

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

NORTHWEST HANDLING SYSTEMS, INC.,
and its successors,

Respondent.

OSHRC DOCKET NO. 00-0356

APPEARANCES:

For the Complainant:

Deia D. Peters, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Greg R. Tichy, Esq., Veradale, Washington

Before: Administrative Law Judge: Benjamin R. Loye

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, Northwest Handling Systems, Inc., and its successors (Northwest), at all times relevant to this action maintained a place of business at One Coldwater Creek Drive, Sandpoint, Idaho, where it was engaged in the installation of storage equipment. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 5-9, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Northwest's Sandpoint work site. As a result of that inspection, citations alleging violations of the Act together with proposed penalties were issued to Northwest. By filing a timely notice of contest Northwest brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 8-10, 2000, a hearing was held in Coeur d'Alene, Idaho. The parties have submitted briefs on the issues and this matter is ready for disposition.

Background

The inspection in this matter was initiated as a result of a July 23, 1999 accident in which two temporary laborers were injured in an accident involving a Skyjack scissor lift. It is undisputed that on that date a Northwest employee, Robert Rhodes, was using the tines of a forklift to raise the platform of the Skyjack scissor lift when the platform slid off the forks and fell to its rest position (Tr. 217, 250, 297, 281, 481). One laborer was thrown into the guardrails, the other to the ground (Tr. 482). Northwest was cited for violations including failure to use fall protection, failure to provide training and improper use of the scissor lift.

Alleged Violation of §1926.451(g)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.451(g)(1): Each employee on a scaffold more than 10 feet (3.1 m) above a lower level was not protected from falling to a lower level.

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, employees were exposed to a fall hazard up to 26 feet from a SKYJACK self propelled elevating work platform, Serial #75095 that was not equipped with a gate at the entry of the platform and a top rail on both sides of the entry area..

The cited standard provides:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided. . . .

Facts

During July 1999, Rhodes, an installer with Northwest, was directing the relocation of an existing pallet rack system at the Coldwater Creek work site (Tr. 405-11; Exh. R-16). Each pallet rack consists of three levels of orange horizontal beams which snap into green vertical uprights (Tr. 426; Exh. R-5, R-6, R-14). Row spacers are bolted between each two rows of racks, which are placed back to back. The row spacers maintain a consistent, 15 inch space between the rear uprights in each row of pallet racks (Tr. 426; R-7). Pallet supports are then placed between the front and back horizontal beams (Tr. 426).

Rhodes testified that relocating the existing system required that pallet racks be dismantled and reassembled in their new location. The pallet supports were removed first (Tr. 428). The lowest beam level was then removed by employees working from the floor (Tr. 428). Rhodes stated that the Skyjack scissor lift was then positioned at the end of the row of pallet racks and used to remove the

two higher beam levels (Tr. 429; Exh. R-16). The row spacers were unbolted and removed on the way up, and the beams removed on the way down (Tr. 430). Once the beams were removed, a forklift, or stockpicker, was used to lift the freed upright from its anchor bolts, and transport it to its new location (Tr. 433-34). The Skyjack was then driven forward to the next upright (Tr. 435). The pallet racks were reassembled in the same manner, in reverse order; with the Skyjack positioned between two uprights, the workers installed the beams and row supports from the top down (Tr. 436-38).

On Friday, July 23rd Labor Ready, which provides temporary workers, sent two new laborers, George Cochrum, and Joel Tennison, to the Coldwater Creek work site (Tr. 198-200, 278-79). Rhodes told the laborers what they would be doing, and ascertained that neither had installed pallet racking before (Tr. 463, 466). Cochrum told Rhodes that he had worked with a scissor lift before, and Rhodes asked him to get on the Skyjack (Tr. 466). Rhodes showed Cochrum how to run the Skyjack and demonstrated how the disassembly process worked (Tr. 466). Rhodes testified that he observed Cochrum and Tennison complete the disassembly sequence once to assure that they were doing it correctly, and then returned to his own work, driving the forklift/stockpicker from the disassembly to the reassembly areas, and installing the uprights and the lower beams, which he could do from the stockpicker (Tr. 468-71).

Sometime during the afternoon of the 23rd Rhodes removed the middle portion of the rear handrail from the Skyjack's guardrail in order to load a pallet of pallet supports onto the rear of the platform (Tr. 212, 248, 475-76; Exh. R-8, p. 000218). Though the Skyjack's safety rules prohibit its operation "without railings and entry gate/chain in place," *see*, (Exh. R-17), it is undisputed that Tennison and Cochrum continued to work at heights of approximately 26 feet for between a half hour to an hour without the rear gate in place (Tr. 510-11).

Rhodes stated that there was no reason for Cochrum or Tennison to be working in the rear area of the Skyjack (Tr. 485). Moreover, Rhodes stated that the pallet of supports blocked the exit gate opening (Tr. 485). Cochrum, however, testified that he worked approximately two feet from the back edge of the platform, at times standing on the pallet of supports to install the individual pallet supports (Tr. 213). Cochrum stated that he worked at heights varying between 3 and 32 feet while the guardrail was off (Tr. 213). Tennison testified that the pallet was approximately two feet high, and that the pallet partially blocked the platform's rear gate (Tr. 346). However, Tennison also stated that he worked within inches of the unguarded edge of the platform after the guardrails had been removed (Tr. 293, 295). When the platform fell off the tines of the forklift and to its rest position, Tennison fell through the opening created by the removal of the gate (Tr. 297).

