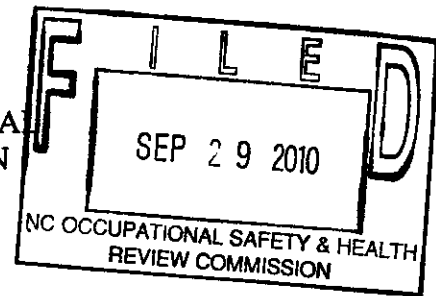


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR FOR)
THE STATE OF NORTH CAROLINA,)

Complainant,)

v.)

FULCHER ELECTRIC OF)
FAYETTEVILLE, INC. and its successors,)

Respondent.)

DOCKET NO. 2008-4774

OSHA INSPECTION NO. 311622716

CSHO ID NO. I2782

ORDER

THIS CAUSE came on for hearing and was heard before the undersigned Reagan H. Weaver, Hearing Examiner for the North Carolina Safety and Health Review Commission, on April 21, 2009, at the North Carolina Medical Society, located at 222 North Pearson Street in Raleigh, North Carolina.

Jane T. Hautin, Special Deputy Attorney General, represented the Complainant. Michael C. Lord of Williams Mullen, represented the Respondent. Complainant's witness was Shay Wingate, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division. (T. 6)¹ Respondent's witnesses were Demetrius McLaurin and Kevin Register, both with Fulcher Electric of Fayetteville, Inc. (T. 14, 106, 140)

Complainant moved to withdraw Citation One, Items 1a and 1b before the hearing commenced, and no evidence was introduced regarding these items. The motion was granted, and this Order acknowledges the dismissal of these items.

¹
References to the Transcript are denoted, "(T. .)."

DATABASE
09-30-10
CR

ISSUES PRESENTED

Did Complainant meet her burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.453(b)(2)(v) by permitting an employee [Demetrius McLaurin] to work in an aerial lift without wearing either a personal fall arrest system or fall restraint device?

Did Complainant meet her burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.454(a) by not ensuring that each employee who performs work while on a scaffold was trained by a competent person?

SAFETY STANDARDS AT ISSUE

1. 29 CFR 1926.453(b)(2)(v) provides as follows:

A body belt shall be worn and a lanyard attached to the boom or bucket when working from an aerial lift.

2. 29 CFR 1926.454(a) provides, in relevant part, as follows:

The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion, and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest dated March 31, 2008 and received by the Complainant, Commissioner of Labor of the State of North Carolina, contesting a citation issued March 4, 2008, to Respondent, Fulcher Electric of Fayetteville, Inc. ("Respondent" or "Fulcher Electric"). (T. 12)
2. Complainant, Commissioner of Labor of the North Carolina Department of Labor, is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").
3. Respondent is a corporation duly organized and existing under the laws of North Carolina. Fulcher Electric is engaged in specialty construction work associated with traffic signals. (T. 9)
4. Respondent is subject to the provisions of the Act and is an employer within the meaning of North Carolina General Statute § 95-127(10).
5. The City of Durham hired Respondent as an electrical subcontractor to install ten traffic signal lights and two pedestrian lights. (T. 9-10) At the time of the inspection, Fulcher Electric was engaged in work at the intersection of Davis Drive and Interstate Highway 40, Exit 280, in the Research Triangle Park. (T. 9)
6. On or about February 19, 2008, Safety Compliance Officer Shay Wingate, employed by the North Carolina Department of Labor, conducted an inspection of Respondent's work site. (T. 7, 40) During the course of the inspection, SCO Wingate took photographs, made notes, interviewed employees and obtained documents. (T. 10-11, 38)

7. Following the inspection, a citation was issued to Respondent alleging serious violations of Construction Standards 29 CFR §§1926.202 and 1926.20(b)(2) in Items 1a and 1b and alleging serious violations of Construction Standards 29 CFR §§1926.453(b)(2)(v) and 1926.454(a) in Items 2a and 2b.

8. SCO Wingate opened the inspection with Kevin Register, the job site foreman. (T. 10) While walking through the site with Mr. Register and talking with him, SCO Wingate observed Mr. McLaurin working from an aerial bucket without fall protection. (T. 14, 22, 103) SCO Wingate observed Mr. McLaurin from the spot indicated on Respondent's Exhibit 1 by a stick figure. (T. 50; Resp. Ex. 1) SCO Wingate estimated that he was approximately 40 to 50 yards away from Mr. McLaurin when he, SCO Wingate, observed the work. (T. 43)

9. SCO Wingate's view of Mr. McLaurin was three to four feet lower in elevation than the ground from which Mr. McLaurin was working. (T. 89, 150) Thus, SCO Wingate was looking up at Mr. McLaurin. (T. 150)

