UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.
CENTRAL FLORIDA UNDERGROUND
Respondent.

OSHRC DOCKET
NO. 93-0818

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 10, 1993. The decision of the Judge will become a final order of the Commission on December 10, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 30, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. 11/10/93

Date: November 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0818

NOTICE IS GIVEN TO THE FOLLOWING:

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Nancy J. Spies
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SECRETARY OF LABOR,

Complainant,

v.

CENTRAL FLORIDA UNDERGROUND, INC.,

Respondent.

OSHRC Docket No. 93-818

APPEARANCES:

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Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Roy Ward
Central Florida Underground, Inc.
Altamonte Springs, Florida
For Respondent *Pro Se*

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On January 4, 1993, an employee of Central Florida Underground, Inc. (Central), was electrocuted when a crane he touched came into contact with overhead electrical lines. Occupational Safety and Health Administration (OSHA) Compliance Officer Donald Valade conducted an accident inspection during January 5 through February 16, 1993. On February 26, 1993, OSHA issued a citation which alleged four serious violations of the Occupational Safety and Health Act of 1970 (Act). Central contested each of the four allegations: §1926.21(b)(2), for failure to instruct in proper rigging; §1926.550(a)(15)(i), for failure to

remain at least 10 feet from energized electrical lines; §1926.550(a)(15)(iv), for failure to designate an employee to observe clearances; and §1926.550(b)(2), for failure to rig the trench box in accordance with applicable ANSI standards. Central primarily asserts the employee misconduct defense.

Central is an Orlando, Florida, underground pipe contractor. On the day of the accident, its crew planned to lay 24 underground sewer pipes, each measuring 48 inches, for the city of Orlando (Tr. 33, 43). Troy Anthony was the pipelayer foreman (Tr. 43). The deceased, Ira Melton, was an inexperienced member of Anthony's crew (Tr. 145). Roy Ward, Central's president, represented his company in this proceeding *pro se*.

ALLEGED SERIOUS CITATION

Item 1: § 1926.21 (b)(2) and Item 4: § 1926.550(b)(2)

The Secretary asserts that the manner in which employees attempted to lift the trench box violated two standards (items 1 and 4). First, he alleges that the way the trench box was lifted demonstrated a lack of training in acceptable rigging procedures and, second, that it violated OSHA's standard incorporating requirements of the American National Standard Institute (ANSI). Central claims that any violation was caused by the unpreventable actions of its foreman.

THE STANDARDS

Section 1926.21(b)(2), the general training standard, requires:

> (b) *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Section 1926.550(b)(2) requires:

> (b) *Crawler, locomotive, and truckcranes.* (2) All . . . cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968. (Emphasis added)

The citation refers specifically to ¶ 5-3.2.3(a)(2) and ¶ 5-3.2.3(b)(3) of ANSI standard B30.5-1968. These sections specify:

> 5-3.2.3 **Moving the Load** (a) The individual directing the lift shall see that ... (2) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.
>
> 5-3.2.3 ... (b) Before starting to hoist, note the following conditions ... (3) The hook shall be brought over the load in such a manner as to prevent swinging.[1]

FACTUAL BACKGROUND

Ward sent a transport truck to deliver a crane to the worksite. The transport driver, Charles Canada, remained to pick up and move a trench box from one trench to another location where Central would lay pipe (132). The trench box weighed more that 10,000 pounds (Tr. 21).

Pipefitter foreman Anthony, an inexperienced crane operator, attempted to load the trench box onto the transport using the crane. He had the truck positioned between the trench box and the crane (Exh. J-1; Tr. 133, 142). Anthony extended the boom low and long so that he could pull the box out from underneath the wires before lifting it. Anthony and other employees attached a 15-foot cable to the box and, as he backed up the crane, he pulled the box towards the transport trailer (Tr. 31, 49). Instead of rigging the trench box at four access points designed for hoisting the trench box with balance, the employees tied the cable around the body of the box. This was Central's usual method for loading a trench box because it allowed the box to be transported and unloaded at the new location on its side (Tr. 86, 142, 143). If employees hoisted the box at its access points, Canada believed that it would have to be transported upright, a position he felt was unsafe (Tr. 142). Rather then lifting the box, Anthony pulled it up to the truck and attempted to drag it onto the

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[1] There was no attempt to show that the hook was incorrectly placed or that the load swung, and the allegation that Central violated ANSI ¶ 5-3.2.3(b)(3) was not substantiated. Only ANSI ¶ 5-3.2.3(a)(2) will be considered as a basis for the alleged violation.

truck bed. This was unsuccessful since the full box could not be positioned squarely on the trailer (Tr. 140). Anthony directed Melton and another employee to re-rig the box for another attempt. This time they moved the cables to the back end of the box and rigged it to a spreader (Tr. 27. 50-51, 126). While moving the box the second time, the boom came into contact with electrical lines which resulted in Melton's electrocution.

