
SECRETARY OF LABOR,

Complainant,

v.

HALMAR CORP. and DEFOE CORP., a
JOINT VENTURE,

Respondent.

OSHRC Docket No. 94-2043

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

Following an employee fatality in April 1994, Occupational Safety and Health Administration (“OSHA”) Compliance Officer Scott Schrilla inspected Respondent, Halmar Corporation and DeFoe Corporation, a Joint Venture (“Halmar/DeFoe”). As a result of the inspection, the Secretary of Labor cited Halmar/DeFoe for alleged violations of various OSHA standards, including the two crane operation standards at issue in this case, 29 C.F.R. § 1926.550(15)(i) and (iv).¹ Administrative Law Judge Richard DeBenedetto affirmed both

¹The standard provides:

§ 1926.550 Cranes and derricks.

....

(a) *General requirements.*

....

(15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machinery shall be operated proximate to power lines only in accordance with the following:

(continued...)

contested citation items and grouped the two violations together and assessed a single penalty of \$5000. We affirm the citations, but assess separate penalties of \$5000 for each violation.

I. BACKGROUND

An employee of Halmar/DeFoe was electrocuted on April 14, 1994, when the boom of a crane came into contact with overhead electrical wires. At the time of the accident, a crew from Halmar/DeFoe was placing concrete catch basins along the median of the New York Thruway when the foreman, Manuel Pinho, noticed that the crew had missed a drop location. Because the basin was already attached to the boom of the crane, Pinho signaled the crane operator to lift the basin off the flatbed truck and brace it against the cab of the crane so that the crane could back up. This required the boom of the crane to be fully extended. Without further discussion, Manuel Pinho got into his pickup truck and drove southbound in reverse. As the crane proceeded backwards, crew member Jack Stewart walked to the right of the crane with his hand on the basin, and another crew member, Domingo Pinho, went behind the crane to move barrels and cones out of the way. Edward Flanagan, the crane operator, testified that his attention was divided between the traffic on the right side and an excavated area on the left. Flanagan had backed up the crane approximately 400 feet when he heard a bang, and then saw employee Jack Stewart laying on the ground.

Dr. George W. Borden, a forensic engineer with an expertise in electrical engineering, testified on behalf of the Secretary that the boom must have come within 3 inches of the electrical wire for electricity to have arced from the wires to the crane. Daniel Perritti, the manager of the Risk Management Department at the Orange and Rockland

¹(...continued)

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

.....

(iv) A person shall be designated to observe clearance of the equipment and give timely warning for all operations where it is difficult for the operator to maintain the desired clearance by visual means.

Utilities, also investigated the accident and concluded that the crane had come into contact with the wire because the metal conductor of the wire was burned through 30-50 percent. Perritti testified that while Halmar/DeFoe had asked his company to deenergize various electrical lines where they expected to be working, the line involved in the accident was not included in that request.

OSHA Compliance Officer Schrilla conducted employee interviews with Flanagan and Domingo Pinho to determine the cause of the accident. Flanagan stated that the foreman, Manuel Pinho, did not warn any of the crew members about the electrical lines, nor did he designate anyone to watch for them. Flanagan also reported that while both Jack Stewart and Domingo Pinho were signaling him to proceed backwards, they had only been watching for clearance of the traffic and the cones and barrels. Flanagan stated that he had visually checked the area for obstructions where he initially had stopped, but testified that he did not look up while reversing the crane because he was concentrating on the road. Domingo Pinho told Schrilla that he did not think it had been his job to watch for overhead wires because he was only told to move the cones and barrels out of the way. Schrilla concluded that the crew had forgotten to watch for electrical wires because they were concentrating on the traffic and the cones.

At the hearing, Flanagan testified that he had not received any training from Halmar/DeFoe regarding working in proximity to overhead electrical lines, but that he is familiar with the safety rules for operating a crane in the vicinity of high voltage lines from previous training and experience. Flanagan admitted that he had read and signed some documents when he started at Halmar/DeFoe in May 1993, but that he did not recall the content of those papers. Domingo Pinho also testified that while he remembers listening to and signing "safety sheets," he did not remember one involving power lines. Both employees stated that prior to the accident, they were aware that overhead electrical lines ran across the portion of the thruway on which they were working.