Discussion

Northwest maintains that the Skyjack, which is the subject of this citation, is an “elevating work platform,” not a scaffold, and that the cited standard is, therefore, inapplicable to the cited circumstances.

The Commission has held that “whether a surface constitutes a scaffold is a question of fact to be answered by comparing the definition of a scaffold to the characteristics of the surface in question.” *Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1995 CCH OSHD ¶30,909 (No. 92-262, 1995).

Subpart L - Scaffolds, at §1926.450, states that “*Scaffold* means any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both.” In *Armstrong*, the Commission found that the painter’s picks in question were clearly elevated working spaces, or platforms, and that because the picks were moved frequently during the job and would be removed from the work site at the job’s completion, were temporary. The Commission concluded that the picks were scaffolds. The Skyjack, by definition, is an elevated work platform. It is temporary, as it is moved about the site as required by the job, and is removed from the site at the job’s completion. This judge finds that the Skyjack platform meets the definition set forth in §1926.450, and is a scaffold.

As noted by Respondent, Exhibit R-17, A Reference Guide, states that the Skyjack is classified as a *Self-Propelled Elevating Work Platform* covered by the industry consensus standards at ANSI/SIA A92.6. Appendix C to 29 CFR 1926, Subpart L lists ANSI/SIA A92.6 as one of several “examples of national consensus standards that are considered to provide employee protection equivalent to that provided through the application of ANSI A92.2-1969, where appropriate.” Subpart L’s reference to a specific consensus standard which may be applicable to this specific piece of equipment, however, does not exempt the equipment from coverage by general OSHA standards which are otherwise applicable and enforceable by OSHA. It is well settled that even where a specific OSHA standard regulating a condition or practice exists, general standards remain applicable where they provide meaningful protection to employees beyond the protection afforded by the specific standard. *See, Quinlan t/a Quinlan Enterps.*, 15 BNA OSHC 1780, 1991-93 CCH OSHC ¶29,765 (No. 91-2131, 1992); *Bratton Corp.*, 14 BNA OSHC 1893, 1987-90 CCH OSHD ¶29,152 (No. 83-132, 1990).

It is clear that the unenforceable consensus standard at A92.6 provides no protection for employees whatsoever, and cannot preempt generally applicable sections of §1926.450.

This conclusion is supported by a July 21, 1998 Compliance Letter, in which the Secretary states:

In regards to your specific question, when working from an elevated scissors lift (ANSI A92.6 series), a worker need only be protected from falling by a properly designed and maintained guardrail system. However, if the guardrail system is less than adequate, or the worker leaves the safety of the work platform, an additional fall protection device would be required. The general scaffolding fall protection provision found in 1926.451(g)(1)(vii) reads in part, "[f]or all scaffolds not otherwise specified in this section, each employee shall be protected by the use of personal fall arrest systems or guardrails systems."

In that letter the Secretary concludes, as has this judge, that because the scissor lift falls under OSHA's plain definition of a scaffold, it is subject to the general requirements of §1926.451. It is clear that OSHA did not intend by its reference to ANSI A92.6 that the consensus standard preempt the duly promulgated fall protection regulations contained in §1926.451. Mandatory Appendix C merely states that for enforcement purposes, OSHA will consider compliance with the provisions of A92.6 as providing equivalent protection.

The ANSI/SIA A92.6 fall protection requirements¹ are set forth in the Skyjack's reference guide (Exh. R-17), which prohibits the use of the lift without the railings and entry gate/chain in place. It is clear that the guardrails were not maintained in the manner required by the ANSI standards. As clearly stated in the Secretary's 1998 interpretation, where a scissor lift's guardrail system is rendered inadequate, §1926.451 (g)(1)(vii) becomes applicable. Subparagraph (vii) requires the "use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4)." Paragraph (g)(4)(i) requires that guardrail systems be installed "along all open sides and ends of platforms."

This judge finds that the Secretary's interpretation of the scope of Subpart L is reasonable, and the cited standard is applicable here. Moreover, even if Northwest was unaware of the applicability of OSHA's Subpart L, it was aware of the ANSI/SIA A92.6 guard rail requirements, which were set forth in its own exhibit R-17. This judge finds, therefore, that Northwest had adequate notice of the need to ensure its employees were protected from falls from the platform.

It is admitted that the platform's gate was removed and that employees continued to work from the platform at heights over 10 feet. Any contention that the pallet provided alternative fall protection is obviated by Tennison's fall through the unguarded gate opening.

The Secretary has established the cited violation.

¹ ANSI/SIA A92.6-1990 **7.9 During Operation**, states:

The aerial platform shall be used in accordance with this standard. The user shall direct his operating personnel and supervise their operation to ensure that the following is adhered to prior to each movement of the aerial platform and each repositioning of the platform. . . (3) the guardrails are installed and access gates or openings are closed per manufacturer's instructions. . .

Penalty

A penalty of \$3,500.00 is proposed for this item.

