

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, )  
 )  
 Complainant, )  
 )  
 v. ) OSHRC Docket No. 76-1538  
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 )  
 JENSEN CONSTRUCTION COMPANY, )  
 )  
 Respondent. )

DECISION

Before: CLEARY, Chairman; BARNAKO and COTTINE, Commissioners.

COTTINE, Commissioner: An October 28, 1976 decision of Administrative Law Judge Vernon Riehl is before the Commission for review under 29 U.S.C. § 661(i). Judge Riehl found the Respondent, Jensen Construction Company ["Jensen"], in serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ["the Act"], for failing to comply with the occupational safety standard published at 29 C.F.R.

§ 1926.28(a). <sup>1/</sup> At issue is whether the judge erred in (1) concluding that the cited standard is not unenforceably vague and accordingly denying Jensen's motion to dismiss the complaint and vacate the citation, and (2) failing to find that the violative conduct of Jensen's supervisor was an "isolated incident." <sup>2/</sup>

1/ The cited standard reads:

§ 1926.28 Personal protective equipment.

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

2/ On November 12, 1976, former Commissioner Moran sua sponte directed this case for review pursuant to 29 U.S.C. § 661(i), without specifying

On March 24, 1976, Jensen was engaged in heavy bridge construction at the Kansas River in Topeka, Kansas. On that date, a compliance officer for the Occupational Safety and Health Administration conducted an inspection of the Jensen jobsite and observed a workman without safety equipment walking on a steel girder approximately 50 feet above the ground. The workman was later identified as Lewis Hayes, Jensen's superintendent. As a result of this inspection, a citation was issued to Jensen alleging a serious violation of the Act for failing to comply with § 1926.28(a). <sup>3/</sup>

At the hearing, Jensen did not offer evidence to refute the alleged violation. Rather, superintendent Hayes testified that he walked onto the girder where he was observed by the compliance officer to warn two employees that their actions in preparing to climb down a ladder were unsafe. He asserted that his earlier efforts to "holler" warnings to the workers had been unsuccessful because of the din of a "big diesel motor" operating within 30 feet of the men. Testimony also reveals that while the compliance officer was enroute to another inspection on the day immediately preceding the inspection date, he observed two of Jensen's employees without safety equipment walking on a girder at this same bridge.

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(Footnote 2, cont'd.)

the issues to be considered by the Commission. On November 22, 1976, Jensen filed a petition for discretionary review raising the issues noted above.

3/ The citation and complaint read in pertinent part:

Employer failed to require the employees walking on the top bridge span of the new Highway 75 by-pass bridge crossing the Kansas River to use safety belts attached to life lines, exposing them to a fall of 60 feet to the river or ground below.

Hayes conceded that the two men under his supervision had been working without safety equipment, but stated that at the time they were in the process of installing safety lines to which safety belts would be attached. Hayes also stated that there is "nothing to hook-off to" when installing these lines. The evidence also establishes that one of Jensen's employees fell to his death from this same bridge at an unspecified time prior to the inspection. Although facts surrounding this incident are not entirely clear, it was established that the deceased worker was not tied off prior to his fall. In addition, the record indicates that Hayes was the supervisor at the time of the incident.

In support of its unpreventable employee misconduct defense, <sup>4/</sup> Jensen submitted evidence of its safety program. Testimony reveals that Jensen's safety officer conducted meetings at each job site at least once a month. These meetings were attended by both supervisors and employees and were conducted to determine whether the job site was in compliance with safety regulations and to familiarize the employees with the hazards on the project. The use of safety belts and lanyards was discussed at a safety meeting held on the day before the inspection. In addition, Jensen held safety meetings twice each month conducted by the supervisor on the job site.

According to Hayes, Jensen disciplined its employees for failure to observe safety regulations. Workers were "usually" sent home for the day when they appeared for work without their safety equipment and on one

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<sup>4/</sup> Assertions that an employee's actions were an "isolated incident" are tantamount to the affirmative defense of unpreventable employee misconduct. See Kansas Power & Light Co., 77 OSAHRC 39/A2, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶ 21,696 (No. 11015, 1977).

occasion an employee had been fired for failing to "stay off from underneath loads."

