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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 90-1349
PITT-DES MOINES, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 30, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 30, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1349

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SECRETARY OF LABOR, Complainant, v. PITT-DES MOINES, INC., Respondent.	OSHRC Docket No. 90-1349

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

On February 17, 1984, the Occupational Safety and Health Administration ("OSHA") issued a proposed standard governing "Crane or Derrick Suspended Personnel Platforms." The final rule was issued on August 2, 1988. The rule initially required anti-two-blocking devices[1] to be installed by October 3, 1988. However, in response to a flurry of temporary variance applications and industry complaints that manufacturers of the devices were unable to fill all their delivery orders promptly, OSHA issued a bulletin on June 26, 1989 extending the compliance deadline to December 31, 1989.

On March 30, 1990--three months after the previously extended abatement deadline and twenty months after the issuance of the final rule--OSHA inspected a Beloit, Wisconsin worksite where Pitt-Des Moines, Inc. ("PDM") was building a water tower. Employees were being carried via a derrick-hoisted man-basket over 90 feet up to what are known as the

[1]An anti-two-blocking device prevents the overhaul ball and the boom tip of a crane or derrick from contacting each other so as to sever the line holding the load--here, employees in a man-basket. Such a device--activated by radio signals or, in a hard-wire system, by electrical signals--shuts down the hoist apparatus before the ball reaches the boom tip.

stem and bowl of a pedestal-type water tower. No anti-two-blocking device was installed on the derrick. PDM was cited for a serious[2] violation of 29 C.F.R. § 1926.550(g)(3)(ii)(C)[3], which requires anti-two-blocking devices to be installed on such derricks.

PDM did not dispute any of the elements of the Secretary's prima facie showing of a violation, *i.e.*, the applicability of the standard, knowledge, exposure or non-compliance. *See Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (1981), *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982). It asserted, however, the affirmative defense of infeasibility. After a hearing on November 6-7, 1990 and March 12, 1991, Administrative Law Judge Benjamin Loye issued a decision on June 18, 1991 rejecting PDM's affirmative defense, affirming the citation and assessing a $500 penalty. PDM petitioned for review of the judge's decision and the case was directed for review.

I. Procedural Issue: Untimely Complaint

At the time this citation was contested, Commission Rule 34 required the Secretary to file a complaint no later than thirty days after he forwarded the notice of contest to the Commission.[4] On May 15, 1990, the Secretary forwarded the notice of contest received from PDM but, without filing a motion for an extension of time, failed to file his complaint until thirty-six days later, on June 20, 1990. The Secretary offered no explanation for the delay. PDM did not move to dismiss the complaint, but rather raised the Secretary's failure

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[2]At the hearing, the Secretary's motion to amend the citation to "willful" was granted from the bench, but the judge did not ultimately find the violation to be willful. The "willful" characterization was not a subject of the petition or direction for review.

[3]The standard provides:

> **§ 1926.550 Cranes and Derricks**
>
> . . . .
>
> (g) *Crane or derrick suspended personnel platforms--*
>
> . . . .
>
> (3) *Cranes and derricks--*
>
> . . . .
>
> (ii) *Instruments and components.*
>
> . . . .
>
> (C) A positive acting device shall be used which prevents contact between the load block or overhaul ball and the boom tip (anti-two-blocking device), or a system shall be used which deactivates the hoisting action before damage occurs in the event of a two-blocking situation (two block damage prevention feature).

[4]The Rule has since been revised to require the complaint to be filed no later than twenty days.

to comply with the rules as an affirmative defense in its answer, and argues that the judge erred in failing to vacate the citation or at least consider the issue in his decision.

The judge did consider the issue in his decision, however. Noting that action under Rule 41[5] is at the discretion of the judge, he concluded: "As Respondent has not been prejudiced in any way by the Secretary filing [his] Complaint two days late, this judge finds that dismissal would be inappropriate."[6]

The Commission has since held that prejudice is only one of the factors to be considered in determining whether a sanction is warranted under Rule 41. *See Chartwell Corp.*, 15 BNA OSHC 1881, 1883, 1992 CCH OSHD ¶ 29,817, p. 40,627 (No. 91-2097, 1992) (Secretary's citations vacated after considerable, unexplained delays in filing a long-promised settlement agreement). Other factors include willful or contumacious conduct, which PDM does not allege here; whether there is a clear record of substantial delay; and principles of judicial economy. *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2005, 1992 CCH OSHD ¶ 29,900, p. 40,797 (No. 90-1505, 1992), *petition for review filed*, No. 93-3090 (6th Cir. Jan. 29, 1993), *citing Duquesne Light Co.*, 8 BNA OSHC 1218, 1980 CCH OSHD ¶ 24,384 (No. 78-5034, 1980) (consolidated cases). In *Ford*, the Commission considered an employer's motion to dismiss for the Secretary's failure to transmit the notice of contest within the period required by the Commission's rules. The employer alleged no prejudice and the Commission found that the 7-day delay was not the result of contumacy on the Secretary's part. "Nor," the Commission held, "do any of the other factors indicate that such a harsh sanction would be in order." *Id.* Similarly, in *Jensen Constr. v. OSHRC*, 597 F.2d 246, 247