In determining the appropriateness of a penalty, the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

Northwest's Spokane branch has 14 employees; there is no evidence in the record of the company's total size. The Secretary introduced no evidence of prior violations. The Complainant charges that Northwest acted in bad faith, in that two of the citations were issued as "willful" violations. As discussed more fully below, this judge believes that the cited violations were not willful in nature, but were the result of simple negligence. Two temporary employees were exposed to the cited hazard for between half an hour to an hour. It is clear that a fall from heights up to 26 feet could result in severe injuries, up to and including death (*See* testimony of Compliance Officer (CO) Virgle Howell, Tr. 44). The CO did not testify as to the probability of an employee falling through the open gate absent the calamitous accident which occurred in this case. Employee Tennison was thrown off the platform as it, and undoubtedly *because* it suddenly returned to its rest position (Tr. 56). Nonetheless, the chance of an employee falling was high, in that the employees stood near the open edge, on the pallet of supports, as they worked.

Taking into account the high gravity of the cited violation, this judge finds that the proposed penalty of \$3,500.00 is appropriate and will be assessed.

Alleged Violations of §1926.454(b)

Serious citation 1, item 2 alleges:

29 CFR 1926.454(b): The employer did not have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question:

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior there to, before authorizing an operator to operate a SKYJACK self propelled elevating work platform, Serial #75095 the employer did not ensure that the operator had been informed of requirements such as but not limited to:

1. Proper guard rails are installed and access gates or openings are closed as required by ANSI/SIA A92.6-1990 paragraph 7.9(3) and the manufacturers operator manual.
2. Rated load capacity is not exceeded when loads are transferred to the platform as required by ANSI/SIA A92.6-1990 paragraph 7.11.6 and the manufacturers operator manual.

3. The aerial platform is not to be used as a crane to lift loads as required by ANSI/SIA A92.6-1990 paragraph 7. 11. 11 and the manufacturers operator manual.
4. Shut down the operation of aerial platform in the case of any suspected malfunctions, or any hazard or potentially unsafe condition that may be encountered as required by ANSI/SIA A92.6-1990 paragraph 7.14 and the manufacturers operator manual.
5. Do not raise the platform while the machine is on a truck, fork lift, or other device or vehicle as stated in the manufacturers operator manual.
6. Do not lift the vehicle from places other than fork lift pockets or lift rings as stated in the manufacturers operator manual.
7. Do not alter or override safety devices or limit switches as stated in the manufacturers operator manual. The over load relief valve was overridden by using a fork lift to gain lifting force by lifting the work platform.

Facts

Rhodes testified that he was familiar with the safety rules for the Skyjack, however, he had not been provided with any formal training by Northwest (Tr. 555-56). At the hearing Rhodes stated that he did not know if it was possible to override any limit switches or check valves on the machine (Tr. 482). Though it would not rise under its own power, Rhodes did not conclude on July 23, 1999 that the Skyjack's platform was not working properly,(Tr. 483-84, 504). Rhodes did not know that assisting the work platform with the stockpicker was an improper use of that equipment (Tr. 497).

George Cochrum testified that Rhodes did not discuss the proper use of guardrails on the scissor lift with him before Cochrum began working from the lift (Tr. 206). Rhodes did not discuss the scissor lift's rated load capacity, or tell him that the lift should be shut down in the event of a malfunction (Tr. 206-07). Cochrum stated that Rhodes never told him that the lift was not to be elevated from any place other than the manufacturer's lift pockets, or that the safety devices on the lift should not be overridden (Tr. 207). According to Cochrum, Rhodes did not inquire about Cochrum's previous experience in the use of a scissor lift (Tr. 207).

Tennison testified that Rhodes showed him what he would be doing on the scissor lift, but did not instruct him in the lift's use (Tr. 307). Rhodes did not discuss the need to use guardrails, the lift's rated load capacity, or the need to shut down the lift in the event of a malfunction (Tr. 282). Rhodes did not tell Tennison that the lift was not to be elevated from any place other than the lift pockets, or warn him against overriding the lift's safety devices (Tr. 283). Tennison stated that he received all his instruction on the operation of the scissor lift from George Cochrum (Tr. 307, 326).

Rhodes agreed with the testimony of Cochrum and Tennison concerning the extent of their training (Tr. 509-10).

Discussion

29 CFR §1926.454(b) requires:

The employer shall have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. . . .

As discussed above, Northwest's use of the Skyjack may be cited under the scaffolding standards, where it fails to provide protection equivalent to that required under Subpart L by complying with the applicable portions of the ANSI/SIA A92.6-1990.

At **7.6 Operator training**, the ANSI standard requires that:

Whenever a user directs or authorizes an individual to operate an aerial platform the user shall ensure that the individual has been trained in accordance with the manufacturer's operating and maintenance manual, the user's work instructions, and the requirements listed in Section 8 [**Responsibilities of Operators**] of this standard before operating the aerial platform.

At **8.6 Before Operation**, the ANSI standards require that the operator shall have:

. . . Read and understood the manufacturer's operating instruction(s) and user's safety rules, or been trained by a qualified person on the contents of the manufacturer's operating instruction(s) and user's safety rules.

The evidence establishes that Rhodes, Cochrum and Tennison were all involved in the operation, maintenance and/or inspection of the Skyjack. Northwest did not provide any formal training to Rhodes before authorizing him to supervise the operation of the Skyjack. Although Rhodes claimed to be familiar with the safety rules applicable to the Skyjack, he failed to demonstrate any familiarity with those rules on July 23rd 1999, and by his own admission failed to recognize the hazard associated with using the lift when the work platform was not working properly. It is undisputed that Rhodes provided Cochrum and Tennison with only minimal training in the operation of the Skyjack, and none in the hazards associated with operation of the Skyjack.² The hazards specifically listed in

² Northwest argues that the Secretary failed to prove the cited violation, arguing that Rhodes went over the hazards of operating the Skyjack, such as "keep[ing] your hands within the confines of the platform while it is moving" (Tr. 421-22). This judge notes that the testimony Northwest relies on refers to the training of the temporary workers who were on the Coldwater site on the Monday preceding Cochrum's and Tennison's arrival on the site. There is no evidence that Cochrum and Tennison received even this rudimentary training.

the citation are clearly set forth in the manufacturer's safety manual, which was submitted by Northwest as Exh. R-17, and with which Rhodes claimed to be familiar.