It is at the point where the trench box was lifted that the Secretary asserts the violations occurred, *i.e.*, that Central's lack of training in rigging was manifest and that Central violated the ANSI standard by the method used (Tr. 28).

ANALYSIS

Because § 1926.21(b)(2) does not specify exactly what instruction employees must receive, the Commission and the courts have held that an employer must instruct its employees in the recognition and avoidance of the hazards which a reasonably prudent employer would have been aware. *E.g., R & R Builders, Inc.*, 14 BNA OSHCO 1844, 1991 CCH OSHD ¶ 29,105 (No. 88-282, 1991); *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991); *See also National Industrial Constructors, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978). Employees must be instructed in what they may reasonably be expected to encounter in their work. *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 1992 CCH OSHD ¶ 29,902 (No. 90-2668, 1992).

Central's employees should have been trained in proper methods for rigging equipment regularly used at their jobsites. Transporting, lifting, and placing trench boxes were an integral part of Central's job performance requirements. Use of the crane was an option available to employees placing or retrieving the trench box. Were Central's employees given the training in rigging that a reasonably prudent employer would have given in the same circumstances?[2]

Ward argued that Central properly trained Anthony, pointing particularly to the "competent person" training Anthony attended on the trenching standards. Simply

[2] Although there may have been other deficiencies in Central's training, such as operation of the crane, the citation and complaint allege only a violation relating to training in rigging.

addressing one area of potential hazards at a worksite does not permit an employer to ignore other potential dangers. A reasonable employer in Central's circumstances would have provided its employees with training on rigging, including how to balance loads in that process.

Valade questioned Troy Anthony and Thomas Wright, the employee who helped Melton rig the trench box, concerning their knowledge of rigging. Neither Anthony nor Wright knew specifics for proper rigging methods (Tr. 34). Employees learned to rig equipment on the job without formal training. Both Anthony and truck driver Canada were unclear about what was an appropriate means to hoist the trench box. Canada was not even sure that using the access points for lifting the trench box was appropriate since he always transported the box on its side (Tr. 143). Anthony was unfamiliar with any rigging requirements of ANSI (Tr. 22). Central's employees performed their work as if they were unaware of proper rigging requirements. Although Ward stated that Central had lifting cables and chains with safety hooks on the site, there was no requirement for their use. The specialized equipment was not generally used to lift the trench box (Tr. 87, 158). Anthony believed his men were not properly trained in rigging and would rig "whichever way they could get it hooked up" (Tr. 92). The method employees used to lift the trench box left the load unbalanced and improperly secured, contrary to the ANSI requirements. The Secretary has established a violation of both the training and rigging standards. Anthony's knowledge of the rigging violation is properly imputed to the employer. Additionally, Central had at least constructive knowledge of the inadequacy of its training program. The Secretary has established a prima facie case that the violations occurred. For reasons discussed in more detail later, Central's defense of employee misconduct has not been proved.

CLASSIFICATION AND PENALTY

Failure to properly rig a 10,000-pound trench box could result in the load slipping and swinging into or falling onto employees. Employees were near the box as it was dragged up onto the trailer bed by the crane. A lack of proper training in rigging procedures and a failure to follow the rigging specifications of ANSI could result in serious injury or death. The violations were serious.

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir 1973). Under section 11(j) of the Act, the Commission is required to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). Central had sixty employees and had a history of previous serious violations (Tr. 35). The gravity of the violation is high where heavy objects are incorrectly rigged and lifted by an inexperienced crane operator near surrounding high voltage wires. The area where the lift was to be made heightened the potential hazard. The fact that the violations, although not duplicative, concern the same violative conduct is considered as a mitigating factor in the penalty assessment. Serious violation of §1926.21(b)(2) is affirmed and a penalty of $1,000 is assessed; serious violation of § 1926.550(b)(2) is affirmed and a penalty of $750 is assessed.

Item 2: §1926.550(a)(15)(i)

The Secretary charges that Central violated the standard at § 1926.550(a)(15)(i) when the boom of its crane came within 10 feet of overhead power lines. Central admits that contact was made with the power lines, but asserts that the incident was caused by the actions of its foreman and was an isolated incident. The standard specifies:

> (15) * * * [E]quipment or machines shall be operated proximate to power lines only in accordance with . . . (i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet[.]

