C.F.R. 1926.556(b)(2)(iv), which states that "[e]mployees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position." Item 5 alleges a violation of 29 C.F.R.

1926.556(b)(2)(v), which requires that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." The record shows Danny Mazzucca went up in the aerial lift without being tied off and then climbed up on the top railing of the lift basket in order to step onto the shoring tower and beam flange; the CO testified lift baskets are to be worked in, not climbed out of, and that employees must also tie off when in them. (Tr. 32-35; 44-47; 57-59). Bruce Greenburg testified that employees tie off when in aerial lifts but have to untie their lanyards to exit the baskets, and Paul Mazzucca testified it was the company policy to tie off when riding in aerial lift baskets. (Tr. 17-19; 114-15). Regardless, the record in this case shows that the employees were not wearing safety belts and were not tied off when they rode in the baskets; the record also shows the employees climbed out of the baskets to work on the beams. Windham therefore violated both of the standards, unless it can demonstrate a recognized affirmative defense as to these items.

As to item 5, Windham contends that it was safer for the employees to go up in the lifts than it was for them to climb up the shoring tower; in this regard, Paul Mazzucca testified, and the CO agreed, that it was safer for the employees to ride in the lift baskets without tying off than it would have been for them to climb up the tower without fall protection. (Tr. 59; 130-31). However, this evidence is beside the point. To prove the affirmative defense of greater hazard in this case, Windham must show that tying off while riding in the lift baskets was more hazardous than not tying off while riding in the baskets. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225 (No. 88-821, 1991). Since Respondent presented no evidence on this point, it cannot show that compliance with the standard was a greater hazard. As to item 4, Windham contends that the work on the beams could not be done from the lift baskets; in this regard, Greenburg testified that the lifts could not be positioned such that the employees could do their drilling work from the baskets. (Tr. 138-139). Regardless, to establish the affirmative defense of infeasibility, Windham must show that compliance with the standard was infeasible under the circumstances *and* that it took an alternative protective measure or that there was no feasible alternative. *Id*. at 1225-28. Greenburg indicated that the employees could have tied off to the tower while drilling on the beams but for the requirement that they tie off overhead. (Tr. 12-14). In view of this evidence, I see no reason why the worker in C-1-3, had he been wearing a safety belt, could not have attached his lanyard to the tower before exiting the basket and thus been protected from falling. It is the employer's burden to establish all elements of

an affirmative defense, and in my view, Windham has not met the second element of the affirmative defense of infeasibility. Items 4 and 5 are accordingly affirmed as serious violations.[5]

Penalty Assessment

The Secretary has proposed a penalty of $1,250.00 for each of the items set out above. CO Wilkes testified that the initial penalty of $2,500.00 for each item was based on the high severity of the conditions, due to the possibility of falls from a significant height, and that the initial penalties were reduced by 50 percent in view of the company's small size and lack of history of previous violations. (Tr. 48-51). In assessing penalties, the Commission is to give due consideration to the size, history and good faith of the employer, as well as to the gravity of the violation. On the basis of the testimony of the CO, the proposed penalties are appropriate and are therefore assessed.

"Other" Citation 2

This citation alleges that the OSHA 200 forms showing the recordable occupational injuries and illnesses for the years 1994, 1995 and 1996 were not provided upon request as required by 29 C.F.R. 1904.7. CO Wilkes testified that during his telephone closing conference with Paul Mazzucca on February 7 he asked for Windham's OSHA 200 forms for the past three years and that although Mazzucca agreed to fax them they were not received by the time the citations were issued on February 20. (Tr. 47-48). At the hearing, Windham presented R-1, an OSHA 200 form for 1996. In addition, Mazzucca indicated that the CO had only requested the 1996 form and that he had faxed it to him; he also indicated his belief that Windham had the forms for 1994 and 1995 but then said he did not know this for a fact. (Tr. 98-99; 109; 124-25). On the basis of the record as a whole, the CO's testimony is credited over that of Mazzucca. Windham was therefore in violation of the cited standard, and a penalty of $500.00 is assessed for this item.[6]

[5]In view of my findings in item 1, Windham's contention that any failure to wear safety belts at the site was due to unpreventable employee misconduct need not be addressed.

[6]The Secretary's proposed penalty of $1,500.00 for this item, in my opinion, is excessive.

Conclusions of Law

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

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.20(b)(2), 1926.21(b)(2), 1926.501(b)(1), 1926.556(b)(2)(iv) and 1926.556(b)(2)(v).

3. Respondent was in "other" violation of 29 C.F.R. § 1904.7.

Order

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

1. Items 1 through 5 of citation 1 are affirmed as serious violations, and a penalty of $1,250.00 is assessed for each item.

2. Item 1 of citation 2 is affirmed as an "other" violation, and a penalty of $500.00 is assessed.

Irving Sommer
Chief Judge

Date: