



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

MASKELL-ROBBINS, INC.,

Respondent.

OSHRC Docket No. 91-2189

DECISION

Before: FOULKE, Chairman, and MONTROYA, Commissioner.

BY THE COMMISSION:

Following the investigation of a fatality, the Occupational Safety and Health Administration ("OSHA") issued to Maskell-Robbins, Inc. ("MRI") an amended citation alleging a serious violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. § 654(a)(1), because an employee "climbed, crawled and/or walked on unstable pipe which shifted and fell on him." Review Commission Administrative Law Judge Louis G. LaVecchia affirmed the citation and assessed the \$2,500 penalty proposed by the Secretary of Labor. MRI petitioned for review and the Secretary filed his opposition to that petition; review was granted. For the reasons that follow, we affirm the judge.

The Facts

MRI's business is distributing polyethylene plastic pipe manufactured by another company, Phillips Driscopipe, Inc. ("PDI"). On May 22, 1991, MRI's Houston office ordered a quantity of 40-foot-long, 18-inch-diameter pipe weighing about 1,430 pounds per

pipe from PDI's South Carolina plant for a third company. When that company refused to accept three truckloads of the pipe because of the way it was loaded, the manager of MRI's Houston office told the company to direct the trucks to MRI's Houston yard for reloading.

William Karsten, MRI's Houston yard manager, was in charge of unloading and reloading the trucks. He had the assistance of employee Armando Villareal. The reloading involved using forklifts to remove two pieces of pipe at a time down to the bottom layer of pipe in each truck. The bottom layer was then lifted up from each truck bed and three 8-foot-long, 2-inch by 4-inch boards were spaced under it. Pipe was then reloaded with another forklift capable of lifting the pipe over the four steel stanchion posts positioned along each side of each truck bed to keep the pipe from rolling off the trucks. The pipe was reloaded two pieces at a time in three additional layers with three more 8-foot-long boards placed between the second and third layers. Pipe pieces were not banded together, but the two bottom layers were tied down and some of the stanchions were tied together.

Eighteen pieces of pipe were reloaded on each of the first two trucks and Karsten and Villareal reloaded sixteen pieces of pipe onto the third truck. Karsten positioned the forklift to place the last two pieces of pipe onto the third truck. He picked up that load and lifted it up but then noticed that the load of pipe had shifted on the blades of the forklift. Karsten shouted and signaled to Villareal to adjust the pipe on the forklift's blades. Karsten next saw Villareal on top of the pipe that had already been loaded onto the truck bed, in front of the forklift load of two pieces of pipe that needed adjusting. Karsten shouted at Villareal to move away from the front of the forklift load and to go to the cab end of the truck. Villareal did so and was bending down to jump off the truck by way of a rail on the front of the truck trailer when the pipe broke loose and bent the steel stanchions running along the far side of the truck bed. Three pieces of pipe and Villareal fell off the far side of the truck; Villareal was struck by a pipe and killed.

The judge found that the Secretary proved the elements of a section 5(a)(1) violation: (1) the employer failed to render its workplace free of a hazard, (2) the employer or the industry recognized the hazard, (3) the hazard caused or was likely to cause death or serious physical harm, and (4) there was a feasible means to reduce or eliminate the hazard. *Baroid Div. of N.L. Indus., Inc. v. OSHRC*, 660 F.2d 439 (10th Cir. 1981); *National Realty and*

Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); *Industrial Glass*, 15 BNA OSHC 1594, 1992 CCH OSHD ¶ 29,655 (No. 88-348, 1992). He relied primarily on the testimony of witnesses Dean Mangan, a quality assurance specialist with PDI, and Melvin Belisle, an employee of Fife Industrial Pipe (“Fife”), a distributor for PDI like MRI, for his conclusion that “it is clear the industry recognizes the hazard of pipe shifting and falling during loading.” Mangan testified that his company had a work rule prohibiting employees from getting on loads of pipe because the “product is slick. It is easy to slip off.” Belisle testified that Fife employees are not permitted to walk on full pipe loads because polyethylene pipes are “very slippery” and “very difficult” to stand on by virtue of their tubular shape, and that an employee standing on a load could cause a pipe to move or could fall off and injure himself. The judge found that the hazard, which resulted in the death of the employee in this case, could have been prevented by instructing the employee not to get up on the pipe.

The judge denied MRI’s claim that the violation resulted from unpreventable employee misconduct, concluding that the deceased employee was inadequately instructed in the hazards of loading pipe. The judge noted that warehouse manager/forklift operator Karsten testified that he regularly got up on pipe loads, that he had not instructed Villareal about the hazard of getting up on loads of pipe and that both he and Villareal had gotten up on pipe on the day of the fatality.

