United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. MARINE TERMINALS CORPORATION, Respondent.	OSHRC DOCKET NO. 05-1031

APPEARANCES:

For the Complainant:
Susan Seletsky, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For the Respondent:
Jeffrey M. Tannenbaum, Esq., Joshua M. Henderson, Esq., Nixon Peabody LLP, San Francisco, California

Before: Administrative Law Judge: Sidney J. Goldstein

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, Respondent, Marine Terminals Corporation (MTC), was engaged in marine cargo handling on board the M/V Ever Deluxe, which was berthed at the Evergreen terminal, Terminal Island, California (Tr. 29). MTC admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On January 31, 2005, an MTC employee was killed during loading operations on the M/V Ever Delux. In response to the reported fatality, the Occupational Safety and Health Administration (OSHA) initiated an investigation of the incident. As a result of its investigation, OSHA issued a citation alleging violations of the longshoring standards at 29 CFR Part 1918. By filing a timely notice of contest MTC brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

The hearing was held in Los Angeles, California on January 25, 2007. Briefs have been submitted on the issues and this matter is ready for disposition.

Alleged Violation of §1918.81(k)

Serious Citation 1, Item 1 alleges:

29 CFR 1918.81(k): The employer did not require employees to stay clear of the area beneath overhead drafts or descending lifting gear:

a. On the marine vessel Ever Deluxe, the employer did not require the employees to stay clear of the descending 12-ton spreader bar. This resulted in the death of an employee on January 31, 2005. The employee was crushed between the spreader bar and a container top.

The cited standard provides:

Subpart H–Handling Cargo
§1918.81 Slinging
(k) The employer shall require that employees stay clear of the area beneath overhead drafts or descending lifting gear.

Facts

On January 31, 2005, Raymond Ponce was using a gantry crane fitted out with a spreader, or beam, to load containers from the dock onto the deck of the M/V Ever Deluxe (Tr. 114). Ponce's practice was to drop the crane's spreader on top of the targeted container. Once the spreader grabbed the container and Ponce got the go-ahead, he lifted the container into its assigned spot (Tr. 75-76, 119). Generally, the corners of the containers were fitted out with "cones," interlocking devices which connect the containers and secure them to the deck or to each other (Tr. 89-90, 155). On January 31, 2005, Ponce discovered that some of the previously loaded containers had been stacked improperly and needed to be moved (Tr. 148). Ponce needed someone to unlock the cones holding these containers and called, by radio, for assistance (Tr. 89, 100, 149). Matt Petrasich, a hatch boss, responded to Ponce's call (Tr. 101, 210). After they successfully unlocked and relocated several containers, Petrasich radioed to Ponce: "Hold on, I'm taking care of these cones." (Tr. 102, 117). Ponce could not see Petrasich, but believed he was on the deck, unlocking the bottom of the one-high containers (Tr. 105, 117, 119). Ponce picked up the last freed container, and held it, suspended, waiting for some further communication from Petrasich (Tr. 102, 105). Some radio chatter distracted him, and some period of time elapsed before Ponce assumed Petrasich was finished unlocking the cones, and set down the container he had been holding suspended. Ponce then dropped the spreader onto the next container (Tr. 102-06). When Ponce realized that container was still locked in place, he looked up and noticed Petrasich lying on top of the container (Tr. 106).

No one observed the events that resulted in Petrasich's death (Tr. 52). Ponce testified there was no reason for Petrasich to be on top of the container (Tr. 116-18). Cones are generally unlocked with a

pole (Tr. 109-10). Someone standing on the fixed catwalks, or gangways, running along the sides of the bays can knock the cones from the sides of the containers with the pole (Tr. 110, 150, 152). In the event a cone cannot be removed from the catwalk, the crane is supposed to be rigged with a man-basket (Tr. 110). Ponce is then to lift a "swingman" to the top of the container, where he can access the area after tying off to the basket with fall protection gear stored in the basket for that purpose (Tr. 110-11, 172).

