Secretary of Labor,
Complainant,

v. OSHRC Docket No. **00-0126 (E-Z)**

Donrey Outdoor Advertising Co.,
Respondent.

Appearances:

Beverlei E. Colston, Esq.
U. S. Department of Labor
Office of the Solicitor
Dallas, Texas
For Complainant

Lee Watson, General Counsel
Donrey Out-of-Home Media
Little Rock, Arkansas
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Donrey Outdoor Advertising (Donrey), installs and maintains commercial signs and billboards. On December 2, 1999, Occupational Safety and Health Administration (OSHA) compliance officer William Cole conducted an inspection of Donrey's billboard worksite along Interstate Highway 630 in Little Rock, Arkansas. OSHA issued Donrey a one-item citation on December 16, 1999, as a result of that inspection. The Secretary asserts that Donrey violated the fall protection requirements of § 1910.23(c)(1) when two of its employees worked on a billboard platform 70 feet high which did not have guardrails. The employees also were not using a safety line that was strung on the platform. Donrey contends that the failure to tie to an installed safety line was an instance of idiosyncratic employee misconduct which violated its workrule. For the reasons discussed below, the Secretary has met her burden to prove the violation, and Donrey has failed to establish each element of its defense.

Background

Donrey is one of several affiliate companies of Donrey Media Group, which is engaged in the communication business (Tr. 30). On December 2, 1999, a four-man crew was changing a billboard "flex" (the vinyl covering on which the advertisement has been printed) along the side of

the Interstate. The sign board was 14 feet by 48 feet (Tr. 48). It rested on a vertical support with an attached ladder. Donrey had previously installed permanent metal platforms at the upper and lower ends of the sign board.

To change the flex, Donrey's foreman and crane operator Stacey Harris boomed the new flex up to the lower work platform 70 feet above ground level. Harris then climbed the ladder and joined the other three crewmembers, who were already on the lower platform. Harris and crewmembers Chris "Wes" Moore, Michael Paley, and Lee Scott wore body harnesses. Harris directed Paley to follow him up to the top work platform. Moore and Scott remained on the lower platform to assist in changing out the flex (Tr. 51).

At about ankle level on the billboard's lower platform, Donrey strung a permanent horizontal cable ("lifeline" or "safety line"). Moore and Scott did not attach their lanyards to the lifeline (Tr. 96, 127, 129).

As Cole and a fellow compliance officer Jeanne Sims drove along the Interstate, they observed the billboard work going on. They noted that the billboard platform was not equipped with guardrails and that employees did not appear to be tied off. After securing his supervisor's approval to conduct the inspection, Cole located the site and approached from a distance. At least 10 minutes elapsed during this process (Tr. 12-13, 24). While Cole could not see whether Harris and Paley were actually tied off on the upper level, he observed that Moore and Scott were moving on the platform and their lanyards were not attached to anything (Tr. 19). When Moore and Scott saw that they were being observed, they tied off their lanyards to the safety line (Tr. 112, 142).

Discussion

The Secretary asserts that Donrey violated §1910.23(c)(1), which provides:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

It is the Secretary's burden to prove: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employees' access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation. *Atlantic*

Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994).

The lower platform was 40 feet long and 5½ feet wide (Tr. 13). This work area constituted a "platform" within the meaning of § 1921(a)(4). The platform was designed to serve the crews who changed the face of the billboard on an approximate weekly basis and also those who performed "construction work" on the billboard structure itself (Tr. 80-81, 122-123). The standard applies to the cited conditions, and the terms of the standard were violated. Without fall protection, employees were exposed to a fall hazard of 70 feet while on the lower platform.

Donrey contends that the Secretary failed to establish the fourth element, *i.e.*, that Donrey had actual or constructive knowledge of the violation. As was customary, foreman Harris was the last man to climb to the lower platform (Tr. 51). Although Harris testified that be believed the men were initially tied off, Moore and Scott candidly admitted that at no time had they tied their lanyards to the safety line until they saw the OSHA inspectors watching them. Donrey relies on Harris's testimony that he did not actually see Scott and Moore untied. Yet, that testimony also shows that Harris knew at some point the two were not tied off (Tr. 61):

> I really never observed [the men untied]. I told -- One of my guys yelled up to me and said that he kept getting yanked by the safety cable and that he needed to untie to roll the vinyl off onto the ground. And I kind of had my hands full. I guess that's when it happened, I mean, when they -- when they unhooked. But I never visually saw them unhook. I never saw them at all.