FACTUAL BACKGROUND

On the morning of January 4, 1993, pipefitter foreman Anthony could not begin laying pipe because his heavy equipment operator did not report for work. Anthony so advised Central's president, Roy Ward, who was at the jobsite at the time (Tr. 44-45). Although Anthony worked as a backhoe operator in the early 1980s and regularly worked

as a front-end loader, he had extremely limited experience as a crane operator. He described this experience as "[j]ust on-the-job training myself, a little bit, you know working on it here and there at different times ... three or four times a year ... an hour here a couple of hours there." (Tr. 46-47). Anthony "never felt comfortable operating the crane" and had never read the crane manual (Tr.77). Central employed Anthony as a pipefitter, not as a crane operator (Tr. 47).

Anthony intended to operate the front-end loader that day, but it was not readily available (Tr. 79). Ward decided to send a crane out to the jobsite with the knowledge that Anthony would have to be the crane operator and that there might be a problem removing the trench box from under the "criss crossed" wires (Tr. 46, 101, 109).

As stated, truck driver Charlie Canada brought the crane to the worksite on his transport truck and remained to drive the trench box to another location (Tr. 132). Two sets of overhead power lines ran perpendicular and parallel to the trench box (Exh. J-1; Tr. 104). The lines were energized at 7.2 kV. Those nearest the trench box were 29 feet above ground (Tr. 31, 39). The crane came within 3 to 4 feet of the electrical wires as Anthony drug the trench box to the trailer (Tr. 49). After Melton and Wright re-rigged the trench box for a second try, Anthony raised the box and accidently swung the boom into the set of wires located nearest the crane (Exh. J-1). Melton, who had his hand resting on the back wheel fender midway on the crane, was electrocuted (Tr. 144).

There is no question that the boom came within 10 feet of energized overhead lines on at least two occasions on the day of the accident. Indeed, the whole operation was conducted without regard to the 10-foot safety distance. Ward did not know, and had never been told, that the safety clearance existed (Tr. 61, 118). Central relies on its defense that Anthony exposed himself and his crew to these hazards because he inexplicably chose to perform the work as he did. This position is a part of the "employee misconduct" defense. For the reasons discussed later, Central did not establish the defense. The Secretary proved that the violation occurred. Central had knowledge of the violation since Ward sent the crane to the jobsite knowing he had only an inexperienced operator and a potentially dangerous condition with overhead electrical lines. This is also established through Anthony's knowledge, which is imputed to Central. The violation is affirmed.

CLASSIFICATION AND PENALTY

The fact that the violation resulted in a fatality demonstrates its serious nature. In consideration of factors previously discussed and the gravity of this violation, a penalty of $3,000 is appropriate and is assessed.

Item 3: §1926.550(a)(15)(iv)

The Secretary asserts that no one was designated to watch and give directions to Anthony as he operated the crane on January 4, 1993. The Secretary also argues that if Melton was the person designated to direct the crane, he was so improperly trained that he could not perform the work he was assigned but did not do (Tr. 38). Central claims that it would have been unnecessary for anyone to spot the crane had Anthony chosen a correct manner to perform the work (Tr. 154). The standard requires:

> (iv) A person shall be designated to observe clearance of the equipment and give timely warning for all operations where it is difficult for the operator to maintain the desired clearance by visual means[.]

FACTUAL BACKGROUND

When the regular crane operator was on the job, Anthony was the crane spotter (Tr. 54). Prior to beginning the second lift on January 4, Anthony asked Melton if "[Anthony] had room" (Tr. 52). In hindsight, Anthony believes that Melton was under a "misconception" since he advised Anthony that he had "plenty of room" (Tr. 52). On the second lift, Anthony intended only to move the box 6 to 8 inches so the load would be secured (Tr. 51). The boom was still extended 38 feet as it had been when Anthony pulled the trench box to the trailer (Tr. 40). After the box was re-rigged, Anthony told the men to "stay clear" (Tr.51). Anthony apparently intended that someone would give him directions as he operated the crane and may have particularly intended that Melton be that person. It is clear, however, that no one with any training on how to perform the task was properly designated to warn Anthony about observing clearances. When the men "stood

clear" of the load, as Anthony ordered, everyone went to the side of the crane which Anthony could not see (Tr. 53). At that point Anthony could only look up, down, and back and forth in trying to determine where to place the trench box (Tr. 51).

