United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ERICKSON AIR-CRANE, INC., Respondent.	OSHRC Docket No. 07-0645

ON BRIEFS:

Lee Grabel, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Gregory F. Jacob, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

George W. Goodman; Cummins, Goodman, Fish, Denley & Vickers, P.C., Newberg, OR
For the Respondent

DECISION

Before: ROGERS, Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

On review before the Commission is a decision by former Administrative Law Judge James H. Barkley in which he affirmed a citation alleging that Erickson Air-Crane, Inc. ("Erickson") violated the general duty clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. §§ 651-678, by exposing its employees to a fall hazard when they were working on top of a fuel tanker truck. The judge found that although the Secretary did not prove that fall protection equipment was a feasible means of abatement, an Erickson work policy that had not been followed here was a feasible abatement method. For the following reasons, we conclude that Erickson lacked fair notice of an obligation under the general duty clause to provide fall protection equipment, and that the issue of whether Erickson's

work policy constituted a feasible means of abatement was not properly tried.[1] Accordingly, we reverse the judge's decision and vacate the citation.

BACKGROUND

Erickson is an Oregon-based company that provides helicopter lifting services for several industries, including construction, logging, and firefighting. At a worksite in Kearney, Nebraska, Erickson stationed a fuel tanker truck on the premises to refuel its helicopters and stored spare helicopter blades in boxes on top of the tanker truck. On March 1, 2007, Erickson suspended its helicopter-lifting services at this worksite due to high wind conditions. During the suspension period, an Erickson foreman instructed two employees to go on top of the tanker truck and repair the spare main rotor blade. While the employees were repairing the blade, a gust of wind blew the lid of the rotor blade box up, causing one employee to fall from the tanker truck to the ground ten feet below. As a result of the fall, the employee sustained serious injuries.

It is undisputed that the foreman's instructions were contrary to an Erickson work policy that requires employees to remove the blade box from the top of the tanker truck before performing any maintenance on the blade. Under this policy, two employees are to climb on top of the tanker truck and prepare the box—which together with the blade weighs 400 to 500 pounds—for removal to the ground by a crane, boom truck, or forklift. Then one employee is to climb off the tanker truck before the box is removed, while the other employee is to remain on top to help guide the box as it is lowered. Once maintenance is complete, employees are to reverse the process to return the blade box to the top of the tanker truck. Erickson does not require employees to use fall protection while they are on top of the tanker truck.

After the accident, OSHA conducted an inspection and issued Erickson a citation alleging a serious violation of the general duty clause based on the exposure of Erickson's employees "to a fall hazard . . . while working on top of the tanker trailer to perform maintenance . . . without the use of fall protection." In the citation, the Secretary listed several methods of abatement that involve the installation and use of fall protection equipment. The judge rejected these methods as infeasible, but affirmed the general duty clause violation based on his determination that

[1] Given our disposition of these issues, we need not address Erickson's argument that the citation to the general duty clause was preempted by specific standards promulgated under section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2).

Erickson's work policy, if it had been properly communicated and enforced, would have materially reduced the recognized fall hazard.

DISCUSSION

Section 5(a)(1) of the Act mandates that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (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. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

On review, Erickson does not dispute that requiring an employee to repair a spare rotor blade from the top of a tanker truck is a recognized fall hazard that is likely to cause death or serious injury. Thus, the only issue before us is whether the Secretary established the fourth element of her burden of proof—a feasible means of abatement.

I. Erickson's Work Policy

Erickson claims that the judge erred in relying on its work policy to affirm a violation because the only means of abatement proffered by the Secretary in the citation related to the use of fall protection equipment; the use of Erickson's policy as a means of abatement was neither asserted nor tried. The Secretary urges the Commission to affirm the judge, and maintains that the citation provided Erickson with reasonable notice that communicating and enforcing this policy served as a feasible means of abatement.[2] Further, she contends that Erickson consented

[2] On review, the Secretary argues that a different Erickson work policy—prohibiting employees from being on top of the tanker trucks in high wind conditions—also constitutes a feasible means of abatement, and that Erickson violated the general duty clause by failing to communicate and enforce this policy. We decline to consider the Secretary's argument as it was not raised before the judge. *See* Commission Rule 92(c), 29 C.F.R. § 2200.92(c) ("[t]he Commission will ordinarily not review issues that the judge did not have the opportunity to pass upon"). We also note that the Secretary, who did not identify this work policy as a feasible means of abatement in the citation, makes no claim that Erickson consented to try the issue. *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129, 1984-85 CCH OSHD ¶ 26,979, p. 34,499 (No. 80-5868, 1984) (stating that the Secretary may amend a citation to include an unpleaded issue if parties consented to try the unpleaded issue).

to try this issue under Federal Rule of Civil Procedure 15(b)(2)[3] by raising the affirmative defense of supervisory misconduct. We disagree.