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[5]Rule 41 provides in relevant part:

> *Failure to obey rules.*
> (a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules . . . he may be declared to be in default either: (1) on the initiative of the . . . Judge . . . or (2) on the motion of a party. Thereafter, the . . . Judge, in [his] discretion, may . . . strike any pleading or document not filed in accordance with these rules.
>
> (b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule.

[6]The judge apparently miscalculated the deadline. According to a 1990 calendar and the Secretary's brief, the filing deadline was June 14, 1990 and the complaint was filed six days late.

(10th Cir. 1979), a case in which the Secretary filed a complaint forty-eight days late due to "an extraordinary caseload," the court found that the judge did not abuse his discretion in excusing the untimely filing.

In some circumstances, a review of the pertinent factors demands harsh results, *e.g.*, *Chartwell*; *Cornell & Co. v. OSHRC*, 573 F.2d 820 (3d Cir. 1978) (cited in *Jensen*); in others, such an "extreme sanction" is seen as "incongruous." *See Marshall v. C.F. & I. Steel Corp.*, 576 F.2d 809, 814 (10th Cir. 1978) (cited in *Jensen*). The judge in this case appears to have focused on the "prejudice" factor in deciding to excuse the untimely filing. Although the Commission subsequently recognized that prejudice is but one of the factors to consider in imposing sanctions, consideration of the other factors does not lead us to find that the judge's decision to allow the case to proceed was so clearly erroneous as to constitute an abuse of discretion. We therefore affirm the judge's decision insofar as it rejects PDM's affirmative defense based on the Secretary's failure to file a timely complaint, and turn to the merits of the violation.

II. The Merits

A. The Employer's Arguments

As previously stated, PDM acknowledges on review that the Secretary had established a prima facie violation of the standard and focuses exclusively on its arguments that the judge erred in rejecting its assertion of the affirmative defense of infeasibility.[7] PDM's arguments in this regard are threefold.

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[7]At the time the judge rendered his decision, Commission precedent on the relative burdens of proof in cases involving the affirmative defense of infeasibility was different from the current Commission position. At that time, if an employer could demonstrate that compliance with a standard's literal requirements was infeasible, the burden would then shift to the Secretary to show that in lieu of literal compliance with the standard, practical and realistic alternative means of protection were available to the employer. The judge observed that in *Dun-Par Engd. Form Co.*, 843 F.2d 1135 (8th Cir. 1988), the Eighth Circuit had relieved the Secretary of this burden, but that on remand, the Commission limited the Eighth Circuit's view to being only the "law of the case," leaving intact Commission precedent that placed the burden on the Secretary. *Dun-Par Engd. Form Co.*, 13 BNA OSHC 2147, 1987-90 CCH OSHD ¶ 28,495 (No. 79-2553, 1989). Thus, the judge in this case was bound by Commission precedent at the time. However, since he found that PDM did not establish the initial quantum of proof, he did not reach the question of alternative measures. The Commission's position on this issue has since changed. *See Seibel Modern Mfg. & Welding Co.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991) (Commission places entire burden on the employer). However, this does not affect the validity of the judge's findings in any way.

First, PDM claims that the judge's finding that an anti-two-blocking system could have been assembled from components readily available was not supported by a preponderance of the evidence. PDM criticizes the judge for relying on the opinion of James S. Kontos, a mechanical engineer with the OSHA's Office of Technical Support, who testified that the technology to implement a hard-wire anti-two-blocking system was available before OSHA's inspection. That is, Kontos testified that the various parts of a hard-wire system were manufactured and were available for purchase. PDM would have the judge rely, instead, on the testimony of its Operations Manager, John Newmeister, that while devices were available on the market for the majority of PDM's rubber-tired and crawler cranes, and that other cranes had been purchased with the devices already installed, the manufacturers he had contacted were unable to provide PDM with a device which could be used for the guyless derricks at issue in this case. Newmeister further testified that he and other high-level PDM managers had formed a committee to research and determine how to approach the problem of adapting this technology. He noted that he had also contacted PDM's trade association, the Steel Plate Fabricator's Association, which informed him that none of its members had been able to procure an anti-two-blocking device appropriate for use on derricks such as PDM's.