II. DISCUSSION

To establish a violation, the Secretary must show that: 1) the standard is applicable, 2) the employer failed to comply with it, 3) employees had access to the violative condition, and 4) the employer had knowledge or constructive knowledge of the condition. *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987). For the reasons that follow, we find that the Secretary has met her burden of proof for both citation items.

A. Failure to Maintain Minimum Clearance of 10 Feet

There is no dispute that the standard is applicable or that employees had access to the violative condition. Halmar/DeFoe also acknowledges that the boom of the crane must have come within 10 feet of the electrical wires. Therefore, the only issue that remains is whether or not Halmar/DeFoe had knowledge of the violative condition.

We reject Halmar/DeFoe's argument that it did not have knowledge of the violative condition because the project did not call for working near electrical wires at that time. The test for knowledge is whether an employer knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶ 29,807 (No. 87-692, 1992). Reasonable diligence includes "the obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981). The fact that Halmar/DeFoe did not intend for its crew to operate the crane near electrical wires does not excuse a supervisor's failure to exercise caution and inspect his worksite when such situations arise. In this case, foreman Manuel Pinho knew that Flanagan was reversing the crane with the boom fully extended. He also knew or should have known that there were electrical wires running across the New York Thruway, having passed under them at least twice that very day.² We therefore conclude that had he exercised reasonable

²The crew passed under the wires as they made their way northbound on the thruway and
(continued...)

diligence, Pinho would have anticipated that the crane might come into contact with those electrical wires. Manuel Pinho's knowledge of the violative condition is imputable to Halmar/DeFoe because actual or constructive knowledge of a supervisor is imputed to an employer. *See Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶ 29,807.

We also reject Halmar/DeFoe's claim that the judge erred, under the court's decision in *New York State Electric & Gas Corp.*, 88 F.3d 98 (2d Cir. 1996) ("*NYS Electric*"), by shifting to the company the Secretary's burden of establishing knowledge of the violative condition. The Secretary has the burden of establishing a *prima facie* case of a violation; as one of the elements of a violation she must show that the employer knew, or with reasonable diligence could have known, of the violative condition. This case is clearly distinguishable from *NYS Electric* in that the Secretary has affirmatively established that Halmar/DeFoe had either actual or constructive knowledge of the violative condition. Unlike *NYS Electric*, it is uncontroverted that the foreman here, Manual Pinho, is a supervisor. Moreover, the Secretary made a strong affirmative case that, having worked as a supervisor for some time on the reconstruction project, having directed the crane to back-up to place the missed catch basin, and having driven under the power lines twice on the day of the accident, Manual Pinho knew or should have known of the danger posed by the electrical wires. Pinho's knowledge, imputable to his employer, establishes a *prima facie* case of knowledge on the part of Halmar/DeFoe. Thus, the Secretary has established Halmar/DeFoe's knowledge through the evidence pertaining to supervisor Manual Pinho and does not rely on the alleged inadequacy of Halmar/DeFoe's safety program to meet this element of the violation.³

²(...continued)

Manual Pinho had to have passed under them again when he backed up his pickup truck, as he was approximately 200 yards behind the crane.

³The adequacy of Halmar/DeFoe's safety program is discussed in depth later in this opinion as it relates to the unpreventable employee misconduct defense.

Accordingly, we find that the Secretary has proven a violation of 29 C.F.R. § 1926.550(a)(15)(i).

