United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. 4 State Trucks, Respondent.	OSHRC Docket No. **08-1125**

Appearances:

Andrea C. Luby, Esq., and Ambriel N. Renn-Scanlan, Esq.,
U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri
For Complainant

Donald W. Jones, Hulston, Jones & Marsh, Springfield, Missouri
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Four State Trucks (4 State) is a privately owned corporation which operates out of Joplin, Missouri, a location where the States of Missouri, Arkansas, Oklahoma, and Kansas converge. From its warehouse in Joplin, Missouri, 4 State sells truck parts and accessories in a catalogue and a retail operation. On May 2, 2008, while retrieving a truck part at the warehouse, employee Chris Fisher fell 15 feet from an elevated Hyster Ordermaster. He later died from his injuries.

On May 12, 2008, Occupational Safety and Health Administration (OSHA) compliance officer David Moehle began an investigation of the fatality. As a result of Moehle's inspection, the Secretary issued a two-item serious citation to 4 State on June 27, 2008. Item 1 alleges a violation of § 1910.23(c)(1) for failure to utilize guardrails on the elevated platform of the Hyster Ordermaster. On September 19, 2008, the undersigned granted the Secretary's motion to amend item 1 to assert an alternative violation of § 5(a)(1) of the Act, the so-called general duty clause. Item 2 alleges a violation of §1910.178(l)(4)(ii)(A) for failure to re-train employees to use safety harnesses and lanyards while elevated on the Hyster Ordermaster.

Four State timely contested the citation. It denies the cited conduct constituted violations of the standards or of §5(a)(1) of the Act. It contends it was without the knowledge needed to establish a violation, and it asserts the affirmative defenses of infeasiblity and employee misconduct.

The parties presented evidence at the hearing conducted on November 13 and 14, 2008, in Neosho, Missouri. They filed post-hearing briefs, and the case is ready for decision. For the reasons discussed below, the undersigned affirms items 1 and 2 of the citation. Four State failed to establish its defenses of infeasiblity and employee misconduct.

Facts

In addition to selling truck parts and accessories, 4 State offers the related services of a body and paint shop, a fabrication shop, an installation center, a salvage yard, and a retail store. (Four State was featured in the reality television program "Trick My Truck") (Tr. 27-29, 295-296). Four State's establishment in Joplin, Missouri, includes a large warehouse which covers approximately 35,000 square feet. The truck parts which 4 State sells in its catalog and retail operations are stocked and sold though the warehouse. The warehouse's many tiered storage shelves vary in size and configuration, depending on their location within the warehouse. At the site of the accident, 4 State has four-tiered storage stacks above the ground floor. Pallets which are set at the highest tier are approximately 23 feet above the floor. At the next lower lever, pallets are set at 12 to 18 feet above the ground floor (Exh. C-1; Tr. 36).

In order to store or later to retrieve the truck parts, 4 State utilizes at least two types of powered industrial trucks. To access the storage shelves for most of the smaller parts, employees usually use one of 4 State's two Hyster Ordermasters (order pickers) (Tr. 45-47). The Hyster Ordermaster is a powered industrial truck which an operator moves to the desired location. The operator stands at a Ordermaster's work pad and raises or lowers himself up, down, or forward to reach into the tiered stacks. The pad measures approximately 2½ to 3-feet long by 4-feet wide (Exh. C-2).[1] Two forks extend horizontally from this work pad. Four State designed a double pallet to fit onto the forks to create an additional work area contiguous with the original pad. Four State

[1] These dimensions are based upon review of the photograph of the Ordermaster at Exhibit C-2.

may or may not use the double pallet for any particular pick (Exhs. ALJ-1, C-2; Tr. 39-40). The double pallet extension was not used at the time of the accident.

On a typical day four employees "constantly" use the two Ordermasters to raise themselves from 4 feet to 23 feet (Tr. 33, 44-45). The pad is not protected with guardrails when elevated above 4 feet. However, the Ordermaster has a tether (or lanyard) attachment point mounted on the equipment to serve as a anchor point for fall protection. Four State provides tethers, which employees are to attach to the equipment, and harnesses, which employees are to wear and attach so that they are tied off on the equipment. Four State keeps tethers and harnesses available for use of the warehouse employees.