Carrying this argument further, PDM argues that requiring an employer to invent and implement safety equipment that is not currently available "is a major step beyond current precedent and deserves the scrutiny of the Commission." If employers are to be expected to comply with standards in this way, PDM urges the Commission to accept its affirmative defense of infeasibility. It claims that its efforts to implement safety equipment not readily available should be adjudged on "a level of activity which is reasonably commensurate with the likelihood or remoteness of the harm occurring which the standard is designed to prevent." PDM characterizes this as a "reasonable efforts test." While acknowledging that it subsequently did implement a safety system that complied with the standard, PDM argues that the level of effort it was required to put into this implementation process should bear a reasonable relationship to the actual risk involved.

Lastly, PDM argues that it had implemented an "alternative measure" of protection because of the infeasibility of literal compliance. This alternative, it argues, is present in the very design of the derrick which minimizes the risk of a two-block accident.

B. The Secretary's Arguments

The Secretary maintains that PDM has failed to establish that it was infeasible for it to achieve literal compliance with the standard through the installation of an anti-two-blocking device and reminds the Commission that this burden of proof lies squarely on the employer. *See Seibel Modern Mfg. & Welding*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991). The Secretary argues that the testimony of Kontos, OSHA's engineer, rebutted any showing that PDM may have made concerning the infeasibility of compliance. The Secretary claims that Kontos' testimony that a hard-wire system could have been installed on PDM's guyless derricks established that it was feasible to comply with the standard. The Secretary notes that although PDM raised a number of objections, both safety-related and technological, to the hard-wire system, PDM failed to produce evidence to counter this rebuttal testimony.

The Secretary concedes that the standard does not restrict an employer's choice of an appropriate compliance method in that it specifies the use of an "anti-two-blocking device" or a "two block damage prevention feature." *See* Note 3, supra. He argues, nevertheless, that the implementation of the radio-signalled system that PDM chose over the hard-wire system was delayed by internal, corporate administrative obstacles rather than by technological problems. This delay the Secretary attributes to PDM's failure to assign responsibility effectively and to establish appropriate priorities for the development of the device, as well as to its cumbersome system for approval of such expenditures. As an example, the Secretary notes that this admittedly protracted corporate approval process delayed PDM's receipt of the components of this device from various manufacturers until late 1989 and delayed installation of its first prototype until July 1990, a year and one half after the radio-controlled device was chosen.

Lastly, the Secretary argues that because PDM never sought a variance, the Commission should not permit the company to challenge the wisdom of the standard or circumvent the variance procedures established in the Act by raising the infeasibility defense

at this late stage. Further, to the extent that PDM claims that its derricks, based on a 27-year old design, were unique and deserving of special treatment, the Secretary responds that such problems were already specifically considered when the standard was issued. The final rule contained an explicit finding by OSHA that while some older cranes would require "considerable modification," the standard does not require any devices that are not "presently available." To the extent that PDM claims not that it was infeasible to develop and build the device, but that it was infeasible to develop and build it *on time* in keeping with the Secretary's compliance schedule, the Secretary responds that the Act already recognizes that potential problem. He cites section 6(b)(6)(A) of the Act as providing a procedure for employers to follow if a device is unavailable by the standard's effective date:

> Any employer may apply to the Secretary for a temporary order granting a variance from a standard . . . . Such temporary order shall be granted only if the employer . . . establishes that (i) [it] is *unable to comply with a standard by its effective date* because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) [it] is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) [it] has an effective program for coming into compliance with the standard as quickly as practicable.

Id. (emphasis added). PDM never sought a temporary variance, even though it was familiar with the procedure.[8] The Secretary claims that permitting an employer to rely on an infeasibility defense as a substitute for seeking a temporary variance would deprive OSHA of the opportunity to evaluate a company's interim measures.

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[8]In its reply brief, PDM points out that application for a variance is not an element of the infeasibility defense, only of the greater hazard defense, citing *Seibel Modern Mfg. & Welding*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991), and thus argues that its failure to seek a variance in this case should not stand in the way of its infeasibility defense. We agree. Seeking a *permanent* variance pursuant to section 6(d) of the Act is properly an element of the greater hazard defense because such variances are granted to employers whose workplaces are "as safe and healthful as those which would prevail if [they] complied with the standard." PDM seems to have confused the so-called "permanent" variance under section 6(d) with the so-called "temporary" variance under section 6(b)(6)(A) noted by the Secretary. While applying for a variance of any kind is not an element of the infeasibility defense, it is this latter section that may be suited to obtaining short-term relief for an employer who, despite its best efforts, is technologically incapable of meeting the requirements of a standard before the effective date of a standard, but still has time to seek a temporary variance.