MRI does not address the cited hazard in its petition for review. Instead, it addresses a related, but not cited hazard, that of “running in front of the loaded forklift.” With regard to this hazard, the company alleges that it established that the deceased’s action was “absolutely unexpected, without reason, and contrary to his training and actual work experience.” It argues that the deceased handled pipe on an almost daily basis “following his training and instructions, and the policy of Respondent, never to get in front of a live load on a forklift.” It claims that the action which led to the employee’s death was an aberration that took place in a matter of a few seconds. MRI advised the Commission by letter that it would not file a brief on review and would rely on the argument contained in its petition for review.

The Secretary, noting MRI’s preference for having the case decided in terms of the forklift hazard, argues that the evidence supports the judge’s findings that warehouse

manager/forklift operator Karsten never claimed that he told the deceased not to go on top of stacked pipe and that working on top of loads of pipe was a regular practice of Karsten and something that he permitted other employees to do. The Secretary contends that a determination of the precise cause of the fatal accident is not critical and that a hazard was presented and the general duty clause violated, whenever either Karsten or the deceased went up on the stacked pipe, whether or not a forklift was nearby or an accident occurred. The Secretary relies on *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1252-53, 1986-87 CCH OSHD ¶ 27,893, p. 36,585 (No. 85-355, 1987); *Concrete Constr. Corp.*, 4 BNA OSHC 1133, 1135, 1975-76 CCH OSHD ¶ 20,610, p. 24,664 (No. 2490, 1976).

Discussion

This case was directed for review to determine if the administrative law judge erred in affirming a violation of section 5(a)(1). MRI objects to the judge's affirmance of a violation, but does not offer a defense to the allegations in the Secretary's amended citation. Rather, MRI addresses an uncited hazard. Having reviewed the record, we conclude that the judge's finding is supported by a preponderance of the evidence.

Order

Accordingly, we affirm the judge's action in affirming the contested citation alleging MRI's violation of section 5(a)(1). After a consideration of the penalty factors set forth in section 17(j) of the Act, 29 U.S.C. §666(j), we conclude that the penalty of \$2,500 assessed by the judge is appropriate.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: October 27, 1993

Docket No. 91-2189

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
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OSHRC DOCKET
NO. 91-2189

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 2, 1992. The decision of the Judge will become a final order of the Commission on December 2, 1992 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before November 23, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Review Commission
1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Date: November 2, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2189

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SECRETARY OF LABOR,

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MASKELL-ROBBINS, INC.,

Respondent.

OSHRC DOCKET NO. 91-2189

APPEARANCES:

Robert A. Fitz, Esquire
Dallas, Texas
For the Complainant.

Clem K. Best, Jr., Esquire
Houston, Texas
For the Respondent.

Before: Administrative Law Judge Louis G. LaVecchia

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration inspected Respondent's pipe yard in Houston, Texas, after a tragic accident on June 6, 1991, which caused the death of an employee; as a result, Respondent was issued a serious citation alleging a violation of section 5(a)(1) of the Act.¹ Respondent contested the citation, and a hearing was held on February 26, 1992. A background of the facts of this case is set out below, followed by a discussion of the alleged violation.

¹The citation, which initially alleged a violation of 29 C.F.R. § 1910.132(a), was amended in the Secretary's complaint to allege a section 5(a)(1) violation.

Background

Maskell-Robbins, with offices in eight cities in the United States, is in the business of distributing polyethylene plastic pipe manufactured by Phillips Driscopipe, Inc. ("Phillips"). On May 22, 1991, Maskell-Robbins' Houston office prepared a purchase order for a quantity of 40-foot-long 18-inch-diameter pipe, which weighs about 1,430 pounds a piece, to be shipped from Phillips' South Carolina plant to S & B Engineers ("S & B") at a warehouse in Pasadena, Texas. On June 5, 1991, S & B refused to accept three truckloads of the pipe because it was "loose loaded" rather than "strip loaded." Neil Balsam, the manager of Maskell-Robbins' Houston office, told S & B to have the trucks go to the Houston yard the next day, where his company would reload the trucks. (Tr. 9-11; 16; 25-37; 42-44; 51; 117; C-2).

William Karsten, the Houston yard manager, was in charge of reloading the trucks with the help of Armando Villareal, who had worked at the yard since April 1991. The reloading, which was the same for each truck, involved removing two pieces of pipe at a time with forklifts down to the bottom layer.² The bottom layer was lifted up and 8-foot-long 2-inch by 4-inch boards were placed under it in three places; the pipe was then reloaded two pieces at a time in three more layers with three more 8-foot-long boards placed between the second and third layers. The ends of the boards were not blocked and the pipe pieces were not banded together, but the two bottom layers were tied down and some of the stanchions were tied together. Eighteen pieces of pipe were reloaded on each of the first two trucks, the excess being stacked in the yard. (Tr. 40; 44; 47-53; 62-63; 85-86; 90-93; C-4-6).

