

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.

Valley Interior Systems, Inc.

Respondent.

OSHRC Docket No. 06-1395

Appearances:

Janice L. Thompson, Esquire, U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For Complainant

Jesse R. Lipcius, Esquire and Stephen S. Holmes, Esquire, Cors & Bassett, Cincinnati, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsh

DECISION AND ORDER

Valley Interior Systems, Inc. (Valley) is a commercial exterior/interior framing and drywall contractor with offices in Ohio. On February 28, 2006, a rented JLG aerial lift collapsed on a construction site at Central State College in Wilberforce, Ohio. Valley's lift operator died several days later. As a result of the aerial lift's collapse, the Occupational Safety and Health Administration (OSHA) conducted an inspection.

On August 1, 2006, a serious citation was issued to Valley which alleges a violation of § 5(a)(1) of the Occupational Safety and Health Act (Act) for failing to remove the malfunctioning JLG aerial lift from service until it was repaired or determined to be in a safe operating condition. The serious citation proposes a penalty of \$5,000.00. Valley timely contested the citation.

The hearing was held in Dayton, Ohio, on February 7 and 8, 2007. The parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post hearing briefs.

Valley denies the alleged violation of § 5(a)(1) and asserts the collapse of the aerial lift was not a recognizable or foreseeable safety risk. Valley, also, claims that if a recognized hazard under § 5(a)(1) is found, the violation should be vacated because it was the result of unpreventable supervisor/employee misconduct.

For the reasons discussed, the violation of § 5(a)(1) of the Act is affirmed and a penalty of \$3,000.00 is assessed.

The Accident

Valley is engaged in the commercial construction business as a contractor for the installation of framing, acoustic ceiling, plastering, and drywall. Valley's corporate office is in Cincinnati, Ohio. Other offices are located in Dayton, Findlay, and Columbus, Ohio. Valley employs more than 400 employees and has been in business since 1981 (Tr. 81, 181, 257-258, 269).

In August 2005, Valley contracted with general contractor, Mardis-Meehan, to install the metal stud framing and drywall for a new science building at Central State College in Wilberforce, Ohio (Tr. 20-21, 27, 84). The project was completed during the summer of 2006 (Tr. 83).

Valley's field foreman for the project was Anthony (Shane) Michael who has been employed by Valley for seven years (Tr. 83). As field foreman, Michael's authority included correcting unsafe conditions, enforcing company safety rules, initiating disciplinary actions, performing safety inspections, planning the day's work, and scheduling employees (Exh. C-11, p. 4; Tr. 20, 24, 60, 77, 79). Although paid by the hour, Michael considered himself part of Valley's management team (Tr. 307). Michael maintained communication with his crew and Valley's higher level supervision by Nextel radio (Tr. 25). On the day of the accident, Michael was the highest ranking supervisor on the project (Tr. 24-25).

To install the exterior framing for the new science building, Valley rented a 60-foot straight boom aerial lift from United Rentals (Tr. 29-30, 84, 96). Valley has rented heavy construction equipment from United Rentals for approximately five years (Tr. 98, 101).

Carpenter James Hill operated the 60-foot aerial lift for two work days prior to the accident (Tr. 28-29). Hill, an hourly employee, had been employed by Valley since 1998. He had worked on the Central State College project since January 13, 2006 (Exh. R-7; Tr. 28, 281, 326). The 60-foot aerial lift operated without problem.

On February 27, 2006, Valley ordered a JLG 80-foot articulating boom aerial lift from United Rentals because of the height of the rotunda where the gutter system was to be installed (Exh. C-6; Tr. 32, 84, 105, 108). The JLG's "Operators and Safety" manual describes the aerial lift as a "self-propelled aerial work platform on the end of an elevating, telescoping and rotating boom." The lift's "intended purpose is to position personnel with their tools and supplies at positions above the ground level" (Exh. C-7, p. 4-1). Unlike a straight (stick) boom which has a base that raises and a telescoping arm, the JLG 80-foot aerial lift consists of a "tower base boom" which is attached to a turntable on a bearing and a "tower fly boom" that telescopes from inside the tower base boom to reach higher work areas (Exh. C-7; Tr. 45, 92, 106, 226-227). A knuckle, the main boom assembly and the work platform are above the tower boom assembly. Despite having approximately 20 years of experience operating other types of aerial lifts, Michael had not previously worked with a 80-foot articulating boom aerial lift (Tr. 35, 81, 307).

