Secretary of Labor, Complainant, v. G. A. West & Company, Inc., Respondent.	OSHRC Docket No. 03-1496

Appearances:

Curtis L. Gaye, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

John N. Leach, Esquire
Helmsing, Leach, Herlong, Newman & Rouse
Mobile, Alabama
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

G. A. West & Company, Inc. (G. A. West), is engaged in demolition contracting. On March 10, 2003, an employee of the respondent was fatally injured when a 41,000-pound steel paper machine calendar roll fell on him at a facility in Mobile, Alabama. A fatality investigation conducted by the Occupational Safety and Health Administration (OSHA) began on that date. As a result of this investigation, a citation was issued to G. A. West on June 24, 2003. Respondent filed a timely notice contesting the violation alleged in Citation No. 1, Item 2, and the penalty proposed for that alleged violation. The Secretary previously withdrew Item 1 of Citation No. 1 during an informal conference prior to contest. Withdrawal of that item is now a final order of the Review Commission. A hearing was held in Mobile, Alabama, on November 18, 2003.

For the reasons that follow, Citation No. 1, Item 2, is affirmed and a penalty of $4,000.00 is assessed.

Background

Respondent had a contract for demolition and dismantling of the paper-making equipment at a paper manufacturing facility in Mobile, Alabama. On March 10, 2003, two employees of G. A. West were completing the loading of a 41,000-pound calendar roll into a closed top container for overseas shipment. The container was 40 feet long, 8 feet wide, and 8.5 feet high. The calendar roll had been transported from a paper machine to the container on two dollies known as Hillman Rollers. Each dolly was 26.25 inches wide, 23 inches long, and 5.75 inches high. The calendar roll was 23 feet 3 inches long. It had been placed in the container and was resting on the dollies.

The job to be done on the day of the accident was preparation and securing of the calendar roll in the container. A portable hydraulic jack was used to raise the end of the calendar roll nearest the rear of the container in order to remove one of the two dollies used to move the calendar roll into the container. After the dolly was removed, shipping timbers would be placed under that end, and the load would be lowered onto the timbers. The load at the front end remained on the dolly. Using the jack, respondent's employees attempted to raise the rear end of the load .375 inches to .5 inches above the dolly. One employee used an 8-foot long, 4-inch by 4-inch shipping timber to push the dolly from under the raised load toward the center of the container. The dolly did not fully clear the base of the load. The employee turned to get a timber to push the dolly completely out from under the base. At that time, the calendar roll fell onto the second employee, fatally injuring him.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Serious Violation of
29 C.F.R. § 1910.244(a)(2)(iii)

The Secretary in Citation No. 1, Item 2, alleges that:

> After the load was raised using a jack, the load was not cribbed, blocked, or otherwise secured at once:
>
> > Paper machine area: On March 10, 2003, employees were removing a metal dolly from under a 41,000 pound steel paper machine calendar roll which was raised with a 11.2 ton hydraulic jack and the load was not cribbed, blocked or otherwise secured to prevent it from rolling.

The cited standard is clearly applicable to respondent's operations. This is a general industry standard, and there is no specific standard controlling these working conditions. Respondent argues that 29 C.F.R. § 1926.305(d)(2)(i) applies to the work being done and that respondent's work is construction work. It presented no evidence in support of this position. The requirements of 29 C.F.R. § 305(d)(1)(i) are identical to those of the cited standard. Respondent's argument lacks merit and is rejected.

The central issue to be decided is whether respondent complied with the terms of 29 C.F.R. § 1910.244(a)(2)(iii) which provides: "After the load has been raised, it shall be cribbed, blocked, or otherwise secured at once."

It is undisputed that the load, one end of a 41,000-pound paper machine calendar roll, was raised by hydraulic jack by respondent's employees on March 10, 2003. At issue is whether respondent cribbed, blocked or otherwise secured that raised load at once.

The Secretary argues that the respondent at no time secured the raised load. Respondent argues that it was in the process of cribbing or securing the load when the load fell.