On May 2, 2008, Chris Fisher responded to a light in the warehouse, which indicates a customer in the retail store is waiting for an item. Filling orders for the retail store takes precedence over other duties. Fisher raised the pad of the Ordermaster up to the 15-foot level (Tr. 193). He did not use a harness and tether for fall protection. When the product did not arrive in the retail store in a timely manner, employees checked on the delay. They found Fisher lying injured on the ground. Fisher was transported to the hospital where he later died.

Discussion

The Secretary bears the burden of proving each element of her case by a preponderance of the evidence.

> In order to establish a violation of the standard, the Secretary must establish: (a) the standard applies to the condition cited; (b) the terms of the standard were not met; (c) employees had access to the violative conditions; and (d) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence.

Offshore Shipbuilding, Inc., 18 BNA OSHC 2170, 2171 (No. 99-0257, 2000).

Item 1: Alleged violation of § 1910.23(c)(1)
Or in the alternative of § 5(a)(1) of the Act

The Secretary first asserts 4 State violated § 1910.23(c)(1), which provides in pertinent part (emphasis added):

> Every *open-sided floor or platform* 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides . . . .

Application of the Standard to the Conditions Cited

Four State contends § 1910.23(c)(1) does not apply. It points to the principle that the specific standard takes precedence over a general one. If a specifically applicable standard were to exist, 4 State posits, it should be found in § 1910.178, which addresses powered industrial trucks. It has long been held, however, that employers must comply with *all* general industry standards. Unless a particular condition is covered by a specific standard, the employer must abide by any other more generally applicable standard. *Dravo Corp. v. OSHRC,* 613 F.2d 1227, 1234 (3d Cir. 1980). In this instance, the standards which most specifically relate to powered industrial trucks (§ 1910.178) do not address the cited fall hazard. The need to provide fall protection on elevated platforms is not negated because the platform may exist on a powered industrial truck. No requirement in § 1910.178 precludes application of 1910.23(c) to 4 State.[2]

Four State's second objection to application of § 1910.23(c)(1) is that the Ordermaster pad is not a "platform" as defined by the standard. Section 1910.21(a)(4) defines "platform" as "[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery or equipment." The evidence does not support 4 State's position. Foreman Stephen Smart describes the Ordermaster as "a rolling platform motorized that would lift you to a shelf so you can retrieve items" and describes its pad as an "operation deck," "small platform," or "working surface" (Tr. 38, 45, 90). The pad is manufactured to be an elevated working space. For the equipment to be functional, an employee must stand and work from the space. *See Federal Express Corp.*, 21 BNA OSHC 2198 (Docket No. 06-1722, 2007) (ALJ) (flat surface elevated to meet truck gate and ease off-loading is a platform). While conceding that the attachable double pallet might constitute a platform, 4 State argues the smaller pad is not. The

[2] Four State also argues § 1910.67(c)(2)(v) (requiring use of belts and harnesses while in the basket of a "vehicle-mounted elevating and rotating work platform") should preempt application of § 1910.23(c), even if the powered industrial truck standards at 1910.178 do not. A review of § 1910.67 demonstrates the standards apply more directly to aerial lifts. Four State raises the potential application of this standard for the first time in its brief. Throughout this proceeding it suggested the Ordermaster is what it appears to be: a powered industrial truck.

definition of a "platform" does not contain a size limitation. The pad is a "platform," and the standard applies to the conditions cited.[3]

Terms of Standard Are Not Met

It is undisputed, 4 State did not comply with the standard's requirement to install guardrails around the open sides of the Ordermaster's elevated platform.

Employees Exposed or Had Access to the Conditions

Four State's employees regularly raised, lowered, and worked from an Ordermaster platform elevated above the 4-foot level. The platforms did not have guardrails around the open sides, and employees often did not tie off to the equipment as a means of alternate fall protection. Because of its small size, when employees worked on the pad (or the extended-pallet platform), they were within inches of more than one unprotected open side (Exh. C-2; Tr. 101).

Knowledge

To establish the element of knowledge, the Secretary must show 4 State had actual or constructive knowledge of the violative conditions. An employer can have both actual and constructive knowledge. *Revoli Constr.*, 19 BNA OSHC at 1684 (both constructive and actual knowledge imputed through supervisor). If a supervisor's knowledge is properly imputable to the company, the Secretary may prove either actual or constructive knowledge based on the supervisor's knowledge. *E.g., Revoli Constr., supra; Jersey Steel Erectors,* 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993). Constructive knowledge is shown if the employer could have known of the existence of the violation with the exercise of reasonable diligence. Reasonable diligence addresses the discoverability of a violation, including the adequacy of work rules, training, supervision, and the measures taken to prevent the violation. *Kokosing*, 17 BNA OSHC 1869, 1871 (Docket No. 92-2596, 1996).