William Wilson was the Southern California area health and safety manager for MTC at the time of the accident (Tr. 126). Wilson was not at the M/V Ever Delux worksite on January 31, 2005; however, he also testified that there was no reason for Mr. Petrasich to be on the top of the container to unlock cones (Tr. 149-50, 171). According the union's contract with MTC, a swingman should have been assigned to unlock the cones (Tr. 172; See also, testimony of Edward Alexander, Tr. 213). Wilson speculated that Petrasich, in a hurry to correct the mis-stow, may have removed two cones on the top of the container himself. Then, to avoid walking down the gangway, climbing down a ladder and crossing the bay to access the other side of the container, he may simply have climbed over the gangway's 36-38" safety railing, and jumped the gap between the gangway and the container onto the container top (Tr. 150-153, 172; Exh. C-17G). He likely was attempting to walk across the container to remove the other two cones when he was struck by the spreader (Tr. 150-53; See also, testimony of Ramos, Tr. 37-40; Alexander Tr. 214). Wilson stated that in accessing the container top, Petrasich improperly placed himself within the bight, or pinchpoint, between the spreader and the container (Tr. 152, 156-57).

David Ramos, a Compliance Officer (CO) with OSHA, testified that MTC has an average written safety and health program, which was communicated to employees and was enforced (Tr. 69-70). MTC's safety program incorporates safety rules promulgated by the Pacific Maritime Association, *i.e.* the Pacific Coast Marine Safety Code (PCMSC). The PCMSC cautions workers to avoid the bight (Tr. 115-16; Exh. R-2).[1] Ponce was well aware of the rule, and constantly told people not to stand within the bight (Tr. 116). William Wilson testified that, shortly after he was hired, he received a verbal reprimand from a union representative at the Evergreen facility for standing under the path of the gantry crane (Tr. 171). Petrasich

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[1] The PSMSC, Rule 658, Section 6. Duties of Employees and Genral Safety Rules states:

> While installing or removing cones from containers, employees shall not position themselves in the bight, where they could be injured by the tractor wheels, container, chassis or other equipment (Exh. R-2, R0025, p. 36).

The identical rule appears at Rule 1622, Section 16. Container Terminal Safety Rules. (Exh. R-2, R0058, p. 101).

received safety training covering the rules contained in the PCMSC when he was promoted to hatch boss, four to five years prior to the accident (Tr. 159-60; Exh. R-5). Petrasich went through the eight-hour safety training course again on April 14, 2004 (Tr. 160, 162; Exh. R-6). According to CO Ramos, Petrasich, as a hatch boss, would have known of the PCMSC's rules prohibiting working under loads (Tr. 47, 59). The need to avoid the bight was common knowledge among longshore workers (Tr. 171).

Wilson was responsible for the training of MTC's newly hired employees, and for providing ongoing training in PCMSC rules and OSHA requirements (Tr. 127, 130, 139-41). He also performed compliance inspection audits at MTC's facilities (Tr. 127, 130). Wilson and his staff performed several surprise inspections each week (Tr. 131-32). Larger facilities, such as the Evergreen Terminal, were audited at least three times a month (Tr. 132). The inspector checked to ensure that each shift began with a foreman-led safety talk, and then looked for violations of a prescribed number of possible violations of MTC's safety program (Tr. 131, 136-38; Exh. R-3). Specifically, the inspector checked to assure that employees were staying clear of overhead and/or unstable loads (Tr. 138; Exh. R-3).