Judge Riehl rejected Jensen's employee misconduct defense, noting that the other "admitted instances" of noncompliance belied the claim of an "isolated incident." In addition, the judge questioned the urgency of the circumstances that Jensen claimed prompted the violative conduct and noted that the assertedly endangered employees were themselves tied-off. Although the judge found the evidence insufficient to sustain Jensen's affirmative defense, he found the facts to be of such a mitigating character as to impel him to assess a penalty less than the \$600 penalty proposed by the Secretary. Accordingly, the judge found Jensen in serious violation of the Act for failing to comply with § 1926.28(a) and assessed a penalty of \$200.

On review Jensen contends that the judge erred in concluding that 29 C.F.R. § 1926.28(a) is not unenforceably vague. The Commission has consistently held that § 1926.28(a) is valid and enforceable. S & H Riggers and Erectors, Inc., OSHRC Docket No. 15855 (April 13, 1979); B & B Insulation Inc., 77 OSAHRC 49/A2, 5 BNA OSHC 1265, 1977-78 CCH OSHD ¶ 21,747 (No. 9985, 1977), rev'd, 583 F.2d 1364 (5th Cir. 1978); Western Waterproofing Co., Inc., 77 OSAHRC 179/B9, 5 BNA OSHC 1897, 1977-78 CCH OSHD ¶ 22,212 (No. 13538, 1977). These holdings are controlling in this case. Moreover, the evidence regarding Jensen's work

rule requiring safety belt use under the conditions observed by the compliance officer during the inspection indicates that Jensen recognized the existence of a hazard requiring the use of personal protective equipment. This evidence further supports the conclusion that the standard is not unenforceably vague. Larkan Steel Erectors, 77 OSAHRC 167/B12, 5 BNA OSHC 1783, 1977-78 CCH OSHD ¶ 22,100 (No. 15016, 1977). Jensen's vagueness argument is, therefore, rejected.

The Secretary has sustained his prima facie burden of establishing employee exposure to a hazardous condition requiring the use of personal protective equipment. See S & H Riggers and Erectors, Inc., supra. The record establishes that Jensen's employee was exposed to a fall hazard that could have been eliminated by the use of safety belt protection. Jensen contends, however, that the violative conduct of its employee was unpreventable, and should not be imputed to it for the purpose of establishing employer liability under the Act.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. Asplundh Tree Expert Co., 78 OSAHRC 77/E12, 6 BNA OSHC 1951, 1978 CCH OSHD ¶ 23,033 (No. 16162, 1978); Mountain States Telephone & Telegraph Co., 78 OSAHRC 30/A2, 6 BNA OSHC 1504, 1978 CCH OSHD ¶ 22,668 (No. 13266, 1978), appeal filed, No. 78-1438 (10th Cir., June 2, 1978). Jensen has failed to satisfy these requirements. In addi-

tion to the evidence that the foreman was not protected against the hazard of falling, evidence indicates that two employees were observed without safety belt protection one day before the inspection and that an unprotected employee fell to his death at this site. These occurrences are inconsistent with Jensen's assertion that it implemented and enforced a "very affirmative" safety program. <sup>5/</sup> Jensen's references to its safety meetings and its qualified policy of disciplining safety violators as evidence of an effective safety program is unpersuasive in light of these recent instances of employee misconduct. <sup>6/</sup>

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<sup>5/</sup> In defending against the alleged violation Jensen raised the defense of unpreventable employee misconduct and introduced evidence in support of that claim. Although the other instances when employees were unprotected from fall hazards are not within the scope of the citation before us, they are relevant to Jensen's claim that it enforced an affirmative safety program. Accordingly, it is noteworthy that Jensen has not sought to explain the circumstances surrounding the fatal fall. Also, we find unpersuasive Hayes' testimony, offered in explanation of his failure to take disciplinary action with respect to the two employees working without fall protection, that the two employees were in the process of installing safety lines and had "nothing to hook-off to." Employees must be protected while they are installing safety equipment. See Floyd S. Pike Electrical Contractor, Inc., 77 OSAHRC 26/B11, 5 BNA OSHC 1088, 1977-78 CCH OSHD ¶ 21,584 (No. 12398, 1977), aff'd, 576 F.2d 72 (5th Cir. 1978). Moreover, Hayes' testimony did not establish that the employees could not have been protected by an alternative means and he offers no explanation for his claim that the workers could not have tied-off to the beam upon which they were working.