C. Judge's Decision

The judge found that PDM had failed to show that compliance with the standard was infeasible on two grounds.

First, with respect to PDM's argument that the technology was unavailable, the judge found that a preponderance of the evidence established that PDM could have implemented the technology for a hard-wire system, even if problems were encountered in implementing the radio-controlled system it preferred. The judge noted that evidence presented by the Secretary's expert witness, who outlined a workable hard-wire system, was not rebutted by PDM. The judge found that PDM's claims that it would be more dangerous to implement a hard-wire system were not fully established. He found that PDM never explained how the risks associated with installing a hard-wire system would be any different from those to which employees were already exposed while erecting the derrick itself, since the system would be largely installed on the ground, with the connections inside each section of the derrick plugged in as the crew assembled the derrick. He also found that no evidence was offered to show that PDM's reservations about using electrical power were insurmountable or any different from those associated with the radio system it eventually selected.

Second, and of greater importance in the context of our decision, the judge found that PDM's failure to comply was due not to technological obstacles, but rather to "the lingering installation delays [that] were caused . . . by unwieldy administrative procedures, and a failure of personnel to appreciate any urgency in having an operational anti-two-blocking system." The judge noted that PDM had implemented the radio-controlled device by July 1990, three months after the date of inspection, and had failed to establish that compliance before that date was infeasible.

D. Analysis

As a preliminary matter, we note that the standard at issue is not broadly worded, but specifies the means of compliance. Therefore, here, it is PDM's burden to show infeasibility as an affirmative defense, not the Secretary's burden to show feasibility as an element of his case. *See Modern Drop Forge Co. v. Secretary of Labor*, 683 F.2d 1105, 1113 (7th Cir. 1982). With this in mind, our review of the judge's decision follows.

The essence of PDM's claim is that it was infeasible for it to have complied with the literal requirements of the standard before the date of inspection. PDM asserts that this is so because an "off-the-shelf" device that would have enabled it to comply was not commercially available. Thus, compliance was dependent on PDM's implementation -- or as PDM describes it, "invention" -- of a workable device which could be applied to its guyless derricks. In this regard, PDM asserts that how it carried out this duty to invent a method of abatement should turn on whether the efforts it made were reasonable in relation to the remote likelihood of any harm occurring. For the reasons that follow, we reject each of these arguments.

As we noted above, the judge found that PDM's failure to develop and install its anti-two-blocking device in a timely manner was principally caused not by technological problems, but by administrative delays that postponed the implementation of compliance. Our review of this record reveals ample evidence to support this finding.

The Commission has long recognized that standards will, in some instances, require some creativity on the part of employers seeking to achieve compliance. In *Castle & Cooke Foods*, 5 BNA OSHC 1435, 1977-78 CCH OSHD ¶ 21,854 (No. 10925, 1977), *aff'd*, 692 F.2d 641 (9th Cir. 1982), a noise control case, the Commission found that the judge's finding that certain engineering controls were not available for immediate implementation on the date of the alleged violation did not necessarily mean that such controls were technologically infeasible. Relying on testimony by the employer's own expert that controls were "presently available to significantly reduce the noise levels" at the employer's plant, the Commission found that the employer "would not be required to develop new technology, but rather to *adapt* presently available technology." *Id.* at 1437 (emphasis added).

As the judge noted, PDM itself proved the technological feasibility of anti-two-blocking devices for its guyless derricks by eventually developing and installing them on its derricks in July 1990. *See American Steel Works*, 9 BNA OSHC 1549, 1981 CCH OSHD ¶ 25,285 (No. 77-553, 1981) (spray paint booth gauges and alarms installed after citation; Commission specifically rejects finding by judge that employer's "best efforts" were satisfactory); *Masonry Contrac., Inc.*, 8 BNA OSHC 1155, 1980 CCH OSHD ¶ 24,338 (No. 76-2902, 1980) (erection of guardrail and completion of job after inspection shows

compliance was neither functionally impossible nor would it unduly interfere with work). PDM did not claim that the delay was caused by a manufacturer's inability to respond to a timely order for parts or components, or that only a late technological breakthrough enabled it to complete its work. To the contrary, it attempted to justify its minimal efforts by proposing that an employer's efforts be judged in relation to the likelihood of an accident.

