UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	Docket No. 96-0822
DESIGN DECORATORS, INC., Respondent.	:	

APPEARANCES: Anthony G. O'Malley, Esq.
Office of the Solicitor
U. S. Department of Labor
For Complainant.

Stephan I. Axelrod, Esq.
Merion, Pennsylvania
and
Barry M. Rothman, Esq.
Philaelphia, Pennsylvania
For Respondent

BEFORE: Michael H. Schoenfeld
Administrative Law Judge, OSHRC

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651-678 (1970) ("The Act").

On the evening of November 25, 1995, William Bauer, then age 22, lost his life in a tragic fatal accident. He had been working from a raised aerial lift doing repairs and maintenance on holiday

decorations and lighting strung along the town's streets. He was still riding in the "bucket" of the aerial lift when the truck drove through an underpass that did not provide enough clearance for the raised bucket and Mr. Bauer. Mr. Bauer died as a result of his impacting the bridge structure.

As a result of the fatality, OSHA, the Occupational Safety and Health Administration of the U.S. Department of Labor, conducted an investigation. Following the investigation, OSHA issued three citations to Design Decorators ("Respondent"), Bauer's employer, charging it with two willful, one serious and one other-than-serious violations of the Act.[1] Penalties totaling $76,000 were proposed by OSHA. Respondent timely contested.[2] Following the filing of complaint and answer and pursuant to notices of hearing, the case came on to be heard in Philadelphia, Pennsylvania on February 19 and 20 and March 11, 12 and 13, 1997. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that at the time of this inspection Respondent was engaged in the manufacture, installation, maintenance and removal of Christmas decorations. Respondent does not deny that it uses tools, equipment and supplies which have moved

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[1] The specifics surrounding the fatality were, unfortunately, focused upon by the parties in preparation for and during the course of the hearing. As the Commission noted in a similar case:

> Whether [the equipment operator's action] was the causal agent of the death... need not be addressed here. A finding of noncompliance [with OSHA standards] need not be predicated on the accuracy of a *post-hoc* accident analysis, and it is not necessary that an established instance of noncompliance have been the causative agent of injuries. We emphasize that our inquiry is directed to the question of whether [the OSHA standard was violated]. [The operator's] actions during any particular operation are referenced here solely as evidence tending to show whether or not he [met the requirements of the cited standard] relating to the operation of the...[equipment].

Herbert Vollers, Inc., 4 BNA OSHC 1798, 1801, n.6 (No. 9747, 1976)(Citations omitted.)

[2] At the hearing Respondent withdrew its notice of contest to the single, other-than-serious item contained in Citation 3 (Tr. 475-76). Accordingly, an other-than-serious violation of the standard at 29 C.F.R. § 1904.8(a) is affirmed and a penalty of $2,500 is assessed therefor.

in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[3] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Some general background information is required to put into perspective the discussion of the individual items which follows.

Respondent's business is small and highly seasonal. It manufactures, installs, maintains and removes Christmas holiday decorations from public places such as, lampposts, building facades, shopping centers and some private residences. During most of the calendar year it employs only the owner, Salvatore Bonafino, his wife Joan, his son Joseph, a foreman, Shawn Tillman and one person who does sewing. (Tr. 1016-17). During "the season" some 20 or 22 employees are engaged. Even at the height of the season there is only one foreman, although Joseph Bonafino, who also has supervisory authority, may be present at a job sit as might the owner, Salvatore Bonafino. Many of the employees return year after year. The nature of the business requires work be done quickly. Those employees actually putting up, maintaining and removing public area Christmas decorations work long days, often well into the night. (Tr. 136).

Citation 1, Item 1
29 C.F.R. § 1910.67(c)(2)(ii).

The sole item of Citation No. 1 alleged a violation of the general industry safety standard at 29 C.F.R. § 1910.67(c)(2)(ii)[4] in that:

> Person(s) other than those trained operated an aerial lift:
> a) Keswick Avenue, Glenside, PA - Employees were not aware of

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[3] *Title 29 U.S.C. § 652(5).*

[4] The cited standard, 29 CFR § 1910.76(c)(2)(ii), provides that, "[o]nly trained persons shall operate an aerial lift."

> unsafe conditions and the regulations that governed them (moving an aerial lift while an employee was aloft in the basket, not wearing a safety belt while in the basket, and not being qualified to operate such machinery). therefor (*sic*.) could not have been considered "trained", on or about 11/25/95.

The wording of the citation is unfortunate in that it implies that where violations are shown to exist it must necessarily follow that employees were insufficiently trained. Such an issue is not present in this case because the weight of the evidence is that employees who were permitted to operate the aerial lift had been insufficiently trained.

