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

SECRETARY OF LABOR, Complainant, v. JESCO, INC., Respondent.	OSHRC Docket No. 10-0265

ON BRIEFS:

Ronald Gottlieb, Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

McCord Wilson, Esq.; Rader & Campbell, P.C.; Dallas, TX
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following an inspection of a worksite in Fulton, Mississippi, the Occupational Safety and Health Administration ("OSHA") issued Jesco, Inc. ("Jesco") a serious citation under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-678, alleging as amended that Jesco "field modified" an aerial lift in violation of 29 C.F.R. § 1910.67(b)(2). In the amended citation, the Secretary alleges two instances of violation and proposes a total penalty of $4,500. Administrative Law Judge Stephen Simko affirmed the two-instance citation, but reduced the penalty to $2,500. For the following reasons, we affirm the citation based on only one of the alleged instances and assess a penalty of $3,500.

BACKGROUND

Jesco was hired to remove and replace several explosion-damaged beams made of angle iron from the ceiling of a facility in Fulton, Mississippi. The company used two aerial lifts to access, remove, and replace the beams, which each weighed approximately 325 pounds. One of these lifts, known as a "JLG Boom Lift," had a boom that extended approximately 40 feet, with an 8-foot by 3-foot "basket" attached to the end of the boom. The basket consisted of a platform surrounded by guardrails. To remove a damaged beam from the ceiling, Jesco would raise the lift and position its basket under the center of the beam so that the beam rested on the basket's guardrails and extended 11.5 feet beyond either side. After the beam was unbolted from the ceiling, the lift would lower it to the ground. New beams were similarly positioned on the lift basket and raised to the ceiling for installation.

When Jesco removed the first damaged beam from the ceiling, it used two vise clamps to restrict the beam's movement on the lift basket's guardrails as a precaution against the beam rolling off. The jaws of the clamps are shaped like the letter "C" when opened. Each clamp was placed around the guardrail with the ends of its jaws clamped to the beam, so that the clamp encircled the guardrail when closed.[1] Approximately two weeks after replacing the first beam, Jesco replaced ten more using the lift to transport the beams, but it did not use clamps or any other method of securing those beams to the lift.

DISCUSSION

On review, Jesco challenges only the judge's conclusion that it failed to comply with the terms of § 1910.67(b)(2).[2] In response, the Secretary argues in support of the judge's holding with regard to Jesco's noncompliance, but contends that his decision to lower the proposed penalty is unwarranted. We turn first to the issue of compliance.

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[1] The clamps, which were of a larger diameter than the guardrails, did not fit tightly around the guardrails. However, they limited the distance the beam could move along the guardrails.

[2] It is undisputed that the Secretary proved the remaining elements of his prima facie case—the applicability of the standard, employee access to the violative condition, and the employer's actual or constructive knowledge of the violation. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138, 1993-1995 CCH OSHD ¶ 30,636, p. 42,452 (No. 90-1747, 1994).

I. Compliance

The Secretary alleges that Jesco violated § 1910.67(b)(2) when it transported beams on the aerial lift both with clamps (instance (a)) and without clamps (instance (b)). The standard provides, as relevant, that "[a]erial lifts may be 'field modified' for uses other than those intended by the manufacturer, provided the modification has been certified in writing . . . ."[3] It is undisputed that Jesco's use of the lift to transport beams was contrary to the lift manufacturer's Operation and Safety Manual ("manufacturer's manual"), and that Jesco did not have the lift certified before using it in this manner.[4] Thus, the only question is whether Jesco "field modified" the lift.

In affirming the violation, the judge concluded, without distinguishing between instances (a) and (b), that " '[m]odification' is not limited to physically altering the lift," and that "Jesco's use of the guardrails to transport the beams was a field modification." On review, Jesco argues that misuse alone—without any physical change to the lift—does not constitute a "modification." According to Jesco, the judge's holding essentially re-writes the standard to require certification for an unintended use of the lift irrespective of whether it was field modified. The Secretary responds that the judge's interpretation of the standard is correct because the meaning of the term "modification" is "sufficiently broad" to include misuse without a physical change.

