SECRETARY OF LABOR, Complainant, v. AMERICAN STEEL ERECTORS, INC., and its successors, Respondent.	OSHRC DOCKET NO. 02-2026

APPEARANCES:

For the Complainant:
Aaron J. Rittmaster, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
David S. Johnson, Pro Se, American Steel Erectors, Council Bluffs, Iowa

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, American Steel Erectors (American), at all times relevant to this action maintained a place of business at the Omaha Convention Arena Center where it was engaged in roofing construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 29, 2002, following its receipt of an accident report, the Occupational Safety and Health Administration (OSHA) initiated an inspection of American's Omaha work site. As a result of that inspection, American was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest American brought this proceeding before the Occupational Safety and Health Review Commission (Commission). The case was designated for E-Z trial, but was removed to conventional proceedings upon the parties' representation that the case presented complex issues of law and fact. Prior to the parties' completion of discovery, American's counsel asked permission to withdraw, and American elected to proceed *pro se*.

On May 16, 2003, a hearing was held in Omaha, Nebraska. No briefs were requested. This matter is, therefore, ready for disposition.

Facts

It is not disputed that on the day of the incident from which the OSHA inspection arose, American employee Adam Brodahl was standing on an I-beam positioning metal decking when he fell from the beam through a hole in the metal deck. Brodahl was wearing an Ultra-Lok 50-foot retractable lifeline attached to a DBI/SALA swiveling roof anchor, which was attached to previously installed decking eight to ten feet back from the hole (Tr. 36-38; Exh. C-3, C-11, C-12). The lifeline broke, however, and Brodahl fell to the ground forty-seven feet below the deck.

OSHA Compliance Officer (CO) Darwin Craig testified that Brodahl's lifeline abraded as it slid across the unprotected I-beam (Tr. 36-38, 42). Craig testified that the cable should have been protected, or another type of fall protection system used (Tr. 58, 62-63). Craig had never before issued a citation for an employer's failure to protect the edges of an I-beam (Tr. 54).

Jeff Boxrud, a sales representative of DBI/SALA testified that carpeting or rubber padding could be used to protect the lifeline cable in cases where a retractable lifeline is used in flat roof steel erection (Tr. 74). However, Boxrud testified that he would not recommend using a retractable lifeline for fall protection on a flat roof such as the one at the Omaha Convention Center (Tr. 70, 83). Boxrud testified that he would recommend a restraint system, which keeps employees from going over the edge, and eliminates the possibility that the lifeline will become abraded on the sharp corner (Tr. 70-71, 79-80). According to Boxrud, a restraining line is typically used in conjunction with a horizontal lifeline in steel erection (Tr. 80, 85). The horizontal lifeline is normally mounted on shoulder height stanchions to limit the free fall distance, and eliminate the possibility of "swing falls" (Tr. 86). The user instruction manual for the swiveling roof anchor warns users to:

> Avoid working where the connecting subsystem (i.e. self retracting lifeline, full body harness, etc.) or other system components will be in contact with, or abrade against unprotected sharp edges. If working with this equipment near sharp edges is unavoidable, proteciton against cutting must be provided by using a heavy pad or other means over the sharp edge (Exh. C-11, p. 4).

James Drake, an ironworker and part owner of American Steel Erectors (Tr. 133), testified that it only takes an hour or two for his crews to lay a bundle of decking (Tr. 137-138). Two steel workers each hold an end of each sheet of steel and slide it across the previously laid panels, lapping the sheet over the last panel (Tr. 137-39). After four or five sheets are laid out, they are wind tacked before the leading edge is advanced (Tr. 138). Drake did not know that OSHA regulations required padding the edges of the steel, and could see no practical benefit in providing padding (Tr. 140, 148). According to Drake, padding the steel would make it difficult for his employees to walk on the steel (Tr. 150).

Ronald Oates, president and apprentice coordinator for Iron Workers Local 21, testified that he has never seen any contractor using padding or abrasion-resistant material to protect the edges of exposed steel (Tr. 96). He had never heard of a lifeline abrading and breaking on the unprotected edge of a steel beam (Tr. 98). Oates stated that protecting exposed steel during decking is infeasible because of the rate decking is laid. Padding would have to be removed as quickly as it was placed, so that the decking can be welded to the steel. Moreover, the steel would be unprotected during that period between the removal of the padding and the laying of the decking (Tr. 96, 99, 115). Oates testified that the fall protection he most often uses when decking is a retractable lifeline attached to a horizontal safety line running between two stanchions, which have been screwed into previously welded portions of decking (Tr. 97). Oates had seen, but never used a swivel mounted lifeline anchor (Tr. 102).

Doug Schneider, a private safety consultant (Tr. 116), testified that the swivel mounted anchor and retractable lifeline that American used on the Omaha work site was appropriate for its roof decking operation (Tr. 123). Schneider stated that he had never seen padding used to protect lifeline cables from abrasion (Tr. 117-18). He was unaware of any padding manufactured for that purpose (Tr. 118). Schneider testified that it was infeasible to install padding under the cited conditions, but also stated if there was a pad approved for the purpose, "probably they should use it" (Tr. 125).

Dave Johnson, the other owner, testified that in the three years he had been in the business, he had never heard of a retractable lifeline abrading and breaking on steel beams (Tr. 155).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.502(d)(11):

> American Steel Erectors, Inc. - Omaha Convention Center/Arena - Lifelines were not protected from cuts or abrasions. The retractable cable lifeline in use by the employee abraded along the edge of the steel beam when the employee fell from the metal decked area being installed. The cable broke allowing the employee to fall to the ground below.