John Randy Janes, respondent's journeyman rigger on this job, testified about the procedure used to jack the load from the dolly in preparation for securing the calendar roll

for shipping. He testified that his job was to get one end of the load off the dolly and onto the container floor using the jack. He placed two steel plates above the jack ram and one steel plate below the jack. These plates were .5 inches thick, 4 inches wide, and 12 inches long. He and another employee, Jesse Williams, were performing this operation. Williams was jacking the load while Janes stood 2 feet from the load to assure it was going up properly and that the jack was not leaking. These employees were attempting to raise the load .375 inches to .5 inches above the dolly so the dolly could be pushed from under the base of the load. Once the dolly was pushed from under the base of the load toward the center of the container, shipping timbers were to be inserted below the load, and the load could then be lowered onto the shipping timbers and secured for shipping. The shipping timbers were landscape timbers and measured 4 inches by 4 inches wide and approximately 8 feet long.

After the load was jacked about .375 inches off the dolly, Janes used one landscape timber to push the 300- to 400-pound dolly from under the base of the load toward the center of the container. Janes testified that the dolly did not fully clear the base so that the shipping timbers could be inserted and the load lowered onto them for securing. Mr. Janes told Mr. Williams he was going to get a 4-inch by 4-inch timber to push the dolly clear of the base. When Janes turned around, Williams was on the side of the load inside the container, pushing the dolly with his hand. The load fell, killing Mr. Williams.

On March 10, 2003, Lonnie McKenzie, respondent's safety manager, adopted, as acceptable, the procedure used by Janes. He testified that he knew the intent of the standard at 29 C.F.R. § 1910.244(a)(2)(iii). Throughout his testimony, McKenzie suggested that the methods and procedure used by Janes complied with the requirements of the standard. The following testimony is indicative of Mr. McKenzie's and respondent's understanding of the intent and requirements of the cited standard.

> Q. Okay. Mr. McKenzie, as a safety director, I believe you stated that you were familiar with this standard, and I had asked you to read it, about the intent. What is the intent of that standard?

A. The intent of the standard?

Q. Yes, sir.

A. After the load has been raised, it shall be cribbed --

Q. Yes, sir.

A. -- or blocked --

Q. Yes, sir.

A. -- or otherwise secured. And otherwise secured, when we let the jack down, it would have been flat on the floor.

Q. Isn't it true that the intent of that standard is to provide protection against the jack bleeding down?

A. True. (Tr. 198-199)

While Mr. McKenzie stated that he knew the intent of the standard and repeated some of its provisions, his testimony regarding respondent's cribbing process was clearly inconsistent with the standard's requirements to crib, block or secure the load at once.

The plain meaning of the language used in this standard requires the load to be secured at once, after it has been raised. The logical inference is that while the load is raised, it must be secured before any other work is done. Respondent argues that cribbing is a process that cannot be done instantaneously.

It takes issue with the Secretary's counsel when he used the term "immediately" rather than "at once." *Webster's Third New International Dictionary* (1971) defines "at once" as "1a: at the same time: simultaneously; b: immediately." It defines "immediate" as "3a: occurring, acting or accomplished without loss: made or done at once." This version of *Webster's* was published at about the same time as the cited standard.

An even earlier edition of *The American College Dictionary*, Random House 1963,

defines "immediately" as "1. Without lapse of time, or without delay; instantly; at once." The Secretary's statement that the load must be secured immediately is consistent with the standard's requirement that the load be secured at once. Respondent's argument merely makes a distinction without a difference and is rejected as lacking merit.

Respondent argues that cribbing, blocking or securing the load is a process that cannot be done instantaneously. While this process cannot be done in the blink of an eye, with the flip of a switch, or in a nanosecond, it can be done at once. This securing of the load can be done before any other work or activity is performed with or near the elevated load. The words "at once" in this standard are limiting words relating not only to time but to sequence of activities.

While Mr. McKenzie demonstrated some confusion as to the sequencing of work relating to when the load must be secured, he clearly indicated that he knew the intent of the standard was to provide protection against the bleeding down of the jack. He also testified that to secure a load is not just to secure it up and down, but also to secure it from tilting.

Respondent adopted as its own and sanctioned the procedure used by Janes to jack the load and move the dolly in preparation for securing the calendar roll for shipping. Janes testified that the load was not cribbed when it was first jacked above the dolly. McKenzie stated that he considered the dolly to be the cribbing even when the load was elevated .5 inches above it. He testified that when the dolly was removed, there was no cribbing. At that point, the load would be 6 inches above the container floor.

Both Janes and McKenzie considered that the 4-inch by 4-inch shipping timbers would become cribbing once they were in place. The load would then be lowered onto them for shipping. Before lowering, however, the load would be suspended 2 inches above the timbers. Respondent appears to have considered these catch platforms, specifically, the dolly, the timbers and the floor, to be cribbing.

