

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

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.

Empire Roofing Company Southeast, LLC

Respondent.

OSHRC Docket No. **13-1034**

Appearances:

Brooke D. Werner McEckron, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

McCord Wilson, Esquire, Rader & Campbell., Dallas, Texas
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Empire Roofing Company Southeast, LLC, contests a one-item Citation and Notification of Penalty issued to it by the Secretary on June 5, 2013. The Secretary issued the Citation and Notification of Penalty following an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Michael Marquez on April 9, 2013, at a worksite in Fort Lauderdale, Florida. Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), for permitting employees to work from an aerial lift without adequate fall protection. The Secretary proposed a penalty of \$4,900.00 for Item 1. Empire timely contested the Citation and Notification of Penalty.

A hearing was held in this matter on December 4, 2013, in Fort Lauderdale, Florida. The parties stipulate the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act) and that it is an employer covered under § 3(5) of the Act (Tr. 7). The parties filed post-hearing briefs on February 3, 2014. Empire

concedes its employees were not tied off while in the aerial lift but contends they were not “working from” the lift at the time of the inspection. Empire also asserts it was unaware of the alleged violative activity. Prior to the hearing, Empire asserted the affirmative defense of unpreventable employee misconduct. Empire withdrew this defense at the beginning of the hearing (Tr. 6-7).

For the reasons discussed below, Item 1 of the Citation is AFFIRMED and a penalty of \$4,900.00 is assessed.

Background

On April 9, 2013, OSHA CSHO Michael Marquez received a referral from the Code Enforcement Office of the City of Fort Lauderdale regarding possible fall hazards at a worksite on West Commercial Boulevard in Fort Lauderdale, Florida (Tr. 11, 15, 17). The referral dovetailed with OSHA’s Local Emphasis Program in South Florida targeting fall hazards, which are the “number one fatality in construction” in that region (Tr. 17).

CSHO Marquez drove to the referred address, which is the location of a commercial building in a strip mall (Tr. 20). The CSHO observed an aerial lift parked in the parking lot next to a work truck. Two workers were on the roof of the building. A third worker was in the basket of the aerial lift, operating the controls to transport himself to the roof of the building. He was not wearing a safety harness and was not tied off to the basket. The CSHO took several photographs of the worksite from his vehicle (Exh. C-1; Tr. 17-19).

CSHO Marquez exited his vehicle and approached the aerial lift to get the operator’s attention. The operator lowered himself to the parking lot and identified himself as the Foreman for Empire at the site. The CSHO held an opening conference with the Foreman and conducted an interview with him. The Foreman informed him that he and his two-man crew were assigned to install metal sheeting on the roof of the building. The aerial lift was the means they used to transport the materials, equipment, and themselves to the roof and back (Tr. 20, 24-25).

The CSHO prepared a written statement of the interview, which the Foreman reviewed and signed (Tr. 34, 81). The CSHO did not interview the two crew members because they spoke Spanish, which the CSHO does not speak (Tr. 25). In his statement, the Foreman said “[h]e did not have a harness on because he was in a hurry and that he was not going to use the aerial lift very long and he said it was his fault” (Tr. 24). The Foreman also stated he previously had transported the two crew members to the roof “and they did not have fall protection on as well

because they were not going to use it very long” (Tr. 24-25). The OSHA inspection interrupted what was to be the Foreman’s third ascent to the roof that day—he had previously taken the two crew members up individually (Tr. 69-70).

CSHO Marquez used a trench rod to measure the height of the roof and found it to be approximately 16 feet high. He estimated the aerial lift was elevated to a height of 16 to 20 feet when he first observed it. The roof of the building was enclosed by a 42-inch high parapet (Exhs. C-1h and C-1i; Tr. 26). Safety harnesses and lanyards were onsite in the work truck parked next to the aerial lift (Tr. 58, 69).

Subsequent to the OSHA inspection, the Foreman’s supervisor issued a warning to the Foreman for failing to use fall protection (Tr. 82). Empire issued a written warning to at least one of the crew members for failing to use fall protection (Tr. 71-73).¹

The Citation

Item 1: Alleged Serious Violation of § 1926.453(b)(2)(v)

Item 1 of the Citation alleges Empire permitted its employees to work from an aerial lift “without wearing a body belt with lanyard attached to the boom or basket.”

Section 1926.453(b)(2)(v) provides:

A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Elements of the Secretary’s Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

¹ The Foreman testified his supervisor issued a warning to him, but did not recall whether it was verbal or written. He stated, “[W]e get a bonus for following the safety rules and since we didn’t follow the safety rules, we’re not getting any bonus” (Tr. 83). One of the crew members also testified at the hearing through an interpreter. He stated he received a written warning “from the Company” and that he had signed it (Tr. 71, 73). No evidence was adduced regarding whether the second crew member received a verbal or written warning for failing to use fall protection.

