



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

PSP MONOTECH INDUSTRIES,

Respondent.

OSHRC Docket No. 06-1201

APPEARANCES:

Nickole C. Winnett, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Jonathan L. Snare, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, CA
For the Respondent

DECISION

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

PSP Monotech Industries (“PSP”) operates a sheet-metal fabrication plant in Schertz, Texas. On March 14, 2006, a PSP employee was killed and another was seriously injured when they were struck by a large, sheet-metal panel that fell from an overhead floor crane. Following an inspection of the worksite, the Occupational Safety and Health Administration (“OSHA”) issued PSP a citation alleging a serious violation of the general duty clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. §§ 651-678.¹ After a hearing, Administrative Law Judge James H. Barkley affirmed the citation and assessed the \$5,000 penalty proposed by the Secretary. For the following reasons, we affirm the citation.

¹ The citation included three additional instances of violation of the general duty clause which the Secretary withdrew at the beginning of the hearing. The parties also settled a three-item citation alleging other-than-serious violations of various recordkeeping standards.

ISSUES

The Secretary contends that PSP violated the general duty clause by failing to keep its employees clear of a suspended load. PSP contends that the company has a safety rule which requires its employees to stay clear of the load and that the accident was the result of unpreventable employee misconduct.

The issues on review are: (1) whether the Secretary established a feasible means of abating the recognized hazard; (2) whether the Secretary established that PSP had knowledge of the hazardous conditions; and (3) whether PSP established the affirmative defense of unpreventable employee misconduct.

FINDINGS OF FACT

During the fabrication process, PSP employees assigned to work as welders use an overhead floor crane to move large, heavy sheet-metal panels between workstations inside the plant. To move a panel from the workstation on which it is lying flat, a PSP welder uses the crane's pendant control to move the trolley assembly above the panel. The welder then attaches the panel to the trolley assembly with a clamp attached to a wire rope, lifts the panel to a vertical position six to twenty inches off the floor, and positions himself at the back end of the panel while using the pendant control to move the panel to the next workstation.

To avoid being hit by a suspended panel in the event that it falls, PSP requires its employees to "stay clear of the load." This rule is set forth in a handout entitled "Crane Operations – Working Under the Load" that PSP provided employees during a weekly safety meeting. In addition to the handout, PSP welders receive on-the-job training on overhead floor crane operation. Before moving a panel, PSP requires the welder operating the overhead floor crane to clear the area by either shouting out to or physically tapping the welder at the nearest workstation and telling the welder to move out of the way. Like a chain reaction, each welder is expected to inform the next welder, continuing down the line to the end of the panel's path.

On March 14, 2006, welder Mike Apaez was using an overhead floor crane to move an 11 x 22-foot panel weighing 3,700 pounds when the panel came loose from the clamp and fell, killing Apaez and seriously injuring welder Roland Luna, who was working near the panel.

I. FEASIBLE MEANS OF ABATEMENT

PRINCIPLES OF LAW

Section 5(a)(1) of the Act states that each employer "shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a

violation of section 5(a)(1), the Secretary must demonstrate that (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535, 1992 CCH OSHD ¶ 29,617, p. 40,097 (No. 86-360, 1992) (consolidated case).

ANALYSIS

At the start of the hearing, PSP stipulated to all four elements required to prove a general duty clause violation explaining that, instead of disputing the Secretary's prima facie case, the company intended only to establish the affirmative defense of unpreventable employee misconduct.² On review, however, PSP claims the Secretary failed to establish a feasible means of abatement because she did not specify the steps the company should have taken to abate the recognized hazard beyond its work rule requiring employees to stay clear of the load.

We disagree with that claim. PSP waived its right to dispute this element of the Secretary's burden of proof by stipulating that "stay[ing] clear of the falling load" was a feasible means of abatement. PSP has given no reason as to why this stipulation should not be conclusive, and we find nothing in the record to indicate that PSP withdrew its agreement to the stipulation. *See Laird v. Air Carrier Engine Serv., Inc.*, 263 F.2d 948, 953-54 (5th Cir. 1959) (stating that stipulations are binding until they are withdrawn); *Pyramid Masonry Contractors Inc.*, 16 BNA OSHC 1461, 1463, 1993-95 CCH OSHD ¶ 30,255, p. 41,673 (No. 91-0600, 1993) (finding that "the plain language and intent of the stipulation prevail"). Moreover, the Secretary relied on the stipulation and refrained from presenting evidence relating to this element. Accordingly, we reject PSP's contention that the Secretary failed to meet her burden of proving a feasible means of abatement.

