United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. RIO DOCE PASHA TERMINAL L.P., and its successors, Respondent.	OSHRC DOCKET NO. 00-0046

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, Rio Doce Pasha Terminal L.P., and its successors (RDP), at all times relevant to this action maintained a place of business on the Vessel JUPITER LIGHT, Berth 145, where it was engaged in stevedoring. On November 16, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of RDP's JUPITER LIGHT work site. As a result of that inspection, RDP was issued a "serious" citation alleging violation of §1918.81(k) of the Act, together with proposed penalties. By filing a timely notice of contest RDP 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) Jay Larsen testified, without contradiction, that RDP is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 11-12).

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

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1918.81(k): The employer did not require employees to stay clear of suspended loads.

(a) Rio Doce Pasha Terminal aboard the vessel Jupiter Light. Employees discharging cargo from Hatch #4 did not stay of clear the suspended load.

Facts

CO Larsen testified that on November 16, 1999 he conducted an inspection of RDP's workplace aboard the JUPITER LIGHT (Tr. 11). Larsen testified that during the inspection he observed employees working in a hold, off-loading cargo consisting of plate or sheet steel (Tr. 13, 107). The employees had placed slings around the load, which was then hoisted out of the hatch (Tr. 13-14). Larson stated that one longshoreman, identified only as Louie, failed to vacate the area beneath the load as it was hoisted (Tr. 14-16, 107; Exh. C-1). Larson believed that the longshoreman was getting ready to sling another load or to pull out some of the 2 x 4's used as spacers (Tr. 15). CO Larson testified that the load could have fallen directly on the exposed longshoreman. Alternatively, had a sling broken, the steel plates would have separated and fallen all over the hatch, striking the exposed employee (Tr. 16). Larson testified that Louie should have gone under the wings that overhang the hatch while the load was being hoisted (Tr. 18, 106-07).[1]

CO Larson testified that he pointed out the exposed employee to RDP's vessel superintendent, Justin Holmquist (Tr. 75-76, 83).[2] Larson stated that the superintendent called down into the hold, and the longshoreman moved under the wings (Tr. 23). Larson testified that he photographed the exposed employee as he moved under cover; Larson stated that the load had been hoisted approximately 25 feet at that point (Tr. 105, 108-09).[3]

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[1] On rebuttal, CO Larson agreed with RDP's witnesses that climbing the dock side framework of the hull would have been inappropriate (Tr. 67, 87, 106-07).

[2] Holmquist testified that it was he who accompanied CO Larson on his walkaround, not Barry Pate as CO Larson testified (Tr. 12, 23, 29, 83).

[3] This judge finds that CO Larson's estimate as to the height of the load conforms to the photographic

(continued...)

Holmquist confirmed that he called down to the foreman in the hold, asking him to make sure that everybody stayed clear of the load (Tr. 90). Holmquist did not believe that the cited employee was directly under the load, but could not explain why he was in the open in the hold rather than under the wings with the other stevedores (Tr. 90-91, 94).

Holmquist testified that when RDP is discharging steel sheeting, the longshoremen stand over the load to be hoisted. The crane operator then lowers a spreader bar, which supports "drop legs," to which two slings are attached (Tr. 79). One or two employees grab each sling and place them underneath the load (Tr. 79). The longshoremen then back away, and the foreman contacts the crane operator, who will "set tight," *i.e.*, lift the load approximately six feet off the floor of the hold to ensure that it is level and properly set (Tr. 79-80, 98). Once it is determined that the load is properly set and balanced, the foreman clears his men away from the load, and the crane operator begins hoisting the load up and away from the longshoremen (Tr. 80, 86).

Holmquist stated that there was a foreman in the hold (Tr. 91). Larson stated that the hatch boss, or foreman, would have been able to see that the longshoreman identified as Louie was still exposed to the suspended load (Tr. 21).