It is well-settled that pleadings are to be liberally construed and easily amended. *General Dynamics Land Sys. Div.*, 15 BNA OSHC 1275, 1279-80, 1991 CCH OSHD ¶ 29,467, p. 39,751 (No. 83-1293, 1991) (citations omitted). As long as fair notice is afforded, an issue litigated at the hearing may be decided by the judge even if the issue is not explicitly raised in the pleadings. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (finding that ambiguity may be cured if the correct formulation is litigated at the hearing with fair notice to the employer). However, an amendment under Rule 15(b)(2) "is proper only if two findings can be made—that the parties *tried* an unpleaded issue and that they *consented* to do so." *McWilliams Forge Co.*, 11 BNA OSHC at 2129, 1984-85 CCH OSHD at p. 34,499. "Consent [will] be found only when the parties … 'squarely recognized' that they were trying an unpleaded issue." *NORDAM Group*, 19 BNA OSHC 1413, 1414-15, 2001 CCH OSHD ¶ 32,365, p. 49,684 (No. 99-0954, 2001) (citing *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished).

Here, it was the judge who first identified the use of Erickson's work policy as an abatement method in his decision, not the Secretary. Only on review does the Secretary now claim that this policy, if properly implemented, constitutes a feasible means of abatement. Indeed, the citation and complaint specifically describe the violation as "employees . . . exposed to a fall hazard . . . without the use of fall protection," and the listed abatement methods all relate

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[3] Rule 15(b)(2) states:

> **For Issues Tried by Consent.** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed.R.Civ.P. 15(b)(2). *See* Commission Rule 2(b), 29 C.F.R. § 2200.2(b) ("In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure."); 29 U.S.C. § 661(g).

to the use of fall protection equipment, not Erickson's policy.[4] And the policy itself makes no mention of fall protection equipment. Thus, we find that the pleadings did not put Erickson on notice that the communication and enforcement of its work policy was at issue.

We also reject the Secretary's claim that Erickson consented to try this issue by asserting the affirmative defense of supervisory employee misconduct in its first Amended Answer.[5] That pleading was superseded by its second Amended Answer, which Erickson filed "to clarify the affirmative defenses asserted in its [first] Amended Answer," and which omitted supervisory misconduct from a revised list of affirmative defenses. *Ferdick v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (noting "well-established doctrine that an amended pleading supersedes the original" and "the original pleading [then] no longer performs any function and is 'treated thereafter as non-existent'") (citations omitted); *Armstrong v. Davis*, 275 F.3d 849, 878 n.40 (9th Cir. 2001) (same), *cert. denied*, 537 U.S. 812 (2001).[6]

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[4] In her brief to the Commission, the Secretary asserts that the citation includes an example of an abatement method that does not involve fall protection equipment, quoting a portion of the second listed method: " '[t]rain employees. . .[on] the hazards associated with falls.' " However, the language omitted from this quotation directly contradicts the Secretary's point: "[t]rain employees *on the use of the fall protection and* the hazards associated with falls." (emphasis added).

[5] The extent to which an employer's safety policy is communicated and enforced is an issue when an employer asserts the affirmative defense of unpreventable supervisory misconduct. *See, e.g., Archer Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶ 29,317, p. 39,377 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished table).

