

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 99-1590
Boh Brothers Construction Co.,	:	
L.L.C.,	:	EZ
Respondent.	:	

Appearances:

Kathleen G. Henderson, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. John Lipani
Vice-President
Boh Brothers Construction Co., L.L.C.
New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Boh Brothers Construction Co., L.L.C. (Boh), contests a two-item citation issued by the Secretary on August 12, 1999. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Brian Smith from June 10 to August 12, 1999. Smith's inspection was triggered by a fatal accident at the Alabama Power Company in Theodore, Alabama, when one of Boh's employees was crushed by a load of steel pipes that slipped while being lifted with a wire rope sling.

The Secretary alleges that Boh committed a serious violation of 29 C.F.R. § 1926.251(c)(8), for failure to balance loads to prevent slippage in slings using a basket hitch (item 1); and of 29 C.F.R. § 1926.550(a)(19), for failure to keep employees clear of suspended loads about to be lifted or suspended.

The Commission designated this case as an E-Z Trial case. Boh stipulated to jurisdiction and coverage (Tr. 5). A hearing was held in this matter on January 25, 2000. Boh asserts the affirmative defense of unpreventable employee misconduct with respect to item 2. The parties did not file post-hearing briefs. For the reasons set out below, items 1 and 2 are

affirmed.

Background

At the beginning of the hearing the parties stipulated to the following (Tr. 5-7):

Boh Brothers is an employer over the following persons: Wallace Delancy, Dan Headrick, Craig Lee, Don Adams, Vic Gremillion, Ray Arsenic, and Michael Pool.

. . . Mr. Delancy was a supervisory employee over Boh Brothers's workers at the site, the site being Alabama Power Company, Generation Unit, Highway 198, Theodore, Alabama, on June the 10th, 1999. . . . [O]n June 10th, 1999, Mr. Delancy was fatally injured when a load being lifted by a crane hit pipes on a flatbed truck causing pipes to fall off the truck and hit Mr. Delancy.

. . . Boh Brothers was required to comply with the standards alleged, being 29 CFR, §§ 1926.251(c)(8) and 1926.550(a)(19). However, it is understood that Boh Brothers has contested the allegations.

. . . [T]he piles or pipes on the truck were bundled together in bundles of three with metal straps on the flatbed truck. . . . [T]he piles or pipes were stacked in three layers on the back of the flatbed truck with six piles on the bottom layer, six piles on the middle layer, and three piles on the top layer.

. . . [T]he bottom two layers consisted of two sets of bundles of piles with each set consisting of three piles bundled together with metal straps. . . . [T]he first layer of pipes was lifted from the truck by means of a forklift.

Boh is a heavy construction contractor whose headquarters are in New Orleans, Louisiana. It builds roads, bridges, chemical plants, oil refineries, and other large-scale projects, predominantly along the Gulf Coast. Boh had been in business for 91 years at the time of the hearing. In June of 1999, Boh employed 1,600 employees (Tr. 19).

The Alabama Power Company had hired Boh to construct an electrical power plant at its site in Theodore, Alabama. One of the initial phases of the project was to drive approximately 500 steel pipes into the ground that would provide support for the foundational slab of the new plant. (The pipes were also referred to as “piles” or “pilings”) (Tr. 27). Each pipe was 60 feet long and 14 inches in diameter, and weighed approximately 2,000 pounds (Tr. 28). The pipes were brought in by truck. Boh employees unloaded the pipes with mechanical help, either a forklift or a crane (Tr. 29).

On the morning of the accident, foreman Wallace Delancy and his crew of six employees were in the process of unloading the day’s first truckload of pipes. Boh had been on the site for approximately one month and had driven in approximately 150 pilings by that time (Tr. 69-70, 145-146). Boh employees rigged two slings around a load of six pipes. One eye on the end of each sling was attached to a crane cable hook. The eye on the opposite end of each sling encircled the crane cable above the hook. This configuration did not allow the two slings to close down around the load, but created a loose cradle to support the load when lifted by the crane.

Crane operator Daniel Headrick testified that Delancy signaled Headrick to lift the load (Tr. 162). Headrick noticed “that the load was picking up unevenly. . . . It was picking up toward the front of the truck cab a little higher than the backside. It was coming up unlevel” (Tr. 163). Headrick stopped the lift. At the hearing, Headrick stated (Tr. 164):

I hollered at Wallace [Delancy] and told him that it didn’t look right to me. And he said, it looks good. Don’t worry about it. He’s got it. He knew what he was doing and he figured it would be okay. And he continued to give me the signal to lift up. . . . I lifted up some more. . . . [Delancy] stopped me from lifting up and started me to boom up.