<sup>6/</sup> The recent fatality was a clear indication that further efforts by Jensen to enforce its workrules were necessary. See Con-structora Maza, Inc., 78 OSAHRC 6/E2, 6 BNA OSHC 1309, 1977-78 CCH OSHD ¶ 22,487 (Nos. 13680 & 14509, 1978).

An employer has a duty to ensure that supervisory personnel are performing their work safely and are themselves adequately supervised with regard to safety matters. Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978); Mountain States Telephone & Telegraph Co., supra; Kansas Power & Light Company, 77 OSAHRC 39/A2, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶ 21,696 (No. 11015, 1977). The evidence in this case does not demonstrate that Jensen assumed this responsibility with respect to superintendent Hayes. Moreover, the fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax. National Realty & Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1267 n. 38 (D.C. Cir. 1973); see Mountain States Telephone & Telegraph Co., supra. The judge properly concluded that Jensen failed to establish its affirmative defense.

As a supervisor's violative conduct is imputable to its employer, Mountain States Telephone & Telegraph Co., supra; Minnotte Contracting & Erection Company, 78 OSAHRC 15/D4, 6 BNA OSHC 1369, 1978 CCH OSHD ¶ 22,551 (No. 15919, 1978); Alder Electric Co., 77 OSAHRC 49/C8, 5 BNA OSHC 1303, 1977-78 CCH OSHD ¶ 21,748 (No. 13573, 1977), and Jensen has failed to establish that it took all necessary precautions to prevent the occurrence of the violation, we affirm the judge's finding that Jensen violated § 1926.28(a) as alleged. We have considered the appropriateness of the \$200 penalty assessed by the judge in light of the criteria set forth

in § 17(j) of the Act, 29 U.S.C. § 666(1), 7/ and find the penalty to be appropriate. Accordingly, the judge's decision is affirmed.

IT IS SO ORDERED.

FOR THE COMMISSION

DATED: JUN 29 1979

  
Executive Secretary

7/ Section 17(j) reads as follows:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

BARNAKO, Commissioner, concurring:

I agree with the majority's conclusion that Jensen committed a serious violation of 29 C.F.R. § 1926.28(a), that Jensen failed to establish the defense of unpreventable employee misconduct,<sup>1/</sup> and that a penalty of \$200 is appropriate. However, in affirming the citation I apply an interpretation of the standard different from that of my colleagues.

In S & H Riggers and Erectors, Inc. 79 OSAHRC , 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979)(concurring opinion), I stated that in addition to the elements of proof the majority concluded were necessary to sustain a violation of § 1926.28(a), I would also require proof that the particular type of personal protective equipment at issue in the case is a feasible means to protect against the cited

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<sup>1/</sup> In concluding that Jensen did not establish this affirmative defense, the majority in n. 5 faults Jensen's assertion that two employees observed without safety belts a day prior to the inspection could not have tied off because they were in the process of installing safety equipment. The majority then states that employees must be protected while they are installing safety equipment, citing Floyd S. Pike Electrical Contractor, Inc., 77 OSAHRC 26/B11, 5 BNA OSHC 1088, 1977-78 CCH OSHD ¶ 21,584 (No. 12398, 1977), aff'd 576 F.2d 72 (5th Cir. 1978). Read together, these statements imply that an employer must always prevent workers from being exposed to a hazardous condition while installing protective equipment. Such an interpretation of the Floyd S. Pike decisions would be incorrect. Both the Commission and the Fifth Circuit held only that needless exposure to a hazard while workers were installing protective equipment was a violation. The Court also noted that during certain stages of the installation process, particularly the early stages, exposure to the hazard may be unavoidable. Accordingly, to the extent that the majority opinion indicates that workers must absolutely be protected while installing safety equipment, I would disassociate myself from that view.

hazard.<sup>2/</sup> In the instant proceeding, both the compliance officer and Jensen's worksite superintendent testified that safety belts could have easily been utilized. Accordingly, the Secretary carried his burden of proof that Jensen violated the standard as alleged.

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<sup>2/</sup> I also stated that § 1926.28(a) mandates reference to other standards in Part 1926 in determining the conditions under which § 1926.28(a) requires the use of personal protective equipment. With respect to the utilization of safety belts, I concluded that 29 CFR § 1926.104 places employers on notice that lifelines, lanyards, and safety belts are an appropriate means of protecting against fall hazards.