B. Failure to Designate a Spotter

Halmar/DeFoe maintains that it complied with section 1926.550(a)(15)(iv) because both Jack Stewart and Domingo Pinho were spotters for the crane. That claim, however, is contradicted by Schrilla's testimony regarding his interviews with the employees and Flanagan's testimony that there was no instruction from the foreman about backing up the crane. Domingo Pinho's testimony that Manuel Pinho had instructed him to move the barrels and had told Jack Stewart to stay with the flatbed truck further contradicts the assertion that Domingo Pinho and Jack Stewart were designated to observe for clearance. Lastly, Schrilla's conclusion, with which Halmar/DeFoe agrees, that the crew simply forgot about the wires lends support to the allegation that there was no designation of a spotter. Whether or not Jack Stewart or Domingo Pinho could have functioned as spotters is not relevant to the finding of a violation in this case. The regulation clearly says that a spotter "shall be designated," indicating that affirmative action must be taken by the employer. *See Brennan v. OSHRC (Gerosa, Inc.)*, 491 F.2d 1340 (2d Cir. 1974) (holding that 'designate' requires specific and positive action by employer to inform an employee of the existence and nature of his duties). Since there was no designation of a person to observe for clearance from overhead electrical wires, we find that Halmar/DeFoe failed to comply with section 1926.550(a)(15)(iv).

The only issue left is one of knowledge. The regulation calls for the use of a spotter whenever it is difficult to obtain clearance by visual means. In this case, the judge found that the conditions were such that the foreman should have known that a spotter was necessary. Not only was there traffic on one side and an excavated area on the other, requiring the crane operator to focus all of his attention on the road, but the boom was fully extended. As discussed previously, Manuel Pinho also knew or should have known that there were overhead electrical wires under which the crane must pass. However, he left the area without reminding his crew of the dangers of electrical wires and without designating a spotter to

watch for wires. Therefore, we find that Manuel Pinho had actual or constructive knowledge of the violative condition. As noted earlier, the knowledge of a supervisory employee is properly imputed to the employer.

Based on the above discussion, we find a violation of 29 C.F.R. § 1926.550(a)(15)(iv).

III. UNPREVENTABLE EMPLOYEE MISCONDUCT

Halmar/DeFoe claims that the unfortunate accident was the result of unpreventable employee misconduct because it had a safety program, to which the foreman and crew did not adhere, that adequately addressed working in the vicinity of electrical wires. To prevail on the unpreventable employee misconduct defense, the employer must show 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.” *Pride Oil Well Svc.*, 15 BNA OSHC at 1815, 1991-93 CCH OSHD at p. 40,585. Halmar/DeFoe claims that the conduct of the crew, including the foreman, was unpreventable because they did not expect to be operating the crane around electrical wires and they simply forgot about the wires.

Halmar/DeFoe presented evidence to support its defense. Arthur Lusignan, a project manager for Halmar/DeFoe, testified that the company had a specific written plan to identify overhead electrical wires on the New York Thruway project. The company had made warning signs and mounted them on orange barrels, and had hung orange streamers from some of the smaller lines. If the project called for work directly beneath a power line, Halmar/DeFoe called the power company and requested that the power be shut off. Lusignan testified that the wires were not deenergized on the day of the accident because there were no plans to work beneath them. However, he stated that there were barrels with warning signs underneath the electrical line involved in the accident.

In addition to the safety plan for the New York Thruway project, Halmar/DeFoe maintains that it provides its employees with general safety instructions for working near electrical wires. Under the section covering cranes and derricks, the safety manual states that special hazard warnings must be posted so that they are visible to the operator and that any operations near overhead electrical lines must maintain a minimum of 10 feet of clearance. The manual also states that a person must be designated to observe operations when an operator's vision is obscured. A copy of this written safety program is on site at each project, as well as in the offices of both companies. Lusignan also testified that Halmar/DeFoe holds regular monthly staff meetings with management people, at which safety is one of the topics discussed, and that sometimes foremen, like Manuel Pinho, are present. According to Lusignan, the company also trains foremen at annual corporate meetings which cover all the major elements of the safety program over the course of two to three years. In addition, Lusignan testified, Halmar/DeFoe prepares a weekly written "toolbox talk" topic and distributes it to all foremen so that they can talk about it with their employees on a weekly basis. The foreman is required to give the safety presentation, then list persons present and have them sign an attendance sheet. Halmar/DeFoe offered into evidence a "toolbox talk" attendance list prepared by foreman Manuel Pinho and signed by Domingo Pinho, dated March 24, 1994, approximately three weeks before the accident. That talk was entitled "Steel Construction," and included such topics as high voltage, cranes, and electrocution. Halmar/DeFoe also submitted a "Toolbox Talk" dated August 20, 1992, signed by Jack Stewart, which covered high voltage. Halmar/DeFoe submits that Flanagan's admission that he knew it was his responsibility to check for overhead wires and Domingo Pinho's admission that he knew the dangers of electrical wires are evidence that its employees are properly trained.