In any event, Harris, Moore, and Scott agreed that Harris could have seen that the men were untied as he stood next to them on the platform or looked down on them from the upper platform (Tr. 54, 118, 155). Even if "he probably wasn't paying attention" (Tr. 155), Harris had reason to know that Moore and Scott were without fall protection on December 2, 1999.

Donrey specifically delegated to Harris safety responsibility for the crew's continuing safety training and for safety enforcement (Tr. 169). The knowledge of a supervisor or foreman may be imputed to the employer. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993). It is appropriate to do so here.[1]

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[1] Imputation of knowledge can be rebutted upon a showing of factors discussed below under the employee misconduct defense, but it was not rebutted in this case.

A fall of 70 feet would most likely result in death. The Secretary has established the elements of a serious violation of § 1910.23(c)(1). Unless Donrey meets its burden of proving a defense, the violation must be affirmed.

The Employee Misconduct Defense

Before addressing the employee misconduct defense, a threshold question of applicability is presented. Does the standard require positive employee action (*i.e.*, tying off) rather than employer action (*i.e*, erecting guardrails)? The affirmative defense of employee misconduct is primarily geared toward violations over which employees have individual control. In addition, a workrule specific enough to meet an employee misconduct defense must be "designed to prevent the cited violation" or be its functional equivalent. *Gary Concrete Prods, Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991); *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1415 n.4 (No.89-1027, 1991). Thus, if the only compliance allowed by the standard is erection of guardrails, the fact that employees were instructed to tie off would not necessarily be adequate.

In this case, the Secretary does not question that the use of a personal fall arrest system can be an acceptable alternate abatement of the fall hazard. Cole explained his understanding of OSHA's policy (Tr. 40):

> It's been the policy of the agency, because there was not a specific personal fall [arrest] standard in general industry as there is in construction, that we would apply the same standard of protection that would be applied in construction. And in the construction standard, you are allowed to either use a guardrailing system or personal fall [arrest] system or, in some cases, safety nets to provide the same degree of protection. So the actual violation is for not having the railing system, as defined by the standard. But we would accept, as a suitable abatement method, an equally effective means of protection.

Neither party urges a different interpretation. Nor is this a case where a standard mandates a specific method of compliance for a particular industry. Therefore, the undersigned accepts that in these circumstances use of a personal fall arrest system constitutes abatement of the hazard addressed by § 1910.23(c)(1). The employee misconduct defense is analyzed with this in mind.

In order to negate a violation on the grounds of employee misconduct, the employer must show that: (l) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to employees; (3) the employer has taken steps

to discover the violations; and (4) the employer has effectively enforced the rules when violations have been discovered. *E.g., Gary Concrete,* 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991).

Donrey's safety instructions were presented to employees on the day of hire. They were given the safety manual (Exh. R-2), told to read it, and shown videos on that day (Tr. 157). Scott testified that he read the manual; Moore said that he did not read all of it (Tr. 110, 141). Donrey also had weekly safety meetings.

As stated, the crew foreman played a pivotal role in Donrey's plans for safety. The safety manual directed employees to follow the foreman's instructions on where to tie off (Exh. R-2, p.8):

> Attachment points differ by type of structure and its construction. Your supervisor or operations manager will instruct you on where to hook up on your company's various structure inventory, but it will generally be on cables, stringers . . . .

The foreman was to assign individual jobs to employees, instruct employees on how to do their jobs, and make sure the job was safe. As foreman, Harris did not have any specific training on the use of fall protection for the crew, beyond what he received as a crewmember (Tr. 44-46).

The safety manual instructs employees to wear safety harnesses with lanyards when engaged in high work (anything over 4 feet), but it does not stress the importance of remaining tied-off while on the work platform (Exh. R- 2). It is doubtful whether Harris himself understood that the crew needed to be tied off at all times.

At the hearing, Moore and Scott accepted full responsibility for not having tied off on December 2. Moore "didn't have a good excuse" and was not tied off "from the minute I got up there" (Tr. 111-112). Scott also recalled "no particular reason" why he did not tie off, "Just noncompliance, I guess. Just a little over-confident and just didn't do it . . ." (Tr. 129). They intended to work on the board that day without being hooked up. In fact, Scott remembered looking at the safety line, finding no problem with it, and then not tying off to it (Tr. 129). Their acceptance of the blame, however, is only half of the story.