The Secretary has established that Northwest failed to train Robert Rhodes to recognize the hazards associated with the operation of the Skyjack. Rhodes failed to train Cochrum and Tennison in accordance with the Skyjack's safety manual, or to otherwise apprise them of the hazards set forth therein, as required by both ANSI 92.6 and the cited OSHA standard.

Penalty

A penalty of \$3,500.00 was proposed for this item.

The injury accident which occurred on July 23rd was a direct result of Rhodes' failure to appreciate the hazards associated with the operation of the Skyjack. Northwest's failure to provide adequate training is shown to be a serious violation of the Act. The gravity of the violation is high. Taking into account the gravity of the violation as well as the statutory factors discussed above, this judge finds the proposed penalty appropriate. A penalty of \$3,500.00 will be assessed.

Alleged Violation of §1926.503(a)(1)

Serious citation 1, item 3 alleges:

29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee who might be exposed to fall hazards that would enable them to recognize the hazards of falling and train each employee in the procedures to be followed in order to minimize these hazards:

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, the employer did not provide a training program for each employee before requiring them to install structural members of a pallet rack storage system at heights up to approximately 26 feet above a cement floor.

Facts

It is undisputed that Northwest did not provide fall hazard training to Cochrum or Tennison before setting them to work installing the pallet rack system (Tr. 207, 283, 488). Northwest instituted a fall protection program and work plan only after the July 23rd accident involving the Skyjack (Tr. 488-90; Exh. R-2, R-3). Ronnie Miller, Northwest's branch manager, testified that the fall protection plan was instituted February 1, 2000 as a result of OSHA's investigation of the Coldwater Creek incident (Tr. 543-44). Miller testified that before its consultation with OSHA, Northwest was not aware that it needed a fall protection plan (Tr. 544, 548).

Rhodes initially testified that there was no need to climb out onto the pallet racking system to perform any of the work on the pallet racking (Tr. 439). During the OSHA inspection Rhodes told the Compliance Officer (CO) Virgle Howell that no one climbed out onto the racks (Tr. 487). At the

hearing, however, he admitted that, at the Coldwater Creek work site, there were occasions where that happened (Tr. 442). Specifically, Rhodes stated that in the area where Cochrum and Tennison began work on July 23rd, the pallet rack system was erected around a building column that prevented them from positioning the Skyjack less than two feet away from the adjacent upright. That is why, Rhodes explained, he and Cochrum climbed out onto the beams of the pallet rack when he was showing Cochrum how to remove the bolts from the row spacers (Tr. 451-55). Rhodes admitted that they did not use fall protection during that demonstration (Tr. 513-14). Rhodes did not perceive climbing on the pallet racks as hazardous (Tr. 517). Rhodes stated that the building columns did not interfere with the positioning of the Skyjack at any other location, but admitted that he did not instruct Cochrum to stay inside the Skyjack during his removal of the other row spacers (Tr. 454-55, 513).

Cochrum testified that he was instructed to climb out onto the pallet rack with Rhodes to unbolt the sprinkler system from the spacers (Tr. 228, 235). He stated that other row spacers, along with the sprinkler system, were also bolted near the building supports, and that it was necessary to climb out onto the pallet rack to unbolt them (Tr. 203). Both Cochrum and Tennison testified that it was not possible to reach the bolts on the back of the racks without leaving the Skyjack platform (Tr. 208-11, 289, 291-92). When asked why they did not reposition the Skyjack so that they could reach the row spacers from inside the work platform, Tennison stated that if there had been any way to reach the row spacers from the Skyjack, they would have stayed on the platform (Tr. 352). Tennison testified that he wasn't familiar with pallet racks, but that he was sure "there was a reason Mr. Rhodes had us climbing out there" (Tr. 329).

Cochrum testified that he probably left the platform between 15 and 20 times, that it took approximately a minute to remove each bolt, and that when he was working at the top level he was approximately 32 feet off the floor (Tr. 211, 235). Tennison stated that he went out onto the racks about eight times, and was approximately six to seven feet from the Skyjack when he was working on the back bolts; he estimated that the top of the pallet rack was about 30 feet high (Tr. 291-92, 329).

According to Rhodes, the only time he saw Cochrum on the pallet rack was during his initial demonstration; he stated that he never saw Joel Tennison climbing on the racks (Tr. 493). Cochrum testified that he did not make eye contact with Rhodes, and could not say whether Rhodes saw him or Tennison working out on the racks, but he was sure that Rhodes was supervising their work (Tr. 242). Tennison stated that Rhodes was working right next to and below them, and that it would have been hard for Rhodes to have missed seeing them on the pallet rack (Tr. 295, 349).

