

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.

International Transportation Service, Inc.,

Respondent.

OSHRC Docket No. **08-1428**

Appearances:

Isabella M. Finnerman, Esquire, San Francisco, California
For Complainant

William N. Brooks, II, Esquire, Long Beach, California
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

International Transportation Service, Inc. (ITS) operates a marine terminal facility at the Port of Long Beach, California. On June 11, 2008, Occupational Safety and Health Administration (OSHA) Compliance Officer John Reich inspected the ITS facility while containers aboard the marine vessel "Shanghai Bridge" were being unloaded.

As a result of the OSHA inspection, ITS received a serious citation on August 21, 2008, alleging a violation of 29 C.F.R. § 1918.85(l). The citation states the hatch boss was exposed to a fall of 9 feet, 2 inches to a steel deck when he was working within 3 feet of the unguarded edge of the hatch cover. The citation proposes a penalty of \$975.00. ITS timely contested the citation.

The hearing, on April 8, 2009, was held in Long Beach, California. The parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post hearing briefs.

ITS denies the alleged violation of § 1918.85(l) and asserts that a fall hazard did not exist and the hatch boss was not "working" at the time of his alleged exposure. ITS, also, denies the serious classification and the reasonableness of the proposed penalty. ITS withdraws the unpreventable employee misconduct defense alleged in its answer (Tr. 4-5).

For the reasons discussed, the violation of §1918.85(1) is affirmed and a penalty of \$200.00 assessed.

The Inspection

ITS operates a marine terminal at the Port of Long Beach, California, loading and unloading shipping containers for transport via marine vessels, over-the-road trucks or railroad. The employees including foremen are members of the International Longshore and Warehouse Union. The terminal employs 100 to 200 union employees depending on the number of vessels being loaded or unloaded. ITS also employs superintendents and other management staff to oversee the terminal's operation. At the time of the OSHA inspection, William Carson was the ITS senior manager of safety and security compliance (Tr. 63, 77, 80, 82).

On June 11, 2008, OSHA Compliance Officer Reich conducted a "planned" inspection of the ITS terminal. He arrived at approximately 1:00 p.m. He held an opening conference with Carson. After the conference, Reich and Carson went aboard the marine vessel "Shanghai Bridge" which was being unloaded (Tr. 11-13, 36, 55).

Once on the main deck of the vessel, Carson called foreman Jack Russo, who was working as the hatch boss on top of the hatch cover directing the unloading of containers, over to the edge of the hatch cover to notify him of the OSHA inspection and inquire of any safety problems aboard the vessel (Exhs. C-1, C-2; Tr. 15, 90, 114). The edge of the hatch cover was unguarded and Russo was not wearing personal fall protection (Tr. 29, 31). The conversation between Carson and Russo lasted less than 2 minutes (Tr. 39, 91). After the conversation, Russo resumed his work in the middle of the hatch cover and was never again observed working near the edge (Tr. 39-40). The hatch cover measured 9 feet, 2 inches above the main deck and was approximately 90 feet by 130 feet (Tr. 26, 106).

Upon observing Russo near the edge of the hatch cover, Reich testified he climbed one or two rungs on a ladder leaning against the hatch cover. From this vantage point on the ladder which Reich described as "a foot below the hatch cover surface," Reich estimated Russo was 1 to 2 feet from the edge. Reich, who did not access the top of the hatch cover, did not measure Russo's distance from the edge. Reich described Russo as a person of average height and a stocky build and testified he was leaning over the edge of the hatch cover while talking to Carson. Reich estimated he was approximately 10 feet from Russo and a foot below the hatch cover surface when he took

the photographs (Tr. 22-23, 32, 39, 99, 103). No other employees were apparently observed near an unprotected edge during OSHA's inspection.

Carson testified that he did not believe Russo was within 3 feet of the unguarded hatch cover edge when he was talking to him. Carson estimated that Reich was more than 20 feet from Russo when he took the photographs (Tr. 93, 116).

Also, the record shows that the top of the hatch cover was approximately 2 to 3 feet above the hatch deck (Tr. 26). With the hatch cover in place as during OSHA's inspection, there was a 16-inch lip of the hatch deck protruding below the top of the cover (Exh. C-3; Tr. 23, 25, 59). The lip was unguarded (Tr. 29).

ITS was issued the serious citation on June 11, 2008, alleging the lack of fall protection as required by 29 C.F.R. § 1918.85(l).

Discussion

In order to establish a violation of a safety 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 either 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).