The Commission, in *Trinity Industries, Inc.*, 15 BNA OSHC 1788 (No. 89-1791) ("*Trinity*"), addressed a standard which requires that powered industrial trucks be operated only by operators trained in their "safe operation."[5] In that case, the Secretary, before the Review Commission, "acknowledged in her brief...that the requirements of the standard can be satisfied, albeit minimally, by instructions in recognition and avoidance of unsafe conditions." *Trinity,* supra., n. 3, p. 1789. While the cited standard in this case does not describe the nature or scope of the training required, it must necessarily mean that an operator of the aerial lift receive training at least sufficient to operate the lift safely. Training limited to the use of the controls does not fulfill the requirements of the standard. *Trinity,* supra, see also, *North Florida Shipyards, Inc.*, ___ BNA OSHC ____ (No. 94-3363, June 3, 1996), 1996 WL 360842 (O.S.H.R.C.)(Welsch, ALJ).[6] The gravamen of the violation as alleged by the Secretary is that while those employees who operated the lift may have been trained as to the functions of the controls and levers which operated the movement of the lift sufficiently to allow them to run it, that such training is incomplete under the cited standard because it fails to apprise the operators of the hazards associated with such operations and how to mitigate those hazards. The Secretary's interpretation of the standard is not unreasonable.

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[5] Title 29 § 1910.178(l), which provides,

> (l) *Operator training*. Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.

[6] Decisions of Administrative Law Judges of the Commission which are not reviewed by the Commission are not precedent. *Leone Construction Co.*, 3 BNA OSHC 1979 (No. 4090, 1976).

Two issues must be answered to resolve this item. First, what kind of training was required given the nature of the aerial lift and the use to which it was put. Second, was training at least meeting the minimum requirements provided to Respondent's employees who operated the lift.

The OSHA inspecting compliance officer testified that "OSHA's definition of training includes a little bit more than just how to operate something" (Tr. 146-7) In reaching her determination as to what the employee training should have been, she consulted the operating manual (GX - 6) and testified that she "got a feel from other industries" as to what type of training was necessary (Tr. 152). She reiterated on cross examination that the employee operators of Respondent's aerial lift should have been required "to know more about the truck than just 'this lever moves it up and this lever moves it down.'" (Tr. 239) She also maintained that "according to the manual...they are to be trained on maintenance." (Tr. 237). The Compliance Officer's supervisor, who was responsible for approving the issuance of the citation, testified that she (and OSHA) "relied" on Appendix A2, *Recommendations for Selection and Training of Operators*, to ANSI A92.2-1969, *American National Standard for Vehicle-Mounted Elevating and Rotating Work Platforms*, for defining what training was required. Such training, she concluded, must encompass "familiarity with the manual and in the safety of the equipment, in the operation of the equipment and the maintenance of the equipment." (Tr. 605) This opinion testimony of the compliance officer and her supervisor is accorded little probative weight. Neither was identified or proffered as an expert witness, nor does the record support a finding that either possesses the degree of training, education or experience with aerial lifts to warrant relying on their opinions as to what training is necessary to safely operate such machinery. The record, however, is not devoid of appropriate evidence.

Charles M. Recard qualified and testified as an expert in aerial lifts. (Tr. 706). His education and experience in the field (Tr. 685-705) warrant assigning considerable evidentiary weight to his opinions as to the nature of training required for safe operation of an aerial lift. With thorough knowledge of the equipment used by Respondent as well as OSHA and ANSI standards, Mr. Recard opined on direct examination that "a training program involving the use of this aerial work platform would, at a minimum, include a review of the information that was in the manual." (Tr. 729) (Similar,

Tr. 722-23). [7]

Another qualified expert, Mr. Ernest Merz, testifying on behalf of Respondent, offered the opinion that the employees were sufficiently trained.(Tr. 1011). Upon careful examination, Mr. Merz's conclusion is not inconsistent with that of Mr. Recard. Mr. Merz conceded that in reaching his opinion he relied on the statements of Mr. Bonafino and Mr. Tillman that employees had been given and had read the operators manual. Mr. Merz also stated that in reaching his conclusion he "neglect[ed], ignore[d] or discredit[ed] the opinion of ex-employees (that they had never seen the manual). Mr. Merz thus concluded that the employees were sufficiently trained, at least in part, because they had reviewed the manual. His opinion as to what constitutes acceptable training is thus in accord with that of Mr. Recard. Mr. Merz simply assumed completely opposite facts.

Accordingly, I conclude that under the requirements of the cited standard, the operators of the aerial lift in this case could be considered to be "adequately trained" if the record shows that the operation of each of the levers and controls was shown to them and they demonstrated under supervision that they could operate the lift and each operator had reviewed the operations manual for the machine.

For the following reasons, I find as fact that Respondent's employees who operated the aerial lift did not receive or read the manual. Accordingly, they were not "trained" within the meaning of the standard.

The Secretary maintains that three "former employees" of Respondent, Mr Maryanski, Mr. Thompson and Mr. Igielski "stated in no uncertain terms that though each of them used the aerial lift, the company did not train them in any safety aspects pertaining to the use of the aerial lift." (Sec. brief, p. 19).