[6] The Secretary claims that Erickson's assertion of the supervisory misconduct defense nonetheless remained in the case. She relies on Erickson's failure to withdraw its motion to accept its first Amended Answer, and also on the judge simultaneously accepting that motion and its motion to accept the second Amended answer. These arguments lack merit. Erickson's second Amended Answer, which sought "to clarify the affirmative defenses asserted in its [first] Amended Answer," made explicit Erickson's intent to withdraw the supervisory misconduct defense identified in its first Amended Answer. Also, there is no practical significance to the judge having simultanously granted both motions rather than granting them in order. To give effect here to Erickson's failure to formally withdraw its first motion, or to nullify the judge's granting of the second motion based on the timing of his order, would inappropriately elevate form over substance. *See Caterpillar Tractor Co. v. Int'l Harvester Co.,* 106 F.2d 769, 772 (9th Cir. 1939) (stating that Federal Rules of Civil Procedure "should be reasonably and not technically construed"); *Riehl v. Nat'l Mut. Ins. Co.*, 374 F.2d 739, 742 (7th Cir. 1967) (finding that procedural error "was but a minor irregularity of no consequence" and "[t]o permit [it] … to defeat the District Court's jurisdiction would be to elevate form over substance").

Under these circumstances, we conclude that whether Erickson's work policy constituted a feasible means of abatement was never "explicitly raised in the pleadings" nor did the parties consent to try this unpleaded issue.

II. Fall Protection Equipment and Training

Turning to the specific fall protection measures identified by the Secretary as feasible means of abatement in the citation, Erickson maintains that based on guidance provided in a 1996 OSHA Enforcement Memorandum ("Memorandum"), it lacked notice that fall protection was required under the circumstances at issue.[7] In general, "an employer cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it." *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1261, 1991 CCH OSHD ¶ 29,465, p. 39,739 (No. 88-671), *aff'd in part, set aside in part on other grounds*, 983 F.2d 1067 [15 BNA OSHC 2025] (6th Cir. 1992) (unpublished table); *see Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (holding that penalty cannot be sustained unless regulated party had notice of interpretation). For the following reasons, we find that Erickson lacked the requisite notice.

In 1990, OSHA proposed adding a "scope and application" provision to the Walking and Working Surfaces ("Working Surfaces") standard, 29 C.F.R. pt. 1910 subpart D.[8] In proposing this new provision, OSHA explained that the standard as revised would "not apply to surfaces that are an integral part of self-propelled, motorized mobile equipment . . . ." *Id.* Six years later, OSHA issued the Memorandum that the parties rely on here—entitled "Enforcement of Fall Protection on Moving Stock"—in order "to clarify the Agency's enforcement policy relating to

[7] Erickson also contends that the judge erroneously limited the testimony of expert witness James Stanley, a former OSHA official, by precluding him from testifying about the notice OSHA provides to the regulated community in its interpretations and OSHA's duty not to mislead the regulated community as to safety obligations. However, we conclude the judge was correct in refusing to allow such testimony because it pertained only to legal conclusions. *See J.C. Watson Co.*, 22 BNA OSHC 1235, 1238 n.3, 2004-09 CCH OSHD ¶ 32,953, p. 53,876 n.3 (Nos. 05-175 & 05-0176, 2008) (determining the judge properly refused to permit expert testimony concerning conclusions of law); *Greenleaf Motor Express Inc.*, 21 BNA OSHC 1872, 1876-77, 2004-09 CCH OSHD ¶ 32,878, p. 53,212 (No. 03-1305, 2007) (upholding judge's exclusion of expert whose proferred testimony did not "address any factual issue that required scientific or technical expertise to understand").

[8] Notice of Proposed Rulemaking for Walking and Working Surfaces, 55 Fed. Reg. 13,360, 13,396 (proposed April 10, 1990) (to be codified at 29 C.F.R. pt. 1910, subpart D).

fall hazards from the tops of 'rolling stock,' such as rail tank or hopper cars and tank or hopper trucks or trailers."[9] The Memorandum states that: (1) the 1990 Subpart D proposal "explicitly excludes rolling stock from coverage"; (2) as a consequence of the 1990 proposed rule change, OSHA's "enforcement policy . . . is that falls from rolling stock . . . will not be cited under the [current Working Surfaces standard]"; and (3) it "would not be appropriate to use the personal protective equipment standard, 29 C.F.R. § 1910.132(a), to cite exposure to fall hazards from the tops of rolling stock, unless employees are working atop stock that is positioned inside or contiguous to a building or other structure where installation of fall protection is feasible."[10] Although the Memorandum also states that a citation could be issued under the general duty clause "where feasible means exist to eliminate or materially reduce the [fall] hazard," the abatement examples listed are limited to methods of reducing fall exposure—none of them involve the use of fall protection equipment.[11] In short, the policy described in the Memorandum regarding the enforcement of subpart D, the PPE standard, and the general duty clause as applied to tanker trucks that are not adjacent to a building or structure is consistent—the use of fall protection equipment is not considered feasible and thus, not required under any one of these provisions.