This interpretation is clearly not consistent with the unambiguous language of the standard. The logical inference to be drawn from the provisions of 29 C.F.R. §

1910.244(a)(2)(iii) is that while the load is raised, it must then be cribbed, blocked, or otherwise secured before any other work can be performed. Mr. Janes admitted that the load was not cribbed when the load was first jacked above the dolly. Mr. McKenzie, respondent's safety manager, confirmed this by testifying that the raised load was not instantaneously cribbed or otherwise secured. He admitted that the jack is unstable once the blocking is removed and a stable support is needed.

Knowing that the raised load was not cribbed, blocked or secured, respondent proceeded to perform work under that load before securing it. This work was attempting to move the dolly from under the base without first securing the load. At no time before the load fell was it cribbed, blocked, or otherwise secured to prevent downward movement or tilting.

Mr. McKenzie's explanation of respondent's process and procedure for cribbing the load is unconvincing and misses the point. The procedure and process used by Janes and sanctioned by McKenzie during his testimony is a process relating to cribbing and securing the load for shipment in the container. It does not address the requirement of the standard to crib, block, or secure the elevated load. Compliance with this standard in this situation would necessitate cribbing, blocking, or securing the raised load before attempting to remove the dolly. Respondent asserts that on March 10, 2003, it was in the process of cribbing when the load fell. That argument is rejected. Respondent was in the process of cribbing or securing the load for shipment. At no time did it crib, block, or otherwise secure the elevated load after it was raised by the jack to prevent it from falling or tilting. Respondent failed to comply with the terms of 29 C.F.R. § 1910.244(a)(2)(iii).

Respondent's employees had access to the violative conditions. It is undisputed that two employees of respondent were working with the elevated calendar roll. John Randy Janes' job was to get one end of the load off a dolly and onto the container floor using a hydraulic jack. Janes testified that he selected the jack and placed the ram under one end of the load. He stated that Jesse Williams jacked the load. During that activity, Janes was 2 to

3 feet from the jack watching the jacking process while the load was raised. Janes then used an 8-foot long timber to attempt to push the dolly toward the center of the shipping container. At that point, he was about 6 feet from the jack. Williams was then at the end of the calendar roll shaft and inside the shipping container. Both employees had access to the elevated end of the unsecured load and were, therefore, exposed to the violative conditions.

Respondent knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Janes, a rigger with 6 years' experience, testified that he did not supervise Jesse Williams but looked out for him as Williams was young and inexperienced in this work. Respondent's supervisor assigned Janes and Williams to load equipment into shipping containers called "Conexes." These employees attempted to move one end of the calendar roll from a dolly to the floor of the Conex container using a jack. Janes received no instructions from respondent's management as to how this job was to be done. Williams received no such instruction and did what Janes told him. Janes relied on his experience to perform this task, including selecting the jack used to raise the load. No written procedure relating to this jacking process was in place on March 10, 2003. Mr. McKenzie, respondent's safety manager, testified that he knew the intent of the standard was to crib, block, or secure a load after it had been raised. He admitted that the load at issue had not been secured instantaneously, but would have been secured when the jack was let down and the load rested flat on the floor. Respondent has never challenged the procedure used by Janes and has adopted it as its own. Respondent, through its management, assigned two employees to do this job, gave them no instructions on how to perform it safely, and concurred in the procedure used to perform this task. Respondent had requisite knowledge of the violative conditions.

The Secretary has established a violation of the cited standard. A falling 41,000-pound calendar roll would result in a crushing injury that could cause death or serious physical injury. In this instance, an employee was fatally injured when the load fell on him. The violation of 29 C.F.R. § 1910.244(a)(2)(iii) was a serious violation.

Whether the Violation Was the Result of
Unpreventable Employee Misconduct

The Review Commission has consistently held that, to establish the affirmative defense of unpreventable employee misconduct, an employer must show:

> (1) it had established work rules designed to prevent the violation; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when a violation had been discovered.

Jensen Construction Co., 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979).