Respondent's witnesses identified four employees who were authorized and trained to operate

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[7] Upon lengthy, often unfocused cross examination frequently peppered with the witnesses disingenuous attempts to parse to death the questioners examination, (*e.g.*, not established that the operators could read, even though each had taken and passed a mechanical aptitude test)(Tr, 768-9), Mr. Recard, who had concluded that the lift had been used improperly, stated that "[b]ased on [the operators] conduct they weren't adequately trained." (Tr. 774). The circumstances leading up to this answer generated sufficient grounds for numerous misunderstandings between the questioner and witness. Such confusion supports giving the answer little weight. It is unclear whether Mr. Recard made this statement in reply to one of a series of hypothetical questions or in a more general vein.

the aerial lift bucket, Mr. Tillman (the Foreman); Mr. Bauer (the deceased); Mr. Igielski (driver of the truck on the night of the fatality) and Mr. Logan.[8] Mr. Tillman had been trained by Mr. Joseph Bonafino (Tr. 805)[9] and, in turn trained the others.[10] Mr. Tillman stated that his training of the employees began by their being given and reading through a "handbook" regarding the equipment. (Tr. 805). According to Mr. Tillman, the men he trained took the manual home and returned it two days later telling him that they had read it. (Tr. 810-11). After having read the manual, he showed them how to operate the equipment and had them do so under his observation.(Id.) Mr. Tillman stated that an additional employee, Mr. Maryanski, who had not read the manual, wanted to learn to use the lift. According to Mr. Tillman, he observed while Mr. Maryanski (presumably with Mr. Tillman's permission) "got up in there, and I told him to come right down. He was scared, so I said come down." (Tr. 816). Mr. Tillman noted that Mr. Igielski was a good operator and that Mr. Logan "very seldom went up there." (Tr. 817).

Respondent's owner, Mr. Bonafino asserted that he just showed employees the truck and turned all training on it over the Mr. Tillman (Tr. 1025-26). He claimed to know that Mr. Tillman gave the employees the manufacturer's manual because Mr. Tillman asked him for the manual. (Tr. 1029). According to Mr. Bonafino, Mr. Maryanski was neither trained nor authorized to operate the lift. (Tr. 1023)

The investigating compliance officer interviewed only three of Respondent's employees, the owner (Mr. Bonafino), the foreman (Mr Tillman) , and the employee who was driving the truck on the night of the fatality (Mr. Igielski). (Tr. 142). She testified that in her initial interview with Respondent's owner, he stated that the aerial lift owner's manual was not used in his training of operators. (Tr. 138-39).

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[8] Respondent's owner, Mr. Bonafino identified Bauer (misspelled as "Bowers"), Tillman and "Joe" (Igielski ?) as the people who were using the bucket during that part of 1995. (GX- 11, p.15).

[9] Mr. Tillman received training on an older, but similar aerial lift owned by Respondent before its purchase of the one referred to in this case. (Tr. 806).

[10] It is clear from Mr. Tillman's testimony that he stated that he had trained Mr. Igielski and Mr. Logan. His answer regarding Mr. Bauer was, however, not responsive and not clarified by counsel. (Tr. 809)

I find that the sum of the Secretary's testimony, even with some caveats, is more persuasive. The testimony of Mr. Igielski will not be considered on any account. He is found to be totally unreliable as a witness. Having admitted to willfully and knowingly lying in interviews and depositions, I cannot consider his testimony at the hearing reliable in any aspect. (See, *e.g.*, Tr. 529). The testimony of Mr. Thompson and Mr. Maryanski, however, is most direct and compelling. Both testified that they had never seen the operators manual and that such a manual was not part of their training. (Tr. 403-07; 410, 412-13; 370-73, 380 and 383). Respondent's attempts to show that Maryanski was in the bucket only once because he was 'afraid" is rejected. Similarly, Respondent had not identified Mr. Thompson as someone authorized to operate the aerial lift. Respondent's reliance on payroll records and time cards, as testified to by Mr. Bonafino, in an attempt to challenge the testimony of Mr. Thompson and Mr. Maryanski, is misplaced. Even if Mr. Bonafino's testimony regarding the meanings of the time cards were to be credited, the records show, at most, that Mr. Thompson and Mr. Maryanski may have somewhat overstated the amount of experience they had in operating the aerial lift. The evidence does not refute their statements that they did indeed operate the equipment. The amount of time which has elapsed since the events to which they testified and the relative unimportance of such details in regard to the essential matters to which they were testifying could well account for such lapses. Their inability to recall some details, however, does not significantly detract from their credibility. Mr. Thompson described training which amounted to nothing more than being shown the how the controls operate. As with other employees, Mr. Thompson described taking turns being in the bucket (Tr. 418-420) and having been "trained" without any awareness of the manufacturers manual. (Tr.. 404). Mr. Bonafino's claim otherwise, that the operator's manual was used in training is rejected for several reasons. First, other inconsistencies, as will be discussed infra., indicate a lack of reliability to his statements about using the manual for training. Second, Mr. Bonafino's statements regarding how Mr. Tillman used or didn't use the manual lack a basis of actual knowledge. He states that he never did any of the training himself (except brief demonstrations) and that he relied on Tillman to do all of the rest. Even if credence were accorded to Mr. Bonafino's claim that Mr. Tillman got the manual from him and returned it at a later date, his claim that the 'trainees" actually took possession of the manual and read it overnight are unsupported and border on speculation. Third, Mr. Bonafino and Mr. Tillman have a much