Cole interviewed Harris, Moore, and Scott during the inspection and prepared signed interview statements. At the hearing the employees verified facts they gave in the statements. Moore explained to Cole that the safety video "didn't go into a lot of detail" and that he was told

to tie off "most of the time" (Tr. 25). Moore was not tied off that morning, he told Cole, because it was difficult to reach the edge of the billboard with the lanyard tied (Tr. 23, 96-97). Cole then asked Moore whether "the foreman had ever seen you not tie off before when working above six feet?" Moore replied, "I don't know. I'm sure he has. There are time we've been working on a board side by side" (Tr. 99). At the hearing, Moore noted that the weather was quite windy and that he would have more difficulty in maneuvering the flex under those conditions while tied off (Tr. 97).

Scott strongly expressed his annoyance with the type of low-strung safety cables found on the lower platform (Tr. 131-133). He explained (Tr. 133):

> It doesn't make it more difficult. It's just a hindrance to me because I'm kind of tall and I'm kind of heavy. So its -- Sometimes it doesn't slide just perfectly across. Sometimes the hook will turn and it will get a little hooked on there. It will turn sideways and it just won't stay or it slides back and forth. But when it's hanging at [waist] level, then it's upside down. So it will just slide better. It doesn't make it dangerous or anything. It makes it more convenient when it's at the [waist level] for myself.

Foreman Harris had experienced the same concern (Tr. 52-53):

> At one point, they were tied off, but it was brought to my attention that on this certain billboard it's kind of hard to be tied off and be mobile at the same time. So sometimes we have to untie and move to a different location * * *
>
> The safety cable that's on the bottom, it kind of had some kinks in it to where you can kind of get hung up or you kind of trip . . . .

Harris explained that the crewmember could trip and fall if he had to move from side to side while being tied off to the cable (Tr. 53, 82).

Harris admits that he worked with the crew while he and they were not tied off, usually when they were moving from one side of the platform to the other (Tr. 56). He has seen his crew not hooked up on a couple of occasions, but he considered these a "spur of the moment" situations (Tr. 86). Harris has never given the crew a verbal warning, and he has never issued a written reprimand when this occurred (Tr. 62, 86).

The demeanor of the three employee witnesses was observed. To varying degrees each was paritially contradictory, each avoided implicating others, and each tried to put the best face

on their actions and on the company's policies, within the constraints of the truth as they remembered it. Considering the record, including the demeanor of the witnesses, it appears that Harris, and thus the crew, may have often worn fall protection but accepted working without it in specific, recurring circumstances. For example, it might be acceptable to remain untied on the platform if they had to move much, if they had to tie to a low strung cable, or if they believed that windy conditions would create additional difficulties.

Moore and Scott only attempted to hook up after they thought someone else, other than Harris, might see that they were not tied off. Yet, they acknowledged that Harris could have easily observed them working without fall protection. This is strong evidence that Harris, as supervisor, condoned infractions of Donrey's workrule.

Where an employer's foreman is either involved in or regularly condones violative conduct, the employer's safety program has been held to be lax. *N & N Contractors., Inc.,* 18 BNA OSHC 2123, 2125-2126 (No. 96-0606, 2000). This is the conclusion drawn here. Further, the employer must establish that it exercised reasonable diligence in detecting workplace hazards. *Pace Constr. Co.*, 14 BNA OSHC 2216 (No. 86-758, 1991). There is a "strong inference" that the element has not been proven when employees feel free to violate the workrule. Donrey has failed to meet its employee misconduct defense.

Penalty

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 the principal factor to be considered.

Cole properly considered the gravity of the violation to be high. In especially windy conditions, two employees were handling a bulky object on a narrow platform 70 feet above ground level. The duration of the exposure was at least 10 minutes but was shortened only because the crewmembers saw that they were being watched.

Cole considered but did not adjust the penalty for size, good faith, and past history of violations (Tr. 28). In determining the size of the employer, Cole appropriately considered

Donrey to be under the control of the larger corporation with its 2,200 employees (Tr. 28, 29). Some credit is granted, however, because the immediate employer is a smaller organization. Likewise, some credit for good faith is appropriate because Donrey supplied safety equipment, was continuing to upgrade safety equipment, and had a functioning safety program. Donrey had been found in violation of OSHA standards within the past three years, and no additional credit is given for history. Considering the above, a penalty of $ 1750 is assessed.

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), Fed. R.Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that the alleged violation of § 1910.23(c)(1) is affirmed and a penalty of $1,750.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: July 10, 2000