

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING  
COMMISSION REVIEW**

Some personal identifiers have been redacted for privacy purposes



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

ERICKSON AIR-CRANE INCORPORATED,

Respondent.

OSHRC DOCKET NO. 07-0645

**APPEARANCES:**

For the Complainant:

Andrea Christensen Luby, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

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 top of 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. 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"  $\pm$  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/

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James H. Barkley  
Judge, OSHRC

Dated: February 11, 2008