We disagree, and find that the judge's interpretation of the standard is inconsistent with its plain meaning. When determining the meaning of a standard, the Commission first looks to its text and structure. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184, 2002-2004 CCH OSHD ¶ 32,667, p. 51,417 (No. 96-1043, 2003). If the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation. *Id.; Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1902, 1991-1993 CCH OSHD ¶ 29,854, p. 40,752 (No.

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[3] The full text of § 1910.67(b)(2) is as follows:

> Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2 – 1969 and this section, and to be at least as safe as the equipment was before modification.

[4] Section 1.3 of the manufacturer's manual states: "Do not use the machine for any purpose other than positioning personnel, their tools, and equipment" and "[d]o not carry materials directly on the platform railing."

89-1394, 1992). Both the courts and the Commission have rejected the Secretary's interpretation of a standard when it strains the plain meaning of the regulatory text. *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1418-19, 1993-1995 CCH OSHD ¶ 30,232, p. 41,635 (No. 89-1206, 1993).

Here, a reading of the entire aerial lift standard shows that "field modified" does not encompass mere misuse. A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section") (internal quotation marks and citation omitted); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580, 2009-2012 CCH OSHD ¶ 33,030, p. 54,369 (No. 94-1979, 2009) (same); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1202-03, 2009-2012 CCH OSHD ¶ 33,079, p. 54,692 (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), *aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). Section 1910.67(b)(2) states that a certification is required when a lift has been " 'field modified' *for* uses other than those intended by the manufacturer . . . ." 29 C.F.R. § 1910.67(b)(2) (emphasis added). As written, therefore, two factors must be present for the certification requirement to apply—a field modification and an unintended use. Construing the term "field modified" to encompass unintended use, as the judge and Secretary would have us do, deprives this term of any effect because only one factor—unintended use—would be sufficient to trigger the provision's requirement. In addition, the plain meaning of "modify," when used in reference to an object, is to make a *physical* change: "to change somewhat *the form or qualities* of; alter partially: to modify a design." Random House Dictionary of the English Language 921 (unabr. ed., 1971) (emphasis added).

OSHA uses "modified" in exactly this way in § 1910.67(b)(1), the provision that immediately precedes the one at issue here. Under that provision, certain older equipment must be "*modified* . . . to conform with the applicable *design and construction* requirements of ANSI A92.2-1969," which contemplates a physical change. 29 C.F.R. §1910.67(b)(1) (emphasis added). Accordingly, the meaning of modification is the same under both provisions: a change to the lift's design and/or construction.[5]

[5] We disagree with the Secretary's contention that the standard's regulatory history shows that OSHA considered a change in use alone to constitute a modification. In the preamble, OSHA

To support his claim that "field modified" encompasses misuse without any physical change, the Secretary points to a section of the incorporated ANSI consensus standard that relates to manufacturer labeling and description requirements for aerial devices that have "alternative configurations." *See* ANSI A92.2-1969 Section 3.1.3: *Alternative Configuration*. In that section, one of the alternative configurations is "[u]se[] as a personnel-carrying device only [versus] use[] as a personnel-carrying and material-handling device." *Id*. (example 5). According to the Secretary, this establishes "as a legal matter" that a change in the lift's use (from personnel-carrying to material handling) is a change to the lift's configuration. And he contends that "altering a device's configuration" satisfies the ordinary definition of "modification."