Applying this OSHA enforcement policy here, the Secretary argues that the Memorandum's reference to rolling stock "positioned inside or contiguous to a building or other structure where installation of fall protection is feasible"—the one specific circumstance

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[9] In our disposition of this case, we do not question the parties' agreement that Erickson's tanker truck is covered by the terms of the Memorandum, but we note the Memorandum appears to use the term "rolling stock" differently than other OSHA pronouncements. *See* Notice of Reopening of the Rulemaking Record for Walking and Working Surfaces and Personal Protective Equipment ("PPE") (Fall Protection Systems), 68 Fed. Reg. 23,528, 23,529-30 (proposed May 2, 2003) (to be codified at 29 C.F.R. pt. 1910) ("Self-propelled, motorized mobile equipment includes tractor trailer trucks, tank trucks, hopper trucks and buses, while rolling stock includes covered and uncovered rail cars, tank cars, and trailers.").

[10] Section 1910.132(d)(1) of the general industry PPE standard requires that employers "assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE)" and have employees use PPE if hazards are identified.

[11] The listed examples address: (1) guarding against icy conditions, heavy rains and wind by determining if the tops of rail cars are free from such hazards; (2) assessing an employee's physical ability; and (3) providing adequate training.

identified in the Memorandum where fall protection on rolling stock is required—put Erickson on notice that it had to provide fall protection under the circumstances at issue. According to the Secretary, Erickson's tanker truck is unique because it has brackets that hold the blade box on, which could also be used to secure fall protection equipment. Her argument is that Erickson should have realized that, so equipped, its tanker truck is analogous to rolling stock "located inside or contiguous to a . . . structure" that can support fall protection equipment.[12]

We disagree, and find that the Memorandum did not provide such notice, particularly considering (1) its broad exemption of all rolling stock from the fall protection standards, limited only by the very specifically described circumstance regarding rolling stock located inside or next to a building or structure, which is inapplicable here, and (2) the indication that under the general duty clause, the agency only requires administrative measures that reduce fall exposure, which are clearly distinct from the fall protection methods sought here by the Secretary. In these circumstances, we find that Erickson did not have notice of any duty to use fall protection equipment or provide the related training with respect to its tanker truck. *See Miami Indus., Inc.*, 15 BNA OSHC at 1262-64, 1991 CCH OSHD at p. 39,739 (finding lack of notice where employer relied on OSHA's prior approval of abatement method).

Accordingly, we conclude the Secretary failed to establish a feasible means of abatement, and therefore vacate the citation.

[12] We note that after the parties filed their briefs on review, OSHA issued a new proposed rule for walking/working surfaces in which it stated that the 1996 Memorandum "did not result in clear direction to the public or to OSHA's field staff" and that "the understanding of the [Memorandum] also varied among commenters" who were responding to a request for information on the feasibility of fall protection for rolling stock in 2003. Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), Proposed Rule, 75 Fed. Reg. 28862, 28867 (proposed May 24, 2010).

ORDER

We vacate the citation alleging a violation of section 5(a)(1) of the Act.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 2, 2012

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SECRETARY OF LABOR, Complainant, v. ERICKSON AIR-CRANE INCORPORATED, Respondent.	OSHRC DOCKET NO. 07-0645

APPEARANCES:

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For the Respondent:
George W. Goodman, Esq., Cummins Goodman Fish Denley & Vickers PC, Newberg, Oregon

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Erickson Air-Crane Incorporated (Erickson), a helicopter heavy-lift company, was an employer engaged in a business affecting commerce, and was subject to the requirements of the Act.

On March 1, 2007[redacted], an Erickson employee, fell, or was blown, from the top of a fuel tanker truck while performing assigned maintenance on a rotor blade stored in a box on top of the tanker (Tr. 127-29, 155) . Following the accident, the Occupational Safety and Health Administration (OSHA) instituted an investigation of the incident. At OSHA's completion of its investigation, Erickson was issued a citation alleging violations of §5(a)(1) of the Act. By filing a timely notice of contest Erickson brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Denver, Colorado on December 6, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

Alleged Violation of §5(a)(1)

Serious citation 1, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970:

> Facility located at Kearney Regional Airport, Kearney, NE - The employer is not furnishing employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious harm to employees in that employees are exposed to the hazards of falls when walking/working on the tops of tractor trailer tankers.
> Specifically, on March 1, 2007, and at times prior to, employees were exposed to a fall hazard greater than four (4) feet above a lower level, while working on the top of a tanker trailer to perform maintenance on spare helicopter parts which are carried in a box on to pf the trailer, without the use of fall protection. This vehicle is used in support of helicopter lifting operations.
>
> Among other methods, feasible and acceptable methods of abatement are:
>
> 1) Install approved fall protection equipment to prevent falls.
> 2) Train employees on the use of the fall protection and the hazards associated with falls.
> 3) Develop work rules and disciplinary procedures prohibiting the walking/working on tanker trailers without the use of fall protection.
> 4) Work with the manufacturers of the trailers utilized to ensure that fall protection equipment is able to be in place and used by employees accessing the tops of the trailers while working/walking on them.

Facts

Mark Lumry, construction manager with Erickson Air-Crane (Tr. 27), testified that Erickson provides helicopter lift services for the construction, logging and firefighting industries (Tr. 31). The tanker involved in the March 1, 2007 accident is a support fuel truck for one of Erickson's aircraft (Tr. 34; Exh. C-1, C-2). Erickson has permanently affixed a tail rotor blade box on top of the tanker, and stores a 30 to 40 pound tail rotor there (Tr. 35-36; Exh. Exh. C-1). A main rotor blade weighing approximately 350 pounds is stored in a large aluminum box that is strapped to brackets welded to the top of the tanker (Tr. 35-36, 49-50, 59; Exh. C-1). Employees regularly access the top of the fuel tank to check fuel levels and occasionally to access the tail rotor box or to remove the main rotor blade box (Tr. 38-40, 63, 91-93). A 33" walkway is located on top of the tanker to the left of the main rotor blade box for those purposes (Tr. 48, 82-84, 130). The walkway is approximately 10'10" ± 3" above the ground (Tr. 171, 192-96, 219; Exh. C-2). Jeff Pfeifer, Erickson's safety/risk manager (Tr. 98), acknowledged that there is a risk of falling from the tanker (Tr. 137), and that if an employee were to fall from the walkway, he would fall to the ground (Tr. 105-06). Prior to working for Erickson, Pfeifer was a compliance officer with Oregon OSHA (Tr. 100). In that capacity he cited an employer for failing to protect an employee

on a chip hauling truck from fall hazards to which he was exposed while working on the edge of the truck (Tr. 113-15). As a former OSHA Compliance officer Pfeifer was aware that it was OSHA's policy to cite fall hazards from rolling stock under 5(a)(1) "[w]here feasible means exist to eliminate or materially reduce the hazard. . . . ." (Tr. 149-52; Exh. C-9).

Erickson employees are required to access the top of the tanker monthly or daily to check fuel levels, depending on the job (Tr. 40; 67). Checking fuel levels takes no more than 10 to 15 minutes (Tr. 40-43). Strapping and unstrapping the main rotor blade box takes approximately 20 minutes (Tr. 93). Lumry testified that Erickson has a policy requiring employees to remove the rotor box from the top of the tanker prior to performing work on the rotor (Tr. 37). Lumry stated he could not be sure whether the policy was reduced to writing prior to March 1, 1007, however, as he was not directly responsible for the maintenance department (Tr. 37-38). In any event, the crew involved in the accident had been assembled approximately a week prior to the accident, and had not been formally trained in the correct procedures for working on the rotor blade (Tr. 175).

Pfeifer testified that on March 1, 2007, Bob Kerr, [redacted] crew chief, or foreman, instructed [redacted] to replace a "tip cap" on the main rotor while it was in the box on top of the tanker. According to Pfeifer, the instruction violated company policy, which requires that all maintenance on the main rotor take place on the ground (Tr. 131, 163). Moreover, Pfeifer maintained, no one should have been up on the tanker on March 1 due to inclement weather, *i.e.*, high winds (Tr. 135, 158, 161-62). After the accident, Erickson's director of field maintenance had a "lengthy conversation with Mr. Kerr" about his "poor decision" to send [redacted] up on the tanker (Tr. 135). Lumry told Kerr he made "a very bad decision" from which he needed to learn (Tr. 69). Pfeifer testified the company policy prohibiting working on the rotor without removing it and its box from the top of the truck was not written at the time of the accident, though the prohibition has since been reduced to writing (Tr. 159-62). Pfeifer believed the policy had been verbally communicated to Bob Kerr (Tr. 163).

