United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. SSA Cooper, LLC, Respondent.	OSHRC Docket No. **07-1867** **Simplified Proceedings**

Appearances:

Angela F. Donaldson, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Edward M. Hughes, Esquire, Callaway, Braun, Riddle & Hughes, P.C., Savannah, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

SSA Cooper, LLC, performs stevedoring operations at the Garden City Terminal near Savannah, Georgia. On September 18, 2007, Occupational Safety and Health Administration (OSHA) compliance officer John Vos conducted a planned inspection aboard the maritime vessel *CGM Marlin*. During his inspection, Vos observed lashing rods strewn across a catwalk. Vos considered the lashing rods to be a tripping hazard, and, upon his recommendation, the Secretary issued a citation to SSA Cooper on November 8, 2007, alleging a serious violation of 29 C. F. R. § 1918.91(a). The Secretary proposed a penalty of $1, 275.00 for this item.

SSA Cooper timely contested the citation. In the pre-hearing conference, SSA Cooper asserted the affirmative defenses of infeasibility and greater hazard. The Commission designated this case for simplified proceedings pursuant to 29 C. F. R. § 2200.200- 2200.211. The court held a hearing in this matter on February 12, 2008, in Savannah, Georgia. SSA Cooper stipulated jurisdiction and coverage under the Occupational Safety and Health Act of 1970 (Act). The parties filed post-hearing briefs.

Upon consideration of the record, the court rejects SSA Cooper's affirmative defenses, affirms item 1 of the citation, and assesses a penalty in the amount of $650.00.

Facts

Compliance officer John Vos arrived at the *CGM Marlin* at approximately 8:45 a.m. on September 18, 2007. The *CGM Marlin* is a cargo container vessel. The night before Vos's inspection, longshoremen had begun unloading and loading cargo containers (Tr. 15-18).

SSA Cooper is a stevedoring company. It contracts with a ship's owner or agent to oversee the unloading and loading of cargo containers. A stevedore is a foreman who is responsible for verifying the correct containers are removed by crane to shore, and new containers are correctly placed in the ship (Tr. 20).

Stevedoring companies contract with unions, such as the International Longshoremen's Association (ILA), for longshore labor to physically unload and load the cargo containers. Longshoremen are laborers who work as, among other positions, lashers who remove lashing rods from or secure lashing rods to containers. Lashing crews, or gangs, work in teams of six, plus a foreman on the ship's deck and a foreman on the dock, for a total of eight workers per gang. Occasionally, two workers are added to a gang (Tr. 35).

Longshoremen use gantry cranes located on the shore to move the containers between the ship and shore. The longshoremen load the containers into bays. Lashing gangs secure the containers to the vessel using metal lashing rods to prevent the containers from moving while the vessel is at sea. After a vessel is loaded, the stevedoring company at the next port receives a faxed schematic showing the number and size of containers on the vessel, so the company can prepare an unloading (discharge) plan and a reloading (load) plan (Tr. 150-151, 206-210).

The lashing rods at issue are approximately 8 to 10 feet long and 1 inch in diameter. The lashing rods vary in weight from 40 to 50 pounds (Tr. 88, 114). As the lashers on the *CGM Marlin* removed the lashing rods from the containers so the containers could be unloaded, they placed the rods on a walkway (also referred to as a catwalk) (Exhs. C-1, C-2, C-3). The *CGM Marlin's* catwalk is approximately 22 inches wide (Tr. 28).

The foreman for SSA Cooper that day was Edward Spivey. Spivey walked back and forth on the catwalk for approximately one hour. Spivey was checking the containers being loaded against the loading plan on his clipboard, a task that required him to look up and down continually. He was not part of the lashing crew. Lashing rods and 30-pound turnbuckles (jacks) were scattered across the width of the catwalk. No other employees were in the area (Tr. 25, 39, 58).

Vos believed the lashing rods posed a tripping hazard to Spivey. As a result of Vos's inspection, the Secretary issued the citation that gave rise to this proceeding.

The Citation

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Prior to the hearing, SSA Cooper stipulated that § 1918.91(a) applies to the cited conditions and that, if a violation existed, its foreman Spivey was exposed to it and the company was aware of it. The only issue presented is whether SSA Cooper complied with the terms of § 1918.91(a).

Section 1918.91(a)

Section 1918.91(a) provides:

> Active work areas shall be kept free of equipment, such as lashing gear, and materials not in use, and clear of debris, projecting nails, strapping and other objects not necessary to the work in progress.

SSA Cooper contends it did not violate the terms of the cited standard because (1) the catwalk was not an active work area, and (2) the lashing rods were necessary to the work in progress. SSA Cooper is incorrect on both counts.

Active Work Area

The definition section of § 1918 (§ 1918.2) does not define "active work area." The plain meaning of the words indicates an area where at least one employee is required to be in order to perform an assigned task, for the duration of the time the employee is present and performing his or her task. SSA Cooper claims the catwalk was not an active area because no longshoremen were in the area during the inspection. It is undisputed, however, that SSA Cooper foreman Spivey was performing his work while walking back and forth on the catwalk. Spivey told Vos he had been on the catwalk for approximately one hour before Vos first saw him (Tr. 39). John Scullion, SSA Cooper's Ship Superintendent, testified Spivey's job required him to walk up and down approximately 100 feet of the catwalk to check the containers (Tr. 122, 124-125). Vos observed Spivey step over two piles of lashing rods spread across the catwalk in two different sections (Tr. 76).

SSA Cooper's contention that the catwalk was not an active work area is contrary to its pre-hearing stipulation that Spivey was exposed to the cited condition. Performance of Spivey's work duties required Spivey to walk back and forth on the catwalk. Thus, the catwalk was an active work area for Spivey during that time.

