

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.

Republic Services of Florida, L.P. d/b/a All
Service Miami-Dade,

Respondent.

OSHRC Docket No. **09-0266**

Appearances:

Uche Egemonye, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Carla J. Gunnin, Esquire, Constangy, Brooks & Smith, LLC, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Republic Services of Florida, LP, d/b/a All Service Miami-Dade (All Service) is in the business of garbage collection in south Florida. On December 19, 2008, an employee of All Service was operating a truck-mounted crane to unload a container at an apartment complex in Hialeah, Florida. The crane's boom came within 2 feet of an overhead power line, and the resulting electric charge caused the truck operator to be blown back from the truck and lose consciousness temporarily.

As a result of an investigation by the Occupational Safety and Health Administration (OSHA), All Service was issued on January 26, 2009, a serious citation alleging two violations of OSHA's electrical standards. Item 1 of the citation alleges a violation of 29 C.F.R. § 1910.332(b)(1) for failing to train the truck operator in the safety-related work practices required by the electrical standards. Item 2 alleges a violation of 29 C.F.R. § 1910.333(c)(iii)(A) for the truck operator's failure to maintain a safe distance when unloading a container near energized overhead transmission

lines. The citation proposes a penalty of \$1,875.00 for Item 1 and a penalty of \$4,500.00 for Item 2. All Service timely contested the citation.

The hearing was held on August 12, 2009, in Miami, Florida. Jurisdiction and coverage were stipulated (Tr. 7-8). The parties have filed post-hearing briefs.

All Service denies the violations. It claims drivers are trained to maintain safe distances from overhead power lines. Also, All Service asserts that it lacked knowledge of the operator's failure to maintain the safe distance that occurred on December 19, 2008.

For the reasons discussed, the alleged violations are vacated.

The Accident

All Service is in the garbage collection business and employs approximately 35,000 employees. It has an office in Medley, Florida. In addition to garbage collection, All Service designates certain employees to deliver large containers to a customer's location. At the time of the accident, the Medley facility had two drivers, Rodgrick Girtman and Simon Ceballos, who delivered the containers to customers (Tr. 6, 25-26, 48, 57-58, 125, 152).

On December 19, 2008, Girtman was delivering a four-cubic yard container to the Sevilla Park Apartments in Hialeah, Florida. The construction of the apartment complex was near completion, but no residents had moved in. The complex consisted of three four-story apartment buildings that formed a U-shape. The complex had two large parking areas, one in front of the buildings and one in the middle of the buildings. At the end of the buildings on the north and south, covered areas with chutes were built to hold the garbage containers. Ceballos had delivered a container to the south location about two weeks earlier (Exhs. C-1A, C-2E; Tr. 16, 21, 36-37, 54-58, 61-62, 66, 72-74).

Girtman was to unload the container using a truck-mounted crane and then move the container, which was on wheels, to the covered area at the end of the building on the north. When Girtman entered the parking lot, he parked the truck underneath power transmission lines that ran across the parking area in front of the building. The power lines were 28 feet above the ground. Girtman testified that he could not turn in front of the building because a parked utility van was blocking the road. While Girtman was unloading the container at about 8:20 a.m., the crane's boom came within 2 feet of an overhead power line. Electricity from the line shot to the ground, damaging the crane, knocking Girtman back and unconscious, and opening a hole in the ground. After the

accident, Girtman called All Service officials who arrived at the site within 15 minutes of his call. The paramedics and police were already on site. The All Service officials testified that they did not see a utility van in the area. Girtman was off work for a month and then given light duty work before he resigned from All Service (Exhs. C-1, C-2; Tr. 17-19, 58, 60-63, 73-79, 92-98, 105-09, 149-50).

After the police department notified OSHA, safety compliance officer Noel Buitrago investigated the accident. Buitrago arrived at the site at about 11:30 a.m., on December 19, 2008, and stayed until 5:00 p.m. As a result of the investigation, All Service received the serious citation at issue (Tr. 15, 21-22, 67).

The Parties' Stipulations

At the hearing, the parties stipulated as follows:

1. Rodgrick Girtman was an employee of All Service at the time of the accident on December 19, 2008.
2. On December 19, 2008, the crane boom came within 2 feet of the overhead power lines.
3. On December 19, 2008, the overhead power line was energized to 230,000 volts and was not insulated or guarded (Tr. 8-9).

Discussion

The Secretary has the burden of proving a violation. In order to establish a violation of an occupational safety or health standard, the Secretary must demonstrate:

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

All Service does not dispute that the cited standards, §§ 1910.332(b)(1) and 1910.333(c)(iii)(A), apply to its garbage container delivery business. It also does not dispute that employees are exposed to electrical hazards when they deliver containers and that the crane boom at the time of the accident was not a safe distance from the power lines.