Employees do not utilize fall protection while they are working atop the tanker (Tr. 44). Lumry testified that in the 15 years he has been with Erickson no employee has had an accident or a near miss while working on top of the trailer (Tr. 45, 72). Lumry has never seen guard rails permanently installed on any fuel tank truck (Tr. 68, 70-71), or seen any of Erickson's competitors' employees using fall protection on top of their trucks (Tr. 71).

George Warren, Vice President of Safety with Columbia Helicopters, a competitor helicopter heavy-lift company (Tr. 326, 328), testified that none of Columbia's fuel trucks have fall protection affixed to the top of the trucks (Tr. 331). Warren was not aware of any fuel truck in the helicopter heavy-lift industry equipped with permanent fall protection (Tr. 331). Warren attends

meetings of the Helicopter Association International, where safety issues in the helicopter industry are discussed (Tr. 331-32). Warren did not recall any instance where fall protection on fuel tanks was discussed (Tr. 332). Though Columbia's facilities have been inspected by OSHA over the last five years, none have ever been cited for failing to use fall protection (Tr. 334). Columbia employees have never been injured or experienced any near misses due to their failure to utilize fall protection (Tr. 334).

Occupational Safety and Health Compliance Officer (CO) Michael Connett testified that he had no reason to believe Erickson management had identified a fall hazard associated with working on the walkway of the tank truck (Tr. 198, 203). Connett had no evidence that any other similarly situated employers identified working on top of tank trucks as a hazardous activity requiring fall protection (Tr. 198-200, 203). Connett testified the issuance of this citation was based on his knowledge of a single citation issued to an employer failing to utilize fall protection on a flatbed trailer (Tr. 201-04).

Matthew Burkart, a consulting engineer with Aegis Corporation since 1975 (Tr. 210-16), testified that it is feasible to provide fall protection for employees working on tank trucks such as Erickson's (Tr. 221). Several means of protection are available (Tr. 221). Fall restraint systems consisting of a belt and 24-30" lanyard could be attached to a Latchway fall restraint system affixed to the existing brackets on the tank truck at the height of the rotor box (Tr. 221-27). Burkart stated that he examined the existing brackets, which already support a dynamic load of approximately 400 pounds, the weight of the rotor and box (Tr. 252, 221-27). The brackets were after welded to the tanker skin and have been in place for 15 years; the welds appeared good and showed no signs of distress (Tr. 50-51, 59, 251-52, 255). According to Burkart they would be more than sufficient to support a fall restraint system capable of supporting 250 to 300 pounds (Tr. 221-26, 230, 256, 259). Burkart also provided documentation describing collapsible guardrails (Tr. 235; Exh. C-11), and a tram system with an extendible arm that attaches to the back of a trailer and allows an employee to traverse the entire length of the trailer while tied off (Tr. 231, 33, 243-45; Exh. C-10).

Discussion

The top of rolling stock is generally not considered a work surface requiring fall protection under the General Industry fall protection standards at §1910 **Subpart D – Walking-Working Surfaces** (Tr. 111-12, 148-50; Exh. C-9). In an October 18, 1996 Standard Interpretation OSHA stated that new proposed fall protection standards explicitly exclude rolling stock from coverage under the general industry fall protection standards (Exh. C-9, R-4). However, the interpretation goes on to state that:

> "Where feasible means exist to eliminate or materially reduce the hazard, a citation can be issued for a Section 5(a)(1) violation. For example, in the case of inclement weather such as icy conditions or heavy rains and winds [employers] are responsible for guarding against workplace hazards. In addition to making a determination as to whether the tops of the rail cars are safe and free from hazards to allow employees to perform their duties, the employers should also make an assessment of the employees's physical ability to perform the job and ensure that employees have received adequate training to perform the job safely."

Because OSHA has excluded rolling stock from coverage under the fall protection standards set forth in Subpart D, Erickson was correctly cited under §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).

