UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MODERN CONTINENTAL CONSTRUCTION COMPANY, INC., Respondent.	:	OSHRC DOCKET NO. 00-1629

Appearances: Christine Eskilson, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Richard D. Wayne, Esquire
Hinckley, Allen and Snyder
Boston, Massachusetts
For the Respondent.

BEFORE: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Modern Continental Construction Company, Inc. ("Modern"), at all times relevant to this case maintained a construction work site in Boston, Massachusetts. Modern admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

On July 22, 2000, an employee was injured while working in a below-grade chamber at the above-referenced construction site, known as the "Big Dig." As a result of the accident, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the site and issued to Modern two citations alleging serious and repeated violations with a proposed total penalty of $49,000. Modern filed a timely notice of contest, and a hearing was held on May 21 and 22, 2001, in Boston, Massachusetts. At the hearing, the Secretary withdrew Item 2 of Serious Citation 1,

leaving for resolution Item 1 of Serious Citation 1 and Item 1 of Repeat Citation 2. The parties have submitted post-hearing briefs, and this matter is ready for disposition.

The Accident

Respondent Modern is the general contractor at the subject site. On the morning of July 22, 2000, Pasquale Pezzano, Modern's general foreman,[1] took the crew down into an underground room and assigned them duties relating to stripping and removing shoring materials from the room, which was approximately 40 feet long, 20 to 30 feet wide and 20 feet deep. While some employees worked below, stripping, stacking and rigging materials to be hoisted out of the room, other employees working above were landing the materials and then strapping and banding them to be hauled off the work site. Natalio Elias, an employee of Modern, was engaged in stacking and rigging the shoring materials so that they could be hoisted out of the room through the access hole in the ceiling that was about 5 feet by 7 feet. Once Mr. Elias had rigged a load, Anthony Cappuccio, another foreman of Modern who was stationed at the surface, directed the crane operator to lift the load through the access hole and over the guard rails around the hole and to then land the load at a location designated by Mr. Pezzano. (Tr. 25, 29-36, 39, 43-45, 58, 78, 109-13, 122, 147-49.)

Mr. Elias rigged several loads of frames horizontally, and these loads were safely landed in the areas Mr. Pezzano designated. Mr. Elias then rigged a load of 7-foot-long cross braces vertically, by wrapping the securing strap once around the braces. Mr. Cappuccio noticed that the strap was slipping from the load as it was being raised, and he gave the signal to lower the load. Mr. Cappuccio tried to explain to Mr. Elias that he needed to either double-wrap the cross braces or use an additional strap. Mr. Elias did not seem to understand, and Mr. Cappuccio called over another employee, Carlos Cardosa, who also tried to explain to Mr. Elias what to do.[2] After these efforts, Louis Sousa, another foreman of Modern who was working in the room with Mr. Elias, rigged the load of cross braces himself and then signaled for Mr. Cappuccio to raise the load. As the load was

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[1]As a general foreman, Mr. Pezzano had supervision over laborers and other foremen. (Tr. 140.)

[2]Mr. Elias may have had difficulty understanding Mr. Cappuccio's instructions because Mr. Elias' first language is Portuguese. (Tr. 50-52, 98.) Mr. Cappuccio called Mr. Cardosa over to interpret because Mr. Cardosa spoke Portugese. *Id.*

being hoisted out of the room it slipped and fell back down through the access hole, and one of the cross braces impaled Mr. Elias in the head. (Tr. 39-40, 43-44, 48-52, 94-101, 127-30).

Serious Citation 1, Item 1

This item alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), which provides that "[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." Specifically, the Secretary alleges that Modern failed to adequately train its employees in proper rigging methods. To establish a violation of a standard, the Secretary must show (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). Respondent in essence argues that the alleged violation (the failure to train employees in rigging) "is unrelated" to the cited standard (the recognition and avoidance of unsafe conditions). (R. Brief, p. 10.) I find, however, that the cited standard is applicable because training employees in proper rigging methods would necessarily include the recognition and avoidance of unsafe conditions.

The Commission has held that § 1926.21(b)(2) requires an employer to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992). Further, these instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7 (No. 90-1106, 1993). Respondent asserts that employees learned how to rig loads through on-the-job training and that this practice is industry custom.[3] (Tr. 101-03, 211; R. Brief, pp.10-11.) This training, however, was inadequate to sufficiently instruct employees, especially an inexperienced employee like Mr. Elias, of the hazards associated with the kind of

[3]Respondent presented evidence that rigging was also discussed at toolbox talks and at the start of an employee's hire. (Tr. 131-32, 240-41.)

rigging method used on the day of the accident.[4]