Violations observed during inspections were immediately corrected, and offenders were verbally warned (Tr. 133). Though MTC had a plan for progressive disciplinary action (Tr. 157-58),[2] Wilson testified that repeat violations were rare (Tr. 133). After the January 31, 2005 accident, Wilson took part in a corrective action review, after which supervisory personnel were instructed to include a discussion specifically about bight hazards in their daily gangway talks (Tr. 146, 164-65)

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, (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, 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 condition). *Atlantic Battery Co.,*16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

Applicability. Citation 1, item 1 cites a violation of §1918.81(k), which states: "The employer shall require that employees stay clear of the area beneath overhead drafts or descending lifting gear." The cited standard falls under **Subpart H–Handling Cargo. §1918.81 Slinging**. Slinging is not defined within the standard; however, Respondent maintains it refers only to the hoisting of break bulk cargo. It

[2] Under the collective bargaining agreement, repeated or serious safety violations warranting a written complaint are submitted to the Pacific Marine Association. The complaint is sent to arbitration for disciplinary action. Any prescribed action is subject to an appeal process (Tr. 157-58).

is undisputed that MTC was engaged in containerized cargo operations (Tr. 52-53, 130). Containerized cargo operations are specifically addressed under **§1918.85 Containerized cargo operations**. While both sections contain prohibitions against working beneath the load, (See, §1918.85(e) *Suspended containers.* The employer shall prohibit employees from working beneath a suspended container.), only the subsection on slinging specifically prohibits employees working under descending lifting gear. Respondent argues that the Secretary never intended the prohibition against working under lifting gear to extend to container operations, citing §1918.81(j), which states that "intermodal containers shall be handled in accordance with section 1918.85."

While the treatment of containerized cargo operations under a separate heading introduces some ambiguity, the Commission has previously rejected the contention that the scope of a standard is necessarily limited by its heading. The Commission noted that headings and titles, although useful tools of reference, cannot be used to limit or alter the plain meaning of the text contained in statutes and regulations. *Constructora Maza, Inc.*, 6 BNA OSHC 1208, 1211, 1977-78 CCH OSHD ¶22,421 at pp. 27.037-38 (No. 12434, 1977). In this case, §1918.81(j) may be read as directing the reader to a subset of slinging, *i.e.*, the slinging, or hoisting of intermodal containers, which requires *additional* regulation. Under this reading, subparagraph (k) which plainly requires that employees stay clear of the area beneath descending lifting gear, would remain applicable to all cargo handling. As the parties agree it is hazardous for employees to place themselves in the bight, *i.e.*, between the container and the descending lifting gear, defining the hoisting of intermodal containers as a subset of slinging better effects the purpose of the standard. The cited standard is found to apply to the cited conditions.

Employee access to the violative condition. It is undisputed that Petrasich was positioned below the descending spreader when he was killed.

Employer 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. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). That the employer may not have known of the specific instance of violative conduct at the time it occurred does not mean 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).

Moreover, the knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Id.* Whether Petrasich's knowledge of his own misconduct may be imputed to MTC depends on whether the record establishes that his failure to follow proper procedures was unpreventable, *i.e.*,

whether MTC had relevant work rules that it adequately communicated and effectively enforced. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).

In this case, no one saw Petrasich access the top of the cited container. Both Ponce and Wilson testified Petrasich did not need to be on top of the container to unlock cones; cones could be removed with a pole from the safety of the gangway (Tr. 116-18, 149-50). Cones which cannot be removed in this manner are to be retrieved by a swingman, who accesses the container from the gantry crane's man-basket using appropriate fall protection (Tr. 110-11, 172). MTC has work rules prohibiting jumping onto stowed containers (Tr. 174), work atop containers without fall protection (Tr. 174), and placing one's self within the bight (Tr. 115-16, 171). CO Ramos testified that MTC had an adequate written safety program which was communicated to employees and enforced. Petrasich completed an eight hour safety training course in April, 2004 (Tr. 162). CO Ramos testified that Petrasich would have been aware of the prohibition against working under loads (Tr. 47, 59). Petrasich had never been observed working in an unsafe manner during regular safety audits (Tr. 169-75).

Complainant argues that Petrasich's misconduct was forseeable in spite of MTC's safety program. Complainant argues MTC should have been aware that employees were not adhering to PCMSC rules and regulations. During a labor dispute in 2001, employees effected a work slowdown by insisting on strict adherence to the rules and regulations of the PCMSC (Tr. 112; 176-78). The Secretary posits both that the slowdown was exclusively caused by employee adherence to safety rules, and that the return to normal production after the labor dispute was settled must have resulted from employees disregarding those same rules and regulations.

