



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Commercial Painting, Inc.,

Respondent.

OSHRC Docket No. **04-1809**

Appearances:

Amy R. Walker, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Scott A. Frick, Esquire
Stokes, Bartholomew, Evans
& Petree
Memphis, Tennessee
For Respondent

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

DECISION AND ORDER

Commercial Painting Co., Inc. is engaged in construction contracting. On August 11, 2004, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the Respondent's jobsite in Southaven, Mississippi. As a result of this inspection, the Respondent was issued a citation and notification of penalty. The Respondent filed a timely notice contesting the citation and proposed penalties. A hearing was held, pursuant to EZ trial procedures, in Memphis, Tennessee, on February 8, 2005. At the hearing, the parties advised that Items 1, 3 and 4 had been settled. The parties agreed that all three items should be affirmed as serious violations and the total penalties of \$2,200.00 should be assessed for those items. Remaining at issue is the alleged violation of 29 CFR § 1926.451(c)(2)(iv). For the reasons that follow, the alleged violation of 29 CFR § 1926.451(c)(2)(iv) is affirmed and a penalty of \$1,250.00 is assessed for that violation.

Background

During the OSHA inspection of the Respondent's jobsite, the Secretary's compliance officer, Jerry Jackson, observed an employee of the Respondent working on a 4-foot x 12-foot work platform, elevated 21 feet above the ground. The platform was supported by the forks of a Gradall Model 534C Material Handler operated by another employee of the Respondent. This material handler is a rough terrain forklift. The platform was designed and built by the Respondent's employees. As a result of this inspection, the Respondent was issued a citation alleging four violations and proposing penalties totaling \$6,000.00.

Discussion

The Secretary has the burden of proving the violation:

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 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).

Alleged Serious Violation of 29 CFR § 1926.451(c)(2)(iv)

The Secretary in Citation No. 1, Item 2, alleges that:

Front-end loaders and similar pieces of equipment were used to support scaffold platforms without being specifically designed by the manufacturer for such use:

7360 Highway 51 North - Employer used equipment to support scaffold platform that was not designed by manufacturer for that purpose.

The standard at 29 CFR § 1926.451(c)(2)(iv) provides:

(iv) Front-end loaders and similar pieces of equipment shall not be used to support scaffold platforms unless they have been specifically designed by the manufacturer for such use.

The threshold issue is the applicability of 29 CFR § 1926.451(c)(2)(iv), to the use of the Respondent's material handler, a rough terrain forklift, to support a scaffold platform. It is undisputed that the personnel work platform is a scaffold platform as defined in 29 CFR § 1926.450.

The standard prohibits the use of front-end loaders and similar pieces of equipment from being used to support scaffold platforms unless they have been specifically designed by the manufacturer for such use.

The initial question before me is whether the Gradall Model 534C Material Handler is a similar piece of equipment within the meaning of the standard. This section of the standard does not use the term forklift or rough terrain forklift. Where, as here, there is possible ambiguity regarding the language of this standard as to whether a forklift is a similar piece of equipment; it is necessary to consider the Secretary's interpretation of this standard. While deference is generally shown to the Secretary's interpretation of standards, the Commission is authorized to review those interpretations for consistency with the regulatory language and for reasonableness. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 111 S.Ct. 1171 at 1173 (1991), *on remand*, 941 F.2d 1051 (10th Cir. 1991).

The standard at 29 CFR § 1926.451(c)(2)(iv) was promulgated as a final rule on August 30, 1996, at Vol. 61, No. 170, page 46026 of the Federal Register. In the preamble to the final rule, the Secretary addressed the applicability of this standard to forklifts, front-end loaders, and similar pieces of equipment as follows:

After a careful review of the above comments, OSHA finds there is insufficient reason to totally ban the use of forklifts, front-end loaders, and other similar equipment as scaffold supports. OSHA notes that the commenters are in general agreement that all equipment not specifically designed to support scaffold platforms must not be used. Accordingly, the Agency has promulgated new paragraphs (c)(2)(iv) and (v) in the final rule to provide guidance for the safe use of specific equipment as scaffold supports. In particular, the added provision requires

that, in the case of forklifts, the entire scaffold platform be secured to the forklift. *All* supported scaffolds, including those support by forklifts, front-end loaders and similar pieces of equipment, must comply with the applicable requirements of § 1926.451 for capacity, construction, access, use, and fall protection.

