

SECRETARY OF LABOR,

Complainant,

v.

THE MONTANA POWER COMPANY,

Respondent.

OSHRC DOCKET NO. 99-1227

**APPEARANCES:**

For the Complainant:

Monica Thompson, Esq., Kayden Howard, Esq., Office of the Solicitor, U.S. Department of  
Labor, Kansas City, Missouri

For the Respondent:

Patrick T. Fleming, Esq., The Montana Power Company, Butte, Montana

Before: Administrative Law Judge: James H. Barkley

**DECISION AND ORDER**

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

Respondent, The Montana Power Company (Montana Power), at all times relevant to this action maintained a place of business at Thunderbird Motel, 1009 Broadway, Missoula, Montana, where it was engaged in electrical service work. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 6, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Montana Power's Thunderbird Motel work site. As a result of that inspection, Montana Power was issued a citation alleging violation of §1926.501(b)(1) of the Act together with proposed penalties. By filing a timely notice of contest Montana Power brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 26, 1999, a hearing was held in Butte, Montana. The parties have submitted briefs on the issues and this matter is ready for disposition.

## Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems;

(a) Thunderbird Motel, Missoula, Mt: Employee exposed to a fall of approximately 22 feet to the ground below on the east side of the motel.

### Facts

Compliance Officer (CO) Trina Mailloux testified that on May 6, 1999 she observed, and videotaped two of Montana Power's employees working at the Thunderbird Motel site (Tr. 23-25; Exh. C-1). One of the employees, Randy Heinrich, was in an aerial lift basket and appeared to be tied off; the other employee, Randy Iverson, was standing approximately a foot to 18 inches from the roof edge facing right, and was exposed to a fall hazard of approximately 22 feet (Tr. 23-24, 29-30, 65, 67; *see also*, testimony of Randy Iverson at Tr. 88). By the time Mailloux began videotaping, Iverson was kneeling; he worked kneeling for the entire time Mailloux taped, two to three minutes (Tr. 25, 27; Exh. C-1). Iverson was wearing a harness but had no lanyard attached (Tr. 26).

Montana Power does not dispute CO Mailloux' account.

Iverson stated that Montana Power was at the Thunderbird Motel to upgrade the transformer bank on the pole outside, and the service wires going into the Motel (Tr. 75). Iverson himself was to barricade the live 1700 and 12,000 volt wires, hang the transformers, and run the service wires from the transformer to the building (Tr. 75-76). The service wires were then to be connected to wires coming out of four "masts," or pipes running up the side of the building by means of an aluminum block connector (Tr. 75, 78, 103; Exh. R-5).

Iverson testified that each of the four masts at the Thunderbird had a weather hood, or head, *i.e.* a cap to keep rain and snow from getting down the pipe. Normally, the weather hoods face outwards to allow the wires to be accessed, but in this case, they had been turned 180°, so that they faced the interior of the roof (Tr. 78-80, 100; Exh. R-5). Iverson stated that, although there was no tension on the wires, it was infeasible to reach around the weather heads from inside the bucket (Tr. 81-82, 103-04). The only way to attach the wires coming from the mast to the

service wires, Iverson claimed, was to actually get on the roof and “train,” or lead those wires around to the aluminum connector block (Tr. 81, 103).

Iverson testified that he had, the previous day, discussed the possibility of him having to work from the roof with his foreman, but that he made the final decision to work on the roof on May 6 (Tr. 81-82). Iverson stated that he determined that there was no safe place to tie off, and so decided to work without a lanyard (Tr. 85). Iverson stated that he tried to stay behind the mast and guy wires, and to keep the bucket between him and the ground as much as possible (Tr. 87). In addition, Iverson stated that Randy Heinrich watched him as he worked to make sure he was not in danger of falling (Tr. 82). Iverson admitted that there were times when Heinrich had his attention on his own work and was not watching Iverson (Tr. 84).

Iverson stated that they did not ask the building owner if there was somewhere they could tie off (Tr. 90). Iverson testified that it was not their responsibility to remove and turn the weather heads around, and that, because they had the power off, they did not have time to locate the responsible party (Tr. 101-02). The heads could not be turned without completely taking them off and re-threading the wires (Tr. 106).