10. Using visual landmarks, SCO Wingate estimated that the aerial bucket from which Mr. McLaurin was working was at least six feet off the ground. (T. 15, 91) SCO Wingate believed that the bucket was above the top of a gray electrical cabinet which stood taller than his own height of six feet, one and a half inches. (T. 18, 74-75) SCO Wingate did not photograph the work as it was happening. (T. 19-20, 51)

11. At the time of the alleged violation, Mr. McLaurin was installing a ground rod, which is a metal pole ten-feet long and dime-sized in diameter that grounds the signal installation. (T. 107-08) Installing a ground rod is a usual task performed by both Fulcher Electric and Mr. McLaurin. (T. 108, 140-41) Depending upon the resistance of

the ground, Mr. McLaurin is able to stick the rod about two feet deep into the earth by hand. (T. 108, 141) Thereafter, he would drive the rod further into the earth using a hammer drill equipped with a specially designed bit that fits over the top of the rod. (T. 108) Mr. McLaurin would then hand the hammer drill to a coworker on the ground to continue the rod installation. (T. 115) The ground man would drive the rod until it was a couple of inches under the earth. (T. 116) At that point, a ground rod driver would be used. (T. 116) It is a heavy metal device with a hollow center which fits over the rod. (T. 117; Comp. Ex. 1) Once underground, the rod is connected to the grounding box through a welded copper wire. (T. 118, 135; Comp. Ex. 2)

12. At the time of the inspection, Fulcher Electric employee Guadalupe "Jimmy" Castro was using the bucket truck. (T. 109) Castro had stopped his aerial work and left the bucket extended to the left side of the truck and suspended in the air approximately 18 inches above the ground. (T. 109-10; Comp. Ex. 2) Castro's use of the aerial lift was not at issue.

13. At the time of CSHO Wingate's inspection, the grounding rod had been driven into the earth some two to three feet by hand, leaving between seven and eight feet of the rod above ground. (T. 113, 114, 135-36). The ground had previously been dug up to install the traffic signal cabinet, and a post-hole digger was used to start the grounding rod hole. (T. 137, 162; Comp. Ex. 1)

14. Mr. McLaurin stands six feet tall. (T. 119)

15. Mr. McLaurin then stepped into the open bucket of the aerial lift and maneuvered it over and up using the controls in the bucket. (T. 112) The elevation of the bottom of the bucket did not exceed three feet from the ground surface. (T. 112-114)

Mr. McLaurin drove the ground rod further into the earth with the hammer drill. (T. 113)
He held the hammer drill over his shoulder with one hand near the top of his head and
with the other hand near the top of his shoulder. (T. 113-14)

16. There was no practical reason for the bucket to have been elevated more
than three feet off the ground.

17. After driving the rod further into the earth, Mr. McLaurin handed the
hammer drill to his co-worker. (T. 115) Mr. McLaurin then lowered the bucket and
exited. (T. 118, 121, 138-39; Comp. Exs. 1 & 2)

18. Fulcher Electric had a written safety program in place (Resp. Ex. 5;² T.
148); had trained its employees about the safety program (T. 123, 143); had a specific
work rule that employees who worked in an aerial bucket tie off to it using a harness and
lanyard system (T. 30); had adequate fall protection equipment at the site (T. 152-53);
had trained employees on how to safely work from an elevated bucket (T. 123-24, T.
142-47; Resp. Exs. 7-10); had held on-site Safety Meetings (T. 30); and had made sure
that its employees were trained on fall protection and the use of aerial lifts (T. 148-49)
Fulcher Electric turned over training records at the informal conference. (T. 31, 147-48)

19. Fulcher Electric specifically trained Demetrius McLaurin on fall
protection while working in an aerial bucket. (T. 124-25, 127; Resp. Ex. 7) McLaurin
described Fulcher Electric's rule to tie off whenever he is in a bucket that is seven and a
half feet above the ground. (T. 122) Fulcher Electric instituted this rule and trained its
employees on it for a practical reason. The six-foot lanyard used by Fulcher Electric

² References to exhibits introduced by Respondent are denoted, "Resp. Ex. _." References to exhibits
introduced by Complainant are denoted, "Comp. Ex. _."

employees would not provide any fall protection at heights less than seven and a half feet.
(T. 153-54)

20. Other than Mr. McLaurin's actions on February 19, 2009, there is no evidence that any employee of Fulcher Electric worked in an aerial bucket without fall protection. (T. 83-87, 125-26, 154-55; Resp. Exs. 3 & 4)

21. SCO Wingate completed OSHA Form 1B as part of his investigation. Questions on this form required an estimation of the severity of a fall out of the aerial bucket. While SCO Wingate testified at the hearing that "broken members" would be received from a fall, the form indicates that he earlier estimated that the severity would be "Low, due to injuries sustained requiring first-aid [and] not requiring hospitalization" and that bruises and scratches were the likely injuries to result. (Comp. Ex. 3, pp. 2 & 5; T. 24, 32-33, 58-60)

CONCLUSIONS OF LAW

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

2. This Court has jurisdiction of this cause and the parties are properly before the Court.

3. Scrapes and bruises are non-serious injuries for citation classification purposes. *ABF Freight Sys., Inc.*, OSHANC 97-3580, at p. 6 (RB 12/21/1999); Complainant's Field Operations Manual, Chapter IV, p. 23, available at <http://www.nclabor.com/osh/compliance/publicfom/Fom04c.pdf>.