61 Fed. Reg. 46044

Subsequent to the issuance of the final standard and publication in the Federal Register, the Secretary, on at least two occasions, issued Standard Interpretations addressing this standard and the use of rough terrain forklifts to lift employees on platforms (Exhs. C-6, C-7).

Both Standard Interpretations were issued by Russell B. Swanson, Director of the Directorate of Construction, Occupational Safety and Health Administration, U.S. Department of Labor. These Standard Interpretations are posted on OSHA's website, available to the public.

In the Standard Interpretation dated September 30, 1999, the Director referenced part of the above quoted preamble, and clearly stated the Secretary's interpretation of applicability of the standard to rough terrain forklifts as follows:

Powered industrial trucks, which include forklifts, as well as rough terrain forklifts, are "similar pieces of equipment" to forklifts and front-end loaders in this context. Therefore, they fall within the requirements of § 1926.451(c)(2)(iv).

(Exh. C-6)

In the Standard Interpretation dated November 27, 2001, the Director quoted extensively from the preamble relating to applicability of the standard to forklifts and rough terrain forklifts, and again clearly stated the Secretary's interpretation as follows:

In construction, powered industrial trucks, which include rough terrain forklifts, are "similar pieces of equipment" to forklifts and front-end loaders in this context. Therefore, they fall within the requirements of § 1926.451(c)(2)(iv) and (v), along with the other requirements of that section for capacity, construction, access, use, and fall protection.

(Exh. C-7)

Both Standard Interpretations are reasonable and consistent with the regulatory language in 29 CFR § 1926.451(c)(2)(iv) and its preamble at page 46044, Volume 61 of the Federal Register, dated August 30, 1996.

The Respondent argues against applicability, relying in part on the language in 29 CFR § 1926.451(c)(2)(v) which provides:

(v) Forklifts shall not be used to support scaffold platforms unless the entire platform is attached to the fork and the forklift is not moved horizontally while the platform is occupied.

That subsection specifically applies to forklifts, requiring the platform to be attached to the forks. Front-end loaders and other similar pieces of equipment do not have forks. That subsection of the standard is therefore limited in its application to forklifts.

By choosing to specifically address forklifts in § 1926.451(c)(2)(v), the Secretary did not exclude forklifts from applicability of § 1926.451(c)(2)(iv). The standard at issue applies more generally to a wider variety of equipment used to lift personnel. This is consistently explained in the standard, the preamble in the Federal Register, and in the Standard Interpretations published by the Secretary. The standard at 29 CFR § 1926.451(c)(2)(iv) is applicable.

The Commission must balance the competing interests in this case. There is a need for wide application of standards to effectuate the remedial purpose of the Act. Due process demands that employers be given adequate prior notice of required conduct. After reviewing the plain language of § 1926.451(c)(2)(iv), and common sense meaning of the words used, I conclude that the Respondent was given adequate prior notice by the standard of the required conduct. The requirements of the standard are clear. Applicability of its terms to forklifts is reasonable. Adequate prior notice of required conduct was given to the Respondent by the terms of the standard, along with the preamble and Standard Interpretations, all of which were published long before the inspection at the Respondent's jobsite. The Secretary has consistently applied the interpretation embodied in Citation No. 1, Item 2. See *Martin v. OSHRC (CF&I Steel Corp.)*, *Supra*, 111 S.Ct. at 1179.

The Respondent clearly failed to comply with the terms of the standard. The standard requires that the pieces of equipment, in this case forklifts, shall not be used to support scaffold platforms unless they have been specifically designed by the manufacturer for such use. Neither the forklift nor the scaffold platform was designed by Gradall, or any other manufacturer, for such use.

Mark Koch, the Respondent's president and owner, testified that the Respondent's employees designed and built the work platform without consulting or contacting Gradall, the manufacturer of

the material handler. Koch further testified that he contacted his structural engineer only regarding the size of the tubes for the platform base. Neither Gradall, nor the Respondent's structural engineer, designed or approved the design and specifications of the work platform.

The Respondent, in designing the work platform, did not know the weight of the platform, material, and personnel to be lifted. It also designed the platform without determining the lifting capacity of the material handler.

The warning decal inside the cab of the Respondent's forklift, relating to safe operation of the machine, warned the Respondent not to use the machine to lift personnel (Exh. C-4). The operating manual for this forklift, inside the cab of the machine, also warned the Respondent to never use attachment devices that are not approved by the manufacturer (Exh. C-5). Gradall's G-Tech Report, dated March 11, 2001, refers to Personnel Work Platforms as attachments (Exh. C-8). While the report applies to the D Series (not the C Series Material Handler used by the Respondent), it indicates that a field installation kit will be available at a later unspecified date for the C Series Material Handlers.