The Secretary's argument is unpersuasive. It simply cannot be inferred that the 2001-02 slowdown was solely the result of employee observance of safety rules.[3] Likewise, the increase in productivity following MTC's settlement of the labor dispute cannot be solely attributed to decreased observance of safety rules.

Complainant points out that MTC produced no evidence of any written disciplinary actions. Complainant maintains that the absence of written reprimands reflects a failure of enforcement, which led to employees shortcutting safety rules.

[3] William Wilson testified that during the labor dispute vehicle drivers would stop work until a truck dome light was replaced (Tr. 176-78).

There is no evidence that, prior to this accident, MTC was aware employees were repeatedly ignoring safety rules.[4] Under MTC's system of progressive discipline, only repeated violations of safety rules require a written reprimand. Wilson testified that regular audits did not turn up repeated violations warranting written complaints. As CO Ramos did not find any inadequacies in MTC's enforcement of its safety program, Wilson's testimony is credited.

The majority of the courts of appeals that have considered the issue have held that where, as here, a supervisor was acting outside the scope of his supervisory responsibilities when the violative conduct occurred, the Secretary must show defects in the employer's safety program that should have provided the employer with notice its program is defective. *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 355 (3d Cir. 1984); *Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. OSHRC*, 594 F.2d 396, 401 (4th Cir. 1979). Given the adequacy of MTC's work rules and training, as well as its regular inspections, there can be no finding that MTC had constructive knowledge its hatch boss would knowingly place himself in the bight, in violation of a basic tenet of the longshoring trade.

On this record, there has been no showing of employer knowledge, and this item is dismissed.

Alleged Violation of §1918.85(g)

Serious Citation 1, Item 2 alleges:

29 CFR 1918.85(g): A safe means of access was not provided for each employee required to work on the top of an intermodal container:

a. On the marine vessel Ever Deluxe, a safe means of access was not provided and ladders were not used to gain access to container tops, exposing employees to fall hazards of at least 8.5-feet.

The cited standard provides:

(g) *Safe container top access*. A safe means of access shall be provided for each employee required to work on the top of an intermodal container. Unless ladders are used for access, such means shall comply with the requirements of §1917.45(j) of this chapter.

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[4] The testimony of dock boss Edward Alexander that longshoremen engage in prohibited practices, including the practice of stepping onto the containers from the catwalks to remove cones (Tr. 214-16), cannot establish MTC's knowledge of the cited conditions, as Alexander did not work at the Evergreen facility at or around the time of the cited violation.

The testimony of Dan Imbagliazzo is, likewise, not probative on this issue. Imbagliazzo, a crane operator, opined that MTC's employment of one, rather than two, dock bosses resulted in a more hazardous work place (Tr. 223-24). It is undisputed, however, that the hatch boss, not the dock boss, is responsible for the crane operations (Tr. 86-87, 163, 221).

Facts

Ramos testified that when he inspected the M/V Ever Delux on February 1, 2005, he did not observe any ladders, and was told there were no ladders with which to access the top of containers, which are 8'6" high (Tr. 37-38, 61). In the absence of ladders, an employee attempting to access the container tops from the catwalk could fall into the gap between them sustaining serious injuries (Tr. 40).

It is undisputed that there were only fixed ladders in the bay where Petrasich was working (Tr. 151, 153-54). However, there were ladders on board the ship (Tr. 175). Moreover, Wilson testified that Petrasich was not required to work on top of intermodal containers. Cones can be safely unlocked from the gangways (Tr. 174). Cones which cannot be unlocked from the gangways are supposed to be referred to swingmen, who can safely access the top of the container from the crane's man-basket (Tr. 149-50, 156, 172). Ramos testified that Petrasich would have been aware of MTC's safe access rules (Tr. 59), and stated that had Petrasich been working "according to rules and regulations, the crane operator would have picked him up with the crane and put him on top of the container" (Tr. 42). Wilson never observed longshoremen accessing containers unsafely (Tr. 174).