We are not persuaded by this argument for two reasons. First, by its terms, the cited OSHA provision incorporates only the ANSI standard's criteria for determining whether a field modification, once made, qualifies for certification. 29 C.F.R. § 1910.67(b)(2) (permitting field modified lifts for other-than-intended uses when "*certified* . . . to be in conformity with all *applicable* provisions of ANSI A92.2-1969" (emphasis added)). The OSHA standard does not, however, incorporate any purported ANSI guidance on what would constitute a modification. Therefore, contrary to the Secretary's contention, the alternative configuration provision of the ANSI standard has no bearing on the meaning of the OSHA provision.[6]

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stated that it included the cited provision to address two concerns: (1) that "so-called 'field modifications' " should be allowed because "often *modifications* actually improve employee safety in performing *specialized tasks for which there is no specially designed equipment*," and (2) that "*changes* may make the equipment dangerous." 37 Fed. Reg. 24,880, 24,881 (Nov. 23, 1972) (preamble to final rule of construction aerial lift standard, later promulgated in relevant portion as general industry rule; *see* 40 Fed. Reg. 13,436, 13,439 (March 26, 1975)) (emphasis added). Ultimately, OSHA concluded that field modifications that meet the requirements of the standard "not only preserve the safety of the equipment, *but in cases of old equipment, may even improve the safety of such equipment* . . . ." 37 Fed. Reg. at 24,882 (emphasis added). It is evident that OSHA was referring, in the first instance, to a physical change in equipment to make it suitable for a specialized task and, in the second instance, to physically altering old equipment to improve its safety. A change in use alone could not have been intended because it would not accomplish either of these objectives.

[6] We note that the only mention of "modifications" appears in the ANSI standard's Appendix, which ANSI makes plain is not part of the standard itself. In any event, the Appendix contemplates that "modifications" are physical changes, referring to them as "alterations of the basic design." ANSI A92.2-1969 Appendix ¶ A1.2: Modifications ("The manufacturers should be consulted *prior* to alterations of the basic design of the aerial device" (emphasis in original)).

Second, even if ANSI's use of "configuration" were relevant, it does not support the Secretary's position because his interpretation of the ANSI standard contravenes the plain meaning of the word "configuration"— "the relative disposition of the parts or elements of a thing" or "external form . . . ." Random House Dictionary of the English Language 308 (unabr. ed., 1971). "Configuration" is thus no more susceptible of meaning "use" than "modification" is of meaning "change in use." Read in light of the ordinary meaning of "configuration" and the four other examples ANSI provides of alternative configurations, all of which address physical aspects of the lift,[7] it is evident that the personnel-to-material handling example assumes the lift has been physically altered to enable it to handle materials. For these reasons, we reject the Secretary's contention that the ANSI standard establishes that "field modified" includes misuse absent a physical change to the lift.[8]

Turning to the issue of whether Jesco physically altered the lift in question, we find that the company's use of vise clamps to attach the first damaged beam to the lift resulted in a field modification. Jesco claims that it made no physical changes to the lift at any time—it simply rested the beams on the lift's guardrails. We agree that on those occasions when Jesco did not use clamps to attach the beam to the lift basket's guardrails, as alleged under instance (b), it did not alter the lift but simply placed a load on it. The Secretary maintains that this nonetheless

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[7] The four other examples listed in the standard address whether parts of the equipment are deployed or if accessories are attached: "without . . . vs with outriggers extended"; "with . . . vs without spring lockouts engaged"; "with only one platform attached vs with two platforms attached"; and "with digger attached to boom vs with digger removed from boom." ANSI A92.2-1969 Section 3.1.3.

[8] The Secretary also contends that even if the plain meaning of "modify" does not include misuse alone, the use of quotation marks around "field modified" in the cited standard shows that OSHA did not intend to limit the term to its ordinary meaning. According to the Secretary, the *Chicago Manual of Style* ("Style Manual") indicates that quotation marks are often used to alert readers that a term is being used in a non-standard way. But the part of the Style Manual relied upon by the Secretary, ¶ 6.73 ("Technical terms in special senses"), does not indicate that quotation marks are used to signal a fundamental change to a term's meaning. Rather, it addresses their use in signaling that the *context* is non-standard (e.g., using the printing press term "proof" in a photography context). That use is inapplicable here, as the term "field modified" is used in its natural context in the cited provision (i.e., addressing alterations to equipment and distinguishing them from the factory modifications referred to in the preceding provision). Under these circumstances, we consider the standard's use of quotation marks to signify that "field modified" is a term of art—a use which is also recognized in the Style Manual. *See* Style Manual, at ¶ 6.80 (quotation marks used around term instead of adding the expression "so called").