PDM warns that a rule that penalizes an employer who develops a device between the time a citation is issued and the time the case is decided is undesirable in that such a rule might deter an employer from working diligently on a solution, or even cause an employer to suspend its efforts pending the conclusion of the proceedings. We see no such danger lurking in any reasonable employer's response to a citation. To the extent that PDM is invoking Rule 407 of the Federal Rules of Evidence,[9] the rule which excludes evidence of subsequent remedial measures from tort litigation, that rule is inapposite here, where the issue is feasibility of precautionary measures. Furthermore, the employer's duty to comply with the standard is ongoing and applies to all employees at all times, not just to a particular plaintiff at a particular time. Evidence of eventual compliance, like any voluntary post-citation abatement, may enhance the good-faith factor in the penalty calculation but does not retroactively revoke the violation.[10]

In the case before us, the evidence establishes that neither John Newmeister, PDM's operations manager responsible for assuring that PDM construction sites have the proper

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[9]The rule provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or *feasibility of precautionary measures*, if controverted, or impeachment.

(Emphasis added).

[10]This is not to say that an employer who attains compliance between the time of the inspection and the time of the hearing is automatically deprived of the opportunity to establish an infeasibility defense. An employer may show that it was infeasible to have been in compliance at the time of the inspection by demonstrating that its good-faith efforts to comply on time were stymied by the unavailability of parts, unexpected engineering problems or other factors beyond its control. If, unlike the employer in this case, an employer were able to demonstrate that abatement of the hazard was infeasible despite its *vigorous* efforts aimed at timely compliance, an infeasibility defense might well be established.

equipment, nor Ingl Zeise, a safety consultant hired by PDM, nor Thurman Yost, a civil engineer and PDM's safety director with twenty-five years with the company, could point to any specific technological barriers which would have forced PDM to *develop* new technology to reach compliance.

In contrast, this record supports the judge's finding that delays in achieving compliance were attributable to a failure to *adapt* existing technology. The testimony of PDM's safety director Yost bears this out in his voicing his perception that no one was "real[ly], you know, putting 110 percent effort into it." Moreover, Eugene Holmes, a 30-year veteran with the company who served as tool house manager, and as such was responsible for procuring, maintaining, or building the necessary tools to erect water towers, addressed this level of effort in the testimony as follows:

> Q. Earlier today I heard testimony that you were the person responsible for trying to comply with the standard['s] requirements; is that true?
>
> A. Yes, I guess so.
>
> Q. Well, you aren't sure when you say I guess so?
>
> A. I was never actually called in by Mr. Newmeister and told [: "Get that thing ready."]
>
> Q. You found out about your responsibilities today, is that right?
>
> A. Yes, that's right.
> (Laughter)
>
> Q. Well, did you receive any instructions on your responsibilities at the time in writing?
>
> A. No.

Holmes also blamed the lengthy approval process for the delay in achieving compliance. He admitted that he was under no deadline and he agreed that compliance with the standard was something less than top-priority. This testimony supports the judge's finding that PDM's failure to timely comply was due to corporate obstacles rather than to the infeasibility of the device.

Since we find that PDM did not establish that a radio-controlled device was infeasible, we need not reach the issue of the feasibility of the hard-wire system proposed by Kontos. Finally, even if we were to find that PDM met its initial burden of proving that literal compliance with the standard by the date of inspection was infeasible, it failed to show the second prong of the infeasibility defense: that alternative measures were either used or infeasible. For its part, PDM claims that the "alternative measures" it instituted was the very design of the derrick itself. While the admittedly remote chance of a two-block accident occurring may help support a relatively low penalty, it does not prove the absence of a violation. PDM fell short, however, of establishing that the design of its derrick constituted the use of an alternative means of protection.

Accordingly, we find that PDM has failed to establish that adaptation to available technology was infeasible and, thus, has failed to establish the affirmative defense.

III. Order

The judge's decision finding a violation of 29 C.F.R. § 1926.550(g)(3)(ii)(C) is affirmed, and a penalty of $500 assessed.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 30, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
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WASHINGTON D.C. 20006-1246

Secretary of Labor,
Complainant,

v.

Pitt-Des Moines, Inc.,
Respondent.

Docket No. 90-1349

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 5, 1991. The decision of the Judge will become a final order of the Commission on August 5, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary **on or before July 25, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1825 K St., N.W., Room 401
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

July 5, 1991
Date

Docket No. 90-1349

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PITT-DES MOINES, INC., Respondent.	OSHRC DOCKET NO. 90-1349

APPEARANCES:

For the Complainant:
Leonard Borden, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, IL

For the Respondent:
Richard Gisler, Esq., Pittsburgh, PA

DECISION AND ORDER

Loye, Judge:

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

Following an inspection of respondent's Beloit, Wisconsin worksite on March 30, 1990 (Tr. 24-25) by the Occupational Safety and Health Administration (OSHA), the Secretary of Labor issued to respondent, Pitt-Des Moines, Inc. (PDM), a 'serious' citation alleging violation 29 C.F.R. 1926.550(g)(3)(ii)(c) and proposing a penalty of $400.00.