In addition to climbing onto the pallet racks to show Cochrum how to do his job, Rhodes admitted that he needed to climb up the racks through the 15 inch space created by the row spacers in order to remove each of the rear “tek” screws, which secure the pallet supports (Tr. 444; Exh. R-5). To remove the screws from the top two levels, Rhodes stood on the beams with his body wedged into the 15 inch space, removed the tek screws with a screw gun, and placed the screws in his tool pouch (Tr. 445). Rhodes did not believe he was in danger of falling at any time because he had a firm footing, and “lots of things to hold onto” (Tr. 445-46, 518). He testified that he did not use the harness when working on the pallet racks because he believed the lanyard would interfere with his work (Tr. 491, 519).

Finally, Rhodes testified that he wore a safety harness and lanyard while using the stockpicker, because it is required, as the stockpicker has no handrails around the operator’s platform (Tr. 463-64).

Discussion

The cited standard requires that:

The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Northwest admits that it did not institute a fall protection program until after the July 23rd accident. It maintains, however, that the erection of pallet racking does not normally expose any employees to fall hazards, and that it is not necessary to provide training in fall protection for workers engaged in that task. Northwest’s argument is without merit.

Each of the employees working installing the pallet racking on July 23rd was exposed to fall hazards, in that each of those employees worked at heights above six feet. Rhodes was exposed to a fall hazard when he worked on the stockpicker, and wore a harness and lanyard to protect him from that fall hazard. Cochrum and Tennison were exposed to a fall hazard when they worked on the Skyjack platform up to 26 feet above the ground. The Skyjack platform was equipped with guardrails to protect workers on the platform from the fall hazard to which they were exposed, though Rhodes defeated the manufacturer’s fall protection by removing the gate that served as part of the guardrail. In addition Rhodes was exposed to a fall hazard every time he climbed up between the pallet racks and worked from the beams above six feet removing tek screws.

Finally, Cochrum and Tennison were exposed to a fall hazard every time they left the safety of the Skyjack’s platform. This judge is not persuaded by Northwest’s argument that Rhodes did not know the temporary workers were leaving the Skyjack’s platform to remove row spacers. During

Cochrum's initial instruction Rhodes had him leave the confines of the platform for that very purpose. Rhodes never told either Cochrum or Tennison not to leave the platform; it was natural that they should assume that the procedure they were shown was the procedure that Rhodes intended them to follow. Moreover, Rhodes was working in the same vicinity as Cochrum and Tennison, and, as their supervisor,³ should have observed the manner in which the work was being performed. Reasonable diligence includes adequate supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991). It is well settled that the knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991).

The record establishes that Northwest knew or should have known that employees involved in the disassembly and reassembly of pallet racking were exposed to fall hazards.

Complainant has established the cited violation.

Penalty

A penalty of \$3,500.00 was proposed for this item.

As noted above, a fall from heights up to 26 feet would likely result in serious injury, up to and including death. The violation was, therefore, properly classified as serious. This judge notes that had a fall protection program been in place, it might have eliminated some of the fall hazards to which Northwest's employees were exposed. Northwest's new policy requires foremen to identify all fall hazards of 6 feet or more, and to develop a plan to eliminate those exposures, if possible, or to select appropriate fall protection systems and/or equipment. (Exh. R-2, p.25). Had Northwest's requirements been in place, Rhodes might have been mindful of the need to maintain the integrity of the Skyjack's guardrails, and to adequately instruct employees to ensure that they did not work outside the guardrails.

Taking into account the gravity of the cited violation as well as the other statutory criteria discussed above, this judge finds that the Secretary's proposed penalty is appropriate. A penalty of \$3,500.00 will be assessed.

³ An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Secretary of Labor v. Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Docket No.s 86-360 & 86-469, 1992).

Alleged Violation of §1926.452(w)
or, alternatively, §5(a)(1)

Willful citation 2, item 1 alleges:

29 CFR 1926.452(w): Fork-lifts, trucks, similar motor vehicles or add-on motors shall not be used to propel scaffolds unless the scaffold is designed for such propulsion systems:

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, the employer used a forklift to assist the SKYJACK self-propelled elevating work platform Serial #75095 when the platform failed to raise under its own power. The elevating platform is not designed to be assisted in this manner.

OR IN THE ALTERNATIVE

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, the employer did not cease operation of a SKYJACK self-propelled elevating work platform, Serial #75095 as required by the manufacturer's operating instructions after the platform failed to elevate under its own power because of inadequately charged batteries. The employer used a forklift truck to elevate the work platform containing two employees and equipment to a height of approximately 15 feet above floor level which exposed the employees to collapse of the aerial platform.

(b) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, the employer did not cease operation of a SKYJACK self-propelled elevating work platform, Serial #75095 as required by manufacturer's operating instructions after the platform failed to elevate under its own power. The probable cause for the platform not elevating was that the load exceeded the design specifications for the machine. The employer used a forklift truck to elevate the work platform containing two employees and equipment which exposed the employees to collapse of the aerial platform.

(c) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, the employer directed the use of the SKYJACK self-propelled elevating work platform, Serial #75095 as a crane to lift a pallet containing structural steel material which exposed the employees to collapse of the aerial platform.

Among other methods, one feasible and acceptable abatement method to correct this hazard is to enforce and require that all supervisors and operators of self-propelled elevating work platforms follow all operating instructions contained in:

1. The operating manual provided by the manufacturer which was stored in a weather resistant storage compartment on the work platform.
2. Hazard warning placard posted near the operator controls on the work platform.
3. The American National Standard Institute publication for Self-Propelled Elevating Work Platforms ANSI/SIA A92.6-1990.