(1) *Applicability of § 1926.453(b)(2)(v)*

Section 1926.450(a), the definition section of Subpart L, provides: “The criteria for aerial lifts are set out exclusively in § 1926.453.” It is undisputed Empire’s Foreman was operating an aerial lift at the worksite.

Empire contends § 1926.453(b)(2)(v) does not apply to the cited conditions because the standard requires employees to tie off “when working from an aerial lift.” Empire argues its employees were not working from the aerial lift, but were only riding in it from the parking lot to the roof of the building. Empire states, “The only fair reading of the phrase ‘when working from’ is that it applies when an aerial lift is stopped in the air so that employees can perform work on a building or structure of some type” (Empire’s brief, p. 9).

This very argument was made 36 years ago by the employer in *Salah & Pecci Construction Company, Inc.*, 6 BNA OSHC 1688 (No. 15769, 1978). (At that time, the subsection of the aerial lift standard cited here as § 1926.453(b)(2)(v) was found at § 1926.556(b)(2)(v). The language of that subsection is identical to that of the current § 1926.453(b)(2)(v)). In *Salah*, the Massachusetts Port Authority hired Salah & Pecci to inspect the structural condition of the Tobin Memorial Bridge in Boston, Massachusetts. Salah & Pecci used a crane to which a basket was affixed to raise employees to the structural area under inspection. An employee named John Gulla was in the basket when the crane operator began lowering the basket.

As the operator began lowering the basket, however, one of the telescopic boom sections unexpectedly fell several feet as a result of a malfunction of an internal, unexposed section of the boom. Gulla fell from the basket to the ground and later died. At the time of the accident Gulla was wearing a safety belt and lanyard but was not tied off to the basket or boom of the crane.

Id.

The Commission in that case confronted the same issue now before the undersigned: “The issue in this case is whether an employee who is being lowered in an aerial lift is ‘working’ with the meaning of the standard at 29 C.F.R. 1926.556(b)(2)(v), and thus must wear a safety belt and lanyard tied off the boom or basket.” *Id.* The ALJ found that the standard did not apply while an employee is being lifted to or lowered from the work position. The Commission reversed, holding that “working” within the meaning of the cited standard “includes the act of being transported in an aerial lift to or from a work level.” *Id.* at 1689. The Commission determined this broad interpretation of “working” promotes the purpose and policy of the Act:

“We note that the standard’s purpose of protecting employees from the hazard of a fall from an aerial lift would be hindered by a narrow reading of the standard.” *Id.* at 1690.

In its post-hearing brief, Empire asks the undersigned to ignore *Salah*, which it refers to as “one older Review Commission case that briefly addressed this issue” (Empire’s brief, p. 10). Empire argues “the *Salah* opinion is not persuasive authority” (Empire’s brief, p.11). Empire is incorrect. The sole issue in *Salah* is whether an employee is “working from” an aerial lift basket when he or she is being transported in the basket, and thus must tie off to the boom or basket. *Salah* is directly on point and remains Commission precedent. The fact it that is an older case does not negate or diminish its precedential value. *Salah* has not been overruled. “Judicial decisions, however, are not spoilable like milk. They do not have an expiration date and go bad merely with passage of time.” *Comtran Group, Inc. v. DOL*, 722 F.3d 1304, 1314 (11th Cir. 2013).

Based on the Commission precedent set forth in *Salah*, it is determined that an employee is “working from an aerial lift” when the employee is using the aerial lift as a means of transportation on the worksite. Section 1926.453(b)(2)(v) applies to the activity cited in the instant case.

(2) Failure to Comply with the Terms of the Standard

The cited standard requires that “[a] body belt must be worn and a lanyard attached to the boom or basket when working from an aerial lift.” It is undisputed that the Foreman and the two crew members were not tied off to the basket or the boom when they were being transported in the aerial lift. The CSHO observed the Foreman in the basket without fall protection and photographed him in the act (Exh. C-1; Tr. 20). The Foreman admitted as much to the CSHO in his written statement and at the hearing. He also admitted that neither of the two crew members was using fall protection when he transported them in the basket of the aerial lift (Tr. 24-25, 81-82). The crew member who testified at the hearing acknowledged that neither he nor his co-workers used fall protection while in the aerial lift that day (Tr. 68-69).

The Secretary has established Empire failed to comply with the terms of § 1926.453(b)(2)(v).

(3) Access to the Violative Condition

It is undisputed that each of Empire’s employees on the site was elevated at a height of 16 to 20 feet in the basket of the aerial lift without being tied off. The Foreman told CSHO

Marquez “that if he were to fall from the aerial lift at approximately 20 feet that he would have multiple broken bones” (Tr. 25).