II. KNOWLEDGE

PRINCIPLES OF LAW

In addition to establishing the four elements of a general duty clause violation, the Secretary must also show the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition.³ *Tampa Shipyards, Inc.*, 15 BNA OSHC at 1535, 1992 CCH OSHD at 40,097; *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207, 2007 CCH OSHD ¶ 32,920, p. 53,552 (No. 03-1344, 2007). When actual knowledge is lacking, the Secretary may prove constructive knowledge

² Specifically, PSP stipulated to the following at the start of the hearing: (1) an employee "working [beside] a suspended load is a recognized hazard"; (2) "staying clear of the load" is a feasible means of abatement; and (3) "if, in fact, there were a violation found, that it was[...]serious."

³ The Secretary does not allege and we have discovered no evidence to suggest PSP had actual knowledge of the hazardous condition.

by showing that the employer failed to establish an adequate program to promote compliance with safety standards.⁴ *NYSEG*, 88 F.3d at 106. In determining whether a safety program is adequate, the Commission considers whether the employer “has established workrules designed to prevent the hazards from occurring, has adequately communicated the workrules to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance.” *Inland Steel Co.*, 12 BNA OSHC 1968, 1976, 1986-87 CCH OSHD ¶ 27,647, p. 36,003 (No. 79-3286, 1986) (citation omitted).

ANALYSIS

The judge found that PSP’s handout containing its work rule regarding the movement of panels with overhead cranes “was a vaguely worded written policy, clearly intended to address the suspending and guiding of overhead loads out of doors, not the fabrication shop” and that it “falls short of abating the hazard.” We need not decide whether the work rule at issue here was adequate because, even assuming *arguendo* that it was, we conclude that PSP’s safety program was nevertheless inadequate because this general rule was not adequately communicated to its employees. Bernard Jimenez, an experienced welder and member of PSP’s safety committee, was responsible for training new welders on the overhead floor crane on their first day of work, including Apaez. He testified that the instruction to employees is to use their common sense. At the same time, he stated that he trained Apaez to make sure employees in the area move back approximately four to five feet, a distance Jimenez conceded would not have been enough to keep an employee from being struck by the 11 x 22-foot panel that fell on the day of the accident. Finally, Jimenez testified that employees are expected to move back as far as they can when the welder is moving a panel, though employees are not expected to move if the welder is only flipping the panel at the workstation.

Testimony from two other witnesses did little to clarify Jimenez’s testimony. Jesse Mora, Apaez’s supervisor, testified that he expected employees to move back maybe fifteen to twenty feet,

⁴ With regard to the burden of proof issue delineated in our briefing notice, we note that the Secretary’s burden of proving constructive knowledge and PSP’s burden of showing unpreventable employee misconduct rest upon an overlapping issue—whether PSP had an adequate safety program. *N.Y. State Elec. & Gas Corp. v. Sec’y of Labor* (“*NYSEG*”), 88 F.3d 98, 106 (2d Cir. 1996). Nevertheless, the Secretary has the initial burden of proving all the elements of her prima facie case to establish a general duty clause violation, including employer knowledge of the violative condition. *Otis Elevator Co.*, 21 BNA OSHC at 2207, 2007 CCH OSHD at 53,552. Therefore, to the extent the judge may have suggested that the Secretary did not have the initial burden of proving knowledge, we find that he erred. *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539 (5th Cir. 2000). However, we conclude that any error was harmless because, as discussed below, the record as a whole establishes that PSP’s safety program was inadequate. *See Bristow v. Drake Street Inc.*, 41 F.3d 345, 353 (7th Cir. 1994) (“Burdens of persuasion affect the outcomes only of cases in which the trier of fact thinks the plaintiff’s and the defendant’s positions equiprobable”).

depending on the height of the panel. On the other hand, Thomas Davies, the Corporate Safety Manager for PSP's parent company, testified that employees should use their own discretion to determine how far back to remove themselves, but conceded that there was no particular method employees should use in determining a sufficient distance. Based on this evidence, we find that PSP communicated its general work rule to employees in an inconsistent and confusing manner. Indeed, if employees followed Jimenez's instructions to move back four to five feet from a suspended panel, they would likely be within the zone of danger in the event that a suspended load fell. Under these circumstances, we conclude PSP had an inadequate safety program because the work rule was not adequately communicated to employees and, therefore had constructive knowledge of the violative conditions.⁵

III. UNPREVENTABLE EMPLOYEE MISCONDUCT

PRINCIPLES OF LAW

An employer may defend against a violation by establishing the affirmative defense of unpreventable employee misconduct. To establish the defense, the employer is required to prove that “(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered.” *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998) (*per curiam*).