As Headrick boomed up, Delancy signaled him to stop. Delancy moved to within two feet of the load and looked at it. While he was looking at it, the load slipped (Tr. 171). The sling closest to the rig slid toward the middle of the pipe, causing the load to twist. The front end of the load closest to Delancy came down and the back end of the load scraped against the truck. This caused some of the pipes to roll off the truck (Tr. 172).

Delancy got in between the truck and the pipe and tried to push the load away from the truck with his hands. One of the pipes from the truck rolled off and tripped Delancy. As he regained his feet, Delancy came directly between the truck and the load. The load crushed Delancy against the truck, killing him (Tr. 173-174).

Discussion

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health 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, 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).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.251(c)(8)

The Secretary alleges that Boh committed a serious violation of 29 C.F.R. § 1926.251(c)(8), which provides: "Slings used in a basket hitch shall have the loads balanced to prevent slippage."

It is undisputed that the load of pipes lifted by Boh on June 10, 1999, was not balanced. Crane operator Headrick noticed the lack of balance as soon as he began his lift. He immediately brought it to the attention of Boh's foreman.

Boh argues that 29 C.F.R. § 1926.251(c)(8) does not apply to the rigging it used on the load because the slings were not used in a basket hitch. Boh contends that its employees rigged the load using a choker hitch that failed to choke properly. The Secretary maintains that, no matter what kind of hitch Boh intended, the hitch that resulted was a basket hitch.

The construction standards do not define “basket hitch” (Tr. 261-262). Compliance officer Brian Smith stated that a basket hitch “cradles the load. It doesn’t wrap the load along.” Mr. Smith identified the hitch used on the load in question as a basket hitch (Exh. C-14; Tr. 219). Here the hitch consisted of two slings with two eyes on the ends of each sling. Mr. Smith further testified that the basket hitch “cradles the load and it has four points of suspension meaning that the load is suspended in four points. . . . A choker sling . . . [has] two points of suspension” (Tr. 219).

Vic Gremillion, Boh’s corporate safety director, drew a similar distinction between a choker hitch and a basket hitch. In a choker hitch, “when the weight is applied, the weight of the load causes a choking action” around the load. In a basket hitch, “the load is just held by gravity in the sling” (Tr. 104).

Mr. Gremillion identified the configuration of the slings at issue as a basket hitch as follows:

- Q. Sir, could you please look at C-1 and tell me whether or not the configuration in C-1 resembles a basket hitch?
- A. I don’t -- I don’t have it.
- Q. Do you have Exhibits C-1, 2 and 3?
- A. Yes.
- Q. Can you please tell me whether or not C-1 resembles a basket hitch?
- A. Yes.
- Q. Could you please look at C-2? And to the right of the flatbed truck, you see some pipes or piles that are in a load with two supporting apparatuses. Does that resemble a basket hitch?
- A. Yes.

Q. Could you please look at C-3? And you see in the photograph directly in front of the flatbed truck are some piles of pipes that are suspended by two configurations. Can you tell me if that resembles a basket hitch?

A. One or the other, but it's not in front of the truck. It's on the right-hand side of the flatbed trailer. But, yes, that is a basket hitch. It resembles a basket hitch. (Tr. 21-22)

Mr. Gremillion described a choker hitch as follows:

A. A choke hitch is made by taking a sling, which has two eyes on each end, and a length of wire rope in the middle, and going under the load, taking the eye that has passed under the load and passed through the eye of the other end of the wire rope sling and attaching one end to the crane -- to the crane so that when the load is lifted, the eye of the sling forms a choke hold on the load (indicating).

THE COURT: It slides down onto the load?

THE WITNESS: It slides down and tightens up onto the load and actually chokes the load (indicating). It has a bite on the load when it's lifted. (Tr. 22)

Here the two slings were not configured as a choker hitch or choke hitch. The eye on one end of the sling did not pass through the eye of the other end of the sling. If this had been a choker hitch, only one end of the sling would have been attached to the crane cable. In this situation, one end of each sling was attached to a crane hook. The eye on the other end of each sling encircles the cable above the hook, not the sling. When the load was lifted, the eye slid down that cable, but only to a point above the hook where it was stopped by a shackle. Each sling had two ends attached to the crane cable. The resulting configuration had four points of suspension from the crane cable and was a basket hitch that cradled the load rather than choking down on it. Respondent's safety director, Mr. Gremillion, admitted throughout his testimony that the resulting configuration used by Boh's crew was a basket hitch, not a choker hitch (Tr. 21-22, 104-108).

It is undisputed that a basket hitch cradles the load in the slings and relies on gravity to keep the load in place. Boh's own corporate safety director stated that the way to tell the difference between a choker hitch and a basket hitch is to see whether the load is secured or

unsecured. “If there’s a big space in here and you’re not choking and biting down on the load, there’s a large space in here, then you’ve got a basket hitch” (Tr. 104). Exhibits C-2, C-3, and C-14 show that the pipes are not secured, but that there is a large triangular space made by pipes on the bottom and the slings on the two sides.