The parties disagree whether foreman Smart is the type of supervisory employee whose knowledge can properly be imputed to 4 State. Smart's job title is "warehouse foreman." Smart supervised the warehouse employees, which included Gene Carrico, Travis Renburg, Greg

[3] The Secretary's alternate allegation that 4 State violated § 5(a)(1) of the Act is considered only if a specific standard does not apply to the cited hazard. *See Armstrong Cork Co.*, 8 BNA OSHC 1070 (No. 76-2777, 1980). Because the standard at § 1910.23(c)(1) applies, no further consideration of § 5(a)(1) is warranted.

McGinnis, Phillip Bare, part-time employee Blaine Cullen, and the decedent Fisher (Tr. 23, 33, 183-184, 217). The Commission's decision in *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (citations omitted) frames the inquiry:

> An employee who has been delegated authority over other employees, even if temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. . . . It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee . . . .

Smart assigned the men "under" him their daily tasks, and he worked alongside them "helping with the work load" (Tr. 23). He saw it as his responsibility to keep the crew "focused" and on track (Tr. 22). The warehouse employees considered Smart their first-line supervisor and came to him with job-related questions. Smart's "first focus" was to ensure the crew worked safely (Tr. 24). Although he could recommend a sanction for a workplace infraction, he could not fire an employee without approval from his supervisor, the purchasing and warehouse manager Bradley Taylor. Smart might write up an employee, and have the employee sign what he had written, but Smart would make sure Taylor was aware of his actions before or after the fact. Smart had authority to tell employees to get on their fall protection or to follow safety rules (Tr. 24-26, 31-33).

Leadmen and working foremen are among the categories of supervisors whose knowledge has been imputed to their employers in the past. *E.g., Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1537-38 (No. 86-360 & 469, 1992). The company delegated immediate supervisory duties to Smart, including first-line responsibility for safety. Smart is a supervisor whose knowledge may be imputed to 4 State.

Smart was aware 4 State had a "general guideline" (Tr. 86), which stated (Exh. R-1, item 1e):

> Policy! Waist belts must be worn and attached to tether belt when pulling parts with pickers. No exceptions!! It is mandatory!"

Four States implemented the policy at least a year and a half prior to the hearing, after Taylor realized employees did not use fall protection while elevated on Ordermaster pickers. Four State

discussed and distributed the agenda for this and other issues at a company meeting[4] (Tr. 53, 116, 128, 151, 155, 204). Four State purchased tethers and harnesses for the employees. However, the tie-off "policy" was not followed for very long.

The warehouse is a fast paced workplace without much downtime (Tr. 31, 79-80). Warehouse employees Smart, McGinnis, Renbury and Carrico openly admitted employees, themselves included, did not regularly tie off while elevated on the Ordermaster (Exh. C-3; Tr. 78-80, 123-124, 129, 140, 170, 189). For example, Foreman Smart admitted he and the other warehouse employees "had all gotten away from [tying off]" (Exh. C-3). He wondered if "a kind of hurried attitude . . . overtook it" (Exh. C-3). He recalled seeing Chris Fisher on the Ordermaster without a harness on the day of the accident (Exh. C-3; Tr. 82). Warehouse employee Gregory McGinnis, Jr., verified employees saw Fisher the day of the accident elevated above 4 feet without fall protection. McGinnis was also frank that he and the other warehouse employees did not often use the tether and harness belt. He knew the equipment was available, "but if we're in a hurry, we really didn't worry about it" (Tr. 130, 134, 140). Travis Renburg noticed his foreman Smart working at heights without a belt. In response to cross-examination whether he deliberately violated 4 State's policy, Renburg explained, "At times, yes . . . You get to be in a rush, you just go without it. I mean it's easy just to go without it. That's why" (Tr. 170). Warehouse employee Gene Carrico testified that employees sometimes "got slack" (Tr. 189). Carrico observed his foreman Smart as well as other employees working on the Ordermaster without being tied off (Tr. 191).