4. Complainant failed to meet her burden of proving a serious violation of Citation 1, Items 2a and 2b.

DISCUSSION

The Fall Protection Citation

The cited standard requires fall protection for persons working from an aerial lift. *See* 29 CFR 1926.500(a)(2)(i) (“Requirements relating to fall protection for employees working on scaffolds are provided in subpart L of this part”). Subpart L treats aerial lifts like scaffolds, as aerial lifts are a subsection of Subpart L. *See* 29 CFR 1926.453. The cited standard that was breached in this case is explicit in its requirement that the employee wear a body belt and a lanyard attached to the boom or bucket of the aerial lift. 29 CFR 1926.453(b)(2)(v). Respondent contends that there should be read into this provision an exception that excuses the wearing of the required fall arrest equipment if the lift is only being used at heights where the fall arrest could be useful. While the practical value of the fall arrest equipment is certainly questionable at low heights, there is no provision in the regulations that provides an exception such as contended by Respondent. Consequently, the Respondent did breach the standard for which it was cited.

SCO Wingate wrote in his investigation that the likely injury from the violation of the fall protection standard would be bruises/scratches. At hearing he testified that broken members would result. Broken members could support a finding that the violation was serious; however, SCO Wingate’s original estimation of the likely injury is deemed more creditable than his testimony at hearing. Since Complainant did not prove that a broken member would have occurred from this violation, it has failed to prove one

of the elements of a serious violation. Complainant may meet its burden of proving a serious violation by proving the following:

1. A hazard covered by the cited standard existed;
2. employees were exposed;
3. the hazard created the possibility of an accident;
4. the substantial probability of an accident could be death or serious physical injury, and
5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

Steel Supply and Erection Company, Inc., OSHANC 2006-4650 (RC 03/03/08)

There is no question whether the failure to use fall protection in an aerial lift is a hazard, whether Mr. McDaniel was exposed to the hazard, and whether the hazard created the possibility of an accident. The employer's knowledge is not in question either, as the violation occurred in front of Respondent's job site foreman, Mr. Register. The critical issue in the examination of whether the violation was serious revolves around the question of the seriousness of the likely injury from a possible fall. SCO Wingate's original estimation that bruises/scratches would be the likely result is consistent with the Respondent's evidence that the height the bucket reached never exceeded three feet. The operation being performed – to install the grounding rod – would not require the bucket to be higher. The total time in the lift, as reported by both Respondent and Complainant, was so brief it is unlikely that any other purpose was being served by Mr. McLaurin's being in the bucket. It is likely that the bucket height never exceeded three feet, so the distance that could have been fallen makes the resulting injury first estimated by SCO Wingate more likely. Had a fall occurred, this Hearing Examiner is unpersuaded

that SCO Wingate's original conclusion that bruises/scratches would occur was wrong. Consequently, Complainant did not prove more likely than not that the violation of the fall protection standard was a serious violation.

Nevertheless, in the absence of a regulation that allows exception to §1926.453(b)(2)(v), the Respondent violated the regulation and a non-serious violation must be found. The use of fall protection in aerial lifts is too important to allow exceptions. Some regulations are of such importance that to allow any exception could create misunderstanding or confusion. A policy such as this creates a strict liability that helps insure that workers using aerial lifts for whatever purpose do not fail to remember the danger that can accompany their use.


The Fall Protection Training Citation

The evidence at the hearing established that Respondent had trained its employees on fall protection, including specifically, fall protection and the use of aerial lifts. While this examiner disagrees with the application of exceptions to the rule of §§1926.453(b)(2)(v) and has so found, no employee at the time of the inspection had acted in contravention of that training. Accordingly, there is no factual support upon which to sustain this citation item. *See Pope Masonry Contractors, Inc.*, OSHANC 99-3821 (ALJ 9/22/2000) (dismissing failure-to-train citation item).

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, it is hereby ORDERED that Citation No. 1, Items 1a and 1b are DISMISSED upon the unopposed motion of the Complainant; Item 2a is found to be a NONSERIOUS violation with NO PENALTY and Item 2b is hereby DISMISSED.

This, the 29 day of September, 2010.


Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

MICHAEL C LORD
WILLIAMS MULLEN PC
PO BOX 1000
RALEIGH NC 27602-1000

by depositing same in the United State Mail, Certified Mail, postage prepaid at Raleigh, North Carolina, and upon:

VICTORIA VOIGHT
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class; and

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEGI NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

This the 30th day of September 2010.

OSCAR A. KELLER, JR.
CHAIRMAN



Nancy D. Swaney
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