United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. MAERSK STEVEDORING COMPANY, Respondent.	OSHRC DOCKET NO. 99-1062

APPEARANCES:

For the Complainant:
Stephanie E. Russell, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:
Ronald L. Signorino, Maersk Container Services Co., Inc., Madison, New Jersey

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent, Maersk Stevedoring Company (Maersk), at all times relevant to this action maintained a place of business on the vessel *Maersk San Antonio*, then located in Long Beach, California, where Maersk was engaged in longshoring. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 7).

On February 25, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Maersk's Long Beach work site. On March 15, 1999, as a result of the February 25, 1999 inspection, Maersk was issued a citation alleging a "serious" violation of §1918.85(j)(3) of the Act together with proposed penalties. By filing a timely notice of contest Maersk brought this proceeding before the Occupational Safety and Health Review Commission (Commission)[Tr. 139].

The Secretary filed her complaint on June 8, 1999 (Tr. 139; Exh. R-10). On or around June 14, 1999, Alan Traenkner, OSHA's director of investigations and enforcement for region 9, called Maersk's representative and left a message, notifying him of the Secretary's intent to withdraw the original citation, and to issue a new citation, based on the same facts, but alleging instead a violation of

§1918.35 (Tr. 142-44). On July 7, 1999, Maersk's representative, Ronald Signorino, relying on Traenkner's phone message, sent a second notice contesting the anticipated new citation (Tr. 150). There is no evidence in the record indicating either that the first citation, which was, at that point, in the hands of the Office of the Solicitor, was ever formally withdrawn, or that a second citation was ever issued (Tr. 154-55). Rather, the record shows that Complainant's counsel requested permission to amend the June 8, 1999 citation. Permission was granted, and an amended Complaint referring back to the original citation, and alleging, in the alternative, violations of §§1918.85(l) and 1918.35 was filed on September 14, 1999 (Tr. 141; Exh. R-11). Maersk filed its answer to the amended complaint on September 22, 1999 (Tr. 141).

On February 8, 2000, a hearing was held in Los Angeles, California. At the hearing Complainant indicated that it intended to proceed solely under §1918.85(l). At that hearing, for the first time, Maersk moved to have the above captioned matter dismissed, claiming that the March 15, 1999 citation was dismissed, and that there is, therefore, no live case before the Commission.

For the reasons set forth below, Maersk's motion is denied.

Withdrawal

Notwithstanding Alan Traenkner's testimony at trial, the evidence establishes that it was never the Secretary's intention to withdraw the March 15, 1999 citation, that the citation was never, in fact, withdrawn, and that any miscommunications between Maersk and Alan Traenkner were harmless, in that Maersk did not rely to its own detriment on those miscommunications.

First of all, this judge notes that, on June 14, 1999, according to OSHA's own internal guidelines, Area Director Traenkner had no authority to withdraw the March 15, 1999 citation.

OSHA's Field Inspection Reference Manual, Section 8 - Chapter IV. Post-Inspection Procedures, B.2.b states that:

> . . . Amendments to or withdrawal of a citation shall not be made by the Area Director under certain conditions which include: (1) Valid notice of contest received.

Moreover, the citation was never actually withdrawn. Traenkner made no attempt to follow OSHA's procedures for the withdrawal of a citation set forth in Section 8 - Chapter IV.B.2.c.(2)(d). That section states that:

> [i]f a citation is to be withdrawn, the following procedures apply: 1. A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter shall refer to the original citation and penalty, state that they are withdrawn and direct that the letter be posted by the employer for 3 working days in those locations where the original citation was posted.

By the time Traenkner made his June 14 phone call to Maersk's representative, Maersk's notice of contest had been received and forwarded to Washington. The Commission's jurisdiction had been invoked, and control of the case had been transferred to the Office of the Solicitor. The Solicitor's Office, which has no power to issue citations, effected OSHA's intent, which was to amend the charges, by requesting leave to file, and by filing an amended complaint, rather than by withdrawing the existing citation and issuing a new one (Tr. 39-40).

