

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Federal Express Corporation,

Respondent.

OSHRC Docket No. **06-1722**

**Simplified Proceedings**

Appearances:

Madeline T. Le, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas  
For Complainant

Courtney E. Felts, Esquire, Legal Department, Federal Express Corporation, Memphis,  
Tennessee,  
and Rodney L. Smith, Esquire, Sherman & Howard, L.L.C., Denver, Colorado  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Federal Express Corporation (FedEx) is engaged in shipping mail and packages throughout the United States. After receiving an employee's complaint regarding the use of the Watkins Aircraft Support Product (WASP) without guardrails along open sides, the Occupational Safety and Health Administration (OSHA) inspected FedEx's Air Cargo facility in Oklahoma City, Oklahoma on June 22, 2006. As a result of the OSHA inspection, FedEx received a serious citation alleging two violations under 29 C.F.R. § 1910.23, on September 22, 2006. FedEx timely contested the serious citation.

The case was designated for Simplified Proceedings under 29 C.F.R. § 2200.200. The hearing on January 26, 2007, was held in Oklahoma City, Oklahoma. The parties stipulated

jurisdiction and coverage (Tr. 5). During the hearing, the Secretary withdrew Citation 1, Item 1, alleged violation of 29 C.F.R. § 1910.23(a)(8)(ii) (Tr. 3).

The issue remaining for determination involves Item 2, alleged violation of 29 C.F.R. § 1910.23(c)(1) for failing to guard by standard railings the WASP used to transfer cargo containers to and from trucks. The citation proposes a penalty of \$3,500.00, for this item. The parties filed statements of position.

FedEx denies the violation. FedEx argues the record fails to show that employees were exposed to a fall hazard or that FedEx knew of the violative condition. FedEx notes that the WASP is no longer used in handling cargo. As part of the facility upgrade, it was replaced by a scissor lift (Tr. 34). FedEx does not assert an affirmative defense. Also, FedEx does not assert nor does the record establish a preemption under § 4(b)(1) of the Occupational Safety and Health Act (Act). There is no evidence that another federal agency has exercised authority over the WASP.

For the foregoing reason, the alleged violation of §1910.23(c)(1) is vacated.

#### **The OSHA Inspection**

The FedEx's Air Cargo facility in Oklahoma City, Oklahoma receives and sorts mail and packages for shipment in cargo containers by airplanes and trucks. The a.m. operations manager is John Futrell. He supervises approximately 15 employees (Tr. 32, 35).

On June 22, 2006, after receiving an employee's complaint, OSHA Industrial Hygienist Tori Contreras initiated an inspection of FedEx's use of the WASP at the Oklahoma City facility (Tr. 8). Because the cargo handling operation on the WASP was completed when Contreras arrived, she returned during the evening of June 23, 2006. When she returned, Contreras observed six trucks being loaded from the WASP (Tr. 10, 12, 27). She saw two employees loading the trucks (Tr. 14).

The WASP is a stationary metal platform which can be elevated to the height of a truck trailer's bed (Exhs. C-1, C-2; Tr.24, 32-33, 36). The metal surface contains casters or rollers every five inches which allows cargo to easily roll onto and off the WASP. The rollers are multidirectional (Tr. 19, 27). The WASP's surface is flat and open without railings along the sides. The WASP is

approximately 17.2 feet (206 inches <sup>1</sup>) wide and 37.1 feet (445 inches) long (Tr. 38). Trailers are backed up to either side of the WASP. The WASP handles typically 8 trucks at a time; 4 on each side (Tr. 35). The WASP is raised or lowered to the level of the trailer's floor.

The WASP was raised and lowered several times while Contreras was observing the operation (Tr. 25). She concluded that each trailer's bed was a different height (Tr. 25). Contreras measured the height of the WASP platform while loading three separate trucks; 42-inches, 46-inches and 51-inches (Tr. 13).<sup>2</sup> She estimated the two employees worked on the platform for approximately 30 to 45 minutes loading trailers (Tr. 14, 26).

During her inspection, Contreras was informed that on February 24, 2004, an employee had been injured when he fell off the WASP. He slipped on the platform and when he fell, a metal bar pierced his leg and went through his groin (Exh. C-3; Tr. 15). Also, Contreras was informed of two near miss incidents; one employee fell off the WASP when it was raining and another employee twisted his ankle because the surface was slippery (Tr. 16-17). The record does not reflect the height of the WASP at the time of the three incidents and the two near misses were not reported to FedEx (Tr. 22).

As a result of the Contreras' inspection, the citation was issued for alleged serious violation of §1910.23(c)(1). Contreras testified that because the WASP was located outdoors over a concrete surface and subject to weather conditions, a fall from the WASP was more likely and from a height of 4-feet or more could result in broken bones, contusions and lacerations (Tr.18). She also noted that the surface of the WASP had rollers every five inches which made walking on the surface difficult (Tr. 19). Contreras' internet review of similar WASP units show them with guardrail systems (Tr. 18).

### **Discussion**

In order to establish a violation of a safety standard, the Secretary has the burden of proving:

- (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions,

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<sup>1</sup>Although the transcript at one place identifies that the width measurements as 106 inches, the correct stipulation is 206 inches which is reflected in other portions of the transcript and the court's notes from the hearing (Tr. 38).