created the potential for instability in the lift which, in his view, constitutes a physical alteration. But even assuming the beam could cause the lift to become unstable, that alone would not establish that the lift had been physically altered, as instability can have other causes—for example, the manufacturer's manual refers to operating the lift on a "sloping, uneven or soft surface" as a "tipping hazard[]."

However, on the one occasion when Jesco used clamps to attach the beam to the lift's guardrails, as alleged under instance (a), it did more than just place a load on the lift—it physically altered it. Under these circumstances, we find that Jesco "field modified" the lift.[9] Because this field modification was for a use—material handling—unintended by the manufacturer, Jesco was required to have the lift certified under § 1910.67(b)(2), and its undisputed failure to do so establishes noncompliance. Accordingly, we affirm Item 1 based on instance (a), but vacate instance (b).

II. Penalty

In assessing a penalty, the Commission must give due consideration to four factors: (l) the employer's size, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of violations. OSH Act §17(j), 29 U.S.C. § 666(j). Gravity is typically the most important factor. *Capform Inc.,* 19 BNA OSHC 1374, 1378, 2001 CCH OSHD ¶ 32,320, p. 49,478 (No. 99-0322, 2001), *aff'd,* 34 F. App'x. 152 (5th Cir. 2002) (unpublished). In this case, the judge assessed a lower penalty than the $4,500 proposed by the Secretary, apparently based on Jesco's "demonstrated good faith in the proceeding" and his finding that the gravity of the violation was only moderately high.

On review, the Secretary argues that this was a high gravity violation because five employees were exposed to the risk of death or serious physical harm from the transportation of the 325-pound beam on the modified lift. He also argues that Jesco should not receive credit for good faith because it knowingly engaged in prohibited conduct. Jesco does not address the Secretary's good faith argument on review, but maintains that the gravity of the violation was moderately high, as the judge found, because the company "took great care . . . to ensure that none of its employees were injured."

[9] Although attaching the beam with the clamps was merely temporary, we note that the cited standard makes no distinction between temporary and permanent modifications.

We agree with the Secretary that this was a high gravity violation based on employee exposure to a serious hazard resulting from Jesco's unapproved modification and misuse of the lift to transport a large, heavy beam. Although Jesco attempted to lessen the possibility that the beam would fall, its makeshift attachment of the beam to the lift's guardrails was clearly unintended by the manufacturer and created a risk of death or serious harm for Jesco employees. Additionally, regardless of Jesco's post-citation conduct, we find that the company's decision to use the lift in a manner that violated the instructions in the manufacturer's manual shows a lack of good faith. Jesco's superintendent acknowledged that he knew using the lift to handle the beams was something they should not do. And despite this knowledge, Jesco made no attempt to have its modification of the lift for this unintended use certified.

The Secretary's proposed penalty of $4,500 covered both instances (a) and (b). Because we affirm the citation only on the basis of instance (a), we find that a penalty of $3,500 is appropriate.

ORDER

We affirm Serious Citation 1, Item 1 based on instance (a), vacate instance (b), and assess a total penalty of $3,500.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 26, 2013

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Jesco, Inc., Respondent.	OSHRC Docket No. **10-0265**

Appearances:

Lydia Jones, Esquire, Atlanta, Georgia
For Complainant

McCord Wilson, Esquire, Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Jesco, Inc., is a construction company located in Fulton, Mississippi. Jesco contests a citation issued by the Secretary alleging a serious violation of 29 C. F. R. § 1910.67(b)(2), for using a "field modified" aerial lift without first obtaining written certification from the manufacturer of the aerial lift. The Secretary proposed a penalty of $ 4,500.00 for the violation.

