

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
Jesco, Inc.,
Respondent.

OSHRC Docket No. **10-0265**

Appearances:

Lydia Jones, Esquire, Atlanta, Georgia
For Complainant

McCord Wilson, Esquire, Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Jesco, Inc., is a construction company located in Fulton, Mississippi. Jesco contests a citation issued by the Secretary alleging a serious violation of 29 C. F. R. § 1910.67(b)(2), for using a “field modified” aerial lift without first obtaining written certification from the manufacturer of the aerial lift. The Secretary proposed a penalty of \$ 4,500.00 for the violation.

Jesco timely contested the citation. The company stipulated jurisdiction and coverage. The court held a hearing in this matter on June 24, 2010, in Tupelo, Mississippi. The parties have filed post-hearing briefs. Jesco argues it did not violate the terms of 29 C. F. R. § 1910.67(b)(2). Jesco also contends the Secretary failed to prove its employees were exposed to a hazard.

The court finds the Secretary established a serious violation of 29 C. F. R. § 1910.67(b)(2). Item 1 of Citation No. 1 is affirmed, and a penalty of \$ 2,500.00 is assessed.

Background

In the summer of 2009, Mueller Copper Tube hired Jesco to remove several damaged beams made of angle iron (also referred to as “angle”) from the ceiling of its facility in Fulton, Mississippi. Each beam was approximately 31 feet long and weighed approximately 325 pounds. The ceiling of the facility was approximately 31.5 feet high. Various structures and equipment in the facility, including an elevator rack, made it difficult to access the ceiling to remove the beams. After analyzing the situation, Jesco determined the best method for removing the beams was to use two rented aerial lifts and one of Mueller’s remote cranes. One of the lifts, rented by Mueller, was a Genie lift; the other lift, rented by Jesco, was a JLG 600S Boom Lift. The basket of the JLG lift was 8 feet wide. It was equipped with standard guardrails.

Jesco’s crew consisted of five men, including superintendent Tom Beane. One crew member was located in a Genie lift, and two crew members were located in the JLG aerial lift. Beane and the remaining crew member stayed on the ground, 30 to 40 feet away from the JLG lift. Jesco’s employees used the two lifts to raise the baskets to the ceiling, where the workers loosened the bolts securing the damaged beam to the ceiling. The workers then moved the JLG lift to the center of the beam and lowered the beam to the guardrails. The center 8 feet of the beam thus rested across the lift basket, leaving 11.5 feet of the beam extending beyond either side of the lift. After the workers placed the beam on the guardrails of the JLG lift, they lowered the beam to the ground. A Mueller employee operating a crane then removed the damaged beam and placed a new beam on the guardrail. The Jesco employees raised the new beam to the ceiling, where they then bolted the beam to the ceiling.

In mid-August 2009, Jesco’s crew removed the first damaged beam from the ceiling. This beam was bent. To prevent the beam from rolling, Jesco’s employees in the JLG lift used two C-clamps to secure the beam to the guardrails. Approximately two weeks later, on August 29, 2009, Jesco removed ten more beams from the ceiling. On this date, they did not use C-clamps to secure the beams to the guardrails.

On August 29, Jesco employees Jason Nanney and Michael Taylor were in the JLG lift. Jason Williams was in the Genie lift. Tom Beane and Will Beane (Tom Beane’s son) were on the

ground. At approximately 5:00 p. m., Mueller's crane operator inadvertently struck the Genie lift with the boom of the crane, damaging the Genie lift. Jason Williams was not injured.

Beane filed a "Near Miss Report" with Jesco. His report states:

Job: taking angle out of ceiling using 2 lifts and Mueller's crane.

We were lowering angle with one lift. The other lift normally comes down to get out of the way. This time, we were lowering angle with one lift, guy in the other lift stayed up. As the angle was being lowered, the Mueller crane operator started swinging over to get the angle out of the basket. As he swung over, he swung into the boom of the 2nd lift because his view was blocked by racks in the plant. Lift operator hollered and crane operator stopped. Could have turned lift over if he had not stopped.

Solution: Make sure that all lifts have been lowered before moving crane.