We are not, however, convinced that Halmar/DeFoe met its burden in this case. Although Halmar/DeFoe's safety program requires cranes to maintain a minimum distance of 10 feet from electrical wires and requires the use of a spotter when the operator's vision

is obstructed, we find that Halmar/DeFoe did not adequately communicate its work rules to its employees and supervisors.

First and most importantly, there is nothing in the record to establish that Halmar/DeFoe properly trained its supervisors. No evidence was presented to establish that Manuel Pinho attended any of the monthly management meetings or that the safe operation of cranes near electrical wires was ever discussed. Likewise, Halmar/DeFoe failed to show that high voltage was discussed at any of the annual corporate meetings, or if all supervisors had been present for all the safety training. Indeed, Cosmo Bartolone, a superintendent, did not even know that the spotter rule was in the written program, for he told Schrilla that it was an unwritten rule. The lack of any evidence regarding the training of supervisors with regards to working near electrical wires leads us to the conclusion that the company's work rules were not effectively communicated to its employees.

Second, neither Flanagan or Domingo Pinho remembered being trained in the hazards posed by electrical wires. While Flanagan admitted that he knew it was his responsibility to check for wires, he stated that such knowledge came from past experience and training, not from Halmar/DeFoe. He stated that the "toolbox talks" were not actual meetings, but that the foreman would bring out a piece of paper for everyone to read and sign. He admitted that sometimes he would just glance at the paper and ask for a quick explanation. While there is evidence that Domingo Pinho signed a "toolbox talk" that covered the general topics at issue in this case, it was his testimony that he did not remember it. Third, the safety program, while addressing these hazards, does not effectively explain its work rules to employees. Under the heading "Signaling for Cranes and Hoists" are the words "Standards as Applicable by A.N.S.I.." The safety program does not list the applicable ANSI Standards and Halmar/DeFoe superintendent Lusignan admitted that some employees, such as Domingo Pinho, would not understand the safety instructions. Lastly, the written safety program was not circulated to employees, but instead maintained in the company's offices, with a copy at each work site.

Based on the record in this case, Halmar/DeFoe has not met its burden of proving unpreventable employee misconduct in this case. Accordingly, we affirm both citation items.

IV. PENALTIES

Although the Secretary had proposed a \$5000 penalty for each citation item, the judge grouped the two items together for a single penalty of \$5000 on the basis that the violations were so closely related as to constitute a single hazardous condition. The Secretary argues on review that the two citation items should not have been grouped for penalty purposes, but neither party contests the penalty amount.⁴

Previous cases make clear that there is no requirement to group penalties even when closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p.32,056 (No. 76-4765, 1981). Furthermore, violations are considered duplicative only where they require the same abatement conduct. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993). In this case, section 1926.550(15)(i) requires maintaining clearance of 10 feet from electrical wires and section 1926.550(15)(iv) requires the designation of a spotter to observe such clearance. Because the violations involve different violative conduct with different means of abatement, we do not believe, in light of the high gravity of these violations, that the grouping of penalties in this case is appropriate. We therefore assess separate penalties of \$5000 for each citation item.

V. CONCLUSION

We affirm the citation items alleging violations of 29 C.F.R. §§ 1926.550(a)(15)(i) and (iv) and assess a \$5000 penalty for each citation item, for a total penalty of \$10,000.

⁴While the issue of penalties was not specifically directed for review, the Commission has the discretion to review the entire judge's decision, including penalty amount, once the case is directed for review. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2177, 1991-93 CCH OSHD ¶ 29,962, p.41,011 (No. 87-0922, 1993).

/s/

Stuart E. Weisberg
Chairman

/s/

Daniel Guttman
Commissioner

Dated: September 23, 1997