Jesco timely contested the citation. The company stipulated jurisdiction and coverage. The court held a hearing in this matter on June 24, 2010, in Tupelo, Mississippi. The parties have filed post-hearing briefs. Jesco argues it did not violate the terms of 29 C. F. R. § 1910.67(b)(2). Jesco also contends the Secretary failed to prove its employees were exposed to a hazard.

The court finds the Secretary established a serious violation of 29 C. F. R. § 1910.67(b)(2). Item 1 of Citation No. 1 is affirmed, and a penalty of $ 2,500.00 is assessed.

Background

In the summer of 2009, Mueller Copper Tube hired Jesco to remove several damaged beams made of angle iron (also referred to as "angle") from the ceiling of its facility in Fulton, Mississippi. Each beam was approximately 31 feet long and weighed approximately 325 pounds. The ceiling of the facility was approximately 31.5 feet high. Various structures and equipment in the facility, including an elevator rack, made it difficult to access the ceiling to remove the beams. After analyzing the situation, Jesco determined the best method for removing the beams was to use two rented aerial lifts and one of Mueller's remote cranes. One of the lifts, rented by Mueller, was a Genie lift; the other lift, rented by Jesco, was a JLG 600S Boom Lift. The basket of the JLG lift was 8 feet wide. It was equipped with standard guardrails.

Jesco's crew consisted of five men, including superintendent Tom Beane. One crew member was located in a Genie lift, and two crew members were located in the JLG aerial lift. Beane and the remaining crew member stayed on the ground, 30 to 40 feet away from the JLG lift. Jesco's employees used the two lifts to raise the baskets to the ceiling, where the workers loosened the bolts securing the damaged beam to the ceiling. The workers then moved the JLG lift to the center of the beam and lowered the beam to the guardrails. The center 8 feet of the beam thus rested across the lift basket, leaving 11.5 feet of the beam extending beyond either side of the lift. After the workers placed the beam on the guardrails of the JLG lift, they lowered the beam to the ground. A Mueller employee operating a crane then removed the damaged beam and placed a new beam on the guardrail. The Jesco employees raised the new beam to the ceiling, where they then bolted the beam to the ceiling.

In mid-August 2009, Jesco's crew removed the first damaged beam from the ceiling. This beam was bent. To prevent the beam from rolling, Jesco's employees in the JLG lift used two C-clamps to secure the beam to the guardrails. Approximately two weeks later, on August 29, 2009, Jesco removed ten more beams from the ceiling. On this date, they did not use C-clamps to secure the beams to the guardrails.

On August 29, Jesco employees Jason Nanney and Michael Taylor were in the JLG lift. Jason Williams was in the Genie lift. Tom Beane and Will Beane (Tom Beane's son) were on the ground. At approximately 5:00 p. m., Mueller's crane operator inadvertently struck the Genie lift with the boom of the crane, damaging the Genie lift. Jason Williams was not injured.

Beane filed a "Near Miss Report" with Jesco. His report states:

> Job: taking angle out of ceiling using 2 lifts and Mueller's crane.
> We were lowering angle with one lift. The other lift normally comes down to get out of the way. This time, we were lowering angle with one lift, guy in the other lift stayed up. As the angle was being lowered, the Mueller crane operator started swinging over to get the angle out of the basket. As he swung over, he swung into the boom of the 2nd lift because his view was blocked by racks in the plant. Lift operator hollered and crane operator stopped. Could have turned lift over if he had not stopped.
> Solution: Make sure that all lifts have been lowered before moving crane.
> Action: Mueller employee was written up.

(Exh. C-1).

The union at Mueller filed a complaint letter with the Occupational Safety and Health Administration (OSHA) following this incident. OSHA compliance officer Henry Rust went to Mueller's facility on September 3, 2009, to investigate. Rust interviewed Mueller's crane operator and took measurements. He also spoke with Mueller's Human Resources officer, who informed him of Jesco's Near Miss Report. Rust obtained a copy of the report, and subsequently opened an investigation of Jesco.