That report addresses the method of attachment of Gradall Personnel Work Platforms, warns against the use of non-approved platforms, and warns about the hazards of using a non-approved platform as follows:

The Gradall Personnel Work Platform attaches to the material handler using the Quick Switch located on the boom head. Only Gradall manufactured personnel work platforms are approved for use on approved model Gradall Material Handlers. The use of non-approved attachments including those described as fork mounted safety work platforms with Gradall Material Handlers could overextend and overload the handler and cause it to tip over with little or no warning, resulting in serious injury or death to the operator, platform occupant(s), and/or people standing or working near the handler. Gradall also cannot assure that fork mounted safety work platforms are adequately attached to the forks and/or carriage. Gradall cannot assure the ability of a non-approved attachment to perform its intended function safely. Non-approved attachments may also cause structural damage to the handler or attachment, which could cause dangerous operating conditions resulting in serious injury or death.

(Exh. C-8)

Subsequent to the hearing, the Respondent submitted Exhibit R-2 which contains specifications for the Gradall Model 534C-6 Multi-Purpose Material Handler, the forklift used by the Respondent on this jobsite. That document was prepared by the forklift manufacturer, Gradall, for this model forklift. It specifically warns the user as follows: “Important” – “Handling personnel with the boom is not authorized.” (Exh. R-2)

This warning is consistent with the Gradall warning in the specifications for its Model 534D-6. (Exh. R-1) The document relating to Model 534D-6 was reviewed by Mr. Koch, the Respondent’s president, prior to purchasing the forklift used on the jobsite. It provides: “Gradall does not approve the use of its material handlers for lifting personnel under any conditions.” (Exh. R-1)

Nowhere does Gradall, the manufacturer of the forklift, approve the use of any work platform not designed or approved by it for such use. It specifically warned that handling personnel with the Model 534C boom was not authorized. The Respondent designed its own platform without contacting Gradall, or even using a registered professional engineer to design it to meet the requirements of 29 CFR § 1926.451 for capacity, construction, access, use or fall protection. The Respondent violated the terms of 29 CFR § 1926.451(c)(2)(iv).

The Respondent’s employees were exposed to the hazard of the work platform and material handler tipping over. It is undisputed that the Respondent’s employee was on the work platform and another employee was operating the forklift when the platform, supported by the forks, was elevated over 20 feet above the ground. Both were in the zone of danger of the hazard, and were therefore exposed to the hazard of the platform and material handler tipping.

It is undisputed that the Respondent knew its employees were using the non-approved platform. The Respondent’s employees designed and built the work platform for use with the forklift. The Secretary has established that the Respondent had actual knowledge of the violative conditions.

The violation of the standard was serious. Two employees, the operator and the employee on the platform, were exposed to the hazard of the forklift and platform tipping. The platform was elevated 21 feet above the ground. A fall from that height could result in death or serious physical injury. The operator could also be seriously injured if the forklift tilted.

The Secretary has established a serious violation of 29 CFR § 1926.451(c)(2)(iv).

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must 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. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

The Respondent is an employer with approximately 30 employees. It has no history of violations which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

This was a two-employee crew. The employee on the work platform was exposed to a 21-foot fall while the platform was elevated. If this platform and forklift tipped, the likely result would be death or serious physical injury. Based on these factors, a penalty of \$1,250.00 is assessed for the violation of 29 CFR § 1926.451(c)(2)(iv).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1. Citation No. 1, Item 1, alleging a serious violation of 29 CFR § 1910.178(l)(1)(i) is affirmed and a penalty of \$500.00 is assessed.
2. Citation No. 1, Item 2, alleging a serious violation of 29 CFR § 1926.451(c)(2)(iv) is affirmed and a penalty of \$1,250.00 is assessed.
3. Citation No. 1, Item 3, alleging a serious violation of 29 CFR § 1926.451(c)(2)(v) is affirmed and a penalty of \$1,400.00 is assessed.
4. Citation No. 1, Item 4, alleging a serious violation of 29 CFR § 1926.451(g)(1) is affirmed and a penalty of \$300.00 is assessed.

/s/

STEPHEN J. SIMKO, JR.

Judge

Date: March 2, 2005