



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ACCESS EQUIPMENT SYSTEMS, INC.
Respondent.

OSHRC DOCKET
NO. 92-1529

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 10, 1993. The decision of the Judge will become a final order of the Commission on March 12, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 2, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: February 10, 1993

DOCKET NO. 92-1529

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

ACCESS EQUIPMENT SYSTEMS, INC.,

Respondent.

OSHRC Docket No. 92-1529

Appearances:

Sharon D. Calhoun, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Robert A. Reese
President, Access
Equipment Systems, Inc.
Lithonia, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Access Equipment Systems, Inc. (Access), contests an alleged violation of Section 1928.451(a)(4) for failure to have guardrails on all open sides of a motorized work platform, which was approximately 60 feet above ground level. The citation for the alleged violation resulted from an inspection conducted by Compliance Officer Frances Hardy-Bennett at a construction worksite in Atlanta, Georgia, during March 3-4, 1992. The single-item, serious citation was issued on April 7, 1992. Access admits that the violative conditions occurred. Unpreventable employee misconduct is asserted as a defense (Answer ¶ VII).

Access is a corporation which leases construction equipment, primarily a mast climbing work platform ("mast platform"), which is also known as an "electrical scaffold" or "tower work platform" (Tr. 80). In addition to leasing the equipment, Access often contracts with the lessor to erect and dismantle the mast platform, which the company may do as often as needed to reposition the equipment throughout the worksite (Tr. 68).

The mast platform is a piece of equipment which allows a work platform to be raised and lowered along a mast or tower (Exh. C-1; Tr. 80). The mast platform is constructed from the ground level up and is dismantled in reverse. The erection process begins with the work platform, which is assembled at ground level. The platform initially has guardrails on all four sides (Tr. 49, 57). The guardrail on one side of the platform is regularly removed in order to facilitate the loading of the tower sections, which will form the mast upon which the platform rises. These tower sections are four feet long and weigh approximately 200 pounds each. Four or five sections are loaded on the work platform at a time. Each tower section is individually bolted into the mast as the employees raise the work platform to the furthest mast section which they have completed. When all four or five tower sections have been bolted together onto the mast, the employees return to the ground level and repeat the process of loading more tower sections onto the work platform (Tr. 60, 61). At certain intervals, the mast is secured to the building (Tr. 56).

Having noted that the guardrail on one side of the platform must regularly be removed to load the tower sections, employee Rodney McLeod stated that prior to raising the work platform, the guardrail at the open side should be replaced (Tr. 36, 49). The process of erecting or dismantling a mast platform is repetitious, requiring repeated loading (or unloading) of tower sections onto the work platform (Tr. 57). It also requires repeated removal and replacement of the guardrail on one side of the work platform (Tr. 43, 61).

On March 3, 1992, as Compliance Officer Hardy-Bennett approached the southwest end of the new hotel complex under construction, she observed that the mast platform had no end guardrail on its open south side. Guardrails were in place on the remaining three sides (Exh. C-2; Tr. 14). The platform was stopped approximately 60 feet above the ground level (Tr. 14).

The compliance officer requested that an Access representative meet with her. The superintendent notified Access foreman, Richard "Hank" Adams, to join the walkaround party (Tr. 13). At that time, Adams and employee McLeod had finished bolting another group of tower sections together and were in the process of securing or tying the mast tower to the building. Adams was on the floor of the building itself, anchoring the tower to a plate, and McLeod was on the work platform 60 feet above ground level assisting in that process (Tr. 56).

While McLeod stayed up on the platform, Adams met with the compliance officer on the ground (Tr. 14, 59). He refused to provide information about the company. When the compliance officer pointed out the apparent guardrail violation, Adams told her that he was familiar with OSHA standards and regulations and that the company had helped to write the standards (Tr. 14). Adams stated that while he was in the process of erecting the mast platform, he was not required to use guardrails (Tr. 14). Adams indicated that guardrails were available at the site, but he stated in his opinion that they were not required "while he was erecting the scaffold" (Tr. 14). When the compliance officer noted that the platform was not moving and was not "being erected at that time," Adams refused further conversation and left the area (Tr. 14).

