United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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| SECRETARY OF LABOR, | : | |
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| Complainant, | : | |
| | : | |
| v. | : | OSHRC DOCKET NO. 98-0963 |
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| J & H REINFORCING & STRUCTURAL ERECTORS, INC. | : | |
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APPEARANCES:

Donald K. Neely, Esquire
Philadelphia, Pennsylvania
For the Complainant.

J. B. Marshall, Jr., Esquire
Portsmouth, Ohio
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). In February of 1998, the Occupational Safety and Health Administration ("OSHA") inspected a work site in Huntington, West Virginia, where Respondent ("J & H") was engaged in steel erection; the inspection took place after an accident in which an employee of J & H was seriously injured. As a result of the inspection, J & H was issued a serious citation. J & H contested the citation, and a hearing was held on November 23, 1998. At the hearing, item 1b of the citation was dismissed, leaving item 1a, which alleged a violation of 29 C.F.R. 1926.452(w)(6)(i).[1]

The OSHA Inspection

John Johnson, the OSHA compliance officer ("CO") who conducted the inspection, went to the site on February 13, 1998, pursuant to a media referral about the accident that had occurred on February 11, 1998; the construction project involved the Marshall University Library in Huntington,

[1]Item 1b, which alleged a violation of 29 C.F.R. 1926.20(b)(2), was dismissed upon the parties' submitting a written stipulation of partial dismissal. (Tr. 4-5).

and the accident had taken place in the rotunda area of the library. CO Johnson met with David Pfister, the general contractor's superintendent, who had taken photos of the scene after the accident. He met next with Raymond Ball, the superintendent of J & H, who told the CO what had happened. Ball and the CO then went to the rotunda area, which the CO videoed; the CO also inspected the scissor lift the injured employee had been operating, and he noted the labels and manuals inside the lift that warned about operating it on uneven surfaces. On February 17, 1998, the CO obtained written statements from Ball and Gregory Sigler, another J & H employee who had been working in the rotunda on the day of the accident. (Tr. 30-31; 35-36; 41-44; 54; 61-68; 76-77).

Based on his inspection, CO Johnson determined that on February 11, Ball had assigned Mark Jones the job of welding in the rotunda from a scissor lift that had been borrowed from another contractor at the site. Specifically, Jones was to weld "kicker braces" or "stiffeners" after Sigler and another employee had put them in place between columns on the northwest and northeast sides of the rotunda's entryway. After completing the welding on the northwest side, Jones began moving the lift, which he had lowered from 30 to 20.5 feet, to the northeast side. The entryway between these two areas was a 5.5-inch-deep "offset" that was 7 feet wide and 14.5 feet long, and as Jones drove the lift by the southeast corner of the offset one of the wheels went in, causing the lift to turn over. Jones was tied off to the lift, but when it fell his head struck the floor and he sustained a life-threatening injury.[2] CO Johnson concluded that J & H had violated the cited standard because the floor was not checked before Jones began his work and because of the offset and obstructions on the floor, including two-by-fours, two-by-sixes, and various electrical "stub-outs." C-2 is the CO's diagram of the rotunda area at the time of the accident. (Tr. 36-42; 45-61; 68-70; 75-79; 94-95).

Discussion

Item 1a alleges a violation of 29 C.F.R. 1926.452(w)(6)(i), which applies to mobile scaffolds. The standard states as follows:

> (6) Employees shall not be allowed to ride on scaffolds unless the following conditions exist: (i) The surface on which the scaffold is being moved is within 3 degrees of level, and free of pits, holes, and obstructions.

[2]CO Johnson testified that although employees must tie off to articulating boom lifts, there is no tie-off requirement in regard to scissor lifts. (Tr. 49; 89-90).

To establish the alleged violation, the Secretary must show that (1) the standard applied to the cited condition, (2) the employer violated the terms of the standard, (3) employees were exposed to the cited condition, and (4) the employer had actual or constructive knowledge of the violation. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). J & H does not dispute the applicability of the standard to the lift, but notes that there was no evidence that any conditions on the rotunda floor would have caused the lift to move on a surface more than 3 degrees off level. The CO conceded his lack of proof in this regard, stating that he would have needed an inclinometer to obtain such information. (Tr. 105-07). However, it is clear from the record that the basis of the citation was the offset and obstructions on the rotunda floor. Moreover, as I read it, the standard has two separate requirements with which employers must comply. That is, the surface a mobile scaffold moves on must be within 3 degrees of level, and the surface must in addition be free of pits, holes and obstructions. Thus, the issue here is not whether the floor was within 3 degrees of level, but, rather, whether the floor where Mark Jones drove the lift was free of pits, holes and obstructions.