Action: Mueller employee was written up.

(Exh. C-1).

The union at Mueller filed a complaint letter with the Occupational Safety and Health Administration (OSHA) following this incident. OSHA compliance officer Henry Rust went to Mueller's facility on September 3, 2009, to investigate. Rust interviewed Mueller's crane operator and took measurements. He also spoke with Mueller's Human Resources officer, who informed him of Jesco's Near Miss Report. Rust obtained a copy of the report, and subsequently opened an investigation of Jesco.

On October 7, 2009, Rust went to Jesco's place of business and interviewed several employees there, including Beane, Nanney, and Williams. Based on Rust's investigation, the Secretary initially issued a citation to Jesco for a violation of the general duty clause, § 5(a)(1), for carrying materials on the guardrails of the JLG lift (the Secretary also cited Mueller for alleged violations arising from the incident with the crane). Prior to the hearing, the Secretary moved to amend the citation to allege a serious violation of 29 C. F. R. § 1910.67(b)(2). The court granted the Secretary's unopposed motion.

Discussion

The Secretary has the burden of proving the violation by a preponderance of the evidence.

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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1

Amended Item 1: Alleged Serious Violation of 29 C. F. R. § 1910.67(b)(2)

The standard at 29 C. F. R. § 1910.67(b)(2) provides:

Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section, and to be at least as safe as the equipment was before the modification.

The amended citation alleges:

29 C. F. R. § 1910.67(b)(2): Aerial lift was "field modified" for uses other than those intended by the manufacturer and the modification had not been certified in writing by the manufacturer or by any other equivalent entity to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section and to be at least as safe as the equipment was before modification, thereby creating a danger of tipping and struck-by hazards.

(a) On or about two weeks prior to August 29, 2009, at Mueller Copper Fittings, employees performed an unapproved field modification of a rented JLG Aerial Boom Lift by using clamps to attach 325-pound, 31-foot long beams to the guardrails of the Lift's platform and using the Lift to lower and lift the beams to the ceiling, 31-feet above. The Operation and Safety Manual for the Lift instructs users to "not carry materials directly on platform railing" and further states that "[s]upplies or tools which extend outside the platform are prohibited unless approved by JLG."

(b) On or about August 29, 2009, at Mueller Copper Fittings, employees performed an unapproved field modification of a rented JLG Aerial Boom Lift by placing 325-pound, 31-foot long beams on the guardrails of the Lift's platform and

using the Lift to lower and lift the beams to the ceiling, 31.5-feet above. The Operation and Safety Manual for the Lift instructs users to “not carry materials directly on platform railing” and further states that “[s]upplies or tools which extend outside the platform are prohibited unless approved by JLG.”

(Secretary’s brief, pp.5-6).¹

¹At the beginning of the hearing, both the Secretary’s counsel and Jesco’s counsel believed Jesco’s crew used two C-clamps to secure beams to the JLG’s guardrails on August 29, 2009. As the hearing progressed, it emerged that Jesco’s crew used C-clamps to secure only one beam to the lift’s guardrails, and that this was done approximately two weeks before August 29. The ten beams that were removed on August 29 were not secured with C-clamps. The court further amended the citation to conform to the evidence adduced at the hearing. The above-quoted amended citation is taken from the post-hearing brief of the Secretary, who drafted it at the court’s direction.

Applicability

Jesco does not dispute the applicability of the cited standard. Jesco stipulated it “was performing maintenance work on August 29, 2009; therefore, OSHA’s general industry standards apply to its conduct, 29 C. F. R. § 1910, et seq.” (Stipulations). The cited standard applies.

Compliance with the Terms of the Standard

The standard at 29 C. F. R. § 1910.67(b)(2) requires the employer to get certification in writing from the manufacturer before it field modifies an aerial lift. Jesco stipulated at the hearing: “JLG did require that users willing to modify their equipment apply to JLG’s engineers for permission to make the modification,” and “Jesco did not apply for a product modification approval” (Tr. 47-48). Jesco contends such certification was not necessary because it did not field modify the aerial lift.