Facts

Rhodes admitted that he used the stockpicker to assist lifting the Skyjack platform four or five times between the preceding Wednesday and Friday, July 23, 1999 (Tr. 473). According to Rhodes, the Skyjack runs off of batteries which are recharged nightly (Tr. 459). Rhodes testified that on Monday and Tuesday the batteries' charge lasted all day; however, by 4:00 or 4:30 p.m. on Wednesday the Skyjack's batteries did not have enough power to lift the platform without assistance (Tr. 460). Rhodes, therefore, placed the tip of the stockpicker's forks under one edge of the Skyjack's platform, and as the lift operator engaged the Skyjack's lift function, Rhodes engaged the stockpicker's lift mechanism until the Skyjack's batteries kicked in and lifted the platform of the stockpicker's tines (Tr. 459, 473).

As noted above, on the afternoon of Friday, the 23rd, while the scissor lift was at rest, Rhodes loaded a pallet of pallet supports onto the rear of the platform (Tr. 248, 475-76; Exh. R-8, p. 000218). When Cochrum and Tennison attempted to raise the platform, it would not move (Tr. 295, 477). Rhodes assisted the Skyjack as he had on prior occasions; as before, the platform began rising under its own power when it was between five and ten feet in the air (Tr. 293-96, 477).

After a half hour to 45 minutes had passed, Rhodes again observed Cochrum and Tennison unsuccessfully attempting to raise the Skyjack's platform (Tr. 480). Rhodes again placed the tips of the stockpicker's forks under the end of the platform and began to assist the scissor lift (Tr. 481). This time, however, as the platform was raised there was a loud bang and the platform slid off the stockpicker's forks and fell to its rest position (Tr. 217, 250, 297, 481). Tennison fell to the floor below, and Cochrum was thrown into the guardrail and onto the pallet of supports (Tr. 482). Both sustained serious injuries (Tr. 217-18, 299)

Peter Vair, the safety training program manager for Skyjack, Inc., testified that elevating the platform of a scissor lift with a forklift is recognized as hazardous by his industry (Tr. 169). A Reference Guide to Safety Rules for SKYJACK Elevating Work Platforms, "**AN OUNCE OF PREVENTION,**" states, *inter alia*, that "FAILURE TO AVOID THE FOLLOWING HAZARDS COULD RESULT IN DEATH OR SERIOUS INJURY. . . DO NOT use if work platform is not working properly or if any part is damaged, worn or missing" (Exh. R-17). Vair testified that the Skyjack's work platform is not working properly if it fails to lift when the lift mechanism is engaged (Tr. 190). His testimony was supported by that of CO Virgle Howell (Tr. 150), and of Timothy McGee, a lead service technician for Northwest (Tr. 578-79). McGee testified that if a lift cannot

perform its primary function, *i.e.*, lifting, it would be clear, even to someone who did not know *how* the machine works, that the lift was not working properly (Tr. 584, 586).

Rhodes testified that he was familiar with the safety rules for the Skyjack (Tr. 483). During the OSHA investigation he told CO Virgle Howell that he read the placards on the Skyjack that prohibited use of the machine if not operating properly (Tr. 102, 144). Rhodes stated, however, that on July 23rd he did not reach the conclusion that the platform was not working properly, and so continued to use the Skyjack (Tr. 483-84, 504). Rhodes further testified that he did not think that assisting the work platform with the stockpicker was an improper use of that equipment (Tr. 497). Since the accident, Rhodes has taken a training course on the use of scissor and boom lifts, and now recognizes that the work platform is not working properly if it fails to rise (Tr. 488, 495, 521). Nonetheless, Rhodes testified that at no time during his training was he specifically told that it was improper to assist the lifting of the work platform with another piece of equipment, though he would not do it again after his experience (Tr. 526). Vair admitted that nothing in the Skyjack’s safety materials specifically states: “Do not assist lifting the platform” (Tr. 189).

Discussion

The Secretary’s alternative citations both allege that Northwest’s installer, Rhodes, improperly lifted the work platform of a Skyjack scissor lift with the tines of a forklift when that platform failed to rise under its own power. As a threshold matter this judge must determine whether the Skyjack scissor lift is a “mobile scaffold,” and whether it was correctly cited under the specific standard at §1926.452(w). If §1926.452(w) is not applicable, and Northwest has no duty under that standard, the Secretary may fall back on §5(a)(1), which is intended to provide protection against unregulated, but recognized hazards. *Con Agra, Inc.*, 11 BNA OSHC 1141, 1983 CCH OSHD ¶26,420 (No. 79-1146, 1983).

As found above, the Skyjack meets the definition of a scaffold. Section 1926.450 states that *Mobile Scaffold* means a powered or unpowered, portable, caster or wheel mounted supported scaffold. In her July 21, 1998 Standards Interpretation and Compliance Letter, the Secretary states that:

. . . We recognize that there is confusion regarding scissors lifts and the appropriate standards governing such equipment. . . . In CPL 2-1.23, . . . dated January 7, 1997, the statement in paragraph K.9.b states that scissors lifts are addressed by 1926.453, Aerial Lifts, and not by 1926.452(2) Mobile Scaffolds. The directive should have more clearly indicated that only aerial lifts meeting the design and construction of the American National Standards Institute (ANSI) A92.2, Vehicle Mounted Elevating and Rotating Work Platforms, are addressed by 1926.453 since the coverage of that section is specifically limited to such lifts. All other types

of mobile lifts would be covered by the specific requirements at 1926.452(w) and/or the general requirements of 1926.451.

