UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
ROG'S, INC.
Respondent.

OSHRC DOCKET
NO. 92-2783

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 30, 1993. The decision of the Judge will become a final order of the Commission on August 30, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 19, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Roy H. Darling, Jr.

Date: July 30, 1993

Ray H. Darling, Jr.
Executive Secretary

/bb

DOCKET NO. 92-2783

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Roger A. Hedderick, President
Rog's Inc.
P.O. Box 1026
Erie, PA 16512

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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COM (202) 606-5100
FTS (202) 606-5100

FAX:
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-2783
ROG'S, INC.,	:	
Respondent.	:	

APPEARANCES:

H.P. Baker, Esq.
Office of the Solicitor of Labor
Philadelphia, Pennsylvania
For Complainant

Roger A. Hedderick
President, Rog's Inc.
Erie, Pennsylvania
Pro-Se

BEFORE: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, Rog's Inc. ("Respondent") was issued one citation alleging three serious violations of the Act relating to the design, construction, and use of a device suspended from a crane which was used to lift personnel into working positions. The

violations were alleged to be serious and penalties of $1400 were proposed for each. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on June 17, 1993, in Erie, Pennsylvania. No affected employees sought to assert party status. Both parties specifically waived their right to file post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in crane rigging and erection work. It is undisputed that at the time of this inspection Respondent was engaged in the removal of an unused smoke stack. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent in an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

All of the standards cited as having been violated by Respondent are subparts of the standard at 29 C.F.R. § 1926.550(g). According to the statement of scope and applicability,

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[1] Title 29 U.S.C. § 652(5).

subsection (g) ". . .applies to the design, construction, testing, use and maintenance of personnel platforms, and the hoisting of personnel platforms on the load lines of cranes or derricks."

There is significant disagreement as to whether the device lifted by a crane and in which an employee sat and performed work was a "personnel platform" or a "boatswain's chair (Tr. 59-61, 103). While no definition of personnel platform appears in the cited standards, the CO was of the opinion, and the Secretary urges as a reasonable interpretation of his standards, that § .550(g) be held to apply to the steel frame device in which one employee, in a seated position, was lifted by crane. Respondent's president, and its only witness, Roger A. Hedderick, knows the device as a boatswain's chair (Tr. 75). The Construction Safety Standards, however, define a boatswain's chair as a seat "supported by slings . . . ," 29 C.F.R. § 1926.452(b)(2) (Tr. 61-2)[2] With all due respect to Mr. Hedderick's many years of experience in the business, as a reasonable interpretation of his own standards, the Secretary's interpretation is accepted. Accordingly, I find that the device which is the subject of the citation in this case is a "personnel platform" for the purposes of the cited standards.

Item 1 alleges related violations regarding the crane claimed by the Secretary to have been used to lift the man-chair.[3] These items present an additional issue as to the applicability of the cited standards. There is significant, credible evidence supporting Respondent's defense (Tr. 59) that the crane cited was not the crane which, in fact, was used to lift the personnel platform. The CO inspected the work site after that part of the operation involving the personnel platform had been completed (Tr. 16). She claimed that she relied on the foreman's identification of the crane which she inspected and photographed (Exs. G-2 & 3) as the one which was used to lift the employee (Tr. 20-21).

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[2] See also 29 C.F.R. 1926.502(e), defining "platform" in part as, "[a] working space for persons, elevated above the surrounding floor or ground level."

[3] Sub-Item 1a alleged a failure to comply with 29 C.F.R. § 1926.550(g)(3)(ii)(B), in that the "[c]rane used to lift employee in man-chair did not have a device to indicate the boom's extended length. Sub-item 1b alleged a failure to comply with 29 C.F.R. § 1926.550(g)(3)(ii)(B), stating that the "[c]rane used to lift employee in man-chair was not equipped with an anti-two-blocking device."

Respondent maintains that the crane photographed and cited was not the crane which was used to lift the employee (Tr 73-4, 95-6).