<sup>2</sup>According to Contreras, the WASP can be raised to approximately 54-inches (Tr. 13).

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).

### **Alleged Violation of §1910.23(c)(1)**

The citation alleges the WASP used at the FedEx facility lacked railings along open sides, exposing employees to a fall hazard of 51 inches above a concrete surface. Section 1910.23(c)(1) provides, in part:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

#### **1. Application of §1910.23(c)(1).**

A platform is defined as “a working space for persons, elevated above the surrounding floor or ground level, such as a balcony or platform for the operation of machinery and equipment.” § 29 C.F.R. 1910.21(a). Whether the cited surface is a platform within the meaning of the standard is a question of fact. *Superior Electric Co.*, 16 BNA OSHC 1494, 1496 (No. 91-1597, 1993).

In this case, the WASP is a platform under § 1910.23(c)(1). The WASP's sole purpose is to provide a surface on which employees work to load and unload trailers. It elevates to a height of 54 inches above the ground level in order to assist the employees (Tr. 13). FedEx does not dispute that the WASP is a platform within § 1910.23(c)(1). FedEx's operations manager described the WASP as “just a platform to maneuver containers to the proper trailer” (Tr. 32). The standard applies to WASP.

#### **2. Compliance with the terms of §1910.23(c)(1).**

To comply with § 1910.23(c)(1), the platform must have standard railings along open sides when it is elevated to 4 feet (48 inches) or more above the ground. There is no dispute the WASP's platform is open-sided. It was not used with standard railings by FedEx (Exhs. C-1, C-2). Also, there is no dispute the WASP's platform can be elevated to 4-feet or more to load and unload trucks. While loading one truck, Contreras measured the height of the WASP at 51-inches above a concrete surface. Of the six trucks observed by IH Contreras, this was the only truck which required the

WASP to be elevated to a height of 48-inches or more. The other measurements of 42-inches and 46-inches taken by Contreras do not require the WASP under § 1910.23(c)(1) to have railings along open sides.

The record establishes that when the WASP is elevated to 4-feet or more, it does not comply with the terms of §1910.23(c)(1) because it lacks standard railings on open sides.

3. **The Employer's Knowledge of the Violative Condition.**

In order to establish a violation of a standard, the Secretary must also show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. *Pace Constr. Corp.* 14 BNA OSHC 2216, 2221 (No. 86-758, 1991). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A. L. Baumgartner Constr., Inc.* 16 BNA OSHC 1995 (No 92-1022, 1994).

In this case, the record shows that FedEx knew of the operation of the WASP and the possible fall hazard. There was only one WASP on site (Tr. 18). It was the only way trucks were loaded by FedEx (Tr. 18). Employees worked on the WASP daily (Tr. 17, 35). Supervisors were always present (Tr. 17). Although the record does not establish the height of WASP at the time of the accident, FedEx was on notice of the potential fall hazard when an employee was injured when he fell from the platform in 2004 (Exh. C-3). FedEx does not dispute its knowledge of the WASP's lack of railings.

4. **Employees' Exposure.**

As a final element of the Secretary's burden of proof, the record must show that employees were exposed or had access to the noncomplying condition. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991.). Employee's exposure means that employees have been, are, or will be in the "zone of danger" either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993).

In this case, Contreras testified she observed two employees on the WASP loading six trucks. Only one truck required the WASP to be elevated to 4-feet or more above ground level (Tr. 26-27).

Contreras, however, did not identify where the two employees were working and standing on the platform in relationship to the open side while loading this truck. It was not shown where the truck was located on the platform. Contreras did not testify as to how often or how close employees came to the edge of the WASP. The Secretary stipulated the WASP is approximately 17 feet wide and 37 feet long (Tr. 38). There were three trucks on each side of the platform. When the three trucks are backed up to the side of the platform, it was not shown there was sufficient space along the length of the platform to expose employees to a fall hazard. Also, it was not shown that the employees were in the zone of danger along the ends of the platform. The record does not show how employees accessed the WASP. The photographs of the WASP fail to show any employees working on the WASP (Exhs. C-1, C-2).<sup>3</sup> She did not know the height of the WASP in her photographs (Tr. 23). Contreras agreed that an employee could be injured from a fall of 12 inches (Tr. 22). However, falls of less than 4 feet are not protected by the requirements of § 1910.23(c)(1).

The record fails to establish whether the employees were at any time on the WASP when elevated above 48 inches in the zone of danger and exposed to a fall hazard. Therefore, the Secretary has not met her burden of proof and a violation of §1910.23(c)(1) is not established.

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<sup>3</sup>Contreras testified that she did not put employees in photographs because of privacy concerns (Tr. 23).

**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:

**Serious Citation 1:**

1. Item 1, alleged serious violation of §1910.23(a)(8)(ii), is withdrawn by the Secretary.
2. Items 2, alleged serious violation of §1910.23(c)(1), is vacated and no penalty is assessed.

/s/  
**KEN S. WELSCH**  
**Judge**

**Date: March 12, 2007**