The parties agree that 29 C.F.R. Part 1918 is applicable to ITS longshoring activities aboard the "Shanghai Bridge" in discharging the containers. Section 1918.85(l) is applicable to containerized cargo operations. ITS does not dispute that if a violation is found, it had knowledge of the condition. The hatch cover was unguarded and Russo was not utilizing personal fall protection while talking to Carson at the edge of the hatch cover.

The issues in dispute are whether Russo was within 3 feet of the unguarded edge of the hatch cover and whether Russo was exposed to a fall hazard because of the 16-inch hatch lip and the short duration of the exposure. Also in disputes is whether Russo was "working" as required by the standard when he was allegedly exposed to a fall hazard.

Alleged Violation of § 1918.85(l)

The citation alleges the hatch boss Russo was exposed to a fall of 9 feet, 2 inches to a steel deck when he was working within 3 feet of the unguarded edge of the hatch cover. Section 1918.85(l) provides:

Working along unguarded edges. The employer shall provide, and ensure that the employee use, fall protection meeting the requirements of paragraph (k) of this section whenever the employee works along an unguarded edge where a fall hazard exists (see § 1918.2).

Section 1918.2 defines “fall hazard” as in the following situations:

- (1) Whenever employees are working within three feet (.91 m) of the unprotected edge of a work surface that is 8 feet or more (2.44 m) above the adjoining surface and twelve inches (.3 m) or more, horizontally, from the adjacent surface; or
- (2) Whenever the weather conditions may impair the vision or sound footing of employees working on top of containers.

The Secretary agrees that subparagraph (2) of the “fall hazard” definition, involving the weather conditions, does not apply in this case (Tr. 63). The weather during the OSHA inspection did not impair the vision or footing of Russo while on top of the hatch cover.

In finding a violation of § 1918.85(l), the following discussion addresses the issues raised by ITS.

Russo was Within Three Feet of the Edge

ITS contends OSHA failed to present sufficient evidence showing Russo was within 3 feet of the unguarded edge. ITS argues Reich had an “affirmative obligation” to measure the distance in question.

Despite Reich’s failure to take an actual measurement of Russo’s distance from the hatch cover’s edge, the Court finds the Secretary has met her burden in establishing that Russo was within 3 feet of the edge when he conferred with Carson. ITS’s reliance upon Chief Judge Sommer’s decision in *Universal Maritime Service Corp.*, 20 BNA OSHC 1853, 1856 (No. 03-0399, 2004) for the proposition that measurements must be made, is misplaced. In the *Universal* case, the compliance officer’s estimate of 8 feet to the top of a container allowed no margin for error in establishing a “fall hazard” which § 1918.2 defines as 8 feet or more. Also, a catwalk upon which the employee was working when he fell, may have been “lower than the top of the container by 1

to 3 inches.” Based upon the record in the *Universal Maritime* case, an accurate measurement was crucial to establishing the violation.

In this case, Reich did measure the height of the hatch cover from the main deck to be 9 feet, 2 inches. Although he did not measure the distance Russo was from the edge, Reich’s estimate of 1 to 2 feet is well within the standard’s requirement of 3 feet from an unprotected edge (Tr. 22, 42). Reich explained that he did not take a measurement on top of the hatch cover because of personal safety concerns (Tr. 26).

Reich’s estimate of Russo’s closeness to the unprotected edge is accepted based on his vantage point and a review of the photographs. The photographs show Russo at the unguarded edge. From the angle of the photographs, only Russo’s feet are not shown. The photographs confirm Reich’s observations regarding Russo’s exposure. Reich’s vantage point on a ladder approximately 10 feet to the side of where Russo was standing was sufficient for him to make this estimate (Tr. 39). Also, his estimate is deemed reliable based on Reich’s 40 years of experience with the general conditions aboard a vessel and his 10 years with OSHA estimating distances and measurements (Tr. 11, 22-23).

Carson’s testimony, on the other hand, is not given weight because he was on the main deck standing below and looking up at Russo. He was more focused on his conversation with Russo and not where Russo was standing. Considering Carson’s vantage directly below Russo and the 16-inch lip of the hatch deck, Russo may have appeared further from the edge. In his deposition offered by the Secretary, Russo was unable to recall his distance from the edge (Exh. C-4, p. 64, 66).

Reich’s estimate that Russo was less than 2 feet from the edge of the unguarded hatch cover is accepted.