Item 1 – Alleged Violation of § 1910.332(b)(1)

The citation alleges that “a truck-mounted crane operator was not familiarized with the safety-related work practices required by 29 C.F.R. § 1910.331 through § 1910.335.” Section 1910.332(b)(1), which identifies the “content for training,” provides:

Practices addressed in this standard. Employees shall be trained in and familiar with the safety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments.

OSHA claims All Service failed to train drivers on the safe distance to maintain from an energized power line. The record shows, and the Secretary does not dispute, that All Service has a safety program that includes a safety manual given to employees, monthly safety meetings for employees, and weekly tool box talks where safety is discussed (Tr. 37-46, 109-119, 138-47).

Girtman, who had been employed by All Service for 14 years as a delivery truck driver, testified that he had never been trained on the safe distance to maintain from an energized overhead power line. He recalled some training advising employees to maintain a safe distance. He indicated that he believed 5 feet to be a safe distance and that he had moved the truck crane’s boom within 5 feet of a power line on several occasions prior to the accident (Tr.76-88, 91-92).¹

Former safety manager Cesar Osegueda discussed the company’s monthly safety meetings. He testified the November 29, 2007 safety meeting specifically addressed the safe distances to keep the boom away from power lines. Girtman was present at that meeting. Osegueda testified that while it was not the main item under discussion, the safe distance requirements were discussed at other monthly meetings Girtman attended. Osegueda recalled that one such meeting occurred on August 28, 2008 (Exhs. R-4, R-5; Tr. 109-119, 130-36).

Osegueda also discussed the safety manual that is given to all employees. In the manual, Part B, Section 7, “Electrical Safety” at subsection 3.5.3, advises that “[u]nqualified employees and mechanical equipment must stay at least 10 feet (3.05 meters) away from overhead power lines. If

¹Girtman indicated that he had operated the crane’s boom from 2 to 5 feet from power lines on several occasions. Buitrago testified that Girtman stated that 2 feet was a “great distance” from a power line (Tr. 21-22, 45, 76-77). Girtman also indicated, however, that upon initially parking the truck crane at the subject site and observing that the power line was directly overhead, he moved the truck over to reduce his exposure (Tr. 74).

the voltage is more than 50,000 volts, the clearance must be increased by 4 inches (10 centimeters) for each additional 10,000 volts.” (Exh. R-9, pg. B7-5; Tr. 138-46).

The cited standard permits classroom or on-the-job training, and the degree of training is determined by the risk to the employee. *See* § 1910.332(c). Girtman, a high school graduate, had been an employee of All Service for more than 14 years as a container delivery truck driver, as opposed to a garbage collection driver. He had operated the truck-mounted crane that he drove on the day of the accident for about eight years (Tr. 70-72).

The only element of Girtman’s training under § 1910.332(b)(1) that the Secretary alleges was deficient was the clearance distances set out in § 1910.333(c). The standard requires that employees be trained in and familiar with the safety-related work practices that pertain to their respective job assignments. Based upon his testimony, Girtman obviously did not understand the need to maintain a safe distance or what the safe distance was. Although the training was provided, it is clear that Girtman did not comprehend the safe distance requirements. The dictionary defines “familiar” as “frequently seen or experienced.” *Webster’s English Dictionary* (2007 Edition). According to Osegueda, he regularly discussed safe distances during the monthly safety meetings even if it was not the main topic. The occurrence of an accident does not establish that an employee did not receive the training. *Intercontinental Terminals Co.*, 8 BNA OSHC 1554 (Nos. 78-5523, 78-5532, 1980) (ALJ). Also, an employee’s failure to comply with a safety rule does not establish a failure to train. *Dravo Engineers and Constructors*, 11 BNA OSHC 2010, 2011-12 (No. 81-748, 1984).

Despite Girtman’s testimony, the Secretary has failed to prove that All Service did not provide training to drivers regarding the safe distance to maintain from overhead power lines. She has also failed to show that the standard requires an employer to test employees to ensure they understand the requirement. The alleged violation has not been established.

Item 2 - Alleged Violation of § 1910.333(c)(3)(iii)(A)

The citation alleges that “a container delivery driver was exposed to electrical shock/electrocution when operating a truck-mounted crane and unloading a garbage/trash container near energized overhead transmission lines.” Section 1910.333(c)(3)(iii)(A) provides:

Any vehicle or mechanical equipment capable of having parts of its structure elevated near energized overhead lines shall be operated so that a clearance of 10 ft. (305 cm) is maintained. If the voltage is higher than 50kV, the clearance shall be increased 4 in. (10 cm) for

every 10kV over that voltage. However, under any of the following conditions, the clearance may be reduced.