PDM was, at all times relevant to this action, engaged in the management and supervision of water tower construction (Answer ¶3). PDM admits it is an employer within the meaning of the Act and that the Commission has jurisdiction over this matter (Answer ¶4; Tr. 7).

On November 6-7, 1990, a hearing was held in Milwaukee, Wisconsin. Additional testimony was heard on March 12, 1991. At the hearing, complainant moved to amend the pleadings to characterize the cited violations as 'willful' (Tr. 13). That motion was granted at the conclusion of the hearing (Tr. 101).

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1926.550(g)(3)(ii)(c): A positive acting device was not used to prevent contact between the load block or overhaul ball and the boom tips:

> The derrick crane used to lift personnel was not equipped with a anti-two blocking feature.

The cited standard provides:

§1926.550 Cranes and derricks.

* * *

(g) Crane or derrick suspended personnel platforms

* * *

(3) **cranes and derricks**

* * *

(ii) Instruments and components.

* * *

(C) A positive acting device shall be used which prevents contact between the load block or overhaul ball and the boom tip (anti-two-blocking device), or a system shall be

used which deactivates the hoisting action before damage occurs in the event of a two-blocking situation (two block damage prevention feature).

Statement of Facts

On March 30, 1990, respondent was engaged in the construction of a water tower on Cranston Road, in Beloit, Wisconsin (Tr. 25). A derrick was erected on top of the water tower, and a work platform, or man basket, was attached to the hook of the derrick (Tr. 26-27; Ex. C-1, C-4). Respondent admits that the work platform was used to perform welding on the tower, which was located over 90 feet above the ground on a 'stem' (Tr. 8, 26, 39-40). Respondent further stipulates that no anti two blocking device had been installed on the derrick (Tr. 8, 29).

An anti two blocking device is generally located just below the boom, and transmits an electrical or radio signal when the overhaul ball, located just over the derrick's hook, and approximately 20 feet above the work platform, comes in contact with it (Tr. 33, 38, 47-48, 77; Ex. C-2). The signal from the anti two blocking device shuts down the hoisting apparatus, preventing contact between the overhaul ball and the boom tip (Tr. 33-35, 365; Ex. C-3). Such contact would normally result in the severing of the cable which supports the load (Tr. 33, 368). Severing of the support for the work platform would likely result in serious bodily injury, including death (Tr. 42, 369).

Mr. John Newmeister, Operations Manager for PDM, testified that he was responsible for securing construction equipment for

PDM (Tr. 67). Mr. Newmeister testified that in August, 1988, he became aware of the anti two blocking device requirement of 1926.550(g)(ii)(c) which was to become effective on October 3, 1988 (Tr. 49, 81). Newmeister testified that at that time he secured the required equipment for PDM's rubber tired and crawler cranes, but was unable to locate any comparable equipment for use on the derricks employed by PDM (Tr. 68, 72-74, 89; See also, testimony of PDM Safety Director Thurman Yost, Tr. 204, 216). Newmeister stated that he thereafter formed a committee to pursue methods of compliance with the OSHA standard (Tr. 74). That committee eventually had two anti two blocking radio systems manufactured.[1] Those devices have been installed on derricks at other sites (Tr. 75-76).

Newmeister's committee first met in September, 1988 (Tr. 276). The committee considered and rejected 'hard wire' electrical systems because of perceived problems in the installation, including unacceptable employee exposure, weather damage to wiring, and interference with the rotating boom (Tr. 119-124). Early in 1989 the committee decided to pursue a radio controlled system (Tr. 114, 279-280). Negotiations with manufacturers resulted in quotes for such a system in

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[1] This Judge finds respondent's claims to have expended in excess of $200,000.00 in procurement costs to develop the anti two blocking devices exaggerated (Tr. 75). Mr. Newmeister testified that the cost to purchase new hoists (which were needed anyway, See Tr. 275) was approximately $65,000.00, with only an additional $6,500.00 for the radio control components (Tr. 101, 104-106, 403; See also, Ex. C-9). Clearly, respondent's major expenditures were for new equipment, rather than for safety devices.

April, 1989 (Tr. 117; Ex. C-8; Ex. C-10). A purchase order was issued around July 1989, and the equipment was received late in 1989 (Tr. 103, 107). PDM's derricks could not be fitted with the equipment, however, until PDM retrofitted its hydraulic hoists with solenoid valves which would open upon receipt of the anti two block's radio signal, and installed a solar collector to power the radio transmitter. This was completed in July, 1990, and the device is now operational, though not fully tested (Tr. 105, 149-150, 269-271).