ANALYSIS

As discussed above, PSP's safety program was inadequate because its work rule requiring employees to stay clear of a suspended load was not adequately communicated. Under these circumstances, PSP cannot establish that the accident was the result of unpreventable misconduct. *See Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1503, 2001 CCH OSHD ¶ 32,397, p.49,867 (No. 98-1192, 2001) (finding that employer's affirmative defense of unpreventable employee misconduct failed “for largely the same reasons upon which [the Commission] base[d] [its] finding of constructive knowledge of the violation at issue; [employer] failed to establish and adequately communicate a work rule that was designed to prevent the hazard”), *aff'd*, 319 F.3d 805 (6th Cir. 2003). Accordingly, we conclude that PSP failed to establish the affirmative defense of unpreventable employee misconduct.

⁵ Since we find that PSP failed to adequately communicate its work rule, we need not consider whether the company took steps to discover noncompliance with the rule or effectively enforced the rule. *Inland Steel Co.*, 12 BNA OSHC at 1976, 1986-87 CCH OSHD at p. 36,003.

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude the Secretary established a feasible means of abatement that would eliminate or materially reduce the recognized hazard of working near a suspended load, and that PSP had constructive knowledge of the hazardous conditions. We further conclude that PSP failed to establish the affirmative defense of unpreventable employee misconduct. Therefore, we affirm a serious violation of the general duty clause.

ORDER

We affirm Citation 1, Item 1(a) and assess a penalty of \$5,000.⁶

SO ORDERED.

/s/ _____
Horace A. Thompson III
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: 8/14/2008

⁶ The parties dispute neither the characterization of the violation nor the penalty amount assessed by the judge.

SECRETARY OF LABOR,

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PSP MONOTECH INDUSTRIES,

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OSHRC DOCKET NO. 06-1201

APPEARANCES:

For the Complainant:

Michael D. Schoen, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, PSP Monotech Industries (PSP) was engaged in sheet metal fabrication at its Schertz, Texas facility. PSP admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On March 14, 2006, the Occupational Safety and Health Administration (OSHA) was notified of a fatality at PSP's worksite and initiated an investigation of that incident. As a result of its inspection, OSHA issued citations alleging violations of 29 CFR §1904 and §5(a)(1) of the Act. By filing a timely notice of contest, PSP brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Immediately prior to the hearing, the parties entered into a partial settlement agreement disposing of the §1904 violations. That agreement is approved and is incorporated by reference in this Order. At the January 24, 2007 hearing, the Secretary withdrew instances (b), (c), and (d) of the remaining citation (Tr. 16). A hearing was held on the remaining instance (a), and briefs were submitted. This matter is ready for disposition.

Alleged Violation of §5(a)(1)

Serious Citation 1, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment free from recognized hazards that were causing, or likely to cause, death or serious physical harm to employees in that employees were exposed to the hazard of being struck by falling suspended loads:

On or about March 14, 2006, at this facility employees were exposed to the hazard of being struck by falling suspended loads while using a Campbell SAC clamp to hoist a load. The employer did not ensure the following with respect to the use of the clamp:

(a) Employees were not kept clear of the suspended load.

The Violation. On March 14, 2006, Mike Apaez and Roland Luna, both welders at the PSP facility, were crushed by a sheet of fabricated metal when it fell from a clamp from which it was suspended. Apaez was killed and Luna seriously injured.

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

PSP stipulates that being crushed by a falling suspended load is a recognized hazard in its industry. Moreover, PSP agrees that keeping employees clear of such loads is an appropriate means of abatement (Tr. 21-23, 110).¹ PSP argues however, that it cannot be held responsible for actions of its employees that were unforeseeably contrary to its explicit safety instructions.