Recognition of the Hazard. A recognized hazard is a practice, procedure or condition under the employers' 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). On this record it is clear that Erickson actually recognized that working on the main rotor while it remained in its box on top of the trailer constituted a hazard, and that employees performing work atop the tanker could fall. Erickson's safety manager, Pfeifer, a former Occupational Safety and Health Officer for the state of Oregon, knew working atop rolling stock constituted a fall hazard and was exempted from coverage under §1910's fall protection standards only because conventional fall protection was generally deemed infeasible. Erickson's policy, to remove the entire rotor box to the ground before work was performed on the main rotor, was adopted *because* of the hazard associated with opening the rotor box and working on the main rotor while it remained on the top of the trailer.

There can be no question that Erickson recognized the fall hazard associated with working on top of the cited tanker.

Likely to cause death or serious physical harm. As a result of his fall from the tanker, [redacted] suffered ongoing head trauma, including significant memory loss (Tr. 130). There can be no question that a fall from the cited tanker can result in serious physical harm.

Feasibility. In order to show an abatement measure's feasibility, the Secretary must show that the recommended precautions are recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the employer's worksite." *Cerro Metal Products Division, Marmon Group, Inc.,* 12 BNA OSHC 1821, ¶27,579 (No. 78-5159, 1986). Burkart, the Secretary's expert, presented convincing evidence that effective means of providing fall protection for workers operating atop rolling stock exist and could be effectively utilized on Erickson's fuel tanker. The Secretary did not show that knowledgeable persons familiar with the helicopter heavy-lift industry generally recognized those means are necessary elements of an effective safety program. The Secretary did not produce any safety experts who were familiar with Erickson's heavy-lift helicopter operations other than Mr. Burkart, who only became aware of the operation following the March 1, 2007 accident. There was no evidence that, prior to this accident, any employee in the industry had sustained injuries as a result of a fall from a support vehicle,

or that any employers or safety experts in the industry utilized, or believed it was necessary to utilize fall protection during the performance of normal operations, *i.e.* checking fuel levels (Testimony of Warren; Tr. 330). Erickson's uncontradicted evidence suggests that Erickson is the only heavy-lift operation that stores a rotor atop its fuel support tanker (Warren; Tr. 335). That practice creates a safety hazard not common to the rest of the helicopter heavy-lift industry, a hazard that Erickson was aware of and attempted to address with administrative controls in the form of a prohibition against working on the rotor until its box was safely removed to the ground.

Erickson's administrative controls may have been effective had they actually been communicated to its employees and enforced in practice. It is clear, however, that Erickson's purported policies were not followed on the day of the accident, and that Erickson could not reasonably have relied on their being followed. The crew had not yet been trained to remove the blade box from the tanker before working on the rotor. The supervisor in charge, crew chief Kerr, specifically instructed the crew to perform a tip cap replacement while the rotor was on top of the tanker, contrary to the stated policy. Finally, even though Kerr's failure to follow procedures resulted in a serious injury, the only discipline he received was a stern rebuke.

Conclusion. Under these circumstances it must be found that Erickson violated §5(a) (1) of the Act. Erickson recognized that working on the rotor atop its tanker truck posed a fall hazard likely to cause death or serious physical harm. Erickson itself identified administrative controls which would, if utilized, have materially reduced the hazard. Erickson failed to exercise reasonable diligence in ensuring the administrative controls it devised were followed in that it failed to properly train its employees in the proper means of working on the rotor. Since Complainant has proved by a preponderance of the evidence that Erickson's rule, prohibiting working on the rotor while it was on top of the tanker, if such a rule existed, was not effectively communicated to its employees, the conduct of its crew chief is properly imputed to Erickson. *See Genesis Health Care Corp.,* 20 BNA OSHC 2161, 2005 CCH OSHD ¶32,751 No. 03-0300, 2004) (the Secretary may prove foreseeability by demonstrating the inadequacy of the employer's safety program, training or supervision).

Penalty

In determining the 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). In determining the gravity of the violation, factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken

against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Erickson is a large employer with approximately 600 employees (Tr. 178). Two employees were exposed to the cited hazard for approximately 30 minutes during high wind conditions (Tr. 177). The probability of an accident occurring is clearly high; one of the employees fell from the tanker, suffering serious head injuries. Connett testified that Erickson had been cited four times in the past four or five years, but did not state the citations were either serious or related to the present citation (Tr. 179). Erickson does have a written safety and health policy, and employees charged with implementing that program (Tr. 178).

The Secretary's proposed penalty of $4,500.00 is appropriate and will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §5(a)(1) is AFFIRMED and a penalty of $4,500.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: February 11, 2008