Area Not Kept Free of Lashing Gear

Besides Vos's undisputed testimony, photographs taken by Vos show that at least two sections of the catwalk were not kept free of lashing rods (Exhs. C-2 and C-3).

Lashing Rods Not Necessary to the Work in Progress

The lashers removed the lashing rods from the cargo containers that were to be unloaded from the vessel. The lashers removed the excess lashing rods that would not be needed for the re-loading process, and placed them in compartments below deck (Tr. 116-117, 147). The lashing rods on the catwalk were placed there to secure newly loaded containers at a later time. SSA Cooper argues the lashing rods were necessary to the work in progress because the lashers would use them to secure the containers once they were loaded.

At the time Vos observed Spivey, no longshoremen were in the process of using the lashing rods on the catwalk (Tr. 41, 71). No lashing crews were in the area (Tr. 112). The only work in progress was Spivey's as stevedore. His work did not require him to use lashing rods.

SSA Cooper's contention the lashing rods on the catwalk were necessary to the work in progress is at odds with its claim the catwalk was not an active work area. The Secretary has established the only work in progress at the time of Vos's inspection was Spivey's , and the lashing rods were not necessary to his job.

The Secretary has proven SSA Cooper was in noncompliance with the terms of § 1918.91(a). SSA Cooper stipulated to applicability, exposure, and knowledge. The Secretary has established a violation of § 1918.91(a).

Affirmative Defenses

Infeasibility

SSA Cooper asserts the infeasibility defense. In order to prove infeasibility, the employer must show: (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically infeasible after its implementation, and (2)

there would have been no feasible alternate means of protection. *V. I. P. Structures, Inc.,* 16 BNA OSHC 1830 (No. 91-1167, 1994). The fact compliance is difficult or expensive is insufficient grounds to excuse compliance from the requirement of the standard. *Hughes Brothers, Inc.,* 16 BNA OSHC 1830 (No. 12523, 1978). The Commission expects employers to exercise some creativity in seeking to achieve compliance. *Pitt Des Moines, Inc.,* 16 BNA OSHC 1429 (No. 90-1349, 1993).

Although it is SSA Cooper's burden to prove infeasibility, it failed to offer even minimal evidence that compliance with § 1918.91(a) was either technologically or economically infeasible. When asked if SSA Cooper explored alternate, cost-effective methods for placing the lashing rods, Paul Harris, SSA Cooper's East Coast Corporate Safety Director, stated, "We don't have a problem with these lashing rods. So why would we explore it?"Tr. 200-201).

The Secretary proposed several alternate methods for keeping the work area free of the lashing rods. These included using "S" hooks to hang rods from railings in the area, stacking the rods to one side of the catwalk so there is a clear path for employees, or placing the rods at another end of the catwalk not being used for work (Tr. 29-33, 44, 46, 51, 77). Although SSA Cooper's witnesses raised various objections to these alternate methods, the company never showed any of the methods were technologically or economically infeasible. The objections generally echoed Harris's sentiment–the longshoremen had always placed the lashing rods on the catwalk, and they did not want to change. Habit does not establish an infeasibility defense.

SSA Cooper has failed to prove that keeping the work area free of the lashing rods was infeasible or that no feasible alternate means of protection existed. Its infeasibility defense is rejected.

Greater Hazard

SSA Cooper also failed to prove its greater hazard defense. In order to establish the greater hazard defense, the employer must prove: (1) that the hazards of compliance were greater than noncompliance; (2) that alternative means of protection were unavailable; and (3) that a variance was unavailable or inappropriate. *Lauhoff Grain Corp.,* 13 BNA OSHC 1084, 1088 (81-984, 1987).

Safety Director Harris conceded SSA Cooper did not look into alternative means of protection (Tr. 192, 200). SSA Cooper admitted it never sought a variance (Tr. 12). SSA Cooper also failed to prove the remaining element of the defense, that keeping the work area free of lashing rods created a greater hazard for the lashing gangs. SSA Cooper argues that it is a greater hazard for lashers to have

to move the lashing rods off the catwalk, citing "repetitive motion type injuries and strains" that "would no doubt occur" (SSA Cooper's brief, p. 8). This is speculation for which SSA Cooper offers no supporting evidence. The greater hazard defense is rejected.

Classification of Violation

The Secretary classified the violation as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violation.

> [T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.,* 15 BNA OSHC 1317, 1324, 1991 CCH P29,500, p. 39,813 (No. 86-351, 1991)[.]

Flintco, Inc., 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

Spivey carried with him a loading plan on a clipboard and a two-way radio (Tr. 26). His job was to check the containers being loaded against the loading plan to ensure the containers were being correctly placed. Spivey's job required him continually to look up at the containers and down at his clipboard . Under these circumstances, it is possible Spivey could be distracted while checking the containers against the loading plan or talking on his radio and trip over the lashing rods. A fall either on the catwalk or onto the lashing rods could result in serious physical harm by causing bruises, lacerations, broken bones, or twisted ankles (Tr. 37).

The Secretary has established the violation was serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor.

SSA Cooper employs more than 250 employees. The company had a history of previous OSHA violations. SSA Cooper demonstrated good faith by having an adequate written safety program (Tr. 39).

The gravity of the violation was moderate. Only one employee was exposed to the hazardous condition. While Spivey's focus on the containers and the loading plan distracted him from watching

his footing, his task did not require him to move quickly over the lashing rods in his path. Based upon these factors, it is determined the appropriate penalty for the serious violation of § 1918.91(a) is $ 650.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the serious citation, alleging a violation of § 1918.91(a), is affirmed, and a penalty of $ 650.00 is assessed.

\s\
KEN S. WELSCH
Judge

Date: March 28, 2008