On Tuesday, February 28, 2006, Valley's crew was performing work inside the building and outside the rotunda. The crew consisted of approximately seven employees and field foreman Michael (Tr. 21, 27). The crew started work at 7:00 a.m. (Tr. 37, 82, 84). At approximately 9:00 a.m., the 80-foot JLG articulating aerial lift, model 800AJ, was delivered to the project (Exhs. C-5, C-6; Tr. 37, 85).¹ After performing a visual inspection, Michael signed for the aerial lift (Tr. 40, 63, 73, 85). Michael assigned Hill to operate the lift to install metal brackets for the gutter system around the rotunda (Exhs. C-1, p. 2, C-4; Tr. 40). Although he had worked with Hill on multiple occasions, Michael did not know whether Hill had previously operated a 80-foot articulating boom aerial lift (Tr. 35, 91, 310). Hill began operating the aerial lift at approximately 9:30 a.m.

At approximately 10:00 a.m., Michael was informed by Hill that the aerial lift was not working properly because the tower base boom would not lower and the tower fly boom would not retract. The entire tower boom assembly was stuck in a vertical position (Exh. C-7, p. 2; Tr. 41, 42, 45, 86-87). Hill was able to return the work platform to the ground by articulating the main boom and knuckle (Exhs. C-5, p. 2, C-8; Tr. 41, 43). The JLG for the model 800 series' brochure states

¹ The aerial lift was manufactured by JLG in 2002 (Tr. 147).

the new boom design “allows the platform to be lowered to the ground while the tower boom is fully raised and extended” (Exh. C-5, p. 5).

Upon inspecting the aerial lift, Michael initially believed the problem with the tower assembly was caused by cold hydraulics (Tr. 88). The warning lights and alarms were not activated (Tr. 77, 192). However, after talking to Hill and checking the controls in an attempt to correct the problem, Michael decided the problem was not cold hydraulics. He could not, however, find a cause for the tower assembly’s inability to move (Tr. 48, 50, 88). Other than the tower base boom and tower fly boom, the aerial lift appeared to operate properly (Tr. 48).

Michael telephoned United Rental’s sales representative David Moses and requested for a service technician to be sent to the project. After checking with the service department, Moses told Michael that no one could get to the project until the next morning (Tr. 50, 88-89, 96, 110-111, 114). Michael also discussed obtaining another 80-foot aerial lift but decided it was not necessary (Tr. 111, 113). Moses was not asked by Michael about the safety of the lift or whether he should continue to operate it (Tr. 76, 114, 116). On the other hand, Moses did not tell Michael to remove the lift from service or suggest that it posed a hazard. As sales representative, Moses testified he was not trained in the technical aspects of aerial lifts. He was not a qualified service technician (Tr. 102-103, 114).

After discussing it with Hill, Michael decided to continue operating the 80-foot aerial lift to install the metal brackets. According to Michael, Hill wanted to get back to work (Tr. 51, 89). Neither Michael nor Hill had read the lift’s operation manual (Exh. C-7; Tr. 58-59). The operation manual and warning labels on the lift instructed operators that if the lift malfunctioned, it needed to be immediately taken out of service (Exhs. C-9, C-10; Tr. 57).

Michael had experienced two previous incidents when a boom lift platform could not be lowered to the ground. One of the lifts had run out of gasoline. Michael was able to manually lower the operator to the ground. In the other incident, a mechanic had to come to the site to repair the lift (Tr. 46).

As Hill resumed his work from the aerial lift, Michael left the area to get razors for the crew working in the interior of the building (Tr. 52). Michael agreed the lift’s tower assembly was not properly operating and was not repaired (Tr. 62).

At approximately 11:00 a.m., the aerial lift collapsed to the ground (Exhs. C-14, 15). Hill was taken to the hospital where he died several days later (Tr. 90, 147). A witness testified that when he saw the knuckle hit the ground, Hill was approximately 20 feet above the ground and “hunkered down” in the cage preparing for impact (Tr. 126-127). Hill was wearing a safety lanyard (Tr. 129, 197). The area on the rotunda where Hill was working was approximately 40 feet above the ground (Tr. 135).

