

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

PASHA MARITIME SERVICES, and its  
successors,

Respondent.

OSHRC DOCKET NO. 99-2244

**APPEARANCES:**

For the Complainant:

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

For the Respondent:

Johnathan L. Wolff, Esq., Timothy M. Gill, Esq., Kelly Gill, Sherburne & Herrera, San Francisco,  
California

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, Pasha Maritime Services, and its successors (Pasha), at all times relevant to this action maintained a place of business on the Vessel BLUE HAWK, where it was engaged in stevedoring. On October 27, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Pasha's BLUE HAWK work site. As a result of that inspection, a "serious" citation alleging violation of §1918.86(c) of the Act, together with proposed penalties was issued to Pasha. By filing a timely notice of contest Pasha brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 20, 2000, a hearing was held in San Diego, California. At the hearing, OSHA Compliance Officer (CO) John Cantrell testified, without contradiction, that Pasha is an employer engaged in stevedoring, and is subject to the requirements of the Act (Tr. 9-10).

The parties have submitted briefs addressing the violation alleged at citation 1, item 1, and this matter is ready for disposition.

### **Alleged Violation**

Serious citation 1, item 1 alleges:

29 CFR 1918.86(c): Ramps used for pedestrian access shall meet the requirements of 1918.25. Such ramps shall provide a physical separation between pedestrian and vehicular routes. When the design of the ramp prevents physical separation, a positive means shall be established to prevent simultaneous use of the ramp by vehicles and pedestrians.

- a) Mid and aft ship ramp aboard the roll on/roll off ship named "Blue Hawk": The employer did not provide longshoremen with designed walkways on the aft or mid ship ramps on the vessel "Blue Hawk."

### **Facts**

CO Cantrell testified that on October 27, 1999 Pasha was engaged in Ro-Ro operations (wherein vehicles are driven on to and off of the vessel aboard which they are transported) at its BLUE HAWK work site (Tr. 13). Cantrell testified that there was no physical separation delineating pedestrian and vehicular routes on either the midship or the aft ramps of the BLUE HAWK (Tr. 12, 18). Cantrell testified that on two occasions during his inspection he observed employees using vehicular ramps to access the vessel (Tr. 13). On the first occasion, Cantrell observed two Pasha employees walking up the midship ramp (Tr. 13-14). Later Cantrell observed and photographed another Pasha employee, Travis Torres, walking up the same midship ramp (Tr. 20; Exh. C-2). Cantrell testified that he watched one round of vehicles being discharged down the midship ramp immediately before Torres came up the ramp (Tr. 53). Moreover, Cantrell testified, as Torres began to walk up the ramp, a van shuttling drivers back on board passed Torres on the ramp (Tr. 115). Cantrell stated that he did not see a signal man in the vicinity, and that it was clear there was no one directing traffic at the time he observed Torres (Tr. 113-14).

Cantrell testified that he had conducted an inspection of another of Pasha's work sites between six months and a year previously (Tr. 29). Cantrell stated that during the earlier inspection he had spoken to Pasha's operations manager, Chris Jensen, about the need for physical barriers between vehicular lanes and pedestrian walkways (Tr. 29). Jensen was with Cantrell on October 27, 1999 when they observed Torres walking up the ramp. Cantrell stated that Jensen told him at that time that employees shouldn't be walking up the ramps, but that it was impossible to monitor all the employees to ensure that they were doing what they were supposed to do (Tr. 25-27; Exh. C-2).

Bengt Andersson, Pasha's safety manager (Tr. 60), admitted that there were no barriers to protect pedestrians from vehicular traffic on the midship ramp (Tr. 82). Andersson admitted that it had not been determined that it was infeasible to install such barriers; the ramps were, in fact, wide enough to accommodate a physical separation (Tr. 83). Nonetheless, Andersson stated that Pasha had determined that physical barriers were unnecessary, because it could keep pedestrian traffic off the ramps by other means (Tr. 84).