A Fall Hazard of 9 Feet Existed

ITS contends that a fall hazard did not exist because the work surface upon which Russo was standing had a lower adjoining surface, the 16-inch lip of the hatch deck, that was less than 3 feet below the top of the hatch cover. ITS argues the fall hazard was, therefore, less than 8 feet as required by the definition of “fall hazard.”

ITS’s argument is rejected. The 16-inch lip of the hatch deck did not negate the fall hazard of more than 9 feet to the main deck. The lip did not constitute a lower adjoining surface as contemplated by the definition of “fall hazard.” The lip was unguarded and provided less than 3 feet

of surface upon which an employee could fall. Reich testified that an employee who fell from the hatch cover would probably fall to the main deck and not be able to land and stay on the 16-inch lip (Tr. 32, 51).

The Secretary's definition of "fall hazard" establishes less than 3 feet as the basis for requiring fall protection to prevent a fall hazard. Therefore, the lip needed to be at least 3 feet or more in order to be considered an adjoining surface. There is no official agency interpretation (Tr. 50). The Court, considering the Secretary's responsibility under the Occupational Safety and Health Act (Act) to provide a safe workplace, is applying a common sense interpretation. Any other interpretation would render the definition vague if it considered the probability of an employee falling off the lip due to its size or distance from the work surface.

Carson agreed. Carson testified that if Russo was within 3 feet of the unguarded edge of the hatch cover, he would have considered Russo exposed to a fall hazard to the main deck (Tr. 117).

The 16-inch lip did not constitute an adjoining surface and a fall hazard in excess of 8 feet is established.

The Short Duration of the Exposure is Immaterial

There is no dispute that Russo's exposure was of less than 2 minutes (Tr. 39, 91). However, the short duration of an exposure does not negate a violation. Although Russo's exposure may have been comparatively brief, it is still sufficient to support the finding of a violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992). An accident can happen without notice.

Russo Was Working

ITS argues Russo was not "working" at the time he was observed by Reich at the unguarded edge of the hatch cover talking to Carson. Carson testified the only reason Russo was near the unguarded edge was to ascertain the identity of the OSHA inspector and whether there were any safety concerns. Once that was done, Russo returned to his regular duties as hatch boss away from the edge (Tr. 91, 113).

Carson asked Russo to come to the unguarded edge (Tr. 114). As a foreman, Russo was working as a hatch boss directing the unloading of containers. Carson's request was part of Russo's work responsibilities to know who was aboard ship and the reason (Tr. 88, 91). Russo was

responding to a request of a senior manager. Also, Russo testified that during the conversation, he was continuously looking over to the containers being loaded by the crane which was part of his duties as the hatch boss. Russo's exposure is considered work within the standard.

A violation of § 1926.760(a)(1) is established.

The Serious Classification

The violation of § 1918.85(l) is classified as serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. The issue is not whether an accident is likely to occur, but rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

The serious classification in this case is appropriate. Carson, who is a senior manager, knew Russo was at the unguarded edge of the hatch cover without fall protection (Tr. 77). Also, Russo was a foreman assigned to work as the hatch boss (Tr. 81, 88). Russo's duties included directing the unloading of the vessel. Carson's and Russo's knowledge of Russo's exposure to an unguarded edge is imputed to ITS. ITS concedes that Carson was aware of the 3-foot standard associated with fall protection based upon his duties as senior manager of safety (ITS Brief, p. 3).

ITS is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). When a supervisory employee such as Carson or Russo has actual or constructive knowledge of the violation conditions, knowledge is imputed to the employer. *Dover Elevator Co.* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

There is not dispute that an employee's fall in excess of 9 feet to the steel main deck could cause serious injuries including a fracture, contusion or concussion (Tr. 32-33, 117).

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

ITS is a large employer with approximately 250 employees (Tr. 56, 80). It is entitled to credit for history and good faith. There is no record of ITS receiving a citation for safety violations within the preceding two years (Tr. 34). According to Reich, ITS has a good safety program. It is noted that Reich's four hour inspection of ITS facility found only one violation of OSHA standards.

A penalty of \$200.00 is reasonable for violation of § 1918.85(1). One employee was exposed for less than 2 minutes to a fall hazard in excess of 9 feet. Russo's exposure was initiated by the senior manager, but was the result of OSHA being on board. Other than this short duration of exposure, there is no evidence Russo or any other employee was exposed to the unguarded edge of the hatch cover.

**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 upon the foregoing decision, it is ORDERED that

Citation No. 1, Item 1, alleged serious violation of § 1918.85(1), is affirmed and a penalty of \$200.00 is assessed.

/s/

KEN S. WELSCH
Judge

Date: June 26, 2009