BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

BURCHETTE SIGN CORPORATION

RESPONDENT.

Insp. No. 306504242
CSHO ID: V3325
OSHANC NO. 2004-4359

ORDER

THIS MATTER was heard by the undersigned on July 29, 2004, in Greensboro, North Carolina. Complainant was represented by Hope M. White, Assistant Attorney General, State of North Carolina Department of Justice. Respondent was represented by Ronnie Plummer, General Manager.

Also present for the hearing from the North Carolina Department of Labor, Occupational Safety and Health Division were Safety Compliance Officer Andrew A. Small; Compliance Officer Charles Knox and Supervisor Doug Jones. Also present for the Complainant was Ralf Haskall, Special Deputy Attorney General. Also present for Respondent was its President, Tim Burchette; its technician George Brown and its safety consultant, Calvin Weatherman, of Safety Tech Consultants, Inc.

ISSUE PRESENTED

Did complainant meet its burden of proving by a preponderance of the evidence that respondent violated General Industry Standard 29 C.F.R. §1910.67(c)(2)(v) or Construction Standard 29 C.F.R. §1926.453(b)(2)(v), both of which provide that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

After reviewing the record file, hearing the evidence and arguments of counsel, and after considering applicable legal authorities, the undersigned makes the following:

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et. seq., the Occupational and Safety and Health Act of North Carolina (the Act).

2. Respondent is a corporation engaged in the business of installing and servicing commercial signs. It conducts business in, and under the laws of, the State of North Carolina.

3. On December 29, 2003, Safety Compliance Officer, Andrew Small, (hereafter "the SCO"), was driving on a public thoroughfare at or near 1701 S40 Drive, Greensboro, North Carolina (the "job site"). The SCO observed a man without fall protection about 26 feet above street level in an aerial lift working on a Best Buy store sign.

4. Since it was after his normal working hours and his office was closed and since the SCO saw in plain view what appeared to be a serious hazard with the potential to seriously injure or kill the worker, the SCO proceeded to conduct an inspection at the job site.

5. The SCO took photographs of the man in the lift and then observed the man lower the lift, exit the lift and retrieve his fall protection equipment from his work vehicle.

6. The SCO identified himself, presented his credentials and explained his purpose to the man. The man identified himself as technician George Brown, an employee of Respondent, Burchette Sign Corporation.

7. The SCO initiated an opening conference with Ronnie Plummer, Respondent's General Manager and Bill Fletcher of Safety Tech Consultants, Inc. (hereafter, "Safety Tech").

8. Respondent had two employees at the job site and seven employees overall.

9. The reason Mr. Brown was in the aerial lift was to determine the reason why the Best Buy store sign was not illuminated and to repair it.

10. Mr. Brown found that a nesting bird had accidently flipped the toggle switch to the "off" position and all he had to do to illuminate the sign was to flip the toggle switch back to the "on" position.

11. Mr. Brown admitted under oath that he went up in the aerial lift without his fall protection equipment and only retrieved his equipment when he saw the SCO approaching his work site. Mr. Brown thought that he was going up in the bucket for only a few minutes to flip a toggle switch and then come back down. He was in a hurry and, thus, did not wear his safety equipment.

12. Respondent stipulated that Mr. Brown was up in the aerial lift without his fall protection equipment.

13. Based upon his observations and his photographs, and in order to enforce the Act, the SCO issued a citation to Respondent on February 10, 2004, alleging a serious citation of General Industry Standard 29 C.F.R. §1910.67(c)(2)(v) or Construction Standard 29 C.F.R. §1926.453(b)(2)(v), both of which provide that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

14. Since Respondent was maintaining and not installing the Best Buy sign, the standard it violated was General Industry Standard 29 C.F.R. §1910.67(c)(2)(v) .

15. The violation cited in Citation 1, Item 1 was serious in that there existed a possibility of an accident, to wit: George Brown falling out of the aerial lift from a height of about 26 feet.

16. The substantial probable result of such an accident would be broken bones requiring hospitalization or lost time from work and potentially permanent partial disability or death.

17. One of Respondent's employees was exposed to the hazard, to wit: George Brown.

18. Because it had been cited for the same violations in October, 2003 and May, 2000, Respondent knew or should have known that - without taking steps to discover violations by workers driving from job to job during the work day - violations of the fall protection standard at issue was foreseeable.

19. The $175.00 penalty imposed for the violation cited in Citation 1, Item 1 was properly calculated in accordance with the North Carolina Operations Manual by respondent as follows:

(a) the severity of the violations was determined to be high due to the height of the aerial lift;

(b) the probability assessment was properly deemed to be medium due to the protection afforded to the technician from the bucket;

(c) the gravity based penalty was properly calculated to be $3,500;

(d) the adjustment factor for size was properly calculated to be 60%;

(e) the adjustment factor of 10% for Respondent's cooperation with the inspection was properly applied;

(f) the adjustment factor of 0% for no history of prior violations was properly applied in that Respondent had been cited for the same violation in October, 2003 and May, 2000.