The photos taken by David Pfister plainly show one of the wheels of the overturned lift inside a corner of the offset. *See* C-1(E)-(G). The photos also show pieces of lumber along the offset and near the lift. *See* C-1(A)-(B); C-1(E)-(I). Finally, the photos show an electrical stub-out adjacent to the lift wheels, *see* C-1(B) and (G), and C-2, the CO's diagram, depicts eight more stub-outs in a row in the area of the overturned lift; the CO testified that the stub-outs were 2 inches high and that the one in C-1(B), (G) was 4 feet long. (Tr. 39-40; 46; 50-52; 55). The CO also testified that the offset and obstructions were well within Jones' work area, based on where the lift was when it fell over and what he learned during his inspection, and that they were tip-over hazards. (Tr. 74-75; 94).

J & H does not dispute the size or depth of the offset or the fact that the lift turned over because one of its wheels went into the offset. J & H likewise does not dispute the presence of lumber and electrical stub-outs in the rotunda area. J & H contends, rather, that the lumber and 4-foot-long stub-out were located underneath the 18-foot-high second floor walkway, and that the lift, which was extended to 20.5 feet at the time of the accident, could not have run over them. J & H also contends that the offset and stub-outs were outside of Mark Jones' designated work area, and that the stub-

outs in any case were not a hazard. Finally, J & H contends, in essence, that Jones' presence outside of his designated work area was unpreventable employee misconduct.

In regard to J & H's first contention, Gregory Sigler did not recall any lumber, but he indicated that the 4-foot-long stub-out was under the second floor walkway and that the lift when raised could not have driven into that area. (Tr. 202-03). In addition, David Pfister indicated that the second floor walkway was 18 feet high and that the lumber and stub-out in his photos could have been under the walkway; however, his testimony reflected uncertainty to the extent that, in my opinion, it is inconclusive. (Tr. 11-20; 26). Moreover, although the CO agreed that there was a second floor walkway around the rotunda, he was emphatic that it was not directly over the stub-out and that there was no walkway or flooring over the offset area; he was also emphatic that the first layer of beams in the rotunda was 30 feet above the ground level and that the lift could have run into the lumber and stub-out. (Tr. 40-41; 46; 52; 55-56; 59-61; 74-75; 81-83; 94;109-10). On balance, I conclude that the CO's testimony is the more reliable evidence of record. His testimony is therefore credited over that of Sigler and Pfister and J & H's contention is rejected.

As to J & H's contention that the stub-outs were not a hazard, Ball testified that some were plastic and some were metal; he was unaware of Jones hitting any stub-outs, but indicated that the lift would have "just snap[ped] them off." (Tr. 158). Sigler, on the other hand, testified that Jones some moments before the accident had run over one of the small stub-outs, like the one shown in C-1(H), and that it simply bent over; he indicated that this stub-out and the 4-foot-long stub-out were both metal. (Tr. 202-03; 207-09). Regardless, I concur with the CO's opinion that the stub-outs were obstructions within the meaning of the standard, in light of his extensive safety background and his training and experience in cranes and mobile scaffolds. (Tr. 31-35; 75; 103-04). Further, even assuming *arguendo* that the small stub-outs did not represent a tip-over hazard, I find that the large stub-out, which was 4 feet long and evidently metal, did represent such a hazard.

Based on the foregoing, the Secretary has established three of the four elements set out *supra*, that is, that the standard applied to the lift, that the terms of the standard were violated, and that employee Mark Jones was exposed to the cited condition. As to the fourth element, knowledge, the Secretary points to C-6, Ball's statement, which the CO wrote out and Ball signed, and to Ball's testimony at the hearing. In this regard, I note Ball's statement in C-6 that "[w]e walked in the area

and I told [Jones] what I wanted welded. We didn't check floor area. Been in and out of the area constantly, walking. I've been in area constantly while setting the steel." I also note Ball's agreement with J & H's interrogatory response that he had "observed the area to be clean when he showed Mark Jones where to work." (Tr. 167). Finally, I note Ball's testimony indicating that he had in fact checked the rotunda floor that day and that he "didn't see anything." (Tr. 168-69). The Secretary contends that the evidence is sufficient to demonstrate knowledge because the offset and obstructions were obvious and Ball either knew or should have known of their presence on the rotunda floor. However, as set out above, J & H contends that Jones drove the lift outside of his designated work area and that his doing so was unpreventable employee misconduct.