§1926.452(w)

The definitions contained in §1926.450, and OSHA's published interpretation letter indicate that the Secretary views elevating work platforms, such as the Skyjack scissor lift, as mobile lifts subject to §1926.452(w), as well as the general requirements of 1926.451. However, after reading the cited standard, §1926.452(w) *Mobile Scaffolds*, in its entirety, this judge cannot find that paragraph (w) was intended to address the circumstances for which Northwest was cited. Section 1926.452(w) addresses the "propulsion" of scaffolds across a horizontal surface, requiring, *inter alia*, that scaffolding be braced to prevent collapse while the scaffold is repositioned; that wheels and casters be locked when a mobile scaffold is used in a stationary position; that manual force be applied as close to the base as practicable; that employees not be allowed to ride on scaffolds being moved across uneven surfaces; and that any propelling force be applied directly to the wheels. Nothing in 1926.452(w) discusses the vertical motion of a scaffold platform, nothing in the standard would place the reasonable employer on notice of any prohibition against using a forklift to elevate a scissor lift platform.

It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC*, 613 F.2d 1227, (3rd Cir. 1980). Because §1926.452(w)(2) would not put a reasonable employer on notice that the cited conduct was prohibited, the violation based on that standard is dismissed.

Section 5(a)(1).

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). A recognized hazard may be a practice, procedure or condition under the employer's control that is known to be hazardous either constructively, i.e. by the industry in general, or actually, by the cited employer in particular. *Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD ¶27,605 (No. 82-388, 1986).

As noted above, Peter Vair, the safety training program manager for Skyjack, Inc., testified that elevating the platform of a scissor lift with a forklift is recognized as hazardous by his industry (Tr. 169). Both the safety manual for the Skyjack and placards located on the machine warn against using the machine if the work platform is not working properly (Tr.102, 144; Exh. R-17); it is readily apparent that the Skyjack's work platform is not working properly if it fails to lift when the lift mechanism is engaged.⁴ The safety guide makes it clear that such use could result in death or serious injury (Exh. R-17).

The Secretary has established that Rhodes' repeated use of the stockpicker to boost the Skyjack platform constituted a recognized hazard. It is not necessary for the Secretary to prove that Rhodes consciously recognized the practice as hazardous. The Secretary has also established that the cited practice was likely to cause serious physical harm. When the platform slipped from the forks of the stockpicker, two employees on the platform were, in fact, seriously injured. That the accident could have been avoided by terminating lifting operations when the the Skyjack platform ceased to operate properly is self-evident.

A violation of §5(a)(1) has been established.

Willful

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by the employer's heightened awareness of the illegality of its conduct or conditions, and by the employer's state of mind – conscious disregard or plain indifference. *See, Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980). In its most recent decision addressing the “willful” classification, the Commission stated that it will find heightened awareness “where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist.” *Propellex Corp.*, 18 OSHC 1677, 1684, 1999 CCH OSHD P31,792, p. 46,591-92 (No. 96-0265, 1999). In *Propellex*, neither the foreman's poor judgment, nor her failure to appreciate the hazard to which she exposed her employees, were deemed sufficient to demonstrate the “heightened awareness” necessary for a finding of willfulness.

⁴ Northwest's continued operation of the malfunctioning Skyjack is sufficient to establish a violation of §5(a)(1); the reason for the platform's failure is irrelevant. Subparagraphs (a) (b) and (c) of citation 2, item 1, alleging that the Skyjack's batteries were inadequately charged, that its platform was overloaded, and that the platform was used as a crane need not, and will not be addressed.

The Secretary maintains that Northwest's failure to provide formal training for Robert Rhodes prior to allowing him to oversee other employees using the scissor lift demonstrates its plain indifference to employee safety. This judge does not agree.

Ronnie Miller testified that because it did not own or sell any scissor lifts (though it did rent scissor lifts for use on occasion), Northwest did not realize that it was required to provide formal training on the proper use of scissor lifts (Tr. 555-56).

There is no evidence that Northwest had ever been cited for violations involving an elevating work platform. Ronnie Miller testified, without contradiction, that Northwest did not own a scissor lift, and was unaware of OSHA training requirements. Given the overlapping and sometimes bewildering interplay of ANSI and OSHA regulations applicable to elevating work platforms (discussed at length above) Northwest's confusion about its responsibilities may have been well founded.

Rhodes testified that on July 23, 1999 he was not aware that boosting the platform of the Skyjack was contrary to the any safety rules or placed Cochrum and Tennison in any danger (Tr. 492). As noted by Rhodes, the placards on the Skyjack do not specifically prohibit the practice. Even during his formal training, Rhodes was never specifically told that it was improper to assist the platform with the forklift (Tr. 526). Rhodes stated that he realizes it is hazardous to lift the scissor platform with the tines of the stockpicker now only because of the accident (Tr. 497, 526).

The Secretary cites no circumstances which would have put Northwest on notice that Rhodes did not understand the Skyjack's operating instructions, or alert them to the possibility that he would endanger employees by circumventing the Skyjack's prescribed operating procedures. This judge is convinced that Rhodes was not actually aware that he was violating the Skyjack's posted safety rules, or was placing Cochrum and Tennison in danger by assisting the Skyjack's platform.⁵

It is true that Rhodes exercised poor judgement, and that his judgment may have been improved by formal training. Nonetheless there is no evidence that Northwest made a conscious decision to disregard known training requirements, that it was aware that Rhodes was inadequately trained, or that it was indifferent to the possibility that Rhodes might, because of his unfamiliarity with the Skyjack, endanger employee safety. This judge cannot find that Northwest's failure to provide formal training demonstrates the "heightened awareness" necessary for a willful finding.