JLG’s product safety engineer Brent Hoover investigated the accident and could not determine what caused the lift to malfunction and collapse (Exh. J-1, pp. 8, 95). United’s sales representative Moses opined that the apparent malfunction was in the lift’s internal “sequencing” which the operator does not control (Tr. 120).

Valley’s outside consultant Dennis Eckstine testified he also was unable to determine why the JLG lift collapsed (Exh. R-1; Tr. 240, 247). Eckstine agreed the JLG lift was not working correctly on the day of the accident because the tower assembly (base and fly boom) was not able to lower to the ground (Tr. 231). Eckstine acknowledged the importance for users to read the operation manual and warning labels on an aerial lift (Tr. 242).

OSHA compliance officer Robert Barbour arrived on the project at approximately 11:30 a.m., and initiated an inspection (Tr. 145). Barbour inspected the site, the aerial lift, and interviewed employees (Exh. C-17; Tr. 159, 163). He measured the extended length of the boom at approximately 67 feet (Tr. 148). As a result of the inspection, a serious citation for a violation of § 5(a)(1) was issued to Valley for failing to remove the aerial lift from service.

Discussion

Alleged Violation of §5(a)(1) of the Act

The citation alleges Valley failed to remove the JLG aerial lift from service which was malfunctioning until it was repaired or determined to be in safe operating condition. Section 5(a)(1) of the Act provides:

Each employer -

shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

A citation alleging a violation of § 5(a)(1) of the Act, the general duty clause, is only appropriate when a specific OSHA standard does not apply to the facts. *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). Although OSHA standards at 29 C.F.R. § 1926.453 address “Aerial lifts,” there is no dispute that there are no OSHA standards which address removing a malfunctioning aerial lift from service until repaired or deemed safe to operate (Tr. 13, 190).

To establish a violation of § 5(a)(1), the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm, and; (4) feasible means existed to eliminate or materially reduce the hazard. *Waldon Healthcare Center, Id.* at 1058.

1. The Hazard

The Secretary alleges the hazard was the use of malfunctioning equipment such as an aerial lift without taking it out of service. A “hazard” is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121 (No. 88-572, 1993). “There is no requirement that there be a ‘significant risk’ of the hazard coming to fruition, only that if the hazardous event occurs, it would create a ‘significant risk’ to employees.” However, the hazardous condition or practice must “occur under other than a freakish or utterly implausible concurrence of circumstances.” *Waldon Healthcare Center, supra* at 1060. An accident may demonstrate that a condition presents a hazard to employees. See *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991).

Valley does not dispute the use of a malfunctioning aerial lift is a hazard (Tr. 17). A Valley employee died after the JLG 80-foot articulating boom aerial lift which was not operating properly collapsed on February 28, 2006 (Tr. 12).

2. The Hazard was Recognized

Valley argues the malfunction of the JLG lift was not a recognized hazard because its upper management and safety officer did not know the lift was functioning improperly (Tr. 18). Michael never called his supervisors about the problem with the aerial lift (Tr. 76, 192). Also, Michael

testified he did not believe it was unsafe to continue operating the lift on February 28, 2006 (Tr. 73, 320). United Rental's sales representative Moses never instructed or suggested for Michael to take the lift out of service (Tr. 76, 116-117).

A hazard is deemed "recognized" when the potential danger of a condition or practice is either actually known to the particular employer or generally known in the industry *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997).

In this case, operating a malfunctioning piece of equipment such as an aerial lift is recognized by the industry as well as Valley (Tr. 286). Under ANSI/SIA A92.5-1992, the "Manual of Responsibilities," section 7.3, for users of boom supported elevating work platforms,² states, in part:

Aerial platforms that are not in proper operating condition shall be immediately removed from service until repaired. Repairs shall be made by a qualified person and the repairs shall be in conformance with the manufacturer's recommendations (Exh. C-12).

Section 7.14 provides:

The user shall direct his operating personnel to cease operation of the aerial platform in case of any suspected malfunction(s) or any potentially hazardous condition(s) that may be encountered. Further information concerning safe operation shall be requested from the owner, dealer, or manufacturer before further operation.