Mr. Eugene Holmes, PDM's Tool House Manager, was in charge of procuring equipment, including the anti two blocking devices at issue (Tr. 256, 266). Holmes testified that he spent upwards of 500 manhours on procuring and installing the anti two blocking devices in 1990, but less than that in both 1988 and 1989 (Tr. 288).

Mr. Holmes stated that process was delayed by a long corporate approval system as well as personnel problems experienced by the manufacturer (Tr. 274, 289). Holmes believe that the devices might have been in service earlier if the project had been assigned a higher priority (Tr. 283).

James S. Kontos, a mechanical engineer with OSHA Technical Support (Tr. 346), testified that it was feasible to equip PDM's derricks with a hard wire electrical anti two block system comprised of components readily available from electrical suppliers (Tr. 369, 375, 396-402; Ex. C-21 through C-24).

A circuit running from the hoisting apparatus's power source to the anti two blocking device and back to the hoist could be created by installing wires inside a conduit permanently attached to the inside of the risers which support the derrick (Tr. 384-386; Ex. C-14). Electrical connector plugs at each riser joint would be joined as the risers were bolted into place (Tr. 382-383, 387). A 'bus bar' inside the rotating raceway at the top of the risers would connect the circuitry in the risers to wires running out the boom (Tr. 369-373; Ex. C-13, C-15). Those wires would be connected to a switch which is operated by a counterweight placed on the hoist cable (Tr. 374-376). Should the overhaul ball come into contact with the counterweight, the switch would open the circuit, cutting off power to the hoist (Tr. 378-380).

Mr. Kontos testified that the circuitry would be protected from the weather by a conduit, the 'bus bar' by a boot of silicone rubber (Tr. 373, 382-384). The drop in voltage caused by multiple connections, 18 by respondent's count, would be negligible (Tr. 413; Vol. II, 73-75, 84). Because the circuitry is permanently attached to the boom and risers, employee exposure during installation would not exceed that already necessary to erect the risers (Tr. 407-408).

Mr. Newmeister stated that the system designed by complainant could not be implemented on the hydraulic hoists that PDM used, because there was no electrical system available

(Tr. Vol. II, 81). The hydraulic hoist is halted by dumping hydraulic fluids with a valve or manual lever (Tr. Vol. II, 86, 89). Newmeister admitted, however, that an electrical system could be provided, and that it was possible that a valve system which could be signaled electrically could be developed (Tr. Vol. II, 87, 91, 97, 100). Mr. Kontos' design envisions use of a generator as an electrical source which would activate solenoid valves in the hoist (Tr. 377-379). The system PDM eventually developed involved a solenoid valve system which was activated by a radio signal (Tr. 95-96). Newmeister also objected to the system based on employee exposure, stating that in some applications, the raceway requires assembly in two sections in the air (Tr. Vol. II, 82).

No variance was sought from OSHA during the period from the regulation's effective date to the date of the inspection, though PDM was familiar with the procedure for obtaining variances (Tr. 145, 241, Vol. II, 19-20). Mr. Thurman Yost, PDM's Safety Director testified that PDM didn't believe there would be a variance granted (Tr. 242).[2]

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[2] Any reliance by respondent on OSHA Notice STD-3, which establishes a grace period of 15 months from the effective date of §1926.550(g)(3)(ii)(C) for compliance with its strictures, would be misplaced. Firstly, STD-3 expired in December, 1989, over three months prior to the inspection which led to this inspection. Moreover, respondent made no effort to establish that it attempted to comply with the guidelines set forth in STD-3, which contain specific alternative measures to be followed by employers using cranes without anti two blocking devices (Tr. 90-96; Ex. R-C).

Mr. Newmeister testified that PDM's derricks are designed to provide alternative protection to workers in a man basket (Tr. 78). The derrick is positioned such that the boom tip is located approximately 40 feet above the top of the water tower. In order for the overhaul ball to come into contact with the boom tip, the man basket would have to be hoisted completely above the top of the tank, an unlikely event (Tr. 78). Ingle Zeise, an independent safety consultant retained by respondent (Tr. 155), testified that the probability of a two blocking incident occurring with the boom point so far above the work station, as on PDM's derrick, was remote (Tr. 176). PDM personnel were aware of no two blocking incidents involving PDM's derricks on elevated water tanks (Tr. 77, 203).