According to Mr. Cappuccio, Mr. Pezzano and Wayne Rice, Modern's vice-president of corporate safety, hoisting a load up vertically, the method that was used to rig the cross braces on the day of the accident, is not recommended because it is less stable and more difficult than lifting a load up horizontally. (Tr. 53-54, 104, 156-57, 284.) In addition, the access hole through which the loads were being lifted was the smallest that Mr. Cappuccio had seen and the smallest from which Mr. Pezzano had removed shoring. (Tr. 31-32, 145.) Yet, Modern did not instruct the crew that day or any other day about how to rig loads under these circumstances. Mr. Pezzano admitted that he did not give Mr. Elias or the other crew members any training on vertical lifting or on rigging the loads that were to be lifted out of the hole that day. (Tr. 166-67.) He also admitted that he did not know if anyone on the crew had ever received previous training on vertical lifts. (Tr. 166.) Scott Collins, a former employee who worked for Modern at the time of the accident, testified that he could not recall any training in rigging for small access holes, in rigging long loose bundles, or in rigging a load vertically. (Tr. 132.) The Secretary identified several alternative methods of rigging cross braces which Modern's foremen considered feasible (lifting the load diagonally or manually removing the load by hand), none of which were demonstrated to Mr. Elias or any other employee. (Tr. 54-55, 163-64, 193-95, 276-78, 291-93.) I conclude that a reasonably prudent employer would have given its employees more specific training on the recognition and avoidance of hazards that Modern employees faced on that day. I find, therefore, that Respondent violated the terms of the standard.

I further find that Modern's employees had access to the cited condition and that Respondent had actual knowledge of the condition. Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, (No. 90-2148, 1995), *aff'd without published op.*, 79 F.3d 1146 (5th Cir. 1996). Moreover, knowledge of the employer's foreman or supervisor is imputable to the employer for the purpose of establishing knowledge. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997).

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[4]While Mr. Pezzano testified that Mr. Elias had been working for him for about five months, it is unclear if Mr. Elias had been employed by Modern for only five months. (Tr. 149.) In any case, I find Mr. Elias to be inexperienced based on Mr. Cappuccio's testimony that Mr. Elias did not know what he was doing. (Tr. 51.)

Here, two of Modern's foremen, Mr. Pezzano and Mr. Cappuccio, admitted that they were aware of the danger of hoisting loads vertically and that Mr. Elias was not familiar with vertical lifts. (Tr. 31-32, 37-38, 51-54, 63, 156-57.) Mr. Cappuccio also testified that Mr. Elias did not know what he was doing and seemed not to understand what he was supposed to do even after being told to double wrap the cross brace load. (Tr. 50-52.) In any case, even if Modern did not have actual knowledge of the violative condition, it could have discovered the condition with the exercise of reasonable diligence.[5] Furthermore, I find that this citation item is properly classified as serious, in light of the serious physical harm that was caused by the violation.

In regard to penalties, the Commission, pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. *See also, J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The gravity of the violation is generally the principal element in penalty assessment. *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992), and cases cited therein. I find the gravity of the violation to be high based upon a finding of high severity and greater probability, and that no adjustments are appropriate for size, history or good faith. (Tr. 199-00.) Based on the foregoing, this item is affirmed as a serious violation, and a penalty of $7,000 is assessed.

Repeat Citation 2, Item 1

This item alleges a repeated violation of 29 C.F.R. § 1926.550(a)(19), which provides that "[a]ll employees shall be kept clear of loads about to be lifted and of suspended loads." It is

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[5]In *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992), the Commission held that reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, to take measures to prevent the occurrence, to adequately supervise employees, and to formulate and implement adequate training programs and work rules to ensure that work is safe. The Commission has also held that where the record establishes that the cited conditions were in plain view and that supervisory personnel were present throughout the work operation as is the case here, this constituted constructive knowledge of the violative conditions. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871-72 (No. 92-2596, 1996); *American Airlines, Inc.*, 17 BNA OSHC 1552, 1555 (No. 93-1817 and 93-1965, 1996).

undisputed the cited standard applies. Moreover, it is apparent that the standard was violated, in that the accident itself shows that Mr. Elias was not clear of the load while it was being lifted. Clearly, Mr. Elias, as well as other employees, had access to the hazardous condition. Finally, I find that Respondent had actual knowledge of the condition. Mr. Pezzano, the general foreman, admitted that he knew that Mr. Elias was too close to the load earlier that morning, and Mr. Cappuccio, another foreman, admitted that Modern employees had been under loads before. (Tr. 64-65, 131.) Even if Modern did not have actual knowledge, however, it could have known of the violative condition in the exercise of reasonable diligence because employees were working under these conditions in the presence of several supervisors.[6] Based on the evidence, the Secretary has demonstrated all of the elements of her prima facie case.

Respondent contends that the violation was a result of "unexplained idiosyncratic behavior or unforeseeable misconduct." (R. Brief, pp. 11-12.) In order to prove the affirmative defense of unpreventable employee misconduct, Modern must show that: (1) it had established work rules designed to prevent the violation, (2) it had adequately communicated the rules to its employees, (3) it had taken steps to discover violations, and (4) it had effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979); *see also, General Dynamics Corp. v. OSHRC*, 599 F.2d 453 (1st Cir. 1979).