I credit Mr. Hedderick's testimony. His intimate knowledge of his own business, especially since it was his sons who were at this work site, warrants more weight than does the basis of the compliance officer's testimony. Moreover, although unskilled in the law, I find Mr. Hedderick to be a credible witness. He was forthright and his demeanor at the hearing was that of a sincere person giving honest, if overly detailed, testimony. I reject Complainant's summary argument as to his credibility. Although a combative relationship had developed between Mr. Hedderick and the compliance officer, his testimony contained the factual details characteristic of a witness with full knowledge of the factual matters to which he testified. It is not at all clear, as Complainant claims, that Mr. Hedderick made any kind of deliberate misstatement or misrepresentation as to whether there was road access to the worksite. Claiming, as Complainant does, that Respondent reversed or changed his testimony in this regard is not clearly supported by the record. I find that the crane which the compliance officer photographed and cited was not the crane used to lift the employee. Thus, Complainant has not demonstrated that Respondent failed to comply with the standards cited in sub-items 1a and 1b of the citation.

Accordingly, item 1, including both sub-items, is VACATED.

Item 2 of the citation, with five sub-items, deals with the design and manufacture of the personnel platform.

The compliance officer, on second hand, untested evidence, reached the conclusion that the chair had been made by Respondent (Tr. 35).[4] I find otherwise. Mr. Hedderick testified that he purchased the man-chair along with a crane (Tr. 75). Respondent does not know who or when the chair was made. Nonetheless, sub-item 2a of the citation alleges a failure to comply with the cited standard because Respondent "did not produce evidence that the home-made man-chair was designed by an engineer or person competent in structural design," while sub-item 2d alleges that did not comply with that standard when it

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[4] See, p. 8, Infra.

"did not produce evidence as to qualifications of the welder who manufacture (sic.) the home-made man-chair."

The standards cited in these instances[5] require that a personnel platform be designed and fabricated by appropriately qualified persons. Neither standard requires a Respondent to prove that the person who did the work was so qualified. Indeed, it is elemental that Complainant bears the burden of proving, by a preponderance of the evidence, that the requirements of a standard were not met. In this case, the Secretary relies solely on the failure of Respondent to produce evidence as to who designed and who made the man-chair for its case. Such logic is specious. While refusing to cooperate with the Secretary's inspection has ramifications as to the degree, if any, a Respondent is considered to have shown "good faith," not knowing who designed or made the chair raises no inference whatsoever as to the qualifications of those people. If the Secretary wanted to promulgate regulations requiring users of such platforms to maintain such records he could do so. The cited standards as they now exist do not penalize the owners of such equipment as the Secretary seeks to do in this case.

Moreover, Complainant's argument that the existence of some bent parts of the chair, the thickness of the plywood seat and back, or the presence of a weld defect, are relative and probative evidence that the chair was not designed or made by someone competent to do so is rejected. Calling such evidence "circumstantial" does not vest it with probative value. These conditions could raise such an inference only if they are shown to truly be defects. In order to reach that conclusion, the compliance officer would have had to testify how much pressure the bent metal should have been able to withstand, how much weight the 18" by 22" and 3/4" thick plywood seat could support and how the weld should have been done in the first place. In the absence of any claim that a person could normally form such conclusions from observing the conditions found during the inspection or that the compliance officer obtained such knowledge based upon her prior experience, the failure to proffer or

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[5] Title 29 C.F.R. § 1926.550(g)(4)(i)(A), and 29 C.F.R. § 1926.550(g)(4)(ii)(H), respectively.

qualify her as an expert requires rejection of such opinion testimony.[6] Rule 701, Fed. R. Evid. Accordingly, sub-items 2a and 2d are VACATED.

Sub-items 2b and 2e, respectively, allege that the man-chair did not have either grab rails or display an appropriate identification plate.[7]

The compliance officer's powers of observation, since only one man-chair was at the scene, are credited. Moreover, her photographs demonstrate the existence of the remaining cited conditions. Respondent did not deny that the man chair lacked grab rails and an information plate. I find that these non-complying conditions existed. Respondent, as the owner and employer of those who used the man-chair, is chargeable with knowledge of these conditions. It not only had custody and control over the chair, but it was used in the presence and under the control of one of its foremen. That Respondent purchased the chair from someone else who made it or that Respondent was unaware of the requirements of the standards are not accepted as a defense to the violative conditions. It is an employer's obligation to comply with applicable OSHA regulations whether it agrees with them or not.