Alleged Violation of §1926.550(g)(3)(ii)(c)

The cited standard requires that a positive acting device (anti two block), which prevents contact between the load block or overhaul ball and the boom tip, be installed on cranes and derricks utilizing suspended personnel platforms. Respondent admits that, on the date of the inspection, its derrick was used to support a personnel platform without being equipped with the anti two block equipment required by the standard. Respondent raises the affirmative defense of infeasibility.[3]

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[3] Respondent also raises the Secretary's untimely filing of her Complaint, and asks that this Judge dismiss the action as authorized under the Commission's Rules of Procedure §2200.41. Action under §2200.41 is at the discretion of the Judge. As respondent has not been prejudiced in any way by the Secretary filing her Complaint two days late, this Judge finds that dismissal would be inappropriate.

Infeasibility

In order to establish a defense of impossibility or infeasibility, an employer must demonstrate, by a preponderance of the evidence, that compliance with a standard's literal requirements is not possible or would preclude performance of the employer's work. If proven, the burden shifts to the Secretary to show that practical and realistic alternative means of protection were available to the employer. Dun-Par Engineered Form Co., 12 BNA OSHC 1949, 1953 (No. 79-2553, 1986), rev'd, 843 F.2d 1135 (8th Cir. 1988).[4]

This Judge finds that the respondent in this case failed to prove that the installation of an anti two block device was infeasible. The respondent failed to convincingly rebut the Secretary's evidence of the feasibility of a hard wire anti two block system. Moreover, respondent currently has in place a radio system which is operating successfully in some of respondent's other worksites.

The Secretary's expert's testimony credibly outlined a hard wire system which could be assembled from components readily available on the market. Respondent's objections to the system were unconvincing. Although its witnesses argued that installation of the system would require repeated employee

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[4] In Dun-Par Engineered Form Company, 13 BNA OSHC 2147, 2150 (No. 79-2553, 1988), the Commission adopted the decision of the 8th Circuit reversing its earlier Dun Par decision as the "law of the case" only, specifically declining to acquiesce in that decision, and leaving Commission precedent intact.

exposure, it was never explained how such exposure would exceed that needed for the initial erection of the derrick.[5] Respondent objected to the use of an electrical system, but admitted that an electrical power source, such as a generator could be easily provided. Its claims that an electrical signal could not be used to dump the hydraulic valves were unsubstantiated, and unbelievable in light of respondent's use of solenoids which could accept radio signals on its own anti two block device.

It was respondent's choice to develop a radio controlled anti two block system, and it spent approximately a year and a half pursuing that option. The evidence establishes that there were no technological obstacles to installing a radio system, though such a system was not commercially available as a unit. It is clear that the lengthy installation delays were caused rather by unwieldy administrative procedures, and a failure of personnel to appreciate any urgency in having an operational anti two block system.

Respondent has failed to prove its affirmative defense, and the cited violation will be affirmed.

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[5] Respondent may not rely, in any event, on employee exposure as a defense to this citation, as that issue raises the separate, 'greater hazard' affirmative defense. Respondent specifically declined to raise the greater hazard defense (Respondent's Brief, p.4), noting that it had failed to file for a variance, an element of the defense.

Willful

The Commission has held that in order to establish that a violation was willful:

> It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious. ... there must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard.

Williams Enterprises, Inc., 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987).

The issue of willfulness focuses on "the employer's state of mind, e.g. its general attitude toward employee safety." Seward Motor Freight, Inc., 13 BNA OSHC 2230, 2234 (No. 86-1691, 1989).

This Judge cannot find that the evidence in the record establishes a conscious disregard of the law on respondent's part. Although respondent could certainly have speeded along the process to come up with an operational anti two block system, there were plans under development to provide the system that respondent felt would best meet its needs. Respondent provided systems for all its other types of cranes, for which those systems were commercially available (Tr. 68). Moreover, both photographs and the unrebutted testimony of respondent's safety consultant establish that the actual likelihood of a two block accident occurring, given the configuration of the derrick set up, was remote (Tr. 155, 176). The citation will be affirmed as a 'serious' violation.

Penalty

PDM is a large company with over 2,000 employees (Tr. 79). The Compliance Officer observed two employees exposed to the anti two blocking hazard (Tr. 44). As noted, the likelihood of a two block accident occurring was remote.

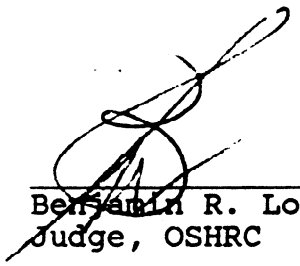
Taking the relevant factors into consideration, a penalty of $500.00 is deemed appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

Order

1. Citation 1, item 1, alleging violation of §1926.550 (g)(3)(ii)(c) is AFFIRMED as a 'serious' violation and a penalty of $500.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: June 18, 1991