greater interest in the outcome of this case. Finally, Mr. Tillman's generalizations, lack of details and observable behavior on the stand as a witness are all more consistent with testimony lacking credibility than was that of the former employee witnesses Mr. Maryanski and Mr. Thompson. I thus find as fact, that employees trained by Respondent to operate the aerial lift and who did, in fact, operate the aerial lift, had no training with the operations manual for the equipment. Their training thus was not even minimally adequate. The requirements of the standard at 29 C.F.R. § 1910.67(c)(2)(ii) were not met. Accordingly, Item 1 of Citation 1 is affirmed.

The Secretary has alleged that this violation is serious within the meaning of § 17(k) of the Act. Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.,* 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied,* 639 F.2d 772 (3d Cir. 1980). It is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.,* 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980).

In this case, regardless of the cause or nature of the fatal occurrence, the hazards associated with the operation of an aerial lift by persons lacking appropriate training in virtually any of the safety aspects of its operation (*e.g.*, observation and clearances required from power lines) raise the possibility of resulting serious bodily injury. As the Compliance Officer testified, aerial lift operators untrained in such matters as the possibilities of collision with objects, inability to recognize situations to be avoided and procedures to use in emergency face the possibility of serious injury. I agree. Accordingly, I find that the violation is serious within the meaning of § 17(k).

The Commission has often held that in determining appropriate penalties for violations "due consideration" must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include; the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." An administrative law judge is required "to state an adequate factual basis

for his assessment of a penalty...." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

Respondent does not have a history of any prior violations. Despite the compliance officer's use of 30 to 40 employees as a measure of Respondent's size (Tr. 609), it is a very small employer. Respondent's business is so highly seasonal that during the "off'" season it employs only 4 persons and employs the 20 or so persons as stated by the compliance officer only during the season from November through January. The single most compelling factor regarding the assessment of an appropriate penalty for this violation, however, is Respondent's owner's "let the foreman take care of it" attitude. As will be discussed in more detail infra., the owner's approach to safety was sorely lacking in sincerity. It is most salient that in a business as small as that of Respondent which is under the direct day to day control of the owner personally that such a lackadaisical attitude towards safety is not only contagious, it clearly sends a signal to all employees that safety concerns occupy a less than significant place in how the company operates. Under such circumstances, I cannot, on this record, find a good faith effort to comply with the safety needs of the employees using the aerial lift. Given the above considerations, and noting that the range of possible penalty for a serious violation of from a maximum of $7,000 to a minimum of $1, I find that a penalty of $3,500 as proposed by the Secretary is appropriate.

Citation 2, Item 1a
1910.67(c)(2)(viii)

Item 1 of Citation 2 contains two sub-parts. Item 1a, citing the standard at 29 CFR § 1910,67(c)(2)(viii)[11], alleges that;

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[11] The standard cited, 29 CFR § 1910.62(c)(2)(vii), provides as follows,

> (viii) An aerial lift truck may not be moved when the boom is elevated in a working position with men in the basket, except for equipment which is specifically designed for this type of operation in accordance with the provisions of paragraphs (b)(1) and (b)(2) of this section.

Paragraphs (b)(1) and (b)(2), in turn, state:

> 1910.67(b) *General requirements*. (1) Unless otherwise provided in this section, aerial devices (aerial lifts) acquired on or after July 1,1975, shall be designed and constructed in conformance with the

(continued...)

> [a]n aerial lift truck was moved when the boom was elevated in a working position with men in the basket:
> a) Keswick Avenue, Glenside, PA - An employee worked in the basket of a Versalift Model BV-24-G aerial lift mounted on a 1983 GMC truck, which was moved while the basket was elevated, exposing him to hazards of striking objects and/or falling from the basket, or about 11/25/95.

Because the most reasonable interpretation of the standard is one which considers the phrase "elevated in a working position" to mean any boom position other than the stored (stowed) or cradled position, and because Respondent did not fulfill its burden of proving an exception to the requirement because the equipment was "specifically designed for this type (mobile) of operation," the undisputed facts of the case demonstrate that there was a violation of the cited standard.

There is virtually no disagreement that at the time of the incident, the boom of the truck was not in the stored or stowed position, the truck was in motion, and there was a man in the bucket.