During the 6 months before the OSHA citation, Smart was aware the warehouse employees did not tie off between the "gray area" of 4 and 6 feet (Tr. 54, 61). Smart responded "possibly" when asked if he saw employees working above 4 to 6 feet without fall protection, and he stated the employees "possibly" violated the fall protection rule on a daily basis (Tr. 63). The undersigned observed Smart as he responded to these questions. Smart first shook his head in emphatic agreement to indicate the answer was to be taken as "yes" and after a pause said, "possibly." The witness's response was not intended as a disavowal of any earlier admissions. Smart had actual

[4] The meeting did not primarily concern safety. This was one of the topics under the general heading of "safety." Other general topics included at the meeting were: "shipping & picking,""stocking/incoming," and "general" (Exh. R-1).

knowledge of his and his crew's repeated failure to use fall protection on the elevated Ordermaster platform.

In addition, Smart's supervisor Taylor was often in the warehouse area. Taylor testified he had not observed anyone not tied off while elevated on the Ordermaster. However, Taylor usually stayed "up front," where he would not have seen the warehouse employees sufficiently to observe whether they wore belts while elevated on the platforms (Tr. 127, 211). Warehouse employee Carrico saw Taylor once or twice a week and believed Taylor did not make a point "to go look particularly to see that that [tying off] was being done" (Tr. 218). The widespread failure to use the tether and harness provided amply opportunity for Taylor to see the violation had he or other supervisors actually checked on use of fall protection on the Ordermaster.

The actual knowledge of foreman Smart is imputed to 4 State. Because an employer is chargeable with conditions which are plainly visible to its supervisory personnel had they look, 4 State also had constructive knowledge of the violation through Brad Taylor. The Secretary has proven the element of knowledge. Unless 4 State establishes an affirmative defense, the violation will be affirmed.

Affirmative Defenses of Infeasibility and Employee Misconduct

Four State contends use of guardrails was infeasible. The elements of the defense of infeasibility are: (1) literal compliance with the requirements of the cited provision was infeasible; and (2) alternative means of protection were used, or were infeasible. *E.g., State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993). Four State appears to argue that when the Secretary seeks an employer's compliance, not with the literal mandate of the standard (which is infeasible), but with some alternate means of protection, the Secretary bears the burden to prove a viable, feasible means of abatement exists. The underlying rationale for shifting the burden to the Secretary to prove the second element of the infeasibility defense has been rejected. *Dun-Par Engineered Form Co*., 843 F.2d ll35, 1138-1139 (8th Cir. l988) (the employer, not the Secretary, bears burden of proof of both prongs of infeasiblity test).

The Secretary does not dispute 4 State meets the first prong of the defense. Warehouse employees bring varied and large-sized truck parts up and down on the elevated platform. The Secretary agrees guardrails could so interfere with the necessary work as to be practically infeasible.

The fact the Secretary accepts an alternate measure as feasible does not mean that the Secretary cited the wrong standard. It just means that an employer can avoid liability under the applicable standard by using the alternative measures. *Rockwell Intl. Corp.*, 17 BNA OSHC 1801, 1807 n.9 (Docket No. 93-234, 1996).

In this case the parties agree the harness and tether offer feasible alternate means of protection for an infeasible guardrail. Four State contends it provided the harnesses and lanyards and had a written rule which required employees to use them. As discussed, however, 4 State has failed to show its employees, in fact, *used* that alternate fall protection until after the accident. Four State thus fails to prove the second element of the defense.

Four State asserts the violative conduct resulted from unpreventable employee misconduct.

Four State argues its warehouse employees, as well as its supervisor Smart, were each guilty of employee misconduct in failing to tie off while on the Ordermaster. To establish the defense, the employer is required to prove that: "(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered." *Gem Industrial, Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-112, 1996), *aff'd without published opinion,* 149 F.3d 1183 (6th Cir. 1998).