Respondent argues that it had an active safety program and that Mr. Williams attended numerous safety classes. Respondent's safety manager, Lonnie McKenzie, however, testified that the safety meetings attended by Mr. Williams did not relate to the work done on March 10, 2003. Janes testified that he was given no instructions by respondent relating to the work he performed on March 10, 2003. No evidence was presented at the hearing that respondent had established any work rules designed to prevent the violation. The violation was that respondent failed to crib, block, or secure the load at once after it was raised. Two employees, Janes and Williams, were exposed to this violation on March 10, 2003, prior to and at the time the load fell. Respondent gave them no instructions or work rule relating to the safe performance of these duties.

While respondent is correct that Janes warned Williams "not to get where he was at" (Tr. 76), this admonition, by a non-supervisory employee, does not rise to the level of a work rule and does not relieve the respondent of its responsibility to establish such work rules. Janes also testified that he gave Williams no specific instructions on how to do this job. Janes was given no specific instructions on how to load the calendar roll. Respondent provided him no written procedure relating to this job. He walked up to it, looked at it, and performed the job based on his experience.

Since respondent has failed to prove it had established work rules designed to prevent this violation, no other elements need be discussed. Its defense of unpreventable employee misconduct is rejected.

Whether Compliance With
29 C.F.R. § 1910.244(a)(2)(iii)
Is Not Feasible

Respondent argues that instantaneous compliance with the standard is impossible. As discussed above, respondent, at no time attempted to crib, block, or otherwise secure the load after it was raised. It performed work under the load by attempting to push the dolly from under the load base without first securing the unstable elevated load. Its argument relates only to securing the load for shipment and not to securing the load while raised. The burden to prove the defense of infeasibility of compliance rests with the respondent. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442. To carry its burden and prove its defense of infeasibility, the employer must prove:

> (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would be technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of

protection was used, or (b) there was no feasible alternative means of protection. *A. J. McNulty & Co., Inc.*, 19 OSHC 1121, 2000 OSHD ¶ 32,209 (2000), citing *Armstrong Steel Erection, Inc.*, 17 OSHC 1358, 1995-97 OSHD ¶ 30,909 (1995).

Respondent made no showing that compliance was infeasible, either technologically or economically, or that work operations would be infeasible after implementation of cribbing, blocking, or other means of securing the load. It made only an unsupported argument of infeasibility in an attempt to shift the burden to the Secretary to prove feasibility. The Secretary did present evidence of other feasible means of protection, the use of open top containers. Samuel Dye, respondent's superintendent, admitted that after the accident, respondent used open top containers. It had considered their use before March 10, 2003, but its customer had not provided them. Use of open top containers would allow a crane to set equipment, such as the calendar roll, directly into the container onto the shipping timbers, eliminating the need for the use of dollies or the need for a jack. This would eliminate the hazard at issue. Respondent failed to prove its infeasibility defense.

Whether Compliance With
29 C.F.R. § 1910.244(a)(2)(iii)
Would Create a Greater Hazard

To carry its burden to prove this defense, respondent must prove (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance application would be inappropriate. *E & R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3d Cir. 1997); *Russ Kaller, Inc.*, 4 OSHC 1758, 1976-77 OSHD ¶ 21,152 (1976). *Accord, Trinity Industries, Inc.*, 15 OSHC 1985, 1992 OSHD ¶ 29,889 (1992).

Respondent made no showing that compliance with this standard would create a greater hazard than noncompliance. On the contrary, respondent argued that it was complying with the standard's requirements and disputed only a suggestion by the Secretary's counsel as to a method of cribbing.

As discussed above, not only was an alternate means of protection available, *i.e.*, open

top containers, but respondent considered using them before March 10, 2003, and actually used them

after that date. Alternate means of protection were, therefore, available. No evidence of whether a variance application would be inappropriate was offered by this employer. Respondent failed to carry its burden to prove this defense.

The violation of 29 C.F.R. § 1910.244(a)(2)(iii) is affirmed as a serious violation.

Penalty

At the hearing, the parties stipulated that a penalty of $4,000.00 would be appropriate if a serious violation was determined to exist. After careful review of the record, the gravity of the violation, the size of the company, respondent's good faith and compliance history, I accept this stipulation and find a penalty of $4,000.00 appropriate for the serious violation of 29 C.F.R. § 1910.244(a)(2)(iii).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing decision, it is ORDERED:

Citation No. 1, Item 2, alleging a serious violation of 29 C.F.R. § 1910.244(a)(2)(iii) is affirmed and a penalty of $4,000.00 is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: March 18, 2004