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[11](...continued)

> applicable requirements of the American National Standard for"Vehicle Mounted Elevating and Rotating Work Platforms," ANSI A92.2 -1969, including appendix, which is incorporated by reference as specified in 1910.6. Aerial lifts acquired for use before July 1, 1975 which do not meet the requirements of ANSI A92.2 - 1969, may not be used after July 1, 1976, unless they shall have been modified so as to conform with the applicable design and construction requirements of ANSI A92.2 - 1969. Aerial devices include the following types of vehicle-mounted aerial devices used to elevate 1910.67(b)(1)(I) personnel to jobsites above ground: (I) Extensible boom platforms, (ii) aerial ladders, (iii) articulating boom platforms, (iv) vertical towers, and (v) a combination of any of the above. Aerial equipment may be made of metal, wood, fiberglass reinforced plastic (FRP), or other material; may be powered or manually operated; and are deemed to be aerial lifts whether or not they are capable of rotating about a substantially vertical axis.
> 1910.67(b)(2)Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2 - 1969 and this section, and to be at least as safe as the equipment was before modification.

There is also reliable, credible evidence that the aerial lift was used in the same or similar manner on other jobs, sometimes in the presence of the foreman, Mr. Tillman (Tr. 408) or in the presence of Mr. Bonafino (Tr. 378). These facts are sufficient for the Secretary's *prima facie* case.

Respondent's argument, essentially that "elevated in a working position" means a position from which work was actually performed, is rejected.

Respondent contends that the standard's prohibition against moving the vehicle with a person in the bucket while the bucket is in an "elevated working position" is so vague as to require an examination of industry custom and practice. One can reach this result only by a taking a strained and unreasonable interpretation of the phrase "elevated working position" which it apparently arrived at after the fatality.

The record contains many indications that Respondent's owner was well aware that his employees should not be in the bucket at any time when the truck was in motion. (GX-11, at p. 52, GX-6). Indeed, at the hearing, Mr. Bonafino testified that he was aware that there were "inherent dangers" in employees riding in the bucket of a moving truck regardless of the position of the bucket. (Tr. 1054). Mr. Bonafino also maintained that he had a "rule" that if an employee were "caught" riding the bucket he would be fired. (Tr. 1052-53). Mr. Bonafino apparently initially told the interviewing Compliance Officers that he had a work rule prohibiting riding in an elevated bucket and at one point said so in his testimony (GX-11, p. 16, 17-18, Tr . 1052). His foreman, Mr. Tillman, however, thought at one point that the "rule" was that employees could ride the bucket if it were half-way down. (GX-12, Pp. 15, 35). The operator's manual which Mr. Bonafino and Mr. Tillman both claim to have reviewed states clearly states: "STORE BOOMS BEFORE DRIVING TRUCK" and "WARNING: DO NOT DRIVE THE TRUCK UNLESS BOTH BOOMS ARE IN THE STOWED POSITION." (GX-6, Pp. 28, 32)(Original all capital case.) Respondent's expert, Mr. Merz, would have us believe that such warnings are ambiguous because somehow "drive" could refer to over-the-road or highway driving as opposed to slowly moving the truck from pole to pole or from one work location to another one which is close by ("mobile operations."). Based on the fact, as testified to by Mr. Merz, that some lift trucks are specifically designed for such "mobile operations," he maintained that the prohibitions in the manual for Respondent's truck which are printed in all capital letters and, in some cases, accompanied by illustrations, "apparently appl[y] to driving from work site

to work site, and not for moving operations. It doesn't say moving operations." (Tr. 1000). As observed by Mr. Recard, "[t]he manual makes it very clear that this truck is not to be driven with the boom out of the cradled position." (Tr. 734).

I reject Mr. Merz's interpretation as strained, unreasonable and untenable in light of the plain, clear and unambiguous language in the manual. The manual's reference to "store" and "stow" cannot, without straining credulity, be read to mean left in any elevated position. Accordingly, I find that the reference in the standard to "elevated working position" means any position other than stored or stowed.

I also reject Respondent's claim that its aerial truck falls within the exemption contained in the standard.

In claiming that the aerial lift in question is exempt from the requirements of the standard, Respondent places the burden of proof on the wrong party. Further, its claim is without merit.

Where, as here, a party claims the benefit of an exception, it has the burden of proving that its claim comes within the exception. *Stanbest Inc*., 11 BNA OSHC 1222, 1226 (No. 76-4355, 1983). Thus, Respondent's assertion that

> because the regulation exempts 'specifically designed' equipment from its scope, the government must prove that, more likely than not, Design Decorator's aerial lift truck was not specifically designed for such operations.

(Respondent brief, p. 15) is rejected.

Respondent's expert, Mr. Merz, opined that the standard does not itself define what constitutes "specifically designed for mobile operations." He also testified that his inspection of the truck and aerial lift led him to determine that it was safe for mobile operations based upon his own analysis of its design, stability and strength (Tr. 947-48). Mr. Merz looked at several ANSI standards for similar equipment and consulted other users of aerial lifts as to the nature of their operations. According to Respondent, it was reasonable for Mr. Merz to reach the conclusion that Respondent's aerial lift was designed for mobile operations because he had determined that Respondent's aerial lift was safe for such operations, and he believed that there were no specific design requirements in the standard and there were no warnings in the manual prohibiting such operations. (Resp. brief, p16). Such reasoning is a *non-sequitur*. First, even if the lift could in fact withstand the strain of mobile

operations does not necessarily mean that it was designed to do so. Second, the lack of specific design criteria in the standard says nothing about whether Respondent's machine was specifically designed for such operations. Third, as previously discussed, the unambiguous warnings in the machine's manual dispel any doubt as to whether the manufacturer of the machine itself thought it was appropriate to conduct mobile operations with its equipment.