The compliance officer's conclusion that these violations are serious within the meaning of the Act is, however, rejected.

Under § 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.*, 7 BNA OSHC 2095, 2101, (No. 16317, 1980),

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[6] The Federal Rules of Evidence have been specifically adopted by the Commission without modification, amendment, or substantial comment. Commission Rule 71, 29 C.F.R. § 2200.71. See also *Daubert v. Merrell Dow Pharmaceutical, Inc.*, ___ U.S. ___, ___ S. Ct. ___ , (No. 92-102, June 28, 1993), Slip Op., Pp. 4-17 (the Federal Rules of Evidence, adopted without modification, provide the exclusive standard for admitting scientific evidence in a federal trial).

[7] Sub-item 2b alleges a failure to comply with 29 C.F.R. § 1926.550(g)(4)(ii)(B), for the lack of a grab rail. Sub-item 2e alleges that the man-chair did not display a plate or permanent marking identifying its weight, rated load capacity or intended load as required by 29 C.F.R. § 1926.550(g)4)(ii)(I).

Item 2c, which cited 29 C.F.R. § 1926.550(g)(4)(ii)(E), alleging that employees could not stand [up] in the man-chair was withdrawn by the Secretary at the hearing (Tr. 45).

pet. for review denied, 639 F.2d 772 (3d Cir. 1980). It is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.,* 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980).

The compliance officer's description of the hazards generated by each of these specific non-complying conditions are not serious. She described the sole hazard arising from the lack of grab rails as "broken bones to the fingers if the employee was holding on to the existing guard rail and the man-chair came in contact with another structure, the fingers would be smashed." I find that the scenario envisioned by the compliance officer is so remote as to be speculative. The only circumstances under which "fingers would be smashed" is if the chair came into contact with another object at the exact point at which the employee's hands were holding on to the existing rail and under such circumstances that the employee could not remove his hands from danger in time to prevent the contact. These conditions are nearly impossible since the employee is seated facing in the direction in which contact would have to be made in order to produce the result the compliance officer testified. I thus conclude that the absence of a grab rail constitutes a failure to comply with the cited standard. I also conclude that the violation was not serious.

Turning to sub-item 2e, the compliance officer stated that the lack of the plate;

> could actually overload the crane itself. . .if the crane were to pick it up, it may not have the ability to pick that up at it's rated load; could cause the crane to tip or damage the rigging to the crane."

(Tr. 50). She was concerned that the tipping of the crane could cause the chair to fall " approximately 20 to 25 feet.

Having used a crane with a lifting capacity of 18 tons (Tr. 74) to lift a man-chair whose weight is not known, but which has a maximum capacity of one employee and his tools, cannot realistically be considered as a possible cause for the crane to tip over. Indeed, such a consequence is so remote I decline to weigh it at all. As such, the violation has not been shown to be serious.

Sub-items 2b and 2e, constitute one other than serious violation of the Act for which a single penalty is to be assessed.

The determination of an appropriate penalty is within the discretion of the Commission. Factors to be considered in determining an appropriate penalty include the size of Respondent's business, gravity of the violation, good faith of the employer and its history of prior violations. 29 U.S.C. § 666(j).

I find that Respondent's business, with seven employees (Answer ¶ V) is very small. The gravity of the violations, the prime consideration in penalty assessment, is very low in that the likelihood of an accident is minimal as is the number of employees exposed (one). Respondent, on the other hand showed little or no good faith. Mr. Hedderick testified in some detail as to a prior inspection conducted by the same compliance officer, and his treatment by an OSHA area director, which he regarded as unfair. Nonetheless, his refusal to meet with the compliance officer or allow a closing conference has to be considered a lack of good faith. Finally, Respondent has a history of one prior, uncontested serious citation the subject of which is unrelated to these violations. On balance, I find that a penalty of $200 (basically $100 for the violation and $100 for the lack of cooperation) is appropriate this non-serious violation of the Act.