⁵ This conclusion is not affected by Cochrum's testimony that, before the second lift, he asked Rhodes if "Bob Villa thought we should do this at home" (Tr. 217). Cochrum's remark was couched as a joke and would have been taken as such.

The Secretary has failed to show that the cited violation was willful.

Penalty

A penalty of \$56,000.00 was proposed for this item. There is no question that this violation was a high gravity, “serious” violation, in that two employees were seriously injured when the Skyjack platform fell from Rhodes’ forklift. Though this judge is unable to find that Northwest’s failure to provide training was “willful,” as defined by the Commission, it is likely that Northwest’s failure to adequately train Rhodes contributed to his failure to appreciate the hazardous activity in which he was engaged.

Taking the relevant factors into consideration, this judge finds that the maximum penalty available for a serious violation, \$7,000.00, is appropriate for this violation. That amount will be assessed.

Alleged Violation of §1926.501(b)(15)

Willful citation 2, item 2 alleges:

29 CFR 1926.501(b)(15): Employees on a walking/working surface 6 ft. or more above lower levels were not protected from falls by a guardrail system, safety net system, or personal fall arrest system:

(a) One Cold Water Creek Drive, Sandpoint, ID: On or about July 23, 1999, and at times prior thereto, employees were standing on approximately 4 inch wide steel beams while installing structural members of a pallet rack storage system at heights up to approximately 26 feet above a cement floor.

Facts

Robert Rhodes admitted that he and Cochrum climbed out onto the beams of the pallet rack when he was showing Cochrum how to remove the bolts from the row spacers (Tr. 201, 451-55). Rhodes further admitted that they did not use fall protection during that demonstration (Tr. 513-14).

As noted above, Cochrum testified that he left the Skyjack platform between 15 and 20 times, while removing bolts up to 32 feet off the floor (Tr. 211, 235). Tennison stated that he went out onto the racks about eight times at heights up to 30 feet (Tr. 291-92, 329).

According to Rhodes, the only time he saw Cochrum on the pallet rack was during his initial demonstration; he did not see Tennison and Cochrum climbing on the racks at any other time (Tr. 493). Neither Cochrum nor Tennison could say for certain that Rhodes saw them working out on the racks (Tr. 242, 295, 349).

Cochrum testified that he asked Rhodes if he and Tennison would be using fall protection (Tr. 203-04). Rhodes told Cochrum that they wouldn’t need it (Tr. 204, 464). Tennison stated that he

noticed that Rhodes was wearing a safety harness, and that he asked for one on two different occasions (Tr. 284-85, 332). Rhodes told him that he didn't need one on the Skyjack (Tr. 285, 332-33).

As noted above, Rhodes testified that he wore a harness because it is required while using the stockpicker, which has no handrails around the operator's platform (Tr. 463-64).

Discussion

The cited standard provides:

Walking/working surfaces not otherwise addressed. Except as provided in §1926.500(a)(2) or in §1926.500(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.

It is clear that Cochrum and Tennison left the Skyjack platform to work on beams up to 30 feet above the ground without fall protection. On at least one occasion Rhodes was aware that Cochrum worked on the pallet racking without fall protection. The Secretary has established the cited violation.

Characterization

As noted above, the record does not contain the type of evidence which would allow this judge to find that Northwest had a heightened awareness of the requirements of the cited standard, or that it was on notice of the violative conditions. *Propellex, supra*. There is no evidence that Northwest had ever been cited for violations of the fall protection standards, or that it was actually aware that its employees were working outside the Skyjack platform without fall protection.

Finally, there is no evidence that Northwest was aware that Rhodes was providing ineffectual supervision to the temporary employees under his charge. *See, Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992) (leaderman's willful behavior may be imputed to employer where his longstanding and reckless practices were well known to supervisory personnel). The Secretary introduced no evidence establishing that Rhodes had a prior record of safety infractions. This judge cannot conclude from the evidence that Northwest had a heightened awareness of a need to take precautions to ensure that Rhodes did not endanger the employees under his supervision. This judge cannot find that the cited violation was willful in nature.

Penalty

A penalty of \$56,000.00 was proposed for this item. This judge finds that amount excessive. While Rhodes' deliberate misconduct resulted in Cochrum's exposure to a hazard, it would be disproportionate to find that the hazard addressed here approached that hazard to which Rhodes

unwittingly exposed Cochrum and Tennison when he lifted the Skyjack platform with his forklift.

A penalty of \$5,000.00 is deemed appropriate for this violation and will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of \$3,500.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.454(b) is AFFIRMED, and a penalty of \$3,500.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1926.503(a)(1) is AFFIRMED, and a penalty of \$3,500.00 is ASSESSED.
4. Citation 2, item 1, alleging violation of §5(a)(1) is AFFIRMED as a “serious” citation, and a penalty of \$7,000.00 is ASSESSED.
5. Citation 2, item 2, alleging violation of §1926.501(b)(15) is AFFIRMED as a “serious” citation, and a penalty of \$5,000.00 is ASSESSED.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: November 6, 2000