“Field modification” is not defined in the OSHA standards. Jesco argues the plain and natural meaning of “modification” is “to change.” Since Jesco did not change anything on the lift, Jesco contends it did not implement a modification.

Jesco narrowly focuses on the phrase “field modification,” without giving due attention to the rest of the sentence. The standard at 29 C. F. R. § 1910.67(b)(2) requires an employer to get certification in writing when the aerial lift is modified “for uses other than those intended by the manufacturer.” When the sentence is read in its entirety, it is clear that “modification” includes use of the aerial lift not intended by the manufacturer.

The Operations Manual is required to be with the lift at all times and is provided by the rental company to the users of the lift. Users of the lift are required to be familiar with the uses and limitations of the lift as set forth in the Operations Manual. Jesco employees Tom Beane, Jason Nanney, and Jason Williams testified at the hearing. They all stated they use aerial lifts virtually every work day, and they are familiar with safety requirements for operating aerial lifts.

The JLG Operations Manual states:

- Use the machine in a manner which is within the scope of its intended application set by JLG.

- **!! WARNING !! MODIFICATION OR ALTERATION ON AN AERIAL WORK PLATFORM SHALL BE MADE ONLY WITH THE WRITTEN PERMISSION FROM THE MANUFACTURER.**

(Exh. C-8, p. 1-2).

The Operations Manual also states:

1.3 OPERATION

GENERAL

- Do not use the machine for any purpose other than positioning personnel, their tools, and equipment.
- Do not carry materials directly on platform railing. Contact JLG for approved material handling accessories.
- Supplies or tools which extend outside the platform are prohibited unless approved by JLG.

(Exh. C-8, p.1-3).

“Modification” is not limited to physically altering the lift. It covers a change in the intended use of the aerial lift. The Operations Manual is clear that the aerial lift is intended to carry personnel, and is not intended to carry materials directly on the platform railing, or to carry materials that extend outside the platform.

The Secretary cites *Blue Ridge Erectors Inc.*, 21 BNA OSHC 1519 (No. 04-1793, 2006), in support of her case. In *Blue Ridge*, the administrative law judge found the employer violated 29 C. F. R. § 1926.453(a)(2) (the construction standard identical to 29 C. F. R. § 1910.67(b)(2)) when it attached a hook and sling to an aerial lift and used it to carry steel. *Blue Ridge* is an unreviewed case and not precedential, but the judge’s reasoning in that case is sound. The employer in *Blue Ridge* argued attaching the hook and sling to the aerial lift was not a modification because “it was temporary and did not involve any fundamental or lasting alteration to the lift.” The judge rejected this argument, finding “the standard does not distinguish between temporary or permanent modifications,” and noting the manufacturer “specifically prohibits attaching an overhanging load to any part” of the lift. *Id.* at 1524.

In its post-hearing brief, Jesco asserts the only other reported case citing 29 C. F. R. § 1926.453(a)(2) is another unreviewed case, *B & L Drywall & Acoustical, Inc.*, 20 BNA OSHC 1430 (No. 03-0152, 2003). In that case, the company had replaced the damaged top rail of a scissor lift

with a metal bar. The administrative law judge vacated the item, finding the replacement of the top rail with a metal bar was not a modification. Jesco contends *B & L Drywall* supports its position, arguing, “If replacing the top guardrail is not a modification to the lift, it is difficult to see how resting an angle on the guardrail is” (Jesco’s brief, p. 6). Again, Jesco’s focus is too narrow. The judge in *B & L Drywall* explicitly stated why he vacated the item: “Although there is no evidence that the manufacturer certified the change, the metal strip was not a modification ‘for uses other than those intended by the manufacturer.’ It replaced a top rail which was apparently removed during transportation.” *Id. at 1436*. The replacement rail still functioned as a guardrail. When Jesco rested the beams on the guardrails, they no longer functioned as guardrails protecting employees for whom the lift was intended; the guardrails were modified to function as a transport system for materials that protruded 11.5 feet on each side.

The court determines Jesco’s use of the guardrails to transport the beams was a field modification of the JLG aerial lift. This modification violated the terms of 9 C. F. R. § 1910.67(b)(2).