CO Mailloux believed that there were places to tie off on the roof, *i.e.* pipes and anchors (Tr. 34). CO Mailloux testified that when she observed Iverson, she was directly below him and could see his full body; the basket was approximately a foot to 18 inches in front of Iverson, and would not have protected him from falling (Tr. 32, 58-59). Mailloux further stated that the guy wires were behind Iverson as he worked, and would not have protected him from falling (Tr. 56, 70). Mailloux testified that no one at Montana Power told her that Heinrich was supposed to be acting as a safety monitor at the time of the inspection (Tr. 68). Mailloux stated that, in any event, Heinrich was engaged in other duties, *i.e.*, connecting the other end of the service lines, at the time when he was ostensibly acting as monitor (Tr. 68).

### Discussion

The cited standard requires:

(b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Montana Power admits that its employee, Iverson, was working on a roof with unprotected sides. There was no guardrail, or safety net, and Iverson was not using his personal fall arrest system. Montana maintains, however, that “the record clearly establishes that compliance with the OSHA standard requiring conventional fall protection was impossible to meet, and strict conformance to OSHA standards would have prevented the performance of the required work.” (Respondent’s post-hearing brief, p. 4).

This judge does not agree. An employer seeking to be excused from implementing a cited standard’s abatement measure on the basis of infeasibility has the burden of proving that 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) alternative methods of protection were used or (b) there were no feasible alternative means of protection. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1190, 1993-95 CCH OSHD ¶30,757, p. 42,734 (No. 92-1891, 1995). In this case, Montana has attempted to show that it was infeasible for its employee, Iverson, to perform his assigned work from Montana’s aerial bucket. Because the cited standard applies only to the walking/working surface of the roof, however, it becomes applicable to Montana’s working conditions only *after* Iverson climbed out of the bucket onto that roof. Whether it was necessary for him to do so is immaterial to the citation.<sup>1</sup> The relevant inquiry is whether, once it was determined that Iverson would work from the roof, it was infeasible to implement one of the methods of fall protection prescribed by the standard.

Montana and the Secretary introduced the testimony of Iverson and Mailloux, respectively, who offered their opinions as to the availability of anchorages for Iverson to tie off to. No evidence was introduced addressing the feasibility of guardrails and/or safety nets. Based on the insufficiency of the record, this judge must find that Montana failed to carry its burden of proving the infeasibility of compliance.

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<sup>1</sup> Having viewed the videotape, however, this judge cannot agree that it would have been impossible for Iverson to perform his duties from the aerial bucket. Though it was undoubtedly easier for Iverson to lead the wires around from the roof side, the lines were in reach and there was, as Iverson admitted, no tension on the lines. After the OSHA inspection, the remainder of the work was completed from inside the aerial lift (Tr. 33, 105). Based on this record, this judge cannot credit Montana’s contention that Iverson’s presence on the roof was necessary.

Because Montana failed to satisfy the first prong of its affirmative defense, it is unnecessary to address the adequacy of its professed alternative methods of protection.

Penalty

Mailloux testified that a fall from 22 feet would result in serious injury or death (Tr. 31). Mailloux felt that the probability of an accident occurring was increased by Iverson's use of bolt cutters on the roof (Tr. 26). The gravity based penalty was set at \$5,000.00.

Though the violation was correctly classified as serious, I find that the gravity of the cited violation was overstated. Only one employee was exposed to the cited hazard for a very brief period of time. Though Mailloux believed that the job the Montana Power employees were performing would have taken approximately 10 minutes, she only observed two or three minutes of exposure before having Iverson come down (Tr. 69; Exh. C-1). The CO's videotape shows Iverson kneeling as he performed his task; he did not appear to be in any danger of losing his balance.

Mailloux testified that Montana Power is a large company, with approximately 900 employees (Tr. 38). No adjustments to the proposed penalty were made for size (Tr. 38). Because Montana Power had been cited for other serious violations of the Act within the last three years, no adjustments were made for history (Tr. 39, 41, 49, 50-51). No adjustments were made for good faith (Tr. 70-71)

No evidence of bad faith was introduced at the hearing, and no explanation was given for the Secretary's failure to credit Montana for good faith.

I find that a penalty of \$1,000.00 is appropriate after adjusting for the reduced gravity of the cited violation, and crediting Montana for good faith.

**ORDER**

1. Serious citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.

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James H. Barkley  
Judge, OSHRC

Dated: January 3, 2000