On October 7, 2009, Rust went to Jesco's place of business and interviewed several employees there, including Beane, Nanney, and Williams. Based on Rust's investigation, the Secretary initially issued a citation to Jesco for a violation of the general duty clause, § 5(a)(1), for carrying materials on the guardrails of the JLG lift (the Secretary also cited Mueller for alleged violations arising from the incident with the crane). Prior to the hearing, the Secretary moved to amend the citation to allege a serious violation of 29 C. F. R. § 1910.67(b)(2). The court granted the Secretary's unopposed motion.

Discussion

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).

Citation No. 1

Amended Item 1: Alleged Serious Violation of 29 C. F. R. § 1910.67(b)(2)

The standard at 29 C. F. R. § 1910.67(b)(2) provides:

Aerial lifts may be "field modified" for uses other than those intended by the manufacturer, provided the modification has been certified in writing by the manufacturer or by any other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2–1969 and this section, and to be at least as safe as the equipment was before the modification.

The amended citation alleges:

29 C. F. R. § 1910.67(b)(2): Aerial lift was "field modified" for uses other than those intended by the manufacturer and the modification had not been certified in writing by the manufacturer or by any other equivalent entity to be in conformity with all applicable provisions of ANSI A92.2–1969 and this section and to be at least as safe as the equipment was before modification, thereby creating a danger of tipping and struck-by hazards.

(a) On or about two weeks prior to August 29, 2009, at Mueller Copper Fittings, employees performed an unapproved field modification of a rented JLG Aerial Boom Lift by using clamps to attach 325-pound, 31-foot long beams to the guardrails of the Lift's platform and using the Lift to lower and lift the beams to the ceiling, 31-feet above. The Operation and Safety Manual for the Lift instructs users to "not carry materials directly on platform railing" and further states that "[s]upplies or tools which extend outside the platform are prohibited unless approved by JLG."

(b) On or about August 29, 2009, at Mueller Copper Fittings, employees performed an unapproved field modification of a rented JLG Aerial Boom Lift by placing 325-pound, 31-foot long beams on the guardrails of the Lift's platform and using the Lift to lower and lift the beams to the ceiling, 31.5-feet above. The Operation and Safety Manual for the Lift instructs users to "not carry materials

directly on platform railing" and further states that "[s]upplies or tools which extend outside the platform are prohibited unless approved by JLG."

(Secretary's brief, pp.5-6).[1]

Applicability

Jesco does not dispute the applicability of the cited standard. Jesco stipulated it "was performing maintenance work on August 29, 2009; therefore, OSHA's general industry standards apply to its conduct, 29 C. F. R. § 1910, et seq." (Stipulations). The cited standard applies.

Compliance with the Terms of the Standard

The standard at 29 C. F. R. § 1910.67(b)(2) requires the employer to get certification in writing from the manufacturer before it field modifies an aerial lift. Jesco stipulated at the hearing: "JLG did require that users willing to modify their equipment apply to JLG's engineers for permission to make the modification," and "Jesco did not apply for a product modification approval" (Tr. 47-48). Jesco contends such certification was not necessary because it did not field modify the aerial lift.

"Field modification" is not defined in the OSHA standards. Jesco argues the plain and natural meaning of "modification" is "to change." Since Jesco did not change anything on the lift, Jesco contends it did not implement a modification.

Jesco narrowly focuses on the phrase "field modification," without giving due attention to the rest of the sentence. The standard at 29 C. F. R. § 1910.67(b)(2) requires an employer to get certification in writing when the aerial lift is modified "for uses other than those intended by

[1]At the beginning of the hearing, both the Secretary's counsel and Jesco's counsel believed Jesco's crew used two C-clamps to secure beams to the JLG's guardrails on August 29, 2009. As the hearing progressed, it emerged that Jesco's crew used C-clamps to secure only one beam to the lift's guardrails, and that this was done approximately two weeks before August 29. The ten beams that were removed on August 29 were not secured with C-clamps. The court further amended the citation to conform to the evidence adduced at the hearing. The above-quoted amended citation is taken from the post-hearing brief of the Secretary, who drafted it at the court's direction.

the manufacturer." When the sentence is read in its entirety, it is clear that "modification" includes use of the aerial lift not intended by the manufacturer.