Andersson testified that discharging is normally set up so that there is only one way traffic on each ramp (Tr. 64). If passenger vans carrying longshoremen are coming up the midship ramp, as pictured in Complainant's Exhibit 2, all discharged vehicles should be going down the stern ramp (Tr. 65). According to Pasha's operation plan: "External ramps are not to be used for pedestrian traffic. Shuttle Buses will drive aboard the vessel or the gangway will be used for pedestrian traffic." (Exh. R-2, #5). Andersson testified that signalmen are assigned to direct traffic and to prevent pedestrians from walking up the ramp (Tr. 94). Andersson was not on the BLUE HAWK site on October 27, 1999, but he testified that the conditions described by Cantrell were contrary to Pasha's standard operating procedures (Tr. 65, 95; Exh. R-2).

Harmon Huff, Pasha's marine superintendent (Tr. 99), was present on the day of the inspection, and testified that traffic flow on the BLUE HAWK was set up so that vans bringing the drivers on board came up one ramp, while vehicles were discharged down the other (Tr. 99-100). Huff testified that a signalman was used on October 27, 1999 (Tr. 103). Huff was not on the midship ramp at the time of the alleged violation, and admitted that it was possible that the signal man might have "vanished for a few minutes and then came back." (Tr. 107).

### Discussion

The cited standard provides:

**Roll-on roll-off (Ro-Ro) operations.** . . (c) Pedestrian traffic. Stern and side port ramps also used for pedestrian access shall meet the requirements of §1918.25. Such ramps shall provide a physical separation between pedestrian and vehicular routes. When the design of the ramp prevents physical separation, a positive means shall be established to prevent simultaneous use of the ramp by vehicles and pedestrians.

**The violation.** It is undisputed that Pasha was engaged in Ro-Ro operations. It is undisputed that there was no physical barrier on the midship ramp, though the design of the ramp did not prevent the physical separation of pedestrian and vehicle traffic.

The evidence establishes that the ramp was used for both vehicle and pedestrian traffic. On two occasions, CO Cantrell observed pedestrians using the ramp to access the vessel. When longshoreman Torres was photographed on the ramp, the ramp was concurrently used by Pasha's shuttle van, which passed Torres on the ramp as it drove aboard the BLUE HAWK.

Pasha maintains that the cited standard is intended to apply only to the discharge of vehicular cargo, and so is inapplicable in the cited circumstances. In addition, Pasha maintains that its operating procedures, which prohibit pedestrian traffic on ramps and provide for a signal man at each ramp to ensure the proper flow of traffic and personnel, satisfy the requirements of the standard.

**Applicability only to discharge of "cargo."** In support of its position, Pasha cites the preamble to the final rule, which states at 62 Fed.Reg. 40152, at 40177:

Final 1918.86, titled "Roll-on roll-off (Ro-Ro) operations," which was a new section in the proposal, addresses operations aboard Ro-Ro vessels. . . In such operations, personnel [lashing cargo] are exposed to being struck by vehicular traffic. In addition, other employees involved with loading or unloading wheeled cargo, both drivers and pedestrians, are exposed to traffic hazards. This section addresses the hazards attributable to this process, in which employees and vehicles are in closely confined and marginally illuminated space.

Initially, this judge notes, that if a statute does not create ambiguity on its face as to the intent of Congress it is neither necessary nor proper to look to secondary sources to discern the intent of the standard. *Unarco Commercial Products*, 16 BNA OSHC 1499, 1991-93 CCH OSHD ¶30,294 (No. 89-1555, 1993); *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1991-93 CCH OSHD ¶29,758 (No. 89-1192, 1992). The language of §1918.86(c) is clear on its face, stating that during Ro-Ro operations, the employer shall provide a physical separation between pedestrian and vehicular routes. Nothing in the standard limits the requirement depending on the type of vehicular traffic to which pedestrians are exposed, or the direction in which the traffic is moving. Because there is no facial ambiguity in the standard, it is inappropriate to look to the standard's preamble for such a limitation.

Moreover, the interpretation suggested by Pasha would lead to an absurd result. As noted by the Secretary in her brief, the hazard to employees addressed by the standard, *i.e.*, being struck by moving vehicles in a closely confined area are the same, regardless of the direction in which the vehicle traffic is moving. The injuries a pedestrian would sustain from impact with a shuttle van would be no less severe than those sustained from impact with a car being discharged.