(g) the adjustment factor of 25% for safety and health programs was properly applied; and

(h) the total reduction of 95% to the $3,500.00 gravity based penalty to reduce the penalty to $175.00 was properly applied.

20. Respondent argued at the hearing the affirmative defense of "isolated incident of employee misconduct."

21. The elements of the affirmative defense of "isolated incident of employee misconduct" are as follows:

(1) the employer has work rules designated to prevent the violation;

(2) the employer has adequately communicated those rules to employees;

(3) the employer has taken steps to discover violations;

(4) the employer has effectively enforced the rules when violations have been discovered.

22. Respondent carries the burden of proof with respect to the affirmative defense.

23. With regard to element (1) of the affirmative defense, Respondent has a written safety program which includes the subject of fall protection. For the first violation of safety standards, the employee is given a verbal and written reprimand. For the second and third violations, the employee is given a written reprimand and a period of suspension without pay. For the fourth violation, the employee is terminated.

24. With regard to element (2) of the affirmative defense, Respondent's work rules are adequately communicated to employees through required attendance at safety meetings conducted by Safety Tech. Safety Tech conducted one such meeting only seven days prior to the violation which is the subject matter of the citation in this case, which included the subject of fall protection. When Mr. Brown saw the SCO, he immediately lowered his bucket and retrieved his safety equipment from his vehicle, evincing his knowledge of the company's safety rules.

25. With regard to element (4) of the affirmative defense, Respondent has effectively enforced the rules when violations have been discovered.

(a) On October 17, 2003, just months prior to the inspection in this case, Todd Bourbonais was issued a verbal and written reprimand and suspended for a day without pay as a result of his second violation of the fall protection policies within a 24 hour period.

(b) On October 17, 2003, Jonathan Gates was issued verbal and written reprimand and suspended for a day without pay as a result of his second violation of the fall protection policies within a 24 hour period. The first violations occurred the day prior when Tim Burchette, Respondent's President, saw from his office window Todd Bourbonais and Jonathan Gates working at the Dodge dealership across the street in an aerial lift without their belts and lanyards.

26. However, with regard to element (3) of the affirmative defense, Respondent failed to carry its burden of proving that it had "taken steps" to discover violations. The only time Respondent's supervisory personnel are at a job site where they can observe safety violations is on jobs which will last for several days at a time or when Respondent's representatives are called to a job site because of a problem. However, in most instances, Respondent's crews travel from job to job, which can last from 20 to 30 minutes to a few hours. The jobs could be local or out of the county as far as the coast. Neither Respondent nor Safety Tech does any announced or unannounced, planned or random inspections at these sites to determine whether Respondent's employees are following proper safety procedures. If a Safety Tech employee is driving down a road and sees a Burchette Sign company vehicle, they do look to see if the employee is following proper safety procedures. Because it had been cited for violations of the same standard in May, 2000 and October, 2003, and because two of those violations occurred in plain view of the President's office window, Respondent should have known that its employees were not adhering to its fall protection policies and it should have taken steps to discover violations by its employees who were driving from job to job during the work day.

27. Respondent argued at the hearing that Mr. Brown did not need his fall protection equipment because the aerial lift basket was protection enough. Respondent's argument must fail. It is true that the aerial lift basket has rails which would prevent most workers from falling out under most circumstances when the aerial lift is stationary and protected from external forces. However, the OSHA standard requiring body belts and lanyards for workers in aerial lifts takes into consideration that an aerial lift is attached to a vehicle which is in or near a roadway. Such a vehicle may suddenly move or jerk either because it is hit by another vehicle or because it was not properly braked. If the vehicle is hit by another vehicle or hits another hard object with sufficient force, a worker can fall from an aerial lift and be seriously hurt or killed.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant proved by a preponderance of the evidence that respondent violated the section of the Act as set forth in the Findings of Fact above, that the violation was serious as designated in the Citation and that the proposed penalty assessed for Citation 1, Item 1 was figured appropriately.

4. Respondent failed to carry its burden of proving the affirmative defense of isolated incident of employee misconduct in that it failed to take steps to discover safety standard violations among its workers who drive from job to job during a work day.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Item 1 is hereby affirmed and the penalty is hereby imposed in the amount of $175.00; and

2. The penalty shall be paid within ten (10) days of the filing date of this Order.

This the 24th day of August, 2004.

Ellen R. Gelbin
Administrative Law Judge