The conditions, §§ 1910.333(c)(iii)(A)(1) through (3), do not apply in this case.

There is no dispute that Girtman moved the crane's boom within 2 feet of the overhead power line, which was energized at 230,000 volts. The line was not insulated or guarded. The resulting electrical shock rendered Girtman temporarily unconscious, damaged the boom, and dug a hole into the ground (Tr. 8-9, 18, 74-78). The Secretary has therefore met her burden of proving that the standard applies, that the terms of the standard were not met, and that an employee was exposed to the cited condition.

The issue for determination is whether All Service knew or should have known with the exercise of reasonable diligence that Girtman would not have complied with the safe distance requirements. There is no dispute that All Service had no actual knowledge of the condition. Girtman was operating the crane alone, and no supervisory employees were on site when he attempted to deliver the container at the apartment complex.

An employer who lacks actual knowledge can nevertheless have constructive knowledge of conditions that could be detected through an inspection of the work site. An employer is expected to use reasonable diligence to discern the presence of a violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). The factors relevant to a reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the adequate supervision of employees, the formulation and implementation of training programs, and the work rules designed to ensure employees work safely. *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991). *See also Hamilton Fixture*, 16 BNA OSHC 1073, 1089-90 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

In this case, there is no showing that All Service should have known of Girtman's failure to comply with the safe distance requirements for overhead power lines. As discussed, Girtman had received training about safe distances, and All Service provided employees with a safety manual identifying the safe distances to maintain from overhead lines.

All Service made reasonable efforts to anticipate hazards to which its employees could be exposed. Osegueda testified its salesmen routinely did risk assessments of new sites and its management used those assessments to decide whether to contract for delivery at the new sites.

Such an assessment was conducted on the Sevilla Park Apartments' site (Exh. R-1). The assessment indicated a low severity and probability of exposure to a hazard (Tr. 121-23).²

Osegueda and Anthony Ceglia, Girtman's supervisor, discussed All Service's observation program, where management officials observe drivers in the field and discuss with the drivers anything done incorrectly. The record shows that Osegueda and Ceglia made five observations of Girtman in 2007 and 2008, and he was warned about occasionally using the cell phone, changing lanes without signaling, and driving over the speed limit (Exh. R-8). Both stated that if Girtman had been too close to power lines during any of the observations, that would have been noted on the forms, and that would have subjected Girtman to discipline.³ All Service's discipline program is progressive; consisting of verbal and written warnings, suspension and termination. Osegueda and Ceglia considered Girtman a safe employee despite noting the driving warnings (Tr. 124-29, 152-56).

As noted above, Girtman testified that he knew the power lines were present, and he moved the truck over to reduce his exposure (Tr. 74). Based on the photographs of the property, there were other areas in the parking lot he could have parked to unload the container that would not have exposed him to the power lines (Tr. 34-35). Girtman testified that he wanted to turn on the perimeter road in front of the building but that a utility van was blocking the road (Tr. 74-75, 93-96). No one else saw the van (Tr. 66, 107-09, 150). Regardless, there were other areas to unload the container. The container was on wheels and had to be pushed to the covered location (Tr. 34-37). Girtman testified he generally parked outside a property and then pushed the container to its location for exercise (Tr. 96-98).

In addition, above the controls that operated the truck crane, there was a sign provided by the manufacturer warning the operator of the "Danger" of an electrocution hazard if the truck was in close proximity to overhead power lines. The sign sets out the safe clearance information required by the cited standard (Exh. R-2). Girtman, who stated that he had been driving the same

²Although the risk assessment seems to apply to the container location in the south building, the same risk applied to the north building because Girtman did not have to park underneath the power lines

³Ceglia testified that for being too close to a power line, Girtman would have received at the very least a written warning (Tr. 156).

truck for eight years, testified that he was aware of the “Danger” sign and that he had “glanced through it.” (Tr. 72, 88-89, 98-99).

Based on this record, All Service has shown that it exercised reasonable diligence and that it had no reason to know that Girtman would have acted as he did on the day of the accident. The alleged violation has not been established.

**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:

1. Item 1 of Serious Citation 1, alleging a violation of § 1910.332(b)(1), is vacated, and no penalty is assessed.

2. Item 2 of Serious Citation 1, alleging a violation of § 1910.333(c)(3)(iii)(A), is vacated, and no penalty is assessed.

\s\ Ken S. Welsch
KEN S. WELSCH
Judge

Date: December 15, 2009