Melton had been on the job only three or four months (Tr. 54). His previous work was as a "tail man," a person who cleaned and inspected the pipe before the next piece of pipe was attached. Canada observed that Melton did not appear to have much knowledge of construction work (Tr. 145). While Anthony operated the crane, Canada saw Melton talking to one of the other men. He was sure that Melton "wasn't going to be directing anyone" (Tr. 146).

Anthony operated the crane in proximity to overhead electrical lines. The lift was awkward and heavy. He needed someone to direct and assist him in lifting the trench box and placing it onto the trailer. This was not done, and the standard was violated. Ward's argument that the work should have been performed in such a manner as to preclude the need for a spotter is rejected. Given the parameters within which Anthony was required to load the trench box, it could reasonably be expected that an inexperienced crane operator, or even an experienced crane operator, would need assistance maintaining clearance. Anthony usually performed the task of directing the crane but, as Ward knew, he was to be the crane operator. The violation is affirmed.

CLASSIFICATION AND PENALTY

Failure to designate someone to direct the crane operator could, as it did in this case, reasonably result in death or serious injury. The violation is serious. The statutory factors have previously been discussed. The gravity of the violation is high. A penalty of $2,000 is assessed.

Central's Employee Misconduct Defense

In reaching the decision in this case, Central's argument that the violations were caused by misconduct of its foreman was carefully considered. As Central asserts, an employer is not required to take into account the idiosyncratic conduct of an employee in carrying out its safety policy. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266

(D.C. Cir. 1973). An employer is not strictly liable for its employees' actions and may allege as a defense unpreventable employee misconduct. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (No. 76-1538, 1979). However, the onus of compliance is on the employer. "In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." *H. B. Zachry Co. v. OSHRC*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1391, 1980), *aff'd*, 638 F.2d 812 (5th Cir. 1981). More specifically, it must show that (1) it had established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover violations of those rules and effectively enforced the rules when violations were discovered. *E.g., Gary Concrete*, 15 BNA OSHC 1051, 1991 CCH OSHD ¶ 19,344 (No. 86-1087, 1991).

Central asserts that Anthony was responsible for the violations since he was "paid as a foreman . . . to make those good judgements" (Tr. 154). As such, it argues that Anthony was "the person in charge," the one who "selected the location to set the crane up," the person who decided "whether what he lifts is correct," and the one responsible "to secure that load and pick [it] up symmetrically" (Tr. 156). Central places much responsibility with its foreman but, to avoid liability for the violation, it must do more than place responsibility. Central must affirmatively show that Anthony was trained and instructed in specific work rules which cover the violative conditions. An employer "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous work practices." *Danco Construction Co. v. OSHRC*, 586 F.2d 1243 (8th Cir. 1978).

The record shows that Anthony was, as Ward described him, "a good employee" (Tr. 152). There was nothing in the record to indicate that Anthony deliberately disobeyed Central's work rules on January 4, 1993. His testimony at the hearing showed him to be a conscientious employee attempting to complete an assignment which was beyond his experience and training. His placement of the crane was not idiosyncratic. Both Ward and Canada were of the opinion that the initial placement of the crane was safe (Tr. 145, 153).

Since an accident in 1989, Central has attempted to develop an effective safety program and has hired a safety director.[3] The program is lacking in specificity. It does not speak well for Central's safety program or training that a foreman who the company knew was an inexperienced crane operator would work under electrical wires without having been instructed to maintain a 10-foot clearance from electrical lines. Although the company distributed weekly safety bulletins (Exh. R-3), these were "brushed through" as the men silently read and signed them (Exh. R-3; Tr. 63-64). The complete safety manual (Exh. R-1) was given to Anthony to keep in his truck. He was never told to read the manual nor did he ever read it (Tr. 66-71). A safety program must be more than a "paper" effort. Since the program failed to address specific hazards and was poorly communicated to its employees, the employee misconduct defense has not been met.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is ORDERED:

(1) That the violation of § 1926.21(b)(2) is affirmed and a penalty of $1,000 is assessed.

(2) That the violation of § 1926.550(a)(15)(i) is affirmed and a penalty of $3,000 is assessed.

(3) That the violation of §1926.550(a)(15)(iv) is affirmed and a penalty of $2,000 is assessed.

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[3] Central's efforts in developing a safety program, although insufficient to establish an employee misconduct defense, resulted in a reduction in the penalty which otherwise would have been assessed.

(4) That the violation of §1926.550(b)(2) is affirmed and a penalty of $750 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: November 4, 1993