Finally, the language Pasha relies on does not support Pasha's interpretation. The phrase "other employees involved with loading or unloading wheeled cargo, both drivers and pedestrians, are exposed to traffic hazards" is sufficiently broad to cover the circumstances cited here.

**Adequacy of Pasha's operating procedures.** Pasha maintains that the Secretary has not established a violation because its operating procedures satisfy the requirements of the standard. This judge disagrees.

When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). Moreover, exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980). The Secretary correctly notes that the cited standard is a performance standard, and requires a physical separation between vehicular and pedestrian routes. No alternatives to physical barriers are allowed, *unless* the design of the ramp renders physical barriers infeasible. Pasha admits that physical barriers could have been installed; Pasha was not, therefore, entitled to take advantage of the exemption in the standard.

Nonetheless, it is true that Pasha's written procedures prohibit pedestrian traffic on the external ramps, and require longshoremen to use shuttle buses or the gangway to access the vessel. The procedures further provide for the assignment of signalmen to prevent pedestrians from using the vehicle ramps. Had Pasha's written policies been followed, no longshoremen would have been exposed to a hazard, and no citation would have been issued. CO Cantrell himself indicated that the absence of physical barriers, in and of itself, would not result in a citation where there was no documented employee exposure (Tr. 29). As the record shows, however, Pasha's operating procedures were *not* followed. Employees did use the external ramps for vessel access, and in at least one case, used the ramp at the same time it was being used by vehicular traffic.

Though not argued by Pasha, its introduction of a work rule designed to prevent employee exposure to the cited hazard raises the issue of employee misconduct. Under Commission precedent, however, the mere existence of a work rule designed to prevent violation of an OSHA standard is insufficient to vitiate a proven violation of that standard. The employer must also show that it adequately communicated those work rules to its employees; took reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

Pasha introduced a copy of its "gangway talk" for the BLUE HAWK job, which includes the instruction not to use external ramps for transit, and the requirement that the shuttle bus or gangway be

used for accessing the vessel (Exh. R-4). Huff testified that the ship boss, Augie Reyes, gave the gangway talk (Tr. 78-79). Huff testified that he was sure longshoremen have been verbally admonished not to walk up the ramp, but did not have any personal knowledge of any verbal discipline (Tr. 90). Nor was Huff aware of any other disciplinary measures taken by Pasha to discourage pedestrian use of the vehicle ramps (Tr. 90-91). Pasha employees disregarded the prohibition against using the ramps as pedestrian routes when there was not vehicular traffic, suggesting that the rule was not, in fact, enforced. At the time of the violation, though there was vehicular traffic on the ramp, there was no signalman present to prevent pedestrian access (Tr. 113-14). Operations manager Jensen told CO Cantrell that it was impossible to monitor all the employees to ensure that they followed proper procedures (Tr. 26-27, 113-14).

Pasha failed to demonstrate that it had effectively communicated and/or enforced its work rule prohibiting the use of external ramps as pedestrian walkways, and therefore, has not shown that Travis Torres' conduct was unpreventable.

The violation is established.

Penalty

A penalty of \$1,500.00 was proposed.

CO Cantrell testified that an employee in a vehicle lane could have his foot run over, or be struck by a vehicle. An employee struck by a car or van would probably suffer broken bones (Tr. 33). The violation, therefore, was properly classified as "serious." Cantrell believed the probability of such an accident occurring was low (Tr. 34-35). The Secretary offered no evidence that Pasha had received citations for any prior violations of the Act. Cantrell stated that he gave Pasha full credit for good faith (Tr. 35).

One employee was exposed to the cited hazard for the seconds it took the shuttle van to pass him. Although it was in technical violation of the standard, Pasha had enacted alternative practices which, if followed, would have eliminated the hazard addressed by the standard. CO Cantrell believed that Pasha acted in good faith. Taking into account the relevant factors, this judge finds that a penalty of \$500.00 is appropriate.

**ORDER**

1. Citation 1, item 1, alleging violation of 29 CFR 1918.86(c) is AFFIRMED, and a penalty of \$500.00 is ASSESSED.

/s/  
Benjamin R. Loye

Dated: June 1, 2000

Judge, OSHRC