The Operations Manual is required to be with the lift at all times and is provided by the rental company to the users of the lift. Users of the lift are required to be familiar with the uses and limitations of the lift as set forth in the Operations Manual. Jesco employees Tom Beane, Jason Nanney, and Jason Williams testified at the hearing. They all stated they use aerial lifts virtually every work day, and they are familiar with safety requirements for operating aerial lifts.

The JLG Operations Manual states:

- Use the machine in a manner which is within the scope of its intended application set by JLG.
- **!! WARNING !! MODIFICATION OR ALTERATION ON AN AERIAL WORK PLATFORM SHALL BE MADE ONLY WITH THE WRITTEN PERMISSION FROM THE MANUFACTURER.**

(Exh. C-8, p. 1-2).

The Operations Manual also states:

1.3 OPERATION
GENERAL

- Do not use the machine for any purpose other than positioning personnel, their tools, and equipment.
- Do not carry materials directly on platform railing. Contact JLG for approved material handling accessories.
- Supplies or tools which extend outside the platform are prohibited unless approved by JLG.

(Exh. C-8, p.1-3).

"Modification" is not limited to physically altering the lift. It covers a change in the intended use of the aerial lift. The Operations Manual is clear that the aerial lift is intended to carry personnel, and is not intended to carry materials directly on the platform railing, or to carry materials that extend outside the platform.

The Secretary cites *Blue Ridge Erectors Inc.*, 21 BNA OSHC 1519 (No. 04-1793, 2006), in support of her case. In *Blue Ridge*, the administrative law judge found the employer violated 29 C. F. R. § 1926.453(a)(2) (the construction standard identical to 29 C. F. R. § 1910.67(b)(2))

when it attached a hook and sling to an aerial lift and used it to carry steel. *Blue Ridge* is an unreviewed case and not precedential, but the judge's reasoning in that case is sound. The employer in *Blue Ridge* argued attaching the hook and sling to the aerial lift was not a modification because "it was temporary and did not involve any fundamental or lasting alteration to the lift." The judge rejected this argument, finding "the standard does not distinguish between temporary or permanent modifications," and noting the manufacturer "specifically prohibits attaching an overhanging load to any part" of the lift. *Id. at* 1524.

In its post-hearing brief, Jesco asserts the only other reported case citing 29 C. F. R. § 1926.453(a)(2) is another unreviewed case, *B & L Drywall & Acoustical, Inc.*, 20 BNA OSHC 1430 (No. 03-0152, 2003). In that case, the company had replaced the damaged top rail of a scissor lift with a metal bar. The administrative law judge vacated the item, finding the replacement of the top rail with a metal bar was not a modification. Jesco contends *B & L Drywall* supports its position, arguing, "If replacing the top guardrail is not a modification to the lift, it is difficult to see how resting an angle on the guardrail is" (Jesco's brief, p. 6). Again, Jesco's focus is too narrow. The judge in *B & L Drywall* explicitly stated why he vacated the item: "Although there is no evidence that the manufacturer certified the change, the metal strip was not a modification 'for uses other than those intended by the manufacturer.' It replaced a top rail which was apparently removed during transportation." *Id. at 1436.* The replacement rail still functioned as a guardrail. When Jesco rested the beams on the guardrails, they no longer functioned as guardrails protecting employees for whom the lift was intended; the guardrails were modified to function as a transport system for materials that protruded 11.5 feet on each side.