Mr. Merz's testimony does not amount to proving by a preponderance of the evidence that Respondent's equipment was specifically designed for mobile operations. Respondent has thus not met its burden of proving its claim that the aerial lift came within the exception to the cited standard.

Moreover, a weighing of the conflicting expert opinions results in rejecting Respondent's position on the merits. The contrary conclusion of Mr. Recard is given far greater weight in light of the basis of his opinion. Mr. Recard's plain reading of the owner's manual, his comparison of this machine to others known to be designed for mobile use and his consideration of the opinion of the manufacturer of Respondent's machine (which Mr. Merz did not seek out) all provided a more sound and reasonable basis for his opinion.

Based on the above, I conclude that the cited standard prohibits moving the truck with the boom out of the cradled position if the basket is occupied by a person. I also conclude that Respondent was in violation of the cited standard.

The record shows that Respondent knew or reasonably should have known that its employees were moving the truck while men were in the bucket which, in turn, was not in a cradled position. Mr. Bonafino and Mr. Tillman admit that they knew such activities were taking place and there is reliable and credible evidence that Mr. Joey Bonafino and Mr. Tillman were present when it was done. (*e.g.*, Tr. 374-75, 381-82, 409-411.) For the reasons stated previously, I credit the testimony of these former employees and find as fact, that Respondent knew or reasonably should have known that the apparatus was being moved with employees in the bucket which had not been lowered all the way into the stored or stowed position.

Accordingly, I conclude that Respondent was in violation of the cited standard. Item 1a of citation 2, is AFFIRMED.

Citation 2, Item 1b

1910.67(c)(2)(xii)

Item 1b of Citation No. 2 alleges a violation of 29 CFR § 1910.67(c)(2)(xii)[12], in that;

> Before moving an aerial lift for travel, the boom was not inspected to see that it was properly cradled:
>
> a) Keswick Avenue, Glenside, PA - An employee worked in the basket of a Versalift Model BV-24-G aerial lift mounted on a 1983 GMC truck, which was moved while the basket was elevated, exposing him to hazards of striking objects and/or falling from the basket, on or about 11/25/95.

While cited as a separate sub-item, I conclude that this alleged violation is encompassed within and is an integral part of Item 1a. It is thus redundant. As such it is dismissed.

Citation 2, Item 2
1910.67(c)(2)(v)

The Item 2 of Citation No.2 alleges a violation of 29 CFR § 1910.67(c)(2)(v), as follows:

> A body belt was not worn with a lanyard attached to the boom or basket when working from an aerial lift:
>
> a) Keswick Avenue, Glenside, PA - No safety belt or lanyard was provided or worn by employee(s) working from the basket of an aerial lift, exposing them to the hazard of falling or being thrown from the basket, on or about 11/25/95.

The cited standard states, " (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift."

While there is conflicting evidence as to whether Respondent "made available" a standard safety belt, there is clear and convincing evidence that employees of Respondent did, in fact, work from the bucket without being secured by a body belt.(Resp. brief, p.3; Tr. 376-377, 385, 410). In addition, Respondent's knowledge that employees worked from the bucket without using a safety belt

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[12] The cited standard, 29 CFR § 1926.679(c)(2)(xii), states:

> (xii) Before moving an aerial lift for travel, the boom(s) shall be inspected to see that it is properly cradled and outriggers are in stowed position, except as provided in paragraph (c)(2)(viii) of this section.

is established by Mr. Bonafino's statements (Tr. 1059) and Mr. Tillman's concession that he knew that when he was not present "guys have a tendency not to use it." (GX-12, Pp. 19-20)[13]. On the above facts, a *prima facie* case for a violation has been made out.

Much time and effort was devoted at the hearing regarding Respondent's claim that a safety belt came with the truck when it was purchased and that the belt was available or at least in a compartment on the truck at virtually all relevant times. Respondent seeks to establish that employees operating the aerial lift without using a safety belt were engaged in unpreventable employee misconduct.

