

SECRETARY OF LABOR,

Complainant,

v.

MARCUS CABLE ASSOCIATES, L.L.C.,

Respondent.

OSHRC DOCKET NO. 02-0966

APPEARANCES:

For the Complainant:

Chris Grier, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

David B. Jones, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Atlanta, Georgia

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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

At all times relevant to this action Marcus Cable Associates, L.L.C. (Marcus) maintained a place of business in Burleson, Texas, where it was engaged in providing and maintaining cable service. Marcus admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act. Marcus is a subsidiary of Charter Cable Operating Company, L.L.C., which is owned by Charter Communications Operating, L.L.C. , which is, in turn, held by Charter Communications Holding Company, L.L.C. (Tr. Vol. II, p. 10; Exh. R-19). The citation and complaint in this matter were originally issued to Charter Communications, Inc. (Charter). At the hearing, Marcus introduced testimony showing, *inter alia*, that Charter owns less than 50 percent of the holding company that owns Marcus (Tr. Vol. II, p. 9). As a result, the Secretary and Marcus entered into a stipulation identifying Marcus as the employer of the affected employees in this case, and requesting the substitution of Marcus Cable Associates, L.L.C. as the Respondent in this action. The parties' request to amend the caption in this matter is GRANTED, and will be reflected in this Decision and Order and in any further pleadings.

On April 5, 2002 Jurica Miskovic, fell to his death from the bucket of a Ford F-450 bucket truck. Following the fatality, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Miskovic's working conditions. As a result of that inspection, citations were issued to Miskovic's employer, now identified as Respondent Marcus Cable Associates, L.L.C. The citation alleges violations of the Act together with proposed penalties. By filing a timely notice of contest, Respondent

brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 14-15, 2002, a hearing was held in Dallas, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Aaron Villareal, a system technician with Marcus (Tr. Vol. I, p. 22), testified that he had lunch with Jurica Miskovic on April 5, 2002 (Tr. Vol. I, p. 24). Because Mr. Miskovic was finished with his calls for that day, he volunteered to help Villareal with the remainder of his repairs (Tr. Vol. I, p. 24). Villareal stated that Miskovic raised the bucket of his truck about 18 feet above the ground to work on an elevated cable (Tr. Vol. I, p. 25). Miskovic had been issued a full body harness and lanyard, but was not wearing them (Tr. Vol. I, p. 26). Villareal testified that Miskovic was a grown man, and made his own decisions. Villareal would not have presumed to tell him to wear his fall protection (Tr. Vol. I, pp. 51-52). Villareal turned away to stow a test line for Miskovic; when he turned around he saw Miskovic fall from the basket to the ground (Tr. Vol. I, pp. 26-27). Miskovic's harness was found in the tool bin of his truck after the accident (Tr. Vol. I, p. 53).

Villareal testified that when he was promoted to system technician, he received on-the-job training from more experienced technicians (Tr. Vol. I, p. 35). Villareal rode along on service calls, and observed the other technicians (Tr. Vol. I, pp. 35-36). Kenneth Trujillo, a system technician with Marcus Communications from October 2000 to August 2002 (Tr. Vol. I, p. 63), also testified that his training consisted solely of on-the-job training received during ride-alongs (Tr. Vol. I, pp. 75-76). Trujillo stated that the training he received covered splicing cable, balancing cable amplifiers, etc. He did not receive training in the safe operation of a bucket truck (Tr. Vol. I, p. 76). Villareal testified similarly, but stated that he was able to operate the truck without difficulty without the benefit of any formal training (Tr. Vol. I, pp. 35-36, 38). He stated that the hazards associated with operating a bucket truck, *i.e.*, energized overhead lines and fall hazards were common knowledge among service technicians (Tr. Vol. I, p. 39).

Though the danger of falling was well recognized, Villareal testified, full-body harnesses and safety lanyards were not provided to system techs until a fiber line was cut at the office, and Jerome Butler, a technical supervisor, observed all the techs working without appropriate fall protection (Tr. Vol. I, pp. 40, 44). After that incident, harnesses and bungee straps were issued to the techs (Tr. Vol. I, p. 40). Villareal could not recall the date harnesses were issued; however, Kenneth Trujillo testified that he received his harness approximately three months prior to Miskovic's accident (Tr. Vol. I, p. 67). Trujillo stated that up until that time he had to use his safety belt, which is used for climbing ladders and poles, while working

from his bucket (Tr. Vol. I, pp. 65-68). Trujillo stated that he repeatedly asked his supervisor, Duane Moment, for a harness, but was told that they were out of stock (Tr. Vol. I, p. 66).