Item 3 of the citation, containing two sub-items, deals with activities required prior to each use of the man chair.[8] Combined as one alleged serious violation, a penalty of $1400 was proposed.

The allegations that the required trial lift and pre-lift meeting were not held rest solely on the compliance officer's testimony as to statements and answers to her questions gathered during a conversation with Respondent's foreman at the work site (Tr. 51, 55).

Such testimony as to conversations which took place outside the courtroom with persons who are not witnesses, might generally be called "hearsay." The Federal Rules of Evidence[9], categorizes statements made by an employee of a respondent during his

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[8] Sub-item 3a, alleged a failure to comply with 29 C.F.R. § 1926.550(g)(5)(i), because "no trial lift was made by designated person from ground level with anticipated weight, immediately before lifting the employee in the home-made man-chair." Sub-item 3b alleged that there was "no pre-lift meeting held, including the operator, ground person, or employee being lifted in the chair" as required by 29 C.F.R. § 1926.550(g)(8)(i).

[9] Rule 801(d)(2)(C).

employment and within the scope of his employment as "[s]tatements which are not hearsay." The Commission has held that a finding of a violation may rest upon "hearsay," even where it is uncorroborated. In this case, however, I conclude that the evidence is so unreliable as to be of such little probative value, that it cannot, by itself, be the basis of a finding of a violation. The evidence is unreliable because the compliance officer lacked care in gathering factual evidence and in giving testimony. Already discussed is the fact that she inspected, photographed and cited the wrong crane. There is also significant variation between the compliance officer's version and the testimony of Mr. Hedderick as to which of Respondent's employees were at the site. Complainant's arguments regarding the lack of Respondent's cooperation as well as the Erie, Pennsylvania "accent" might be accountable for some errors, but they do not explain all of the misstatements of fact. Moreover, the inherent difficulties of reconstructing events some time after they have taken place detracts from the reliability of the evidence in this case. In addition, the combative atmosphere between this Respondent and the particular compliance officer greatly reduces the likelihood of dispassionate and accurate factual testimony by the persons involved. Also, the reliability of the declarant, upon which the reliability of his supposed statements rests, is not established on this record. Given the lack of a positive identification of who was at the site in which capacity there is no way to determine whether the declarant recognized the import of his statements or whether the declarant had a propensity for veracity. See, *Regina Construction Co.,* 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991)

Accordingly, I conclude that the Secretary has not shown by a preponderance of the reliable probative evidence, that Respondent failed to comply with the standards cited in Item 3. Item 3 is thus VACATED.

FINDINGS OF FACT

Findings of fact relevant and necessary for a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent did not fail to comply with the standards at 29 C.F.R. § § 1926.550(g)(3)(ii)(B) and .550(g)(3)(ii)(B), as alleged in Item 1.

4. Respondent did not fail to comply with the standards at 29 C.F.R. § § 1926.550(g)(4)(i)(A) and .550(g)(4)(ii)(H) as alleged in Sub-items 2a and 2d.

5. Respondent failed to comply with the standards at 29 C.F.R. § § 1926.550(g)(4)(ii)(B) and .550(g)(4)(ii)(I), as alleged in Sub-items 2b and 2e.

6. Respondent's failure to comply with the standards at 29 C.F.R. § § 1926.550(g)(4)(ii)(B) and .550(g)(4)(ii)(I), as alleged in Sub-items 2b and 2e, constitute one, other-than-serious violation of the Act. A civil penalty of $200 is appropriate for the violation.

7. Respondent did not fail to comply with the standards at 29 C.F.R. § § 1926.550(g)(5)(i) and .550(g)(8)(i), as alleged in Item 3.

ORDER

1. Items 1 and 3, and sub-items 2a and 2d of the citation issued to Respondent on or about August 10, 1992 are VACATED.

2. Sub-items 2b and 2e of the citation issued to Respondent on or about August 10, 1992 are AFFIRMED as a single, other-than-serious, violation of the Act. A penalty of $200 is assessed therefor.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JUL 28 1993
Washington, D.C.