In support of its contention that it had a work rule designed to prevent the violation and that it adequately communicated the rule, Modern points to its safety manual, orientation for new hires, toolbox talks, Wednesday night meetings, and verbal instructions that supervisors gave to employees. (Tr. 240-45; R. Brief, p.12.) I conclude, however, that Modern has not met its burden of proving that the violation was due to unpreventable employee misconduct. The essence of the rule communicated to employees was to "stay away from the hole" and to "stay clear of the load."[7] (Tr. 92, 107-08, 161-63.) The rule was simple, and it was evidently repeated to the crew. Regardless, the rule did not inform Mr. Elias and other employees when they could or could not work near the access hole. In fact, the only way that employees knew that no load was overhead was when the loading

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[6]*See* discussion *supra* on actual and constructive knowledge.

[7]Modern had variations of the same instruction in its safety manual. (Tr. 231-32, 241-45.)

strap was sent back down for the next load, and there was no other signaling system in place to let the crew know that the load had cleared.[8] (Tr. 60, 159-60.) Further, Mr. Elias's assigned duties required him to work near or under the access hole, and he was expected to continue working even though the loading strap had not been sent back down. *Id.* Stated another way, Mr. Elias was expected to continue working near the hole while a load was being hoisted out of the underground room.[9] Given this expectation, Modern's work rule was not designed to prevent the violation.

Even assuming *arguendo* that the rule was designed to prevent the violation, Respondent has failed to satisfy the other elements of its affirmative defense. The evidence shows that Mr. Elias had difficulty understanding the explanations Mr. Cappuccio gave him. (Tr. 50-52, 98.) It is reasonable to infer from this evidence that Mr. Elias' ability to understand communications in English was limited, and Modern has failed to show that its means of communicating the rule to Mr. Elias was adequate. The safety manual, meetings and supervisory instructions would not have adequately communicated the rule unless non-English speaking employees like Mr. Elias could understand it, and Modern presented nothing to show that its safety communications were provided in any language other than English. In addition, Modern has not established that it took steps to discover violations of the rule or taken any disciplinary action when such violations were discovered. Mr. Rice, Modern's vice-president of corporate safety, admitted that although the company policy called for notations in personnel files for violating rules, "we didn't do that." (Tr. 279-81.) He further admitted that Modern's foremen, who have direct supervision over laborers, were "reluctant to issue warnings." (Tr. 257.) Finally, Foremen Cappuccio and Pezzano testified that they did not know of any employee being written up, suspended or terminated for being under a load.[10] (Tr. 68-69, 168-

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[8]Modern presented photographs (R-2) as evidence that employees in the access hole could clearly see when a load was overhead. I conclude that these photographs, taken some ten months after the accident, are not dispositive evidence of a clear view of loads as it is undisputed that conditions had changed. I further conclude that the Secretary's photographs (C-1-2) are the more reliable evidence in this regard.

[9]Modern never told employees that they were not supposed to go near the access hole until the loading strap came back down. (Tr. 60.)

[10]Although Modern presented evidence of various written warnings issued to employees for violating safety rules (R-7), none of the warnings related to the work rule at issue. In any case, Mr.

69.) Based on the foregoing, Respondent has failed to prove its affirmative defense of unpreventable employee misconduct.

The Secretary has classified this violation as repeated. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). It is undisputed that at the time of the subject violation, there was a final order against Modern for a previous violation of the same standard cited here. (C-6.) While Respondent argues that the facts and circumstances of the prior violation were substantially different, it has not rebutted the Secretary's evidence of the prior violation.[11] *See Monitor Constr. Co.*, 16 BNA OSHC 1589 (No. 91-1807, 1994). Accordingly, this citation item is properly classified as repeated. As to penalty assessment, I find that the gravity of the violation is high and that no adjustment is appropriate for size, history or good faith.[12] (Tr. 203-05.) This item is therefore affirmed as a repeated violation, and the proposed penalty of $35,000 is assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED, and a penalty of $7,000 is assessed.

Rice testified that there was no evidence of any written warnings to employees for being under a load. (Tr. 279-82.)

[11]Respondent asserts in its brief that because "[t]he facts giving rise to the alleged predicate prior violation are so different than the circumstances of the instant violation," the subject violation cannot be classified as repeated. (R. Brief, p.12.) Respondent, however, offers no Commission cases to support this assertion. Nor does Respondent offer with specificity how the facts and circumstances are sufficiently different to rebut the Secretary's evidence. Upon review of the record, Modern's employees were exposed to the same hazard in both violations–working while a load or basket was suspended over employee(s). (Tr. 284.)

[12]*See supra* discussion on penalty assessment.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.251(a)(1), is VACATED.

3. Citation 2, Item 1, alleging a repeated violation of 29 C.F.R. § 1926.550(a)(19), is AFFIRMED, and a penalty of $35,000 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: September 24, 2001
Washington, D.C.