The courts have variously considered this issue as the affirmative defense of unpreventable employee misconduct, to be proven by the employer, and as constructive knowledge, which is part of the

¹ In its post-hearing brief, Complainant suggests that using tag lines is a feasible means of abating the cited hazard. The use of tag lines, however, was not listed as a suggested means of abatement in the complaint. Moreover, Complainant introduced absolutely no evidence tending to show that the use of tag lines inside the facility was recognized by either PSP or by other "knowledgeable persons familiar with the industry" as a "necessary and valuable [step] for a sound safety program *in the particular circumstances*" existing at this worksite. See *Cerro Metal Products Division, Marmon Group, Inc.*, 12 BNA OSHC 1821, ¶27,579 (No. 78-5159, 1986) [emphasis added]. Complainant's reliance on PSP's use of tag lines to guide suspended loads outside the facility is misplaced. The witnesses at trial adequately distinguished the hoisting of overhead loads out of doors from the movement of panels with a floor operated crane inside the plant (Tr. 70-71, 76, 100, 183, 218-19, 252-54; Exh. C-6, R-9).

Secretary's *prima facie* burden. *New York State Elec. & Gas Corp. v. Secretary*, 88 F.3d 98, 107 (2d Cir. 1996); *Brock v. L. E. Meyers Co.* 818 F.2d 1270 (6th Cir 1987), *cert denied* 108 S. Ct. 479 (1987). In this case, regardless of the placement of the burden of proof, the record shows that exposure to the recognized crushing hazard resulted from PSP's failure to adequately establish, communicate and enforce explicit policies prohibiting, 1) walking beside fabricated panels and 2) moving panels through occupied work areas in its plant.

The Accident. On March 14, 2006, in Building 1, Bay 3, of PSP's facility, Mike Apaez was working on the panel depicted in Complainant's Exhibit 4. The 11 x 22-foot, 3,700 pound fabricated metal panel was, at that time, lying flat on a skid, or work table (Tr. 41-45, 50-51, 59-63). After finishing work on the panel, Apaez used a pendant control to move the trolley assembly of an overhead floor crane above the middle of the top edge of the panel. He then attached the panel to the trolley assembly with a clamp attached to a wire rope (Tr. 45, 63-66; Exh. C-4). The panel was then lifted to the vertical, hanging straight down from the clamp with the bottom of the panel 6 to 20 inches off the floor (Tr. 50-51, 66, 68, 177).

According to Bennie Hooper, PSP's vice president of operations, did not witness the accident, but testified that Apaez would then have positioned himself at the back end of the panel and steadied it with his hand while using the pendant control of the overhead crane to move the panel to the next work station (Tr. 67-68, 176). He stated that operators are trained to follow behind the panel, not to walk beside it while it is moving (Tr. 67-68, 75, 83). Operators are not to position themselves on the sides where they would be "under" or next to the load (Tr. 84, 195). Hooper further testified it is PSP's policy that the operator is responsible for making sure the pathway is cleared of other employees (Tr. 85). If other employees are in front of or beside the panel, the operator is to stop and clear the area (Tr. 85-86).

Apaez neither stood clear of the load, nor cleared the area. Apaez was crushed under the fabricated panel when it came loose from the clamp and fell. Luna was caught on his hands and knees near the front of the panel (Tr. 170-73, 179; Exh. C-4).

PSP's Safety Program. Apaez began work for PSP on December 16, 2005 (Tr. 124). At that time, Apaez' foreman, Jesse Mora, assigned an experienced employee, Juan Herrera, to work with Apaez. Mora testified that new hires are not left to work by themselves (Tr. 158, 166). Mora determined Apaez required additional training, including training in the operation of the floor crane (Tr. 127, 153-54; Exh. C-11, R-6, p. 2). Bernard Jimenez, a PSP welder who was on PSP's safety committee and who had completed a "Train the Trainer" safety course on overhead crane operation, conducted Apaez' training the day he began

work (Tr. 129, 154, 156, 225-26). Jimenez was to act as Apaez’ “mentor” for crane operations in Bay 3 (Tr. 129).

In the course of his training, Apaez was required to demonstrate proper hook up techniques as well as his ability to raise, and lower the load and to move the crane in all directions (Exh. C-12; R-8, item 7). Jimenez testified he trains operators to keep as much distance as they can from panels they are moving (Tr. 244), *i.e.*, to stand as far behind and to the side of the panel as the pendant control allows (Tr. 245-46). Mora, however, testified that operators routinely hold the end of the panel and walk beside it, not just behind it, to keep it from swinging (Tr. 218). Mora did not believe that walking alongside the panel was a hazardous practice. It had always been done that way, and was not prohibited by PSP’s safety rules (Tr. 218-19).