The JLG "Operators and Safety" manual for the model 800 AJ aerial lift advises as a "Warning" which indicates a potential hazardous situation that could result in serious injury or death, that;

To avoid injury, do not operate a machine until all malfunctions have been corrected. Use of a malfunctioning machine is a safety violation (Exh. C-7, pp. b, 2-5, 2-7).

JLG engineer Hoover testified the general rule concerning use of an articulating boom lift that is malfunctioning is to remove it from service. He could not name any malfunctions of the lift where continued use would be considered safe (Exh. J-1, p. 10). The JLG's operator manual provides that "any evidence of lack of maintenance, malfunction, excessive wear, damage or

² Valley's consultant Eckstine agreed ANSI 92.5 for Boom-Supported Elevating Work Platforms applies to the JLG lift at issue (Exh. R-1).

modification” to the aerial lift “be reported immediately to the machine owner or the jobsite supervisor or safety manager and that the machine be taken out of service until all discrepancies are corrected” (Exh. C-7, p. 4-1). The manual also advises that “to avoid tilting the machine if tower boom switching malfunctions:

- Lower platform to ground via main boom lift and telescope functions.
- Have condition corrected by a certified JLG service technician before continuing use of machine” (Exh. C-7, pp. 4-6).

The warning decals located on the JLG’s boom lift platform controls and the lift’s control panel state:

Operate this machine with extreme caution. STOP all operation if a malfunction occurs (Exhs. C-9, C-10).

In addition to industry recognition of the hazard, Valley recognized the hazard associated with using malfunctioning equipment. Valley’s written safety rule requires that malfunctioning equipment be taken out of service and repaired (Exh. C-11, pp. 7, 22; Tr. 286). Foreman Michael knew the tower assembly on the aerial lift was not functioning properly (Tr. 41-43, 45, 48, 50, 58). Despite not knowing the cause of the malfunction and failing to correct it, Michael decided to continue operating the aerial lift instead of having the lift repaired or replaced (Tr. 51, 89).

The allegation that Michael’s supervisors were unaware of the malfunctioning lift is immaterial to a finding of a recognized hazard. Michael’s knowledge of the continued use of the malfunctioning lift is imputed to Valley. *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179-2180 (No. 77-1598, 1984). Michael’s authority as field foreman included directing the work of employees, uncovering unsafe conditions, protecting employees’ safety, and disciplining employees for safety violations (Exh. C-11, p. 4; Tr. 60, 77).

Valley argues the hazard was the lift’s internal sequencing affecting its stability which was not a recognizable or foreseeable safety risk. Valley’s characterization of the hazard is too narrow and misrepresents the unsafe condition in this case. “It is the hazard, not the specific incident, that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard.” *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970, 1973 (No. 78-4555, 1982) *aff’d* 729 F.2d 317 (5th Cir, 1984). The hazard in this case was the continued operation of an aerial lift which had

malfunctioned. It was not taken out of service or determined to be safe for continued operation. It is undisputed the JLG articulating boom lift malfunctioned and Valley employees continued to use the lift knowing it malfunctioned (Tr. 12).

The record establishes the continued use of a malfunctioning aerial lift was a recognized hazard.

3. The Hazard is Likely to Cause Injury

_____The continued use of malfunctioning equipment, such as an aerial lift, with an employee on a work platform more than 40 feet above the ground can cause death or serious injury if it collapsed (Tr. 176). In this case, the employee died after the aerial lift collapsed. Valley does not dispute the likelihood of injury.

4. The Hazard Can be Materially Reduced or Eliminated

As the final element in establishing a § 5(a)(1) violation, it must be shown the proposed abatement can “eliminate or materially reduce the hazard.” *Flour Constructors International Inc.*, 17 BNA OSHC 1947 (No. 92-2342, 1997). The proposed method of abatement is judged by what a reasonable person familiar with the conditions of the industry would have instituted.

_____OSHA’s proposed abatement involves removing malfunctioning equipment such as an aerial lift from service until repaired. Valley does not dispute that removing malfunctioning equipment from service is abatement (Tr. 18). In fact, removal from is service is required by Valley’s work safety rules (Exh. C-11, p.7; Tr. 286).