Finally, both parties understood that it was, in fact, never the Secretary's intent to drop the matter, as evidenced by Maersk's second (unnecessary) notice of contest, and its stipulation to the filing of the amended complaint. Generally, the Commission has found that no relief is available to an employer where the Secretary made misleading statements or failed to follow proper procedures unless the employer relied on the Secretary's misrepresentations and was thereby prejudiced in the preparation or presentation of its defenses. *See, e.g.; Keppel's Inc.*, 7 BNA OSHC 1442 (No. 77-3020, 1979); *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996); *Stripe-a-Zone, Inc.*, 10 BNA OSHC 1694, 1982 CCH OSHD ¶26,069 (No. 79-2380, 1982). Although the amended complaint alleged charges of both §§1918.85(l) and 1918.35, in the alternative, rather than the sole §1918.35 charge Maersk expected, Maersk received, and answered said amended complaint. Maersk produced witnesses at the hearing and presented a defense meeting the amended citation. Maersk cannot, under the circumstances, claim to have been prejudiced by Traenkner's mistaken assertion that the March 15, 1999 citation was being withdrawn.

This judge finds that the March 15, 1999 citation was never withdrawn, and that Maersk was not prejudiced by Traenkner's representation that said citation was being withdrawn, because Maersk knew at all times that although the legal basis for the violation was being changed, the Secretary intended to pursue litigation based on the allegedly violative conditions set forth in the original citation.

Alleged Violation

Serious citation 1, item 1, as amended (Tr. 7), alleges:

29 CFR 1918.85(l): The Employer did not provide, and ensure that employees use, fall protection meeting the requirements of paragraph 1918.85(k) whenever the employee works along an unguarded edge where a fall hazard exists.

> (a) Vessel Maersk San Antonio, Long Beach, CA. An employee was allowed to work unprotected at the open edge of a hatch exposed to a fall hazard.

Facts

OSHA Compliance Officer, Jay Larson, testified that, on February 25th, 1999, during a routine scheduled inspection aboard the *Maersk San Antonio,* he observed and photographed a Maersk walking boss standing approximately one foot from the edge of a 40' hatch, looking down (Tr. 17, 19-20; Exh. C-1). Larson testified that the walking boss was not using any fall protection, and could have fallen approximately 16 to 20 feet into the hatch (Tr. 20-21, 25). Larson testified that the walking boss was exposed to the fall hazard for approximately three to four minutes (Tr. 21).

Mark Blackman, Maersk's safety manager, testified that, based on the CO's photograph, he believed the walking boss was not within three feet of the edge of the open hatch (Tr. 88). Blackman admitted however, that it was difficult to tell from the picture, and that he was not present during the inspection (Tr. 88, 96).

Blackman testified that Maersk does not, in fact, require its walking bosses to use fall protection when making brief "orientation observations," *i.e.*, when taking three or four seconds to look into a hatch which is being, or about to be unloaded, to see what type of cargo, and/or "surprises," might be down there (Tr. 73, 79, 94). Blackman testified that Maersk determined that although these walking bosses would be "fleetingly" exposed to a fall hazard there was no way to provide fall protection for them (Tr. 74, 84). Blackman testified that Maersk did not ascertain whether there were any safe anchorages for a harness and lanyard, as required under OSHA standard §1918.85(k)(6), which states:

> Each fall protection system's fixed anchorages shall be capable of sustaining a force of 5,000 pounds (22.2 kN) or be certified as capable of sustaining at least twice the potential impact load of an employee's fall. Such certification must be made by a qualified person.. . .
>
> * * *
>
> For the purposes of this paragraph, qualified person means one with a recognized degree or professional certificate and extensive knowledge and experience in the subject field who is capable of design, analysis, evaluation and specifications in the subject work, project, or product.

(Tr. 100-03). Blackman testified that because Maersk does not own the *San Antonio,* "it would be very difficult" for Maersk to obtain permission to bring in a qualified person to certify possible anchorages (Tr. 103). Similarly Blackman testified that permanent anchors could not be installed because the ship is chartered, rather than owned by Maersk (Tr. 85). Blackman stated that Maersk cautioned its walking bosses not to put themselves in danger unnecessarily, and to stay away from unguarded edges as much as possible (Tr. 84, 95, 105).