Apaez was required to perform a “work area pre-lift observation for employees and obstructions,” (Exh. C-12, R-8, item 7); *i.e.*, before asking Apaez to lift a load, Jimenez instructed Apaez to secure, or clear the area around him (Tr. 227). According to both Mora and Jimenez, the operator ordinarily clears the area by tapping the welder nearest him and telling him to move out of the path (Tr. 162-65, 191, 229-30). “After that, its kind of like a chain reaction. You know, that employee tells the [person] that’s next to him . . .” (Tr. 229-30).

PSP’s ongoing safety training on crane operations includes a Monday morning safety talk (Tr. 164). Mora testified the hazards of working under a load are discussed “pretty often” (Tr. 164-65; Exh. C-6; R-9). An information sheet distributed at a February 13, 2006 safety meeting was titled **CRANE OPERATIONS–WORKING UNDER THE LOAD**, and states:

. . . Loads can be heavy, difficult to rig, and are subject to unexpected movement. There is only one sure way to avoid injury—stay clear of the load!

Crane movements should always be considered prior to set up. Every effort should be made to avoid having to move the load over the work area. If this cannot be done, work should be temporarily halted and the area cleared while the pick is taking place.

Be aware of what is happening around you and above you.

Others may not be as conscientious as they should. An operator may not even think of the danger of moving a load over your head. If you see a load coming, get out of the way. Don’t forget to look out for your buddy also.

Riggers and others may have to work near a suspended load in order to guide it into position. The use of tag lines can help keep you out of harm’s way, the tag line will put distance between yourself and the load in the event the load shifts or moves unexpectedly.

* * *

Lastly, be sure if you are guiding a load with a tag line that your travel path is clear and safe **before** the load is suspended. You will be spending a lot of time watching the load, rather than where you are going. . .

(Tr. 80; Exh. C-6, R-9). Apaez's foreman, Jesse Mora, was present at the February 13, 2006 safety meeting regarding crane operations, as was Mike Apaez (Tr. 80-82, 150; Exh. C-6, R-9, p. 4). Mora testified the handout was intended to cover operations inside the bay as well as "trial fits" outside the plant (Tr. 144). According to Mora the warning to stay clear of the load encompassed the area on either side of a suspended vertical panel (Tr. 207).

Because the size of PSP's fabricated panels varies, its employees must exercise their own judgment in determining how far from the load it is safe to stand (Tr. 46-47, 86-87, 90). At the hearing Jimenez testified that he would be happy with employees moving four or five feet back from the panels, though they are trained to move as far back as possible (Tr. 247-48).² He further testified that if an operator was merely flipping a panel, rather than moving it through the bay, other employees are not required to move completely out of the way (Tr. 257-58).

A foreman is present in each bay to ensure that operators are following proper procedures (Tr. 58, 72, 201). Mora, the foreman in Bay 3, stated would stop any operator he observed hoisting a fabricated panel without clearing employees from the work stations on either side of him (Tr. 201-04). As soon as a welder is notified that an operator is ready to move a panel, the welder is supposed to notify the next worker down the line, whereupon "everybody" stops working and moves to the side (Tr. 205-06; See Jimenez's testimony, Tr. 233). Mora could not explain why Luna had not been cleared from Apaez' path (Tr. 208).

PSP's safety program provides for progressive discipline including 1) a verbal warning, which is to be recorded, 2) a written warning, 3) a three day suspension and 4) discharge (Tr. 132-36; Exh. R-5, R-13). Mora admitted he has stopped lifts because he observed people in the area (Tr. 206). In the two years he has been a foreman, Mora has issued perhaps three, "no more than five" verbal reprimands to his crews for failure to warn employees working in areas where panels were being moved (Tr. 209-13). He never put any of these reprimands in writing, however, though he understood that it was PSP's policy to write up all instances of safety violations (Tr. 209, 214-15).

On the day of the accident Jimenez was working approximately three stations down from Apaez (Tr. 237). Immediately prior to lifting the panel depicted in Exhibit C-4, Apaez told Jimenez he was going

² The bay is approximately 40 feet wide and 250-300 feet long (Tr. 78).

to move it down the bay (Tr. 238). Jimenez continued buffing and grinding the piece he was working on (Tr. 239). He did not step back from his work area to make way for the panel coming through (Tr. 239). At the hearing Jimenez testified that he knew he was supposed to stop work, and could not explain his failure to do so (Tr. 239-240).

Though Mora, Herrera and Jimenez were all in the bay at the time, no one witnessed the accident (Tr. 168, 175, 217, 223).