Both Villareal and Trujillo testified that, after receiving harnesses, they were admonished at each regular Wednesday safety meeting to wear the fall protection (Tr. Vol. I, pp. 45-46, 68). Trujillo, however, testified that they were never shown how to use or inspect the body harness or body belt and strap (Tr. Vol. I, pp. 67-68). Moreover, both Villareal and Trujillo agreed that the technicians rarely wore fall protection prior to Miskovic's accident (Tr. Vol. I, pp. 50, 69, 71). According to both techs, it took longer to put on the harness than it did to complete most jobs, so the technicians did not bother to put on the harnesses and lanyards unless they were worried about being caught without them (Tr. Vol. I, pp. 51, 70-71).

John Vallejo, who worked as a line technician for Marcus until May or June of 2002, used a bucket truck to work on the main cable lines (Tr. Vol. I, p. 84-85). Vallejo stated that a body harness and lanyard were issued to his truck, but that he was never trained to inspect or to use them (Tr. Vol. I, pp. 88-89). Vallejo never used the body harness, which remained wadded up in his truck the entire time he worked for Marcus (Tr. Vol. I, pp. 89-90). Nor did Vallejo ever see the other technicians using body harnesses. He testified that there was not enough time for the techs to complete their routes if they took time out to put on the fall protection (Tr. Vol. I, p. 92).

Tony Shaw worked as a line maintenance technician for Marcus until January 2000 (Tr. Vol. I, p. 99). Shaw testified that a body harness and lanyard were issued with his 2000 F-450 Ford bucket truck (Tr. Vol. I, pp. 102-03). Though Shaw was not trained in the use of the body harness and lanyard, he understood that he was supposed to use them every time he went up in the bucket (Tr. Vol. I, p. 104).¹ Shaw testified that he wore the fall protection 95% of the time, but that on 5% of his calls, he was in too much of a hurry to get his work done to spend the time it took to don the equipment (Tr. Vol. I, p. 104). Shaw had, on occasion, seen other technicians working from aerial lifts without fall protection (Tr. Vol. I, p. 106).

Trujillo testified that no supervisory personnel ever saw him working without fall protection, because none ever came out to his job site (Tr. Vol. I, p. 70, 72). Villareal stated that Ervin Adams was the only supervisor to perform spot checks in the field (Tr. Vol. I, p. 29, 49). To his knowledge, Adams never saw him working from his bucket without his harness and lanyard on (Tr. Vol. I, p. 49). Mr. Vallejo,

¹ Respondent introduced an employee safety orientation sheet initialed by Shaw (Tr. Vol. I, p. 106-08). Shaw testified, however, that his supervisor had him initial the form without actually providing him with any safety training (Tr. Vol. I, p. 112).

however, was disciplined on February 21, 2002 after Ervin Adams saw him on a ladder without a safety strap or a hard hat (Tr. Vol. I, p. 94-96; Exh. R-12).

Ervin Adams, who was, during the relevant period, the system technical manager at Marcus (Tr. Vol. I, p.194), confirmed that technicians received mainly on-the-job training (Tr. Vol. I, p.195). More experienced technicians would show the apprentice techs how to perform whatever function was called for on a particular job (Tr. Vol. I, p. 195). Adams testified that the purpose of the regular Wednesday morning meetings was actually to discuss general concerns. The safety portion of the meetings was “thrown in” at the end of the meeting. Safety concerns, such as bee stings, might be discussed (Tr. Vol. I, p. 196). According to Adams, Marcus’ safety policy required that all employees be tied off when working from a bucket (Tr. Vol. I, pp. 200, 207). Adams did not know whether employees were actually provided with a written copy of the policy (Tr. Vol. I, p. 208). The policy was supposed to be communicated to employees during on-the-job training, and in meetings (Tr. Vol. I, pp. 200, 208). Adams did not go to safety meetings himself, however. According to Adams, that was the supervisors’ job (Tr. Vol. I, p. 202). Adams testified that he did check up on the technicians in the field, but stated that the purpose of his visits was not to check on safety (Tr. Vol. I, p. 196). Adams did occasionally stop to ask a technician to put cones out behind his truck, and Adams recalled observing Manuel Vallejo working without fall protection on February 21, 2002, which led to the disciplinary action against Mr. Vallejo (Tr. Vol. I, pp. 197-98).