After finishing the first two trucks, Karsten and Villareal reloaded sixteen pieces of pipe on the third truck. Karsten positioned the forklift to place the last two pipes on the truck, lifted the load, and, noticing it had shifted, shouted and signaled to Villareal to adjust the pipe on the forks. Karsten next saw Villareal on top of the pipe on the truck in front of the load. Karsten shouted at him to not stand in front of the load and to go back to the

²Karsten and Villareal operated two forklifts to unload the pipe. One was a forklift Maskell-Robbins already had available at the yard, and the other was a rented forklift with the 15-foot lifting capability needed to get the pipes over the four stanchions along both sides of the trucks. Only the rented forklift was used to reload the pipe. (Tr. 52; 61-62; 117-18).

cab end of the truck. Villareal did so and was bending down to step onto a rail when a pipe from the truck and the load fell, which resulted in Villareal falling and being struck by the pipe. (Tr. 53-60; 63; 67; 85-86; 89-91; C-4-7).

Memorandum Opinion

The citation, as amended, alleges Respondent violated section 5(a)(1), the general duty clause, because “it did not furnish to each of its employees employment and a place of employment which were free from a recognized hazard that caused death to one of its employees.” The citation further alleges that an employee “climbed, crawled and/or walked on unstable pipe which shifted and fell on him,” and that “Respondent could have eliminated or materially reduced this hazard by instructing and training this employee not to climb, crawl and/or walk on unstable pipe.”

To establish a 5(a)(1) violation, the Secretary must show (1) the employer failed to render its workplace free of a hazard, (2) the employer or the industry recognized the hazard, (3) the hazard caused or was likely to cause death or serious physical harm, and (4) there was a feasible means to reduce or eliminate the hazard. *Baroid Div. of N.L. Indus., Inc. v. OSHRC*, 660 F.2d 439 (10th Cir. 1981); *National Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973); *Indus. Glass*, 15 BNA OSHC 1594, 1992 CCH OSHD ¶ 29,655 (88-348, 1992). The evidence in this regard follows.

Dean Mangan, a quality assurance specialist with Phillips, is in charge of the company's packaging task force. He testified that Phillips offers loose and strip loading for customer convenience. He identified C-1 as excerpts from Phillips' packaging manual, and described loose and strip loading for the subject pipe. In loose loading, which accommodates twenty-seven pieces, four steel stakes are installed on either side of the truck bed; the pipe is loaded in alternating layers of five and four pieces, and every pair of stakes is tied together with rope every two layers to retain the load. Strip loading accommodates twenty pieces and no stakes are used; instead, four 4-inch by 4-inch lengths of wood are placed across the bed, and the pipe, banded in pairs, is placed on the wood. This process is repeated three more times with the lengths of wood, which are blocked on the ends, being placed on every layer. Mangan noted Phillips loads pipe with forklifts, and that the company

has work rules prohibiting employees from getting in front of forklift loads or on top of loads of pipe because the pipes are slick and it is easy to slip. (Tr. 9-18; 23-25; C-3).

Melvin Belisle is employed by Fife Industrial Pipe ("Fife"), a distributor for Phillips similar to Maskell-Robbins. Belisle testified he has been in the pipe business since 1975, and that the standard in the industry is to loose or strip load pipes. He said he had never seen the upright supports on truck beds tied together, and that the first two layers could be banded together or not in loose loading. He also said the lengths of wood used to strip load the subject pipe are placed every other layer, that the wood can be blocked or not, and that the pipes are not banded together before being loaded. (Tr. 97-108).

Belisle further testified that Fife loads pipe in accordance with industry practice, with a forklift and with a helper to assist the operator. He said pipe is aligned by the helper manipulating the pipe on one end or the other, that it is not hazardous as long as the helper does not get in front of the load, and that aligning the pipe at the middle is difficult and unsafe. Belisle noted Fife employees are not allowed to get in front of forklift loads or walk on full loads. He pointed out the pipes are slippery and difficult to stand on, and that an employee on a load could slip or cause a pipe to move. (Tr. 99-105; 108-11).

Neil Balsam, who has been with Maskell-Robbins since 1985 and has 22 years experience in the pipe business, testified he had heard of pipes falling from trucks but knew of no prior instances at Maskell-Robbins or with other distributors. William Karsten, who has been the Houston yard manager for three years, testified he instructed the employees he supervised to align pipes on the ends and to never get in front of a loaded forklift. He identified R-1 as an outline he had prepared of the training he gave employees. (Tr. 47-48; 54; 60; 64-65; 73-82; 112-14).