Discussion. Where, as here, the cited hazard is a form of hazardous conduct by employees, a 5(a)(1) violation will be found where the hazardous conduct is “substantially probable,” *i.e.*, foreseeable “under the employer’s regime of safety precautions. . .” *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1268, n. 41 (D.C. Cir. 1973); *see also, New York State Elec. & Gas Corp. v. Secretary*, 88 F.3d 98, 107 (2d Cir. 1996) [employer’s constructive knowledge of hazardous conduct may be predicated on an employer’s failure to establish an adequate safety program].

PSP argues that it had established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *See, L.R. Willson and Sons Inc. v. Occupational Safety and Health Review Commission*, 134 F.3d 1235 (4th Cir. 1998). The record, however, supports a contrary conclusion.

PSP’s rules regarding the movement of fabricated panels on overhead cranes was a vaguely worded written policy, clearly intended to address the suspending and guiding of overhead loads out of doors, not inside the fabrication shop (Exh. R-9). The document “Crane Operations–Working Under the Load” cautions crane operators to avoid “[moving] the load over the work area,” looking out for operators “moving a load over your head,” and using tag lines “to put distance between yourself and the load.” None of these provisions apply to the use of the floor crane. Respondent would have us believe the written policy was, therefore, modified verbally to address the specific hazards posed by vertical loads moving through the indoor work area by means of pendant controlled trolley and hoist.

PSP insists that the principle set forth in its policy on crane operations, “stay clear of the load” was equally applicable to both indoor and outdoor hoisting operations. This may be true, but, without further explication, that warning falls short of abating the hazard. And the record shows that PSP did not adequately communicate the particulars of its verbal policy to its employees, including its supervisors. Mora, a foreman, did not realize that walking beside a suspended panel was hazardous and did not believe the practice was prohibited by PSP’s safety policy. Mora was aware of a previous accident where an employee was injured by a falling beam (Tr. 201), yet did not find it merited a written warning when he

observed operators failing to clear the area before lifting a panel. The importance of walking behind the panels, and of clearing other employees from the area appears to have been touched on only once during Apaez' initial training on the day he was hired. It was not reiterated during subsequent Monday morning safety talks (Tr. 243, 249-50). The evidence establishes that PSP's stated policies were neither clearly communicated, nor vigorously enforced.

The movement of fabricated panels through the welding bay is a frequent event, taking only three to five minutes, and occurring every thirty minutes or so during the day (Tr. 70, 174, 205). Welders working in the bay must be constantly interrupted and asked to move back from their work stations to a distance equaling the height of the panel, to allow the panels to pass. That the welders are reluctant to interrupt their work is understandable, as is the, at best, spotty compliance with the rule. Most significantly, Jimenez, a member of PSP's safety committee and Apaez' mentor for crane operations, admitted that he ignored Apaez' caution, given immediately prior to the accident. He failed to clear the area; in fact, he did not even look up, continuing to work on the piece he was buffing until he heard the sound of the panel falling (Tr. 238-40).

While Respondent had a written safety program for its outside cranes, in spite of having one incident of falling material inside, it had not developed a comparable written policy for its inside cranes. The testimony establishes the scope of its verbal "policy" was neither fully understood nor enforced by its supervisory personnel. At the time of the accident, one employee, Apaez, placed himself in the zone of danger and failed to clear another employee, Luna, from the danger zone. A third employee, the crane safety trainer, Jimenez, failed to remove himself from the zone of danger even after being warned.

In conclusion, PSP's purported verbal safety rule was ineffectual at best. Mora, the foreman in Bay 3 neither fully understood the rule, nor enforced the rule as he did understand it. Apaez's training in the proper transport of fabricated panels was minimal, consisting of only a single practical demonstration on the same day he was hired. Training on the operation of indoor cranes was not reinforced by weekly safety meetings. Retraining on outdoor crane safety may actually have undermined any relevant training he received at hiring. Apaez's trainer, Jimenez, demonstrated a complete disregard for the crane safety rules he imparted to Apaez. Given PSP's failure to effectively communicate and enforce a clear policy on the proper precautions to be taken in transporting fabricated panels indoors, it was reasonably foreseeable that employees would be exposed to the cited crushing hazard. The Secretary has established the cited violation.

Penalty

The parties stipulate that the cited hazard was serious and that the proposed penalty of \$5,000.00 is appropriate (Tr. 24).

ORDER

1. Serious citation 1, item 1, alleging violation of §5(a)(1) of the Act is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: April 12, 2007