Duane Moment, Miskovic’s supervisor (Tr. Vol. I, p. 212), could not recall who provided Miskovic with his on-the-job training (Tr. Vol. I, p. 213). Apprentice techs were assigned to whichever more experienced technician was working during that shift (Tr. Vol. I, p. 213). According to Moment, Miskovic’s training may or may not have included the proper use of a bucket truck, depending on what jobs he rode along on. If the work to be done was underground work, use of the bucket would not have come up (Tr. Vol. I, p. 213). Moment testified that the he only went out into the field when one of his technicians would call for support (Tr. Vol. I, p. 215). Because the technician knew when Moment was coming, he would always be wearing the appropriate personal gear, including fall protection (Tr. Vol. I, p. 215). Moment was not familiar with Marcus’ safety handbook, or with any specific safety rule requiring that safety belts be attached to the designated attachment point of the boom whenever an employee was working aloft from aerial equipment (Tr. Vol. I, pp. 223-24). Moment did attest that Manuel Vallejo’s disciplinary action was discussed in the February 27, 2002 Wednesday morning meeting (Tr. Vol. I, p. 222; Exh. R-4; *see also*, testimony of Ralph Varnado, Tr. Vol. I, pp. 255, 261). The sign in sheet for that meeting indicates that Jurica Miskovic was in attendance (Exh. R-4, p. 2).

Ralph Varnado, a supervisor at Marcus (Tr. Vol. I, p. 249), testified regarding an e-mail he received on Wednesday, March 27, 2002 (Tr. Vol. I, p. 251; Exh. R-3). The e-mail consisted of a memo regarding a Charter Communication employee who was observed by a MIOSHA inspector. The employee was working from a boom bucket without a harness or lanyard. The employee had an “Aerial Platform Permit,” and “[s]hould have known” better (Exh. R-3). The memo suggested that “you get a strong message out to you employees, safety meetings, additional safety training (if necessary) and Technical Supervisors QC safety visits to the employees in the field (sic).” (Exh. R-3). According to Varnado, the e-mail was posted in the meeting area at Marcus (Tr. Vol. I, p. 252). Varnado testified that the e-mail was discussed at the following April 3, 2002 Wednesday morning meeting (Tr. Vol. I, pp. 253, 260, 262). Jurika Miskovic’s signature appears on the sign in sheet for the April 3, 2002 meeting (Tr. Vol. I, p. 253; Exh. R-3, p. 3).

Mr. Varnado testified that he made trips into the field twice a week specifically to ensure that the men under his supervision were following safe work practices (Tr. Vol. I, p. 257). His men were generally aware that when he would be coming, and he never found any of them working without full-body harness and lanyard (Tr. Vol. I, pp. 257-59).

Technical supervisor Darrell Grubbs testified that he tried to get into the field approximately once a week to make sure his crew was working safely, or to offer them additional instruction (Tr. Vol. I, pp. 181-82). According to Grubbs, his men did not always know he would be coming (Tr. Vol. I, p. 182). Grubbs stated that he never observed any safety violations serious enough to warrant disciplinary action (Tr. Vol. I, p. 182).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1910.268(c):

- a) At the jobsite; Employees have not been certified to operate the bucket on the Ford F-450, model AT200A, serial number 0300BV6056, exposing employees to the hazard of falling out of the bucket to death.

The cited standard provides:

Training. Employers shall provide training in the various precautions and safe practices described in this section and shall insure that employees do not engage in the activities to which this section applies until such employees have received proper training in the various precautions and safe practices required by this section. . . . Where training is required, it shall consist of on-the-job training or classroom type training or a combination of both. The employer shall certify that employees have been trained by preparing a certification record which includes the identity of the person trained, the signature of the employer or the person who conducted the training, and the date the training was completed. The

certification record shall be prepared at the completion of training and shall be maintained on file for the duration of the employee's employment. . . .

Discussion

Respondent admits that employees were not certified to operate the bucket of the Ford F-450 (Tr. Vol. I, pp. 15-16). Respondent stipulates that the only questions to be litigated are: 1) whether the violation was properly classified as "serious," and 2) whether the proposed penalty of \$4,500.00 is appropriate (Tr. Vol. I, p. 16). Respondent argues that the mere failure to certify that an employee has been trained, where that employee actually received training, cannot, in itself, result in serious injury or death.

The citation at issue charges Respondent with failure to comply with the training requirements at §1910.268(c), as set forth above. The cited section requires that employees be trained in safe practices applicable to the telecommunications industry. The citation specifically refers to precautions necessary to prevent an employee from falling from the elevated bucket of the Ford F-450 bucket truck. It is clear from the evidence adduced at the hearing that Respondent's failure to produce any records certifying that Mr. Miskovic received any training initially led to Marcus' citation under §1910.268. Based on the evidence adduced at the hearing, however, it is clear that Complainant intended to charge Marcus with failing to adequately train its employees to use fall protection, as is required under the cited section. The issue of whether Jurica Miskovic was adequately trained to use a harness and lanyard when working from the bucket truck was also fully addressed by Respondent. As the training issue was fully tried by the parties, it is properly before this judge.

