United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

THIRO USA, INC.,

Respondent.

OSHRC Docket No. 00-0044

APPEARANCES:

For the Complainant:
Kevin E. Sullivan, Esquire, U.S. Department of Labor, Office of the Solicitor, JFK Federal Building, Boston, Massachusetts 022203

For the Respondent:
Joseph Rubino, Assistant General Manager, Thiro USA, Inc., 127 Costello Road, Newington, Connecticut 06111

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Thiro USA, Inc. ("Thiro"), is a corporation engaged in electrical utility construction. On November 23, 1999, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at a Thiro work site in Everett, Massachusetts. As a result of the inspection, OSHA issued Thiro a two-item serious citation. Thiro filed a timely notice of contest, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and the hearing in this matter was held in Boston, Massachusetts on July 19, 2000.

Thiro acknowledges that it is an employer engaged in a business affecting interstate commerce and that it is an employer within the meaning of section 3 of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter. (Tr. 5).

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DISCUSSION

The citation alleges that Thiro violated 29 C.F.R. § 1926.21(b)(2) by failing to train its employees in the recognition and avoidance of unsafe conditions and 29 C.F.R. § 1926.951(b)(1) by allowing its employees to work at an elevated location without fall protection. Thiro argues that it reasonably relied upon the union that provided the employees to train them and that the failure to use fall protection at the work site was due to unpreventable employee misconduct.

The facts are generally uncontroverted. On November 23, 1999, compliance officer Daniel Cargill ("the CO") visited Thiro's work site where it was repairing and replacing utility poles. As he approached by car, the CO observed two Thiro employees without fall protection standing on the elevated end of a derrick truck boom to work on a secondary wire. The employees, Scott Ryan and Joseph Michelin, were wearing hard hats and rubber gloves; however, only one wore any eye protection and neither wore fall protection, which remained on the ground nearby. Kenneth Mackie, their foreman, had instructed the two to climb the boom and remained nearby while they did so. Both employees were exposed to a fall of at least 15 feet. (Tr. 6-7, 18-23, 29-36, 46-62, 67-75; C-2-C-5).

Thiro had hired Ryan, Michelin and Mackie from a local union hall about three weeks earlier. All three employees had received formal safety training through the union, including an OSHA 500 course which had at least one hour of instruction on general fall protection at construction sites; however, Ryan and Michelin were still apprentices and were limited in the work they could do without the foreman present. On their first day of work, Orin Reed, Thiro's general foreman, had provided each employee with personal protective equipment and a copy of the company's safety manual. Reed visited the work site once a week, and Paul Loughran, a union safety officer, made four impromptu visits and found nothing amiss. Each morning, the employees had a job site meeting at

which safety was incidentally discussed. The day after the inspection, Reed met with the three employees but gave none of them a written reprimand. All three employees were laid off when the job was completed a few weeks later. (Tr. 30-46, 49-63, 68-77, 83-85; R-2, R-4, R-6, R-9, R-11).

After questioning Mackie and the two employees about their work, the CO concluded that they were poorly informed about safe fall protection practices and OSHA requirements. Both the CO and Loughran considered climbing the boom dangerous, and, upon consideration, Mackie agreed. Ryan, on the other hand, did not consider it unsafe to climb the boom. In regard to eye protection, the CO testified that without safety glasses an employee's eyes could have been burned or otherwise injured from an unanticipated electrical arc or contact. (Tr. 24-29, 55, 77, 87).

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.21(b)(2)

Section 1926.21(b)(2) provides:

> 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 of other exposure to illness or injury.

Thiro acknowledges that it did not train Mackie, Ryan and Michelin, but it relies upon the union having done so. As noted above, all three employees had completed the OSHA 500 ten-hour class and had therefore received at least one hour of general fall protection training. However, there is no evidence that any of the three had received additional training on fall protection or on relevant OSHA requirements. In addition, the three employees were hired for the particular job and had not worked for Thiro before, and there is nothing to indicate that Thiro took any steps to ascertain how well they were trained or to emphasize either the particular safety hazards the job presented or specific safety practices Thiro expected to be followed on this job. Under these circumstances, Thiro's reliance on the union's training was not reasonable.