While it would appear, based on the foregoing, that there is a difference of opinion in the industry in regard to the requirements for loose and strip loading, it is clear the industry recognizes the hazard of pipe shifting and falling during loading. Respondent asserts, however, that the loaded pipe in this case was not unstable and did not shift. Respondent further asserts that the citation does not fit the facts of this case because the accident was caused by the forklift load falling on the already-loaded pipe.

C-4 and C-5 show that the two top layers of pipe were supported by nothing more than the stanchions, and Belisle, Respondent's own witness, testified an employee standing on pipe could cause it to move. Moreover, R-1, the outline of instructions Karsten prepared, cautions about watching for shifting pipe during and after loading. Finally, Karsten himself testified the pipe "broke loose" and fell from the truck, and nowhere stated that the forklift load fell on the loaded pipe. (Tr. 59-60; 85-86). It is not unreasonable to conclude, therefore, that the pipe could have shifted, broken the stanchions, and caused the forklift load to also fall. Regardless, even if the forklift load caused the accident, this hazard was clearly recognized based on the industry's knowledge of the dangers of loading pipe. Further, the hazard is within the scope of the citation, particularly since its consequences could have been prevented by the same means, *to wit*, instructing Villareal to not get up on the pipe. Accordingly, the Secretary has established a section 5(a)(1) violation, unless Respondent is able to demonstrate one of the affirmative defenses recognized by the Commission.

Respondent contends the accident was due to unpreventable employee misconduct. To prevail in this affirmative defense, an employer must show it both established and adequately communicated work rules designed to prevent the violation, and that it took steps to detect violations and enforced its rules when violations were discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979). The evidence in this regard follows.

Karsten testified that Villareal was the only employee under his supervision in June 1991, and that he instructed him to align pipes on the ends and to never get in front of a loaded forklift. Karsten said he and Villareal moved pipe with a forklift every day, and that Villareal assisted with loading or unloading trucks about five times. Karsten also said the yard normally handles only half loads, and that he and Villareal had not worked with a full load before the accident. (Tr. 48-49; 54-55; 62-65; 73-77).

Karsten further testified he had no doubt Villareal understood his instructions on the day of the accident, and that he did not know why he got up on the pipe in front of the forklift. Karsten noted he did not tell Villareal to work at the end of the pipe or to not get in front of the load that day, but that he did tell him to get up on the front of the truck

trailer. Karsten also noted he and Villareal had been on top of the pipes to tie down the first two layers and place the boards, and indicated this was his normal practice. Karsten said he had instructed Villareal verbally and with hand signals on the several other occasions he had aligned pipe, and that he had never seen him get in front of a forklift load before. Karsten also said Villareal spoke fluent English and learned quickly, and that there had been no prior problems with his understanding instructions. (Tr. 50; 54; 60-61; 64-68; 82-88; 91).

Based on the foregoing, the violation in this case was not the result of unpreventable employee misconduct. Villareal had worked for Maskell-Robbins, at most, for nine weeks at the time of the accident. He had loaded or unloaded only five trucks, had never worked with a full load, and had only aligned pipe several times.³ In spite of the recognized hazard of getting up on loads of pipes, Karsten had never instructed Villareal in this regard; in fact, both employees got up on the pipes on the day of the accident and Karsten indicated this was his regular practice. Moreover, although Karsten had previously told Villareal to align pipes on the ends and to not get in front of forklift loads, he did not repeat these instructions when he directed Villareal to adjust the pipe on June 6. On the basis of the record, it can only be concluded that Villareal was inadequately instructed in the hazards of loading pipe, and that Respondent has not demonstrated unpreventable employee misconduct. The citation is therefore affirmed, and the proposed penalty of \$2,500.00 is assessed.

Conclusions of Law

1. Respondent, Maskell-Robbins, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

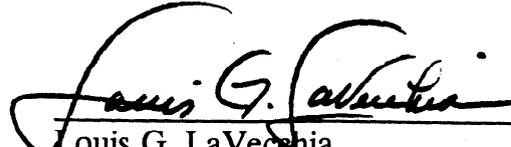
2. Respondent was in serious violation of section 5(a)(1) of the Act.

³There is no evidence to support Respondent's assertion that Villareal had "repeatedly" aligned pipe, and none to show that he did so on June 6 before the accident.

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED, and a penalty of \$2,500.00 is assessed.



Louis G. LaVecchia
Administrative Law Judge

Date: **OCT 26 1992**