Discussion

The cited standard provides that "[t]he employer shall require that employees stay clear of the area beneath overhead drafts or descending lifting gear." RDP argues that the Secretary failed to show 1) that its employee was ever underneath a load, or 2) that it failed to require its employees to stay clear of overhead loads.

The Violation. In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The Secretary has made out a *prima facie* case, in that the evidence shows that the longshoreman, Louie, was not clear of the area where a load was being drawn overhead, and so was exposed to hazard the standard was intended to address.

Employee exposure. RDP argues that the Secretary failed to show that the longshoreman Louie was directly beneath the load being hoisted, pointing to CO Larson's photograph, which was submitted as Exh. C-1. However CO Larson testified, and it is clear from the photograph, that the exposed employee had already begun to move towards cover at the time the

[3](...continued)
evidence and so gives his testimony credence over Holmquist's "guesstimate" of six feet (Tr. 99).

photograph was taken, *after* Larson observed the employee in the hold, and after superintendent Holmquist called down into the hold. Moreover, in this case, it is not necessary for the Secretary to establish the exposed employee's exact position in order to establish the cited violation. It is well established that for the Secretary to establish employee exposure to a hazard, she must only show that it is reasonably predictable that employees have been, are, or will be in the "zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1998 CCH OSHD ¶31,463 (No. 93-1853, 1997). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶30,754, p.42,729 (No. 91-2107, 1995). CO Larson testified, without contradiction, that in the event of an accident the steel plates being hoisted would not necessarily fall straight down, but could ricochet around the hold. Larson's testimony establishes that the exposed employee was in the zone of danger contemplated by the standard.

Employee misconduct. RDP further argues that it does require its employees to stay clear of the area beneath loads being hoisted. Superintendent Holmquist stated that prior to every job he goes over RDP's safety rules with the foremen (Tr. 80, 82, 92). Point number seven on Holmquist's safety talk states: "All persons are reminded to be aware of their work area and to always take a safe position when working around cargo handling equipment." (Tr. 82, Exh. R-2). Nonetheless, the evidence establishes that there was a foreman in the hold at the time of the violation who could see the exposed longshoreman. That foreman signaled the crane operator to proceed with his lift without first requiring that all the longshoremen vacate the hold.

Though RDP does not specifically raise the issue of employee misconduct, this judge notes that in order to establish an unpreventable employee misconduct defense, the employer must establish that it had: 1) established work rules designed to prevent the violation; 2) adequately communicated those work rules to its employees (including supervisors); 3) taken reasonable steps to discover violations of those work rules; and 4) effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (No. 91-2897, 1995).

The only evidence RDP submitted in support of an employee misconduct defense was Holmquist's testimony that he did cover the safety rules contained on the vessel safety talk sheet, submitted as Respondent's Exhibit 2, prior to the start of the JUPITER LIGHT job (Tr. 92). Holmquist testified that a signed and dated documentation of his talk was submitted to RDP's safety manager (Tr. 92). Holmquist could not explain RDP's failure to produce the signed, dated copy (Tr. 92, 95).

RDP's showing is inadequate to make out the affirmative defense of unpreventable employee misconduct.

Penalty

A penalty of $2,250.00 was proposed for this item.

Larson testified that, in the event of an accident, the falling steel plates would probably crush and kill an exposed employee (Tr. 23-24). The violation was, therefore, properly classified as "serious." Larson stated that he felt the severity of the hazard was high, though the probability of an accident occurring was lesser (Tr. 24). Larson calculated a 10% reduction in the size of the penalty because RDP had no history of prior OSHA violations (Tr. 24).

Only one employee was exposed to the cited hazard, for a matter of seconds. Though RDP failed to make out an employee misconduct defense, it did establish its good faith, in that it had a work rule designed to prevent the cited violation. Moreover, the majority of the crew in the hold had taken cover in compliance with RDP's safety policy and the OSHA regulation.

Taking into account the relevant factors, I find that a penalty of $1,500.00 is appropriate and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1918.81(k) is AFFIRMED, and a penalty of $1,500.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: May 30, 2000