Employee Exposure

The alleged violation description of the amended citation asserts the modified use of the lift to transport the beams created “a danger of tipping and struck-by hazards.” Jesco had five employees on the site—two in the JLG lift, one in the Genie lift, and two on the ground, 30 to 40 feet from the JLG lift.

Jesco rested each beam, weighing 325 pounds and measuring 31 feet long, on the guardrails of the lift. Also in the vicinity were a Genie lift and a crane. Jesco argues that basket of the JLG lift never swayed or shifted, and its employees took care to ensure the basket remained level as they raised and lowered the beams. Jesco overlooks, however, the potential for the basket of the JLG lift to be tipped or struck by an outside force, causing the beams to fall.

When the boom of the crane struck the Genie lift, it started to tip over. Williams was unhurt. The JLG lift was in the same work area as the Genie lift. Had the boom of the crane struck either the JLG basket or one of the protruding ends of the beam, Jesco’s employees would likely not be so fortunate. Nanney and Taylor, the employees in the JLG basket, were exposed to being struck by

the beam as it shifted if the basket tipped. Tom and Will Beane, standing on the ground, were exposed to being struck by the beam if it slid off of the guardrails as the basket tipped.

Jesco asserts the employees on the ground were outside the zone of danger because they were standing 40 feet from the JLG lift. Jesco is cutting off the lower end of the estimate given by Beane, who, when asked how many feet he was from the JLG lift, replied, "I'm going to say 30 to 40" (Tr. 101). At its highest working level, the JLG was extended to allow employees to reach the ceiling, 31.5 feet above the floor. It was carrying a 31 foot long beam. If the JLG lift was knocked over, the beam could have fallen on employees standing 30 feet away.

As Rust explained, the zone of danger is not limited to the area directly below the basket of the lift:

What's the zone of danger? The zone of danger is not just straight down. Because if this object is sitting on these guardrails, remember, it's 11½ feet on each side. If it happens to slide this way [witness demonstrating], and that basket can be rotated, shifted, if it slid this way, now you're getting—that beam is coming out this way, and it's 31½ feet.

When it falls, it's going to fall and bounce. There's no real way of defining who is in the zone of danger. For a direct straight-down fall, you can define that, but we don't know where that beam was going to end up.

(Tr. 68).

The Secretary has established Jesco's employees were exposed to the hazard of being struck by the transported beams.

Employer Knowledge

Tom Beane was Jesco's onsite superintendent. Before removing the beams, Beane discussed with his crew members how best to accomplish the assignment. Together they decided to use the JLG aerial lift to transport the damaged beams from the ceiling to the floor, and then to transport the new beams from the floor to the ceiling. Beane had actual knowledge of the violative conduct. As superintendent, Beane's actual knowledge is imputed to Jesco. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employee has actual or constructive

knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.”)

The Secretary has established Jesco violated 29 C. F. R. § 1910.67(b)(2). She classified the violation as serious. Under § 17(k) of the Act, a violation is serious “if there is a substantial probability that death or serious physical harm could result from” the violative condition. The violative condition created the hazard of the aerial lift tipping over and crushing employees in the basket or on the ground, and the hazard of the beam shifting and crushing employees in the lift or falling on employees on the ground. The violation is properly classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. “In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith.” *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The record does not disclose the number of workers employed by Jesco. The company has no history of OSHA violations for at least the three years prior to the instant citation. Jesco demonstrated good faith in this proceeding.

The gravity of the violation is moderately high. Jesco's crew took care to center the beam, using a tape measure to ascertain the correct measurements. The record establishes Jesco's crew members were conscientious and attentive to details of their assignment. The decision to use the aerial lift to lower the beams was incorrect, but the crew members did not compound the error with a careless approach to the task. It is determined a penalty of \$ 2,500.00 is appropriate.

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 Item 1 of Citation No. 1, alleging a serious violation of 29 C. F. R. § 1910.67(b)(2), is affirmed, and a penalty of \$ 2,500.00 is assessed.

_____/s/_____
Judge Stephen J. Simko, Jr.

Date: November 22, 2010