At the closing conference held the following morning, the compliance officer spoke to Access's president, Robert Reese (Tr. 14). According to the compliance officer, Reese repeated the company's position that guardrails were not necessary during the process of erecting the mast scaffold (Tr. 27, 28). She did not recall any acknowledgement by Reese that full guardrails were needed during that process (Tr. 32). To the contrary, Reese testified that he informed the compliance officer at the closing conference that, although he believed one could argue whether guardrails were necessary while erecting the mast platform, he always tells employees to use them (Tr. 70, 71).

Access does not now dispute that the employees' exposure to a fall hazard created by the missing guardrail would constitute a serious violation of the standard. Its position is that its foreman misinterpreted its policies and that the violation was caused by the simple

fact that, contrary to instructions, its employees inadvertently forgot to replace the guardrail on the work platform.¹

Unpreventable Employee Misconduct

It has long been recognized that an employer is not strictly liable for its employees' actions and that it may validly defend against an asserted violation by alleging unpreventable employee misconduct. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (No. 76-1538, 1979). The onus of compliance remains on the employer who has the duty to effectively communicate and uniformly enforce applicable work rules. *H. B. Zachery Co.*, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1391, 1980), *aff'd*, 638 F.2d 812 (5th Cir. 1981). A respondent "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous work practices." *Danco Construction Co. v. OSHRC*, 586 F.2d 1243 (8th Cir. 1978). The burden of proving the defense rests with the employer asserting it. *S & H Riggers & Erectors, Inc.*, 7 OSHC 1260, 1979 OSHD ¶ 23,480 (No. 15853, 1979), *rev'd on other grounds* 659 F.2d 1273 (5th Cir. 1981).

Respondent's Work Rule

Access's president, Robert Reese, asserts that the company has an established work rule regarding use of guardrails. Respondent relies on its written "policies" and has submitted three of its business forms to demonstrate that it has such a work rule. The "Equipment Erection Check List" (Exh. R-1) is a one-page form which lists 15 items to be checked before the equipment is turned over to the lessor, among which is to "ensure that all guard rails are properly installed and secure." This form is not directed to the employees' erection process but rather to the condition of the mast platform at the time that it is turned over to the customer (Tr. 38). Respondent's "Operator's Check List" (Exh.

¹ The parties did not litigate application of the cited standard to Respondent's mast erection procedures.

R-2) and "Equipment Inspection Check List" (Exh. R-3) are also *customer* oriented (Tr. 39, 42). Access's forms are not given to all employees on the jobsite (Tr. 38, 47). None of the forms submitted constitutes the type of specific guardrail policy required to establish this defense.

Access further relies on the existence of an oral work rule. Employee McLeod testified that Reese discussed use of guardrails at "every one" of the "safety meetings" McLeod attended (Tr. 48). The company's safety meetings, which are conducted approximately once a month, are not exclusively or primarily concerned with safety. Topics include, among other things, upcoming jobs and administrative matters, as well as safety (Tr. 62, Exh. R-4). On at least one occasion, on January 20, 1992, minutes of such a meeting were made (Exh. R-4, Tr. 69, 73). Among other matters, the minutes reflect a general reference to safety: "SAFETY - using common sense and good judgment. Don't cut corners." It contains a reminder to employees to "PLAN the proper amount of time involved for special rigging; i.e., guardrail, I-beams . . ." (Exh. R-4).²

These minutes attest to the general type of Respondent's safety instruction, as well as to the nature of the topics discussed at its "safety meetings." The very informality of Access's safety program and its policies regarding guardrails undercuts the testimony of Reese and his employee concerning the alleged specific oral directive. Access's argument that it has a work rule which proscribes the activities observed during the OSHA inspection must be viewed in light of Adams' misunderstanding or misstatement of that policy and McLeod's testimony that he had not realized the guardrail was off the platform until it was pointed out to him. These facts also bear upon whether such a work rule was effectively communicated to the employees.