The employee misconduct defense "is more rigorous and the defense is more difficult to establish . . ." when the employee is a supervisor. "Moreover, the fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." *Jensen Constr. Co*., 7 BNA OSHC 1477 (No. 76-l538, l979). The question arises whether the employer adequately trained and supervised the supervisor. Smart appeared to be conscientious and able and someone who took his work responsibilities seriously. The other warehouse employees also appeared conscientious. Four State was aware it had a fast-paced workplace and a fast-moving crew. A supervisor's failure to comply with a workrule, plus the employees' willingness to break the workrule in the supervisor's presence, indicate lax enforcement or communication of the workrule. *Jensen Constr. Co., supra*. It is unnecessary to dwell further on each element of the defense. A (rarely communicated) workrule, even with a manufacturer's sign on the equipment warning "to always wear tether line and belt," cannot prevail against the example of a supervisor and co-workers

performing the work without fall protection. Four State failed to establish it effectively communicated, sought to discover, or enforced the workrule in question.

Having failed to establish either defense, the violation of § 1910.23(c)(1) is affirmed.

Item 2: Alleged violation of §1910.178(l)(4)(ii)(A)

The Secretary asserts 4 State violated §1910.178(l)(4)(ii)(A) by failing to retrain employees to use a safety harness and lanyards while elevated on the Hyster Ordermaster. The standard requires:

> (l)(4)(ii) Refresher training in relevant topics shall be provided to the operator when:
> (A) The operator has been observed to operate the vehicle in an unsafe manner; . . .

Four State conducted annual training, which included a reference to its policy to tie off while elevated on the Ordermaster picker. The Secretary contends the fall protection portion of the safety training was insufficient but, regardless of its sufficiency, when employees ignored their training to use harnesses and tethers, additional training was required. Four State counters its fall protection training was adequate and appropriate. It claims to be without knowledge that the training may have been ineffective for certain individuals.

The standard mandates re-training only if the operator has been "*observed to operate*" unsafely. Focusing on the word "observed," 4 State contends the standard mandates the Secretary prove it had actual (not just constructive) knowledge of the violation. Four State is correct that the re-training requirement does not come into play unless an operator is "observed," but it is incorrect that this equates to a mandate for actual knowledge. For the reasons stated in the previous section, the actual and constructive knowledge of its supervisors are imputed to 4 State.

The Secretary cannot require re-training on a safety issue for which training was not required in the first place. Section 1910.178(3) requires operators of powered industrial trucks to be trained in a series of "truck-related topics." Included in this list at subsection (M) is the standard's requirement that:

> (M) Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.

The operator's manual for the Hyster Ordermaster, as well as warning labels on the equipment itself, specify operators or others who are lifted on the equipment must "Always wear

tether line and belt" when being lifted (Exhs. R-4, R-5). Thus, 4 State was required to train its operators to wear the personal fall protection of a harness or belt and to attach it to the tether. When 4 State's supervisor observed the Hyster operators retrieving truck parts at elevated levels and not using their harnesses and tether lines, the standard required 4 State to re-train the operators to do so. The violation is affirmed. For the reasons discussed, 4 State fails to meet its affirmative defenses of infeasiblity and employee misconduct.

Penalty

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Act requires the Commission to consider the size of the employer, any history of previous violations, the employer's good faith, and the gravity of the violation.

Four State employed 50 employees at the time of the inspection. It cooperated with the inspection and made employees available to be interviewed. It had a written safety program, although it did not fully implement the program. While the focus in assessing good faith is the time period before the violation, it is noted 4 State's current efforts to communicate and enforce the workrule are commendable (Tr. 79). Four State had no previous violation of the OSH Act.

The gravity of a violation, however, is the principal factor to be considered. Gravity considerations include such factors as the number of employees exposed, the duration of the exposure, the precautions against injury, and the degree of probability that an accident would occur. The gravity of these violations are high. Employees worked in a busy warehouse from a relatively small platform, which elevated them to a height of up to 23 feet. The employees brought odd shaped items onto the platform with them. The employees worked within inches of the open sides of the platform. Falls from the platform could result in serious injury or death.

Item 1 and item 2 are not duplicative, but they are closely related. In recognition of that fact, and the facts described above, a reduction in the penalty is appropriate. The penalty for item 1 is assessed at $3,000.00 and for item 2 at $1,000.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

1. Item 1 of the citation, alleging a violation of § 1910.23(c)(1) is affirmed and a penalty of $3,000.00 is assessed; and
2. Item 2 of the citation, alleging a violation of § 1910.178(l)(4)(ii)(A), is affirmed and a penalty of $1,000.00 is assessed.

/s/
Nancy J. Spies
Judge

Date: August 25, 2009
Atlanta, Georgia