The unpreventable employee misconduct defense has long been recognized by the Commission. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979); accord *Brock v. L.E. Myers*, 818 F.2d 270, 276 (6th Cir. 1987), cert. denied, 484 U.S. 989 (1987). Its elements were clearly stated by the United States Court of Appeals for the First Circuit as follows;

> The OSH Act requires that an employer do everything reasonably within its power to ensure that its personnel do not violate safety standards. But if an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma, both OSHRC and the courts have recognized the availability of the UEM defense.
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> The contours of the UEM defense are relatively well defined. To reach safe harbor, an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it. See *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir.1996); *General Dynamics*, 599 F.2d at 458-59; *Jensen Constr. Co.*, 7 O.S.H. Cas. (BNA) 1477, 1479 (1979). The employer must shoulder the burden of proving all four elements of the UEM defense. See *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.1987); *General Dynamics*, 599 F.2d at 459. Sustaining this

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[13] I credit Mr. Tillman's statement at deposition over his contradictory statement at the hearing. (Tr. 848). The deposition was closer in time to the events in question and there is more likelihood that he was being truthful in the less dramatic circumstances of a deposition as compared to testifying in court. In addition, at the time of the deposition, there had been considerably less time and opportunity to plan and discuss a line of defense for Respondent.

> burden requires more than pious platitudes: "an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees." *General Dynamics*, 599 F.2d at 458; accord *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir.1981).
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> Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them. See *Centex-Rooney Constr. Co.*, 16 O.S.H. CAS. (BNA) 2127, 2130 (1994).

P. Gioioso & Sons, Inc., ___ F.3d ___ (No. 96-1807, 1st Cir., June 13, 1997), *slip op., p. 9 (footnotes omitted.) [1997 WL 309916]*

Respondent's assertion that it had a work rule that belts were to be used need not be resolved in light of the clear testimony that to the degree that such a "rule" existed, Respondent's management did virtually nothing to discover incidents of non-compliance with the rule or to enforce the rule. Mr. Salvatore Bonafino and Mr. Tillman both stood pat on their positions that they had heard that employees were not using the belt but that they could do nothing about because they could never catch the employees in the dangerous act. In light of all of the testimony as to Mr. Bonafino's and Mr. Tillman's presence at work sites, this contention is clearly not meritorious. Mr. Bonafino also testified that he never fired anyone for not wearing a safety belt because he never had "proof." (Tr. 1060-61).[14]

On this record as a whole, I find that there was no earnest effort on the part of either Mr. Bonafino or Mr. Tillman to discover violations of the supposed work rule or to effectively enforce it. Such acquiescence by supervisory personnel is strong evidence that an employer's safety program is lax. Even if Respondent had supplied a belt and the belt was, at all times, in the bucket or easily accessible in a compartment on the truck, Respondent would not prevail on this defense because it failed to take any action in the face of actual or rumored or general employee knowledge of non-use

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[14] Mr. Bonafino's claim to have fired an employee for his improper use of the aerial lift does not withstand close scrutiny. The "firing" lasted a few days at most after which the employee was rehired, albeit, at an hourly salary one dollar less than before. (Tr. 1027-28). The employee received a bonus at the end of that season (Tr. 1032).

of the belt[15]. Respondent has thus failed to make out the affirmative defense of unpreventable employee misconduct.[16]

The subject of unpreventable employee misconduct cannot be left without comment on Respondent's raising the possibility of drug or alcohol use by either or both of the employees involved in the accident. A great deal of time, effort and expense was expended in investigating and bringing to trial the issue of possible drug use. The issue is only marginally relevant. Moreover, Respondent makes no such arguments in its post hearing brief, and has thus. abandoned the claim.[17]

Even if Respondent could show that the driver of the truck was under the influence of cannabis at the time of the accident, it would have, at most, established the likely cause of the accident and perhaps demonstrated that the particular episode was the product of employee misconduct. In light of the extended and consistent course of conduct of Mr. Bonafino and Mr. Tillman in disregarding employee safety, however, one night's employee misconduct would not be found to have been unpreventable within the meaning of the affirmative defense.

Were it necessary to arrive at a factual determination as to the state of the truck driver on the night of the fatality, I would find on the evidence on this record that he was not under the influence of cannabis or any other drug at the time of the incident. Two well qualified expert witnesses, Dr. George Jackson and Dr. Sunil Kumar Niyogi, disagreed as to whether the post-incident

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[15] In this regard, were I called upon to determine as fact whether the belt was generally on the truck and available to employees I would find that it was not. I would accord more credibility and weight to the testimony of Mr. Maryanski and Thompson that they knew of no belt on the truck as well as the police search of the truck two days after the incident (even though Respondent seeks to question the thoroughness and validity of the search.) . In sum, I would reject Mr. Bonafino's and Mr. Tillman's claims on credibility grounds.

[16] Respondent merely mentions the infeasibleness and greater hazard affirmative defenses in its post-hearing briefs. It presents little or no rationale, argument or evidence in support of either defense. Even if, as Respondent claims, having the employee get out of the bucket while the truck is moved from lamp post to lamp post would increase costs, slow the operation down, and add physical exertion, neither defense has been made out. The claims are rejected.