The cited standard provides:

Lifelines shall be protected against being cut or abraded.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). There is no question in this case that the employee's lifeline was abraded on the structural steel during his fall. American argues, however, that it had no knowledge of prior accidents caused by the abrasion of a lifeline on structural steel and did not know that OSHA required protection against such damage. In effect, American argues that it could not reasonably have been expected to know that it was required by §1926.502(d)(11) to pad the structural steel on which it was working. American also maintains that protecting lifelines by padding the steel is both infeasible and would result in a greater hazard

Knowledge/Vagueness. The record establishes that American's owners supplied fall protection equipment for their employees, and were actually unaware of any possibility that the lifelines provided could become abraded by the structural steel. However, American cannot excuse its failure to comply with the cited standard by claiming ignorance of the need to protect its lifelines against becoming cut or abraded on the structural steel in the event of a fall. The Commission has held that the Secretary need not prove the employer had knowledge of a specific hazard, or that an accident was forseeable. It is well settled that the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the conditions in their workplace; *Ormet,*14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991).

Moreover, the Secretary takes the position that a reasonable employer should know that a lifeline can become abraded if an employee's fall brings his lifeline into contact with the sharp edge of a steel structure. The Secretary further contends that a reasonable employer should know that where a lifeline allows an employee to fall over an edge, that employee may swing at the end of his tether, further abrading and/or cutting the lifeline. In support of its contention, the Secretary points to DBI/SALA's user manual, which alerts users to the danger posed by sharp edges and swing falls.

29 CFR §1926.502(d)(11) requires that lifelines be protected against abrasion. The Commission has held that a standard is so vague as to be unenforceable if a reasonable person, examining the standard in light of the particular circumstances, can determine what is required. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 86-2059, 1993). Moreover, it has held that an employer has a duty to inquire into the requirements of the law. *Peterson Brothers Steel Erection Company*, 16 BNA

OSHC 1196, 1991-93 CCH OSHD ¶30,052 (No. 90-2304, 1993), *aff'd.* 26 F.3d 573 (5th Cir. 1994). In this case the manufacturer's instruction manual warns the user of the need to protect the lifeline from becoming cut or abraded with padding or some other means where the lifeline will come in contact with sharp edges. As noted by American itself, in the event of *any* fall at this work place, an employee's lifeline will probably come in contact with a sharp edge. In these particular circumstances a reasonable employer with access to the user manual should have been aware of the need to protect its employees' lifelines from cutting and/or abrasion in the event of a fall. This judge is constrained to find, therefore, that American had sufficient notice of its duty under the Act to render the cited standard enforceable.

Infeasibility. To establish the affirmative defense of infeasibility, an employer must show that: 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

The record establishes that literal compliance with the cited standard is infeasible. American established that there is no way to use the suggested precaution, *i.e.* padding the structural steel, without unreasonably disrupting the decking work to be performed. *See; Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991). However, American failed to carry its burden of showing that no alternative means of fall protection are available to its employees. The record establishes that horizontal lifelines are routinely installed during roof decking operations. American failed to rebut the Secretary's suggestion that a restraint system be used in combination with a horizontal lifeline. Because American failed to show that no alternative means of fall protection were available to it, the affirmative defense of infeasibility must be rejected.

Greater Hazard. In order to establish the affirmative defense of a greater hazard, the employer must show that: 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). Because this defense also requires American to prove that no alternative means of protection were available, it must also be rejected.

Serious citation 1, item 1 is affirmed.

Penalty

A penalty of $2,000.00 was proposed for this item. In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The proposed penalty in this matter was $2,000.00 (Tr. 43). Three or four employees were using the retractable lifelines to install decking and so were continuously exposed to the cited hazard (Tr. 38-40). The gravity based penalty was reduced by 60% due to American's small size (Tr. 43-44). Craig testified that no adjustment for history was provided as American was cited for a serious violation of the Act in the preceding three years (Tr. 44). No credit was given for good faith because of inadequacies in American's safety program, *see* item 2, below (Tr. 44). However, that American paid serious attention to its employees' safety is clear from the fall protection in use at the work site. American should be given credit for its good faith and willingness to accept its responsibilities under the Act. The fact that American did not foresee that its safety line would break and so did not choose an alternative means of fall protection does not establish bad faith. Accordingly, the penalty is reduced to $500.00 to reflect American's good faith.

Serious citation 1, item 2 alleges:

29 CFR 1926.503(a)(2)(ii):

> American Steel Erectors, Inc. - Omaha Convention Center/Arena - Employees were not adequately trained on the proper erection procedures for fall protection systems that were used. The erection of the retractable back from the edge of the work area allowed for the potential of abrading the cable against the edge of the steel in the event of a fall. This additional distance also allows an employee to free fall greater than 6 feet in the event of a fall.

Facts

At the hearing, Dave Johnson testified that American provided on-the-job training for its employees in the use of the fall protection system they provided (Tr. 157). American also trained employees in the proper way to set up the system (Tr. 157). Johnson admitted that American did not train its employees to provide padding on the structural steel, as it was not aware of any need for such protection (Tr. 158). Employees were not trained to recognize the hazard of swing falls (Tr. 158).

Discussion

Citation 1, item 2, charges American with failing to train its employees in the proper erection procedures for the fall protection systems that were used. The citation suggests that the improper erection of the system was responsible for creating the potential for abrasion in the event of the fall. The citation

further suggests that the improper erection of the system allowed employees to free fall more than six feet. There is no evidence in the record establishing that the swiveling roof anchor was improperly placed, or that the placing of the anchor would have prevented the system's automatic locking, or self-retracting feature to engage.

The Secretary clearly failed to prove the allegations made in this item. Accordingly this item is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1926.502(d)(11) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

2. Citation 1, item 2 alleging violation of 29 CFR 1926.503(a)(2)(ii) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: September 2, 2003