Communication of the Work Rule to Its Employees

Construction of the platform tower is repetitious work (Tr. 43, 60). McLeod impliedly acknowledged that it requires conscious effort to replace the guardrail each time

² It is debatable whether work platform guardrails constitute "special rigging."

the tower sections are loaded (Tr. 61). It was for this reason, McLeod noted, Reese “stressed a number of times . . . to replace the guardrail as you go along” (Tr. 43). The actions of Access’s employees conflicted with the oral directions. Access’s foreman Adams was so unclear as to what the company policy was that he advised the compliance officer that the company, which had “helped write the standard,” did not require guardrails during the erection process. Reese also doubted whether guardrails were actually required during this process when he met with the compliance officer the next morning. Reese admits that he continues to question whether OSHA guardrail standards apply to the mast platform erection process (Tr. 70, 71). Although Reese affirms that he had advised the employees, notwithstanding, to use guardrails during the erection process, he was aware that what foreman Adams told the compliance officer was “talk around the office” (Tr. 70, 71). In such circumstances, where the employer could foresee that there might well be confusion concerning the company’s guardrail policy, the employer had a heightened responsibility to ensure that an appropriate work rule, if one existed, was accurately and effectively communicated to all employees.

The apparent confusion which existed for Respondent’s supervisory personnel emphasizes that this was not done to the extent required to establish its defense.

Attempts to Discover Violations

There is no evidence that Access has specific procedures in place to discover violations of its work rules. None was alleged. The noncompliance occurred during Access’s regular erection process and under the control of its supervisory employee.

Effective Enforcement of Work Rules

At the time of the inspection, not only did Adams apparently believe full guardrails were unnecessary, but McLeod, who shared the platform with him and who stated that he knew guardrails should have been used, did not even realize the guardrail was off. Like Adams on this job, McLeod had served as an Access foreman on other jobs (Tr. 55). Access

had not communicated to its employees that they would in any way be disciplined for infractions of the company's alleged oral work rule (Tr. 51). The "punishment," as McLeod assumed, was that a person would be hurt if an accident occurred, since Reese "never discussed punishment--he discussed safety" (Tr. 51). McLeod was not disciplined for his documented failure to use guardrails at the time of the inspection (Tr. 50-52).³

Access's communication and enforcement of its alleged work rule was insufficient to establish the defense of isolated employee misconduct. Given the conflicting views regarding the application of the guardrail requirement and without an appropriately communicated and enforced work rule, the employees' action in working without full guardrail protection was foreseeable.

Violation of § 1926.451(a)(4)

In its answer, Access admits that its employees violated the requirements of the standard. Consistent with its asserted defense, it denies that it had knowledge of the violative conditions. Adams was the foreman directing the erection of the mast platform. Both he and employee McLeod, who as noted, was also a foreman for the company at other jobsites, were exposed to the 60-foot fall. The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 19,344, p. 39449 (No. 86-1087, 1991). Access's affirmative defense having failed, the Secretary has established that Access had knowledge of the violation.

³ There is no specific proof in the record that any employee operated the mast platform without full guardrails prior to the inspection. McLeod did not admit that he violated the guardrail requirement in the past. McLeod testified that he would replace the guardrail on the platform after loading the tower section and before the platform was raised--not after the platform had left the ground (Tr. 49, 50, 53, 65, 66).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under § 17(j) of the Occupational Safety and Health Act of 1970 (Act), the Commission is required to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15, 032 (No. 4, 1972). Access has ten employees and had two on site. It has no history of previous violation of the Act. The gravity of the violation is high. Based upon the relevant factors, it is determined that a penalty of \$900 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

That citation for the serious violation of 29 C.F.R. § 1926.451(a)(4) is affirmed and a penalty of \$900 is hereby assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: February 1, 1993