The CSHO testified employees are required to tie off while in the basket because an equipment malfunction (such as the one that occurred in *Salah*) could cause them to be ejected “or traffic could also strike the piece of equipment that would cause them to bounce out” (Tr. 28). In *Jesco, Inc.*, 24 BNA OSHC 1076 (No. 10-0265, 2013), a crane operator inadvertently swung the boom of the crane into an aerial lift which almost caused the lift to tip over. Here, Empire’s aerial lift was parked in an open public parking lot, into which anyone could drive a vehicle (Exh. C-1). Empire had placed a single orange cone next to a portable toilet. The entrance to the parking lot was unobstructed (Tr. 22).

Empire argues the Secretary failed to establish its employees had access to a fall hazard because the basket of the aerial lift was equipped with standard guardrails. Empire states, “There is no credible evidence on the record before this court that anything more than guardrails that were in place on the lift were necessary” (Empire’s brief, p. 16). Empire is essentially arguing that the Secretary did not establish that a hazard existed despite its employees’ failure to tie off to the basket. This position is contrary to Commission precedent:

Under Commission and judicial precedent . . . the Secretary bears no burden of proving that failure to comply with such a specific standard creates a hazard. E.g., *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir.1981) (“[unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a ‘serious’ one”); *Pyramid Masonry Constr.*, 16 BNA OSHC 1461, 1464, 1993 CCH OSHD ¶ 30,255, p. 41,674 (No. 91–600, 1993) (if standard presumes that hazard exists when its terms are not met, Secretary need not prove existence of hazard).

Kaspar Electroplating Corp., 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993).

Here, § 1926.453(b)(2)(v) requires employees to tie off “when working from an aerial lift.” It presumes that a hazard exists if employees are not tied off when working from an aerial lift. The Secretary need only show employees had access to the violative condition. He has done so in this case. The employees were not tied off while in the aerial lift basket elevated to a height of 16 to 20 feet. A fall from that height would likely result in serious physical injuries, including broken bones.

(4) Knowledge

The Secretary must establish that the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. This case arises in the Eleventh Circuit. The Court of Appeals for the Eleventh Circuit recently issued the *Comtran* decision, which holds that where a violation is caused solely by the actions of a supervisor, the Secretary does not satisfy his burden of establishing employer knowledge by imputing the supervisor's knowledge of his or her own actions to the employer. In so holding, the 11th Circuit joined the 3rd, 4th, 5th, and 10th Circuits in holding that in order to impute the rogue conduct of a supervisor to the employer, the Secretary must present evidence that the supervisor's actions were foreseeable, for example, where the Secretary demonstrates that the employer had improper training or lax safety standards. *Comtran*, 722 F.3d at 1316, 1318.

The Circuit Court's holding does not disturb precedent holding that where a violation is caused by the actions of a subordinate employee and the supervisor knew or should have known of the violation, the supervisor's actual or constructive knowledge is imputed to the employer. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). A supervisor's knowledge of a subordinate's misconduct is imputable to the employer. *Comtran*, 722 F.3d at 1317.

In this case, the Foreman had actual knowledge of the violative conduct of his two crew members. Each crew member rode up in the basket of the aerial lift with him during two separate trips from the parking lot to the roof. Empire had a work rule requiring employees to tie off when in an aerial lift basket. The Foreman was aware of the rule and admitted violating it. Empire disciplined the Foreman for the violation. The Foreman admitted to the CSHO and at the hearing that he had actual knowledge of his crew's violative actions. The Foreman's actual knowledge of the crew members' failure to tie off is imputed to Empire.

The Secretary has established a violation of § 1926.453(b)(2)(v). Under § 17(k) of the Act, a serious violation exists if there is a "substantial probability that death or serious physical harm could result" from the violation. A fall from 16 to 20 feet onto the parking lot surface would likely result in serious physical harm. The violation is properly classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give

due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The record does not reflect the number of employees employed by Empire, but the CSHO testified the company received a reduction in the proposed penalty due to its small size. OSHA had not inspected Empire in the five years prior to the instant inspection (Tr. 45-46). There is no evidence of lack of good faith on Empire's part.

The gravity of the violation is moderate. Three employees were exposed to the fall hazard. Their exposure was of short duration. It is determined that the proposed penalty of \$4,900.00 is appropriate for Item 1.

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 hereby ORDERED that Item 1 of the Citation, alleging a serious violation of § 1926.453(b)(2)(v), is AFFIRMED and a penalty of \$4,900.00 is assessed.

/s/ Judge Sharon D. Calhoun
JUDGE SHARON D. CALHOUN