The evidence shows that Marcus provided on-the-job training to new system techs, having them work with more experienced technicians. None of the testimony, however, establishes that training in fall protection was included in that training. It is clear from the record that safety training was not the main focus when new technicians rode along with more experienced techs. The main purpose of every trip out was to accomplish the work assigned to the experienced technician. Any training the apprentice technician received was incidental to the specific job to be performed. Thus a new technician might, or might not receive instruction on the use of fall protection, depending on the nature of the jobs he rode along on.

Nonetheless, the record establishes that Marcus did have a safety policy requiring the use of harnesses and lanyards while working from a bucket, and that the policy was communicated to employees at regular Wednesday morning meetings. Jurica Miskovic was present for at least two meetings where the use of fall protection was discussed. Though uniformly eschewing the rule, the testifying employees were aware of its existence. The Commission has recently held that an employer's failure to enforce compliance

with work rules on the job does not establish a failure to train. *N & N Contractors, Inc.* 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000). In this case, the record does not establish that Marcus failed to provide the training required under §1910.268(c), only that Marcus failed to effectively enforce that training. Nonetheless, as Marcus admits, Marcus was in technical violation of §1910.268 in that it failed to certify each employee's training.

Penalty

This judge agrees that a failure to certify training that was, in fact, received by employees, is not likely to result in either serious injury or death. The citation, therefore, will be affirmed as an "other than serious" violation. It is well established that in determining an appropriate penalty, the gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Because there is little probability that the proven violation would result in injury to employees, a penalty of \$500.00 is deemed appropriate, and is assessed.

Serious citation 1, item 2 alleges:

29 CFR 1910.268(e):

- a) At the jobsite; Employer did not ensure that employees are wearing safety harnesses whenever inside the bucket of the Ford F-450, model AT200A, serial number 0300BV6056, exposing employees to the hazard of falling out of the bucket to death.

The cited standard provides:

Tools and personal protective equipment. Personal protective equipment, protective devices and special tools needed for the work of employees shall be provided and the employer shall ensure that they are used by employees. . . .

Facts

Respondent admits that the cited standard applies, that it was violated, and that Mr. Miskovic was exposed to the hazard. Marcus denies, however, that it had knowledge of the violation. Marcus further raises the affirmative defense of unpreventable employee misconduct (Tr. Vol. I, p. 16-17).

Discussion

Knowledge. In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994); *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). Constructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards. *New York State Elec. & Gas Corp.* 88 F.3d 98, (2nd Cir. 1996). The fact that [the employer]

may not have known of the specific instance of violative conduct at the time it occurred does not mean that that conduct was unpreventable. *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991). Reasonable diligence includes adequate supervision of employees as well as the formulation and implementation of work rules and training programs designed to ensure that employees perform their work safely. *See; Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1991-93 CCH OSHD ¶29,344 (No. 86-1087, 1991). It is clear that Marcus' safety program was not designed to ensure that its employees utilized fall protection unless a supervisor would actually be watching. Rather the evidence establishes that Marcus' fall protection program was uniformly ignored by its employees, *unless*, a technician knew that a supervisor would be at his work site. Unanimity of noncomplying conduct by all employees strongly suggests ineffective enforcement *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Marcus could easily have instituted measures designed to discover violations of the fall protection rules, such as requiring supervisory personnel to conduct regular surprise inspections of technicians performing aerial work *See, Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). Supervisors made virtually no unannounced inspections, and, consequently Marcus remained unaware that employees eschewed the use of fall protection. The Secretary has established that Marcus' constructive knowledge.

Employee Misconduct. To prove that a violative condition resulted from unpreventable employee misconduct, the employer must show that it had a work rule that effectively implemented the requirements of the cited standard and that the work rule was adequately communicated and effectively enforced. *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH OSHD ¶29,344, p. 39,452 (No. 86-1087, 1991). The defense fails here for the same reason that Marcus was found to have constructive knowledge of the violation. *See, Danis Shook*, 19 BNA OSHC 1497, 2001 CCH OSHD ¶32,397 (No. 98-1192, 2001). Marcus had a work rule, but it did little to implement or enforce the rule. Therefore, the defense fails.

Penalty

Respondent stipulates that, should a violation be found, the classification and proposed penalty are appropriate (Tr. Vol. I, p. 17). The proposed penalty of \$4,500.00 is, therefore, affirmed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1910.268(c) is AFFIRMED as an “other than serious” violation and a penalty of \$500.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of 29 CFR §1910.268(e) is AFFIRMED as a serious violation and a penalty of \$4,500.00 is ASSESSED

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: March 10, 2003