The record does not show why Valley could not have waited one day for a service technician to come to the project or why the aerial lift could not have been replaced with another lift. Valley was not behind schedule (Tr. 21). United Rental’s sales representative testified that another lift could have been delivered to the project that afternoon (Tr. 113).

Having established Valley’s violation of §5(a)(1) of the Act, consideration is given next to Valley’s unpreventable supervisor/employee misconduct defense.

Unpreventable Supervisor/Employee Misconduct

Valley asserts the continued operation of the malfunctioning aerial lift by Michael and Hill was unpreventable supervisor/employee misconduct. In order to establish the affirmative defense of employee misconduct, Valley has the burden to show it has (1) established work rules designed

to prevent the violative conditions; (2) communicated these rules to its employees; (3) taken steps to discover violations of the work rules; and (4) effectively enforced the work rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

An employer can avoid imputation of knowledge based on supervisory misconduct by establishing that it “took reasonable measures to prevent the occurrence of the violation.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). However, “in cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer’s safety policy.” *Danis-Shook Joint Venture VVV v. Secretary of Labor*, 319 F.3d 805, 811 (6th Cir. 2003).

Valley’s CEO Strawser testified he had no reason to believe Michael would violate Valley’s safety rules and continue to use a malfunctioning aerial lift prior to February 28, 2006 (Tr. 264).

1. Valley’s Safety Rules

A work rule is defined as “an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.” *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977). The work rule must be sufficiently precise to implement the requirements of a standard or be functionally equivalent to it. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1415 (No. 89-1027, 1991).

Valley has a written safety program which contains the company’s safety work rules (Exh. R-5; Tr. 282). Valley’s work rules applicable in this case direct employees to take malfunctioning equipment out of service (Tr. 285-286). The Secretary agrees Valley’s work rules are adequate to address the violative condition in this case (Tr. 190, 253-254). Valley’s safety rule under “General Safety Rules” (Exh. C-11, p. 7) states:

Immediately remove from service any equipment, which is defective and report it to your supervisor so it can be tagged “DO NOT USE” until it can be removed from the job to be repaired.

Under the section for “Scissors and Aerial Lifts” (Exh. C-11, p. 22), Valley safety program also states:

Inspect the lift before use. A malfunctioning lift shall be shut down and tagged DO NOT OPERATE until repaired.

The record establishes that Valley's written safety rules appropriately address the hazard associated with operating a malfunctioning aerial lift on February 28, 2006.

2. Valley's Communication of the Safety Rules

The second element of the misconduct defense is met when the employees are well-trained, experienced and know the work rules. *Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980). The employer must show it has communicated the specific rule or rules that are at issue. *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (although the record shows the employees received training on general safety matters and procedures, the evidence is insufficient to establish that the specific rule was communicated to employees).

The record in this case fails to show Valley communicated its safety rules involving the prohibition against using malfunctioning equipment such as an aerial lift. There is no evidence the weekly safety meetings specifically addressed the requirement to remove malfunctioning equipment from service (Exh. C-7; Tr. 305). The weekly safety topics discussed on this project involved safety programs in general, accident prevention, purpose of safety rules, and teaching safety (Tr. 295-296).

The record also fails to show Michael received training/instruction on removing equipment such as the aerial lift from service until repaired. There is no evidence Michael knew the rule or had been trained on the rule. Although he has received training by Bobcat and Passport, as well as the OSHA 30 hour class, Michael testified he did not remember receiving training on what to do with malfunctioning equipment (Exh. R-3; Tr. 67, 280, 308). There is no evidence he read the lift's operation manual prior to sending Hill to work from the aerial lift (Tr. 67). If he had read the operation manual, Michael would have known that "[t]o avoid injury, do not operate a machine until all malfunctions have been corrected" (Exh. C-7, p. 2-7; Tr. 68). According to Valley's safety manual, a field foreman such as Michael "is the safety representative for his project. He has the responsibility to detect unsafe conditions and the authority to take corrective action including disciplining employees" (Exh. C-11, p. 4).