Citation 1, Item 1 is affirmed, and, because the condition could have resulted in electrical shock and/or a fall of 15 or more feet, this item is affirmed as a serious violation.

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.951(b)(1)

Section 1926.951(b)(1) specifies that "body belts with straps or lanyards shall be worn to protect employees working at elevated locations on poles, towers, or other structures" except when it would create a greater hazard. Thiro does not contest that it violated the standard when the two employees, at the direction of their foreman, climbed and worked from the boom without any type

of fall protection, subjecting them to a fall hazard of 15 or more feet. Instead, it asserts that the violation was due to unpreventable employee misconduct.

To prevail in this affirmative defense, Thiro has the burden of showing: (1) that it had a work rule designed to prevent the violation; (2) that it had adequately communicated the rule to its employees; (3) that it had taken steps to prevent violations of the rule; and (4) that it had effectively enforced the rule when violations were discovered. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F.3d 401 (6th Cir. 1977). Although Thiro had safety rules which could have prevented the violation, they were not adequately communicated to employees. The testimony of Mackie and Ryan establishes that it is very unlikely that they ever read any of Thiro's safety rules. Thiro took no steps to assure employees did more than accept the safety materials they were given on their first day on the job. Safety rules were not routinely or thoroughly discussed at daily job site meetings or any other meetings. Clearly, Thiro did not effectively communicate its safety rules to its employees. Thiro also has not demonstrated that it effectively enforced infractions of safety rules when they were discovered. The testimony of Mackie and Ryan establishes that they considered their disregard of safety requirements to be of little consequence and of no lasting importance. Whatever Reed said to them did not have the effect of a meaningful reprimand. I find that Thiro has failed to meet its burden of demonstrating unpreventable employee misconduct.

In a similar argument, Thiro asserts that it should not be penalized for the employees' conscious disregard of safety requirements when it had no choice but to hire from the union hall and the employees themselves suffered no adverse consequences. This argument might have some merit if Thiro had supervised the employees more closely, taken steps to ascertain they were adequately trained, and imposed meaningful discipline. However, under the circumstances of this case, Thiro's argument is rejected.

Citation 1, Item 2 is affirmed, and, since a fall from the boom could have resulted in death or serious injury, this item is affirmed as a serious violation.

PENALTIES

Section 17(j) of the Act, 29 U.S.C. § 666(j), states that penalty assessment requires due consideration to be given to the gravity of the violation and to the employer's size, good faith and prior history of OSHA violations. Gravity, usually the most significant factor, is judged by the number of employees exposed, the duration of the exposure, precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co*., 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary has proposed a $1,100.00 penalty for Citation 1, Item 1, the training violation, and a $3,500.00 penalty for Citation 1, Item 2, the fall protection violation. With respect to the fall protection violation, I assess the gravity to be moderately high. The violation lasted but a few minutes and involved only two employees. However, the likelihood of falling was increased by the possibility of bumping into a wire and receiving an electrical shock, and a fall of 15 feet or more to the street below would have resulted in serious injury. Thiro employs 120 to 150 workers, and no evidence of any previous OSHA violations was introduced. There is also no evidence that Thiro has taken any steps to avoid reoccurrence of the violation. Considering these factors, I conclude that a penalty of $3,000.00 is appropriate.

The training violation involved an additional employee but less likelihood of an immediate injury. On the other hand, the high potential for life-threatening injury inherent in work involving high-voltage electrical wires requires a finding of at least moderate gravity. I conclude that a penalty of $1,000.00 is appropriate for this citation item.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.

2. Respondent was in serious violation of 29 C.F.R. 1926.21(b)(2), and a penalty of $1,000.00 is appropriate.

3. Respondent was in serious violation of 29 C.F.R. 1926.951(b)(1), and a penalty of $3,000.00 is appropriate.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Citation 1 is affirmed, and a penalty of $1,000.00 is assessed.

2. Item 2 of Citation 1 is affirmed, and a penalty of $3,000.00 is assessed.

/s/

Ann Z. Cook
Judge, OSHRC

Dated: 21 AUG 2000
Washington, D.C