Traenkner testified that Maersk could have erected guardrails around the hatch, but acknowledged Maersk's position that guardrails would be knocked down by containers being hoisted from the hatch (Tr. 126).[1] Alternatively, Traenkner suggested that the walking boss could have tied off to hooks in the hatch cover, D-rings in the floor, or to the I beams pictured behind him (Tr. 126; Exh. C-1). Traenkner believed that any of these anchorage points would have met the requirements of §1918.85(k)(6). Finally Traenkner testified that Maersk could have installed a static line where its exposed employees could tie off (Tr. 127).

Discussion

Maersk argues that the cited standard is inapplicable, and that the Secretary has failed to make out her *prima facie* case. In addition, Maersk raises the affirmative defenses of "greater hazard" and "infeasibility."

Exposure. Maersk argues that Complainant's evidence fails to establish, by a preponderance of the evidence, that its walking boss was within three feet of the unguarded hatch edge. This judge disagrees.

Photographs can be misleading, and it is not entirely clear from Complainant's Exh. C-1 how far from the edge of the hatch Maersk's walking boss was at the time the picture was taken. The photograph, however, catches only a single second of CO Larson's observations. Larson, the only witness testifying who was actually present at the job site, testified that it was clear to him that the walking boss came within three feet of the edge (Tr. 44).

This judge credits Larson's testimony, and finds that employee exposure to the unguarded edge has been established.

Applicability. Maersk argues that §1918.85(l) is inapplicable to the cited circumstances, and that §1918.85 **Containerized cargo operations** . . . (j) *fall protection.. . .*(3) *Other exposure to fall hazards,* is the applicable standard. Subsection (j)(3) provides:

> The employer shall ensure that each employee exposed to a fall hazard is protected by a fall protection system meeting the requirements of paragraph (k) of this section. Exception. Where the employer can demonstrate that fall protection for an employee would be infeasible or create a greater hazard due to vessel design, container design, container storage, other cargo stowage, container handling equipment, lifting gear, or port conditions, the employer shall alert the affected employee about the fall hazard and instruct the employee in ways to minimize exposure to that hazard.

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[1] The feasibility of installing guardrails is not at issue, however. Section 1918.85(l), is applicable *only* to unguarded edges, that is, where *no* guardrails have been installed. Subsection (l) prescribes a specific means of abating the described hazard, *i.e.*, the individual harness/lanyard systems described in §1918.85(k).

The standard cited by the Complainant, §1918.85(l) *Working along unguarded edges*, provides:

> The employer shall provide, and ensure that the employee use, individual fall protection meeting the requirements of paragraph (k) of this section whenever the employee works along an unguarded edge where a fall hazard exists (see §1918.2).

Reading the standard in its entirety, it appears that subsection (j) applies to work taking place atop containers, (*See also,* Note to the Final Rule, 62 FR 40142, 40173 (1997)[§1918.85(j) covers the hazard of falls from the tops of intermodal containers]), while subsection (l) applies to fall hazards not covered by subsection (j) to which employees may be exposed while engaged in longshoring activities. The walking boss exposed to the cited hazard was working on deck rather than atop an intermodal container, and subsection (l) was correctly cited.

This judge notes that the protections required by both standards, *i.e.*, personal fall arrest systems conforming to the requirements of subsection (k), are identical. Moreover, the infeasibility and greater hazard exceptions listed in subsection (j)(3), and relied upon by Maersk are also recognized affirmative defenses, and so may be raised by Maersk regardless of which subsection is cited. Stated another way, even if §1918.85(j)(3) were found to be applicable, Respondent would still have to establish that it came within the exception stated therein. For the reasons stated below, it failed to carry its burden.

Complainant argues that Maersk failed to raise the affirmative defense of infeasibility prior to the hearing; however, an answer can be amended to include an affirmative defense so long as the opposing party is not prejudiced. *General Motors Corporation, Chevrolet Motor Division*, 10 BNA OSHC 1293, 1982 CCH OSHD ¶25,872 (No. 76-5344, 1982). Post-trial amendment of the pleadings is proper "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties." *Peavey Co.*,16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). The Commission has held that consent may be implied from the parties' introduction of evidence relevant only to the unpleaded issue. *McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984).