[17] If anything, Mr. Tillman's statement that on one occasion when he suspected that the driver was under the influence of drugs, he merely moved him to an "inside job'" but did not discipline him or report the incident the Mr. Bonafino (Tr. 865-66) reinforces the conclusions reached elsewhere regarding the paucity of safety enforcement and the indifference to employee safety.

blood tests of the truck driver [18] demonstrated that he was under a drug induced impairment at the time of the fatality. Both experts presented scientifically based conclusions, essentially representing two opposing schools of thought, both of which are accepted in their field of expertise. (Tr. 465). Thus I would reject neither expert's testimony. I would, however, accord more probative weight to that of Dr. Jackson because his conclusion that the blood tests did not provide a reliable indication that the driver was impaired at the time of the incident is more consistent with the testimony of the investigating police officers who were at the scene and reported nothing in the driver's behavior that they considered to demonstrate intoxication or functional impairment nor was he charged with any such driving violation. (Tr. 22-23, 26-27, 69-70, 78-79, 259-260).

Accordingly, Item 2 of Citation 2 is AFFIRMED.

Willfulness of Violations Alleged in Citation 2.

The Secretary alleges that the violations alleged in Citation 2 were willful.

A willful violation is committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade,Inc*., 13 BNA 0SHRC 1019 (1987); *Asbestos Textile Co*., 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered a conscious disregard or plain indifference to the standard, i.e., *General Motors Corp*., *Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated); *Williams Enterprises Inc.*, 13 BNA 0SHRC at 1256-57. The test for willfulness describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co*., 595 F.2d 309, 318-319 (5th Cir. 1979); *Ensign - Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C. Cir. 1983).

The single most telling aspect of the nature of the alleged violations in this case is that each of the violations generated hazards of which both Mr. Bonafino and Mr Tillman were clearly aware. They both acknowledged that they knew that riding in an elevated bucket and working from the bucket without using a properly installed safety belt were hazardous. Nonetheless, as previously

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[18] The blood tests revealed the presence of 15 nanograms per deciliter of 9-carboxy-THC, considered a positive for the presence of cannabinoids, (Tr. 327-28).

discussed, both turned their heads the other way in the face of actual instances of occurring in front of them. Both did nothing to gain further information for the purpose of alleviating the hazardous conduct despite persistent rumors of such conduct. Such actual awareness of hazardous conditions along with their failure as supervisors to correct or eliminate them demonstrates plain indifference for the purposes of willfulness. *A. Schonbek & Co. v. Donavan,* 646 F.2d 799, 800 (2nd Cir. 1981).

This is not a case of misfeasance but rather non-feasance. Mr. Bonafino tried to wash his hands of all responsibility. He agreed that he personally took no action to enforce the use of safety belts, saying "I depend on Shawn Tillman for that." (Tr. 1062). Despite his awareness of "rumors" that employees were not wearing the belts as required (Tr. 1060), Mr. Bonafino made no inquires at all, of either the employees or Mr. Tillman. Mr. Bonafino essentially ignored the situation because enforcement of safety rules was Mr. Tillman's job. (Tr 1063-63). Both Mr. Bonafino and Mr. Tillman consciously chose to take no action in the face of knowledge that their employees were "violating" safety rules and common sense and thus exposing themselves to dangers they need not have faced. Such inaction constitutes a clear indifference or reckless disregard for employee safety and demonstrates a greater degree of culpability than mere knowledge of a hazardous condition existing. Conscious, voluntary inaction is as willful as deliberate action. The record in this case lacks any reliable evidence that Respondent made a good faith effort to comply with the Act. On these bases, the violations are willful within the meaning of the Act.

In light of the penalty factors previously considered, especially Respondent's small size and the small number of employees exposed to the violations (4), and the fact that the range of possible penalty for each willful violation is from $5,000 minimum to $70,000 maximum under § 17(a) of the Act, 29 C.F.R. § 662, the amount proposed by the Secretary, $35,000 for each violation, amounting to one-half of the allowable maximum, is too high. A penalty of $10,000 for each violation is more appropriate.

Accordingly, Items 1a and 2 of Citation 2 are AFFIRMED as willful violations of the Act and a penalty of $10,000 is assessed for each violation.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.67(c)(2)(ii), as alleged in Citation 1, Item 1.

4. The violation above was serious within the meaning of § 17(b) of the Act for which a penalty of $3,500 is appropriate.

5. Respondent was in violation of § 5(a)(2) of the Act in that is failed to comply with the standards at 29 C.F.R. § § 1910.67(c)(2)(viii) and 67(c)(2)(v), as alleged in Citation 2, Items 1a and 2.

6. The violations above were willful within the meaning of § 17(a) of the Act for which a civil penalty of $10,000 each is appropriate.

7. Pursuant to Respondent's withdraw of its notice of contest, Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with 29 C.F.R. § 1904.8 as alleged in Citation 3, Item 1.

8. The violation above was other-than-serious for which a civil penalty of $2,500 is appropriate.

ORDER

1. Citation 1, Item 1 is AFFIRMED.
2. Citation 2, Items 1a and 2 are AFFIRMED.
3. Citation 2, Item 1b is VACATED.
4 Citation 2, Item 1 is AFFIRMED.
5. Civil penalties totaling $ 26,000 are assessed.

Michael H. Schoenfeld
Judge, OSHRC

Dated: 8/19/97
Washington, D.C.