In addition to Michael, operator Hill was expected to know Valley's safety rules. There is no showing Hill specifically received training on Valley's rule not to operate malfunctioning equipment although he had received the Passport aerial lift training and had a forklift license, (Exh. R-4; Tr. 282). Hill was given a copy of Valley's safety manual and it was generally reviewed

by the safety office during orientation (Exh. C-11; Tr. 283-284). Such a general review does not mean the specific rule regarding removing from service malfunctioning equipment was discussed.

The record does not establish Valley's rule against utilizing malfunctioning equipment was communicated to foreman Michael and operator Hill or that they knew or understood the rule.

3. Steps to Discover Violations of Safety Rules

The effective implementation of a safety program requires a "diligent effort to discover and discourage violations of safety rules by employees." *Propellex Corp.*, Id. at 1682. If an employer maintains an adequate inspection program, the burden is on the Secretary to show the employer's failure to discover the violative condition was due to a lack of reasonable diligence. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999).

The Central State College project had been inspected by Valley's safety personnel 15 times from August 25, 2005, until February 15, 2006 (Exh. R-6; Tr. 298). The safety office uses a safety checklist in conducting these safety inspections (Tr. 296). Although the inspections did not find employees using malfunctioning equipment, it is noted the safety checklist does not specifically address the continued use of malfunctioning equipment (Exh. R-6). The checklist recognizes that it "does not contain all potential safety hazards on every job. It is intended to bring the most common hazardous situations to your attention."

Although Valley took steps to discover safety violations as outlined in the checklist and there is no history of safety violations by Michael or Hill, the record fails to show Valley specifically inspected projects for the use of malfunctioning equipment such as aerial lifts (Tr. 279, 284).

4. Valley's Enforcement of Safety Rules

Adequate enforcement is a critical element of the employee misconduct defense. For enforcement, an employer may show a progressive disciplinary plan consisting of increasingly harsher discipline taken against employees who repeatedly violate the work rules. Besides having a written disciplinary plan, the employer must show it actually administered the discipline outlined in its plan. "Commission precedent does not rule out consideration of post inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline." *Precast Services Inc.*, 17 BNA OSHC 1454, 1455-1456 (No. 93-2971, 1995) aff'd without published opinion, 106 F.3d 401 (6th Cir. 1997).

Valley maintains a progressive disciplinary program with verbal warnings, written warnings, suspensions and terminations (Exh. C-11, p. 6; Tr. 287-288). Valley's discipline records reflect its enforcement of the safety rules (Exh. R-5; Tr. 290-294). Most of the employees' discipline involved not wearing safety glasses, fall protection, or hard hats. There was no employee disciplined for operating malfunctioning equipment (Tr. 287). Michael testified he has never disciplined an employee for not inspecting a boom lift prior to use or for continuing to use a malfunctioning lift (Tr. 63, 65).

Prior to February 28, 2006, neither Michael's nor Hill's records show disciplinary action for safety violations (Tr. 264, 279, 281, 283).³ In fact, both Michael and Hill have received safety incentive rewards from Valley for their lack of safety violations (Tr. 299). However, since the accident, Michael has received a written warning for not wearing safety glasses (Tr. 270, 278-279, 320).

Neither Michael nor Hill were disciplined as a result of the accident on February 28, 2006, although Valley determined they violated its safety rules (Tr. 64, 264-265, 270). CEO Strawser agrees Michael should have taken the lift out of service (Tr. 272). According to Strawser, Michael was not disciplined because he had lost a co-worker (Tr. 264). Strawser considered Michael to have exercised "bad judgment" and he did not think Michael "willingly or knowingly broke any kind of a safety rule" (Tr. 264-265, 270).

Although Valley claimed Hill was a "valued friend" of Michael, the record does not reflect more than a work relationship (Valley Brief, p. 21). By not disciplining Michael because he did not knowingly violate the rule implies Valley understood it had not adequately communicated the work rule. Also, the argument that Michael's failure to comply with the work rule was not willful should not have excused him from disciplinary action. He violated Valley's safety rule and should have received some discipline under its disciplinary program. If it was a willful violation, the discipline could have been more severe.