Both parties introduced evidence relevant to the issue of infeasibility; the pleadings are, therefore, amended to conform to that evidence. The affirmative defenses of both infeasibility and greater hazard are at issue.

Infeasibility. To establish the affirmative defense of infeasibility, an employer bears the burden of showing that: 1) the means of compliance prescribed by the applicable standard was infeasible, in that (a) its implementation was technologically or economically infeasible or (b) necessary work operations were technologically or economically infeasible after its implementation,

and 2) there were no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Maersk maintains that the use of a fall protection system conforming to the requirements of §1918.85(k) was infeasible because there were no certified anchorages available where a lanyard could be tied off. Maersk, however, introduced *no* evidence that any of the suggested possible anchorages were inadequate. Rather Maersk's witness, Blackman, merely testified that it would have been "difficult" to obtain permission to have possible anchorages tested.

Maersk's showing fails to establish that it would have been infeasible for the walking boss to tie off either to the suggested equipment or to a static line.

Greater Hazard. It appears that Maersk's real concern, however, is for the perceived greater hazard to employees tied off to *any* anchorage while containers are being hoisted. Maersk maintains that cargo securing equipment is in more or less constant motion while containers are being loaded and/or unloaded. Maersk contends that any life line in use around a hatch is "sure to be fouled by such concurrent movements, endangering the person tied to it." (Brief in Support of Respondent's Argument, p. 10).

In order to establish the affirmative defense of a greater hazard, the employer must show that: 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). Moreover, the Commission has held that an employer's failure to explain why it did not apply for a variance for regularly performed operations obviates need to address the first two elements of the defense. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

Maersk admits that it was its longstanding practice to allow its walking bosses to inspect open hatches without the use of fall protection. Maersk further admits that it was aware that those employees were exposed to the very fall hazards contemplated by §1918.85(l), but made a conscious decision not to require the protection dictated by that standard, believing that the prescribed safety precautions created a greater hazard to their employees. Yet Maersk introduced no evidence that it has ever applied, or contemplated applying to OSHA for a variance from the operation of §1918.85(l).

Under Commission precedent, therefore, Maersk may not rely on the greater hazard defense.[2]

Penalty

A penalty of $1,300.00 was proposed for this item.

CO Larson testified, without contradiction, that the cited violation was serious, in that a 16 to 20 foot fall could result in broken bones, contusions and internal injuries (Tr. 25). As noted above, one employee was exposed for three or four minutes. Larson did not believe that the probability of an accident occurring was great (Tr. 26). Larson believed that the gravity of the violation, therefore, was moderate (Tr. 26).

Larson testified that Maersk is a large company, therefore, he made no adjustment in the size of the penalty for size (Tr. 26). Larson did, however, give Maersk credit for good faith, and for history, based on Maersk's good record with OSHA and the quality of its safety program (Tr. 26-27).

This judge considers the gravity of the violation to be low. In addition, I note that even OSHA had significant problems identifying what standard applied. Moreover, Respondent did take some, albeit inadequate, steps to address the cited hazard, warning its walking bosses to stay away from unguarded edges

Taking into account the relevant factors, this judge finds that a penalty of $400.00 is appropriate and will be assessed. This decision, however, should serve to put Maersk on notice that it must either require its walking bosses comply with the provisions of §1918.85(l) where those employees are, however briefly, exposed to unguarded edges, or apply to OSHA for a variance from the operation of the standard.

ORDER

1. Citation 1, item 1, alleging violation of 1918.85(l) is AFFIRMED, and a penalty of $400.00 is ASSESSED.

/s/
Stanley M. Schwartz
Judge, OSHRC

Dated: May 8, 2000

[2] In any event, Maersk introduced no evidence supporting the contention stated in its brief. Maersk's bare contention is insufficient to support a finding that the hazard to tied off employees posed by moving cargo equipment is greater than the fall hazard that tying off is intended to prevent.