The court determines Jesco's use of the guardrails to transport the beams was a field modification of the JLG aerial lift. This modification violated the terms of 9 C. F. R. § 1910.67(b)(2).

Employee Exposure

The alleged violation description of the amended citation asserts the modified use of the lift to transport the beams created "a danger of tipping and struck-by hazards." Jesco had five

employees on the site–two in the JLG lift, one in the Genie lift, and two on the ground, 30 to 40 feet from the JLG lift.

Jesco rested each beam, weighing 325 pounds and measuring 31 feet long, on the guardrails of the lift. Also in the vicinity were a Genie lift and a crane. Jesco argues that basket of the JLG lift never swayed or shifted, and its employees took care to ensure the basket remained level as they raised and lowered the beams. Jesco overlooks, however, the potential for the basket of the JLG lift to be tipped or struck by an outside force, causing the beams to fall.

When the boom of the crane struck the Genie lift, it started to tip over. Williams was unhurt. The JLG lift was in the same work area as the Genie lift. Had the boom of the crane struck either the JLG basket or one of the protruding ends of the beam, Jesco's employees would likely not be so fortunate. Nanney and Taylor, the employees in the JLG basket, were exposed to being struck by the beam as it shifted if the basket tipped. Tom and Will Beane, standing on the ground, were exposed to being struck by the beam if it slid off of the guardrails as the basket tipped.

Jesco asserts the employees on the ground were outside the zone of danger because they were standing 40 feet from the JLG lift. Jesco is cutting off the lower end of the estimate given by Beane, who, when asked how many feet he was from the JLG lift, replied, "I'm going to say 30 to 40" (Tr. 101). At its highest working level, the JLG was extended to allow employees to reach the ceiling, 31.5 feet above the floor. It was carrying a 31 foot long beam. If the JLG lift was knocked over, the beam could have fallen on employees standing 30 feet away.

As Rust explained, the zone of danger is not limited to the area directly below the basket of the lift:

> What's the zone of danger? The zone of danger is not just straight down. Because if this object is sitting on these guardrails, remember, it's 11½ feet on each side. If it happens to slide this way [witness demonstrating], and that basket can be rotated, shifted, if it slid this way, now you're getting–that beam is coming out this way, and it's 31½ feet.
> When it falls, it's going to fall and bounce. There's no real way of defining who is in the zone of danger. For a direct straight-down fall, you can define that, but we don't know where that beam was going to end up.

(Tr. 68).

The Secretary has established Jesco's employees were exposed to the hazard of being struck by the transported beams.

Employer Knowledge

Tom Beane was Jesco's onsite superintendent. Before removing the beams, Beane discussed with his crew members how best to accomplish the assignment. Together they decided to use the JLG aerial lift to transport the damaged beams from the ceiling to the floor, and then to transport the new beams from the floor to the ceiling. Beane had actual knowledge of the violative conduct. As superintendent, Beane's actual knowledge is imputed to Jesco. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

The Secretary has established Jesco violated 29 C. F. R. § 1910.67(b)(2). She 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 violative condition. The violative condition created the hazard of the aerial lift tipping over and crushing employees in the basket or on the ground, and the hazard of the beam shifting and crushing employees in the lift or falling on employees on the ground. 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 disclose the number of workers employed by Jesco. The company has no history of OSHA violations for at least the three years prior to the instant citation. Jesco demonstrated good faith in this proceeding.

The gravity of the violation is moderately high. Jesco's crew took care to center the beam, using a tape measure to ascertain the correct measurements. The record establishes Jesco's crew members were conscientious and attentive to details of their assignment. The decision to use the aerial lift to lower the beams was incorrect, but the crew members did not compound the error with a careless approach to the task. It is determined a penalty of $ 2,500.00 is appropriate.

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 Citation No. 1, alleging a serious violation of 29 C. F. R. § 1910.67(b)(2), is affirmed, and a penalty of $ 2,500.00 is assessed.

____/s/_____
Judge Stephen J. Simko, Jr.

Date: November 22, 2010