Boh’s claim that this was not a basket hitch, but a choker hitch done wrong is not persuasive. I find that Boh rigged the load using a basket hitch and that the load was not balanced. The intent of the standard is to prevent unsecured loads from slipping. Regardless of how Boh intended to configure the rigging, it ended up with 12,000 pounds of unbalanced metal pipe resting in a basket hitch. The purpose of the standard is effected not by focusing on the employer’s intention in rigging a load, but by looking at the actual result of the rigging.

The Secretary has established that 29 C.F.R. § 1926.251(c)(8) applies to the rigging of the load and that Boh failed to balance the load. Seven Boh employees were present at the site and exposed to the violative condition. Boh was aware of the violative condition. The fact that the load was unbalanced was plainly visible to all and was specifically called to the attention of the foreman. Violation of 29 C.F.R. § 1926.251(c)(8) created the substantial probability that death or serious physical injury could result. Boh was in serious violation of 29 C.F.R. § 1926.251(c)(8).

Item 2: Alleged Serious Violation of 29 C.F.R. § 1926.550(a)(19)

The Secretary alleges that Boh committed a serious violation of 29 C.F.R. §1926.550(a)(19), which provides: “All employees shall be kept clear of loads about to be lifted and of suspended loads.”

It is undisputed that 29 C.F.R. § 1926.550(a)(19) applies to the cited conditions. Boh concedes that it violated the terms of the standard when Delancy attempted to push the load away from the truck with his hands. Delancy was exposed to the hazard and, as foreman, his knowledge of his own actions is imputed to Boh. The Secretary has established a violation of 29 C.F.R. § 1926.550(a)(19).

Boh's Unpreventable Employee Misconduct Defense

Boh argues that the violation of the standard is the result of unpreventable employee misconduct on the part of Delancy.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997). However, “[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991).

Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *United Geophysical Corporation*, 9 BNA OSHC 2117, 2122-2123 (No. 78-6265, 1981).

Boh identified several rules written in its “Safety and Health Manual” that are designed to prevent the violation of 29 C.F.R. § 1926.550(a)(19) (Exh. C-4). Under “Material Handling,” the manual states (Exh. C-4, pp. 79-80, emphasis in original):

A. The unloading of piles shall be supervised. All unnecessary personnel shall be kept clear.

...

I. Taglines should be used on all loads.

J. No employee shall walk under or be placed under a suspended load at any time.

K. Employees shall refrain from “manhandling” piles which are being lifted by the rig **and shall avoid the area when piles are being lifted.**

Boh claims that it effectively communicated these rules to its employees in bimonthly supervisor meetings and weekly safety meetings (Tr. 58). The record establishes, however, that Boh did not take steps to discover violations of these work rules and that it did not enforce the rules when violations were discovered.

Delancy had been a supervisor with Boh for eighteen years at the time of his death (Tr. 57). Boh empowered its supervisors with considerable discretionary authority. Corporate safety director Gremillion stated, “[T]he supervisor, who is kind of running the show and can see, feel, hear, smell, taste what’s going on there, he makes the calls” (Tr. 36-37), and “You usually have to listen to what your supervisor tells you to do, whether it’s written in the book or not written in the book” (Tr. 56).

Crane operator Headrick testified that it was not unusual for employees to get within two feet of a suspended load (Tr. 171). When asked if it had ever happened before that an employee would try to guide the load with his hands, Headrick responded, “Always” (Tr. 173). On the day of the accident, Delancy walked up to within two feet of the suspended load to examine it and later attempted to guide the load by pushing it with his hands. He did this in plain view of his crew.

Boh claims that Delancy’s misconduct was unpreventable, but the evidence supports the view that his actions were routine and condoned by Boh. It is telling that Boh’s corporate safety director stated that if he observed rigging or lifting violations during field visits, he would “make suggestions on how to do it the correct way” (Tr. 46). He makes no mention of actually enforcing Boh’s work rules or disciplining the employees who are responsible for violating the rules.

Boh has failed to establish its unpreventable employee misconduct defense. The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation,

(3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is usually the principal factor to be considered.

Boh employs approximately 1,600 employees (Tr. 19). Boh had no history of violations for the three years prior to the June 10, 1999, fatality (Tr. 225). Boh demonstrated good faith. It had a safety and health manual and held weekly safety meetings with its employees.

The gravity of the violations is high. Boh was lifting an unbalanced load weighing approximately 12,000 pounds. Its foreman attempted to guide the load with his hands. The combination of the two violations resulted in Delancy's death. The Secretary's proposed penalties of \$4,500.00 for each item is determined to be appropriate.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation No. 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.251(c)(8), is affirmed and a penalty of \$4,500.00 is assessed; and
2. Citation No. 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.550(a)(19), is affirmed and a penalty of \$4,500.00 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: March 10, 2000