Discussion

Though the fixed ladders could not be used to access container tops, ladders were available for use. The evidence establishes that Petrasich was not required to work atop container; however, a safe means of access was available to employees such as swingmen, who are required to work on top of intermodal containers.

Because MTC had work rules addressing safe access to container tops that were adequately communicated and effectively enforced, there can be no finding of employer knowledge.

This violation is dismissed.

Alleged Violation of §1918.85(j)(1)(iii)

Serious Citation 1, Item 3 alleges:

29 CFR 1918.85(j)(1)(iii): The employer did not ensure that each employee on top of a container was protected from fall hazards by a fall protection system meeting the requirements of paragraph (k) of this section:

a. On the marine vessel Ever Deluxe, there was no fall protection for employees on container tops to release the containers, exposing employees to falls of at least 8.5-feet.

This violation was not related to the accident of January 31, 2005

The cited standard provides:

(j) *Fall protection*–(1) *Containers being handled by container gantry cranes. . . .* (iii) The employer shall ensure that each employee on top of a container is protected from fall hazards by a fall protection system meeting the requirements of paragraph (k) of this section.

Facts

CO Ramos testified that Petrasich was not wearing any personal protective equipment (PPE) at the time of the accident (Tr. 41). Without fall protection, Petrasich was exposed to falls from three unprotected sides of the subject container (Tr. 44). MTC stores fall protection gear in the gantry crane's manbasket, and requires its use (Tr. 60-61, 173-74). It is uncontroverted that Petrasich knew he could have utilized the basket and tied off to the crane's basket and walked across the container safety (Tr. 42, 59, 173). Wilson never saw longshoremen working atop containers without fall protection (Tr. 173).

Discussion

MTC provided fall protection equipment, and had work rules requiring its use when accessing container tops. The evidence establishes the rules were adequately communicated and effectively enforced. There can, therefore, be no finding of employer knowledge.

This violation is dismissed.

Alleged Violation of §1918.103(a)

Serious Citation 1, Item 4 alleges:

29 CFR 1918.103(a): The employer did not ensure that each affected employee wore a protective helmet when working in areas where there was a potential for injury to the head from falling objects.

a. On the marine vessel Ever Deluxe, the employer did not ensure employees wore hard hats, exposing employees to the hazard of being struck by the container crane spreader bar.

This violation was not related to the accident of January 31, 2005

The cited standard provides:

The employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects.

Facts

Petrasich received a hard hat during his safety training (Tr. 165-66). He had never been observed not wearing his hard hat when he was required to (Tr. 170). Yet no hard hat was recovered during the accident investigation (Tr. 45). Ramos testified that Petrasich's hair was combed (Tr. 66), and noted that some longshoremen don't like to use their hard hats (Tr. 45-46).

It is undisputed that Petrasich was hit in the head with the spreader (Tr. 52). Wilson testified that the spreader knocked Petrasich fifty or sixty feet in the air (Tr. 170).

Discussion

Under the circumstances described in the record, it is possible that Petrasich may have been wearing a hard hat, which was subsequently knocked overboard. The Secretary has not shown, by a preponderance of the evidence, that Petrasich was not wearing a hard hat. This item is dismissed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of all issues have been made above. All proposed findings of fact inconsistent with this decision are hereby denied.

ORDER

1. Serious citation 1, item 1, alleging violation of §29 CFR 1918.81(k) is VACATED.
2. Serious citation 1, item 2, alleging violation of §29 CFR 1918.85(g) is VACATED.
3. Serious citation 1, item 3, alleging violation of §29 CFR 1918.85(j)(1)(iii) is VACATED.
4. Serious citation 1, item 4, alleging violation of §29 CFR 1918.103(1) is VACATED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated:May 24, 2007