Valley characterizes its safety rules as a "absolute prohibition or zero tolerance policy-against the use of malfunctioning equipment regardless of whether the malfunction presents any

³ Michael failed a drug test after being hired in 2000. He was given 30 days off and retested (Tr. 279).

hazard” (Valley Brief, p. 24-25). Valley agrees the safety rules are designed to eliminate the need for an employee to make an evaluation of whether the malfunction presents a safety hazard (*Id.*). Valley also acknowledges that not every employee is qualified to make judgments on whether a given malfunction presents a safety risk (Valley Brief, p. 26). Valley’s written safety policy states that field foreman “are responsible for the enforcement of the company policies and/or safety and health program” (Exh. C-11, p.6). Despite this characterization of its safety rules, Michael was not disciplined for instructing an employee to continue operating a malfunctioning aerial lift without knowing the cause for the malfunction.

Also, it is noted Michael was not concerned about being disciplined when he instructed Hill to continue using the aerial lift (Tr. 69). There is no evidence Michael or Hill discussed the rule when they decided to continue operating the JLG aerial lift on February 28, 2006. “Where all the employees participating in a particular activity violate an employer’s work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.” *Gem Industrial Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) *aff’d*, 149 F.3d 1183 (6th Cir. 1998).

Based on Valley’s failure to show it communicated, took steps to discover and adequately enforced its safety rules involving the continued use of malfunctioning equipment, Valley’s supervisory/employee misconduct defense is rejected.

Serious Classification

Valley’s violation of § 5(a)(1) is classified as serious. In order to establish a violation is “serious” under § 17(k) of the Act, the Secretary must show there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation.

As discussed, Valley had actual knowledge of the failure to remove the malfunctioning aerial lift from service by its foreman on site. Michael’s knowledge as field foreman responsible for the safety of the crew is imputed to Valley. A foreman such as Michael who has been delegated authority and safety responsibility over other employees is considered a supervisor for purposes of imputing knowledge to his employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos 86-360 86-469, 1992). Michael’s knowledge of his actions and conditions is imputed to Valley.

Michael's failure to know the cause of the aerial lift's malfunction is not a determination it was safe to operate. Even if Michael believed the lift was safe to continue operation, his belief was not based upon any particular technical knowledge in this type of aerial lift. His operation of other aerial lifts was not shown to give him the appropriate knowledge that the JLG aerial lift was safe to continue operation on February 28, 2006. No one from United Rental or JLG told him it was safe to continue operating the lift once the boom assembly malfunctioned.

The probable injury from operation a malfunctioning aerial lift is serious bodily harm or death (Tr. 176). "In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur." *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989). In this case, the malfunctioning 80-foot articulating boom aerial lift did collapse causing the death of the operator.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required by the Act to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is considered the principal factor.

Valley is a large employer with more than 400 employees (Tr. 81, 181, 269). Valley is also not entitled to credit for history because Valley has received OSHA citations within 3 years (Tr. 182). It is noted, however, Barbour's first inspection of the Central State University project in December 2005 found no safety violations (Tr. 143-144). Also, none of Valley's prior OSHA violations dealt with operating malfunctioning equipment (Tr. 198). Valley is entitled to good faith credit based on its written safety program, full-time safety staff, and performance of periodic worksite safety audits (Exh. C-11; Tr. 259, 266). Valley has a safety incentive program which encourages and rewards employees to work safe. If an employee works 500 hours without a "lost time" injury or OSHA citation, he receives increasing degrees of rewards, ranging from shirts to a \$1,000.00 savings bond. During 2005, Valley spent \$95,350.00 on incentives for 868,983 hours worked (Exhs. C-11, p. 25, R-2; Tr. 260-261, 267).⁴

⁴ The 2006 figure was not available at the time of the hearing (Tr. 268-269).

A penalty of \$3,000.00, is assessed for serious violation of § 5(a)(1) of the Act. There was one employee exposed to the malfunction in the aerial lift. The lift was not removed from service although foreman Michael had no understanding of the cause and had not fixed it (Tr. 88). Although he knew it was not operating properly, he allowed an employee to continue to work from the lift at a height of 40 feet above the ground (Tr. 89). The record shows both Michael and Hill lacked understanding of Valley's safety rule. Michael was the supervisor for the project and he was designated by Valley to be responsible for the safety of the employees on the project.

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:

Citation no. 1, Item 1, alleged serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of \$3,000.00, is assessed.

/s/

KEN S. WELSCH
Judge

Date: June 11, 2007