Ball testified that Jones' job that day was to weld permanently bracing that Sigler and the other employee had installed and welded temporarily between the columns in the rotunda; he further testified that Jones sat on the beams to weld the day before, that he asked Jones if he wanted to use a lift, and that Jones said he did, whereupon Ball borrowed the lift from another contractor at the site. According to Ball, Jones was not welding bracing on the columns to the immediate left and right of the two columns forming the rotunda entryway, as indicated on C-2, the CO's diagram, because that welding was already done. Rather, Jones began welding at the point Ball marked with an "O" on the left side of R-2, another diagram of the rotunda area, and was to weld the column bracing all the way around the rotunda in a counterclockwise direction over to the corresponding point on the right side of R-2; however, Jones was to go directly to that point on the right side of R-2 to assist Sigler and the other employee if they asked him to, and Jones was driving the lift in reverse to that location when the accident occurred. Ball said that he had given the CO this same information, that C-2 was inaccurate, and that Jones had had no reason to be in the areas of the offset and obstructions. He also said that Jones had gone into the rotunda entryway several times a day for several weeks, that he and Jones had stood in the offset when he was telling Jones what he wanted done, and that he was certain that Jones had been aware of the offset. (Tr. 138-57; 161; 173-75; 179-80).

J & H asserts that the above testimony of Ball shows that Jones was working outside of his designated area when the accident occurred. I disagree. First, R-2, which Ball made with the help of prior counsel on September 11, 1998, indicates that the bracing to the immediate left and right of the rotunda entryway columns was in fact the bracing that Jones was to weld, and Ball's testimony that

this was a "mistake" was not persuasive.[3] (Tr. 149; 162-66). Second, the CO was adamant that C-2 reflected his observations and measurements and what Ball and Sigler told him and, moreover, that Ball and Sigler never said anything about misconduct or working around the rotunda in a counterclockwise fashion. (Tr. 36-41; 70-71; 78-79; 85-89; 98-101; 104-05). Third, Ball's written statement was that "[w]e came out to area and I told [Jones] what 2 beams I wanted welded first," while Sigler's written statement was that "[w]e had completed the northwest corner. Mark ... [c]ompleted northwest weld. Paul and I moved to the northeast side. Mark was moving the lift." *See* C-6, C-9. Finally, although Ball denied it, Erica Jones, Mark Jones' wife, testified that Ball told her at the hospital that Jones was not at fault and could not have seen the offset; further, both Erica Jones and Jeff Humble, the couple's minister, testified that Don Hadsell, J & H's president, stated at the hospital that Jones was not at fault, and Humble also testified that Hadsell told him that Jones could not see the offset because it was covered with snow.[4] (Tr. 126-35; 138; 157-58).

In view of the foregoing, I conclude that Jones was not working outside of his designated area and that Jones drove the lift into the offset because he could not see it due to the presence of snow.[5] I also conclude that the accident was not the result of unpreventable employee misconduct. As the Secretary notes, this defense requires the employer to show that it had work rules designed to prevent the violation, that it had adequately communicated the rules to employees, that it had taken steps to discover violations, and that it had effectively enforced the rules when violations were discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). As the Secretary also notes, she has established that J & H had no work rules to prevent the violation that occurred in this case. Jones testified that he had had written scissor lift instruction during his apprenticeship training and that in the two years preceding the accident he had operated scissor lifts two to three times a year for

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[3]Specifically, the lines on R-2 showing the bracing to the immediate left and right of the entryway have notations reading, respectively, "angle welded 1st assist" and "angle welded at fall."

[4]Although Mark Jones was a witness at the hearing, he had no memory of what had happened on the day of the accident; in addition, while Hadsell testified as to his belief that Jones was injured because he was tied off, he did not deny making the statements set out above. (Tr. 115-16; 210-13).

[5]The accident occurred between 8:00 and 8:30 a.m., and Pfister's photos, taken about two hours later, show that there was still some snow in the offset at that time. (Tr. 7-9; 109; C-1(E)-(G)).

a total of approximately 80 hours. (Tr. 116-25). In addition, the CO testified that there were labels and manuals inside the subject lift that warned users to check the work area for tip-over hazards and to not operate the lift on uneven surfaces. (Tr. 57; 62-66; C-1(D); C-4-5). However, it is clear that the work area in this case was not checked for tip-over hazards before Jones began using the lift. Moreover, the CO testified that J & H had no safety rule in place in regard to the safe operation of lifts or mobile scaffolds, and Ball himself admitted that there was nothing in the company safety manual addressing this topic; Ball also admitted that he did not look at the lift's operator's manual that morning or direct Jones to do so. (Tr. 71; 171-72).

On the basis of the record, the Secretary has shown all of the elements necessary to establish the alleged violation. This citation item is accordingly affirmed as a serious violation, and the proposed penalty of $3,000.00, which reflects the gravity of the violation as well as the size, history and good faith of the employer, is assessed. (Tr. 76; 79-80; 108).

Conclusions of Law

1. Respondent, J & H Reinforcing & Structural Erectors, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1926.452(w)(6)(i).

3. Respondent was not in violation of 29 C.F.R. 1926.20(b)(2).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1a of Citation 1 is AFFIRMED as a serious violation, and a penalty of $3,000.00 is assessed.

2. Item 1b of Citation 1 is VACATED.

Irving Sommer
Chief Judge

Date: