UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. STEVEDORING SERVICES OF AMERICA, Respondent.	OSHRC Docket No. 97-1105

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For Complainant

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For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a Compliance Officer ("CO") of the Occupational Safety and Health Administration ("OSHA"), Stevedoring Services of America ("SSA" or "Respondent")

was issued one citation on June 23, 1997 alleging one serious violation under the Act. A civil penalty of $5,000 was proposed. Respondent timely contested the citation and notification of proposed penalty. Following the filing of a complaint and answer, an extensive discovery period and significant pre-trial motions, and pursuant to a notice of hearing, the case came on to be heard in Newport News, Virginia on September 29 and 30, 1998. No affected employees sought to assert party status. Both parties filed post-hearing briefs on December 31, 1998. At the request of the Administrative Law Judge, the parties filed supplemental briefs on February 17, 1999.

Jurisdiction

Complainant alleges and Respondent does not deny that it is a stevedoring company in that it contracts to load and unload ships. It employs "longshoremen" on a daily basis to perform its work. It is undisputed that at the time of this inspection Respondent was engaged in unloading the cargo from a vessel in the port of Newport News. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. On these facts, I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Based upon an inspection of SSA's unloading operations OSHA issued a citation alleging that Respondent failed to comply with the longshoring standard at 29 C.F.R. § 1918.32(b) which as of the date of inspection provided;

> (b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee failing, the edge shall be guarded by a safety net of adequate strength

[1] Title 29 U.S.C. § 652(5).

to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.

The parties have stipulated that a stevedoring gang[2] was unloading cargo containers from a docked vessel when their working conditions were inspected for OSHA by CO Edwards.

The essential facts are undisputed. The cargo containers, much like truck trailers, were stacked like quadrels "five-high" in places (Tr.5). Having finished unloading the top three levels, two longshoremen who were working for Respondent were performing their duties on the top of the uppermost container, about 16 feet above the deck of the ship (Tr 22). They were doing so without the use of the "Eddie" fall protection system usually in operation in those circumstances.[3] They were thus subjected to the hazard of falls of up to 16 feet. While working without the fall protection, the employees were observed by CO Edwards. When asked by the CO why they were working without fall protection, they explained that the "Eddie" system had malfunctioned earlier and that Mr. Mitchell, the "hatch boss" of the gang, knew of the failure of the eddies and had allowed the work to proceed without their use.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Also, before the Commission, an employer may raise as an affirmative defense the claim that the violation occurred as a result of unpreventable employee misconduct. To successfully defend in

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[2] The longshoremen were working under a collective bargaining agreement between the Hampton Roads Shipping Association and the International Longshoremen's Association (AFL-CIO) which required supplying longshoring labor in "gangs." Each gang has a number of workers and a "hatch boss" (also called a "header.")

[3] The "Eddie" system is accepted by OSHA as a "means of providing equal protection" under the cited standard. (Sec. brief, p. 3).

this manner, a Respondent must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed *Gioioso & Sons, Inc.*, 115 F.3d 100 (1st Cir. 1997). As an affirmative defense, the employer has the burden of proving all four elements of the defense. See, *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.1987), *cert. denied*, 484 U.S. 989 (1987). "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). Moreover, a foreman's or supervisor's violation of a safety rule permits an inference that the employer's safety program has not been adequately enforced. *D. A. Collins v. Secretary*, 117 F.3d 691 (2d 1997) ("*Collins*").

Many Commission precedents do not, however, apply in this case. This case can be appealed to the United States Court of Appeals for the Fourth Circuit because the site of the alleged violation was in Virginia. Act, §§ 11(a) and (b), 29 U.S.C. §§ 660(a) and (b). *Farrens Tree Surgeons, Inc.* 15 BNA OSHC1793, 1794 (No. 90-0998, 1992). The Fourth Circuit has held that the Secretary must establish as part of her case in chief that the supervisory employee's acts were not unforeseeable or unpreventable. 1998), *citing*, *Ocean Electric Corp. v. Secretary*, 549 F.2d 396, 401 (4th Cir. 1979) ("*Ocean Electric*.") Thus, in order to establish this alleged violation, the burden is on the Secretary to show by a preponderance of the evidence of record that, 1) Respondent did not have applicable safety rules, or, 2) that Respondent did not effectively communicate the applicable safety rules to its employees, or, 3) that Respondent failed to enforce the applicable safety rules. The Secretary has not met this burden because she conceded the existence and effective communication of applicable safety rules and did not prove lax enforcement of the rules by Respondent.

The Secretary concedes that Respondent had an appropriate safety rule (requiring the use of the Eddie system) and that the rule was "regularly" communicated to the employees. (Sec. brief, p. 7). The Secretary argues only that Respondent's "enforcement of the rule was not complete." (*Id.*)[4].

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[4] In its supplemental brief, the Secretary reiterates the same argument, stating that; "[t]here (continued...)

The Secretary claims that the record shows that neither the hatch boss nor the employees who worked without fall protection were ever disciplined. The Secretary's representation of the record is not correct. The Secretary, on this record, has not fulfilled the burden of proving that Respondent failed to discipline the employees.

The Secretary has no claim and no evidence that any prior failure to use the eddie system went undisciplined by Respondent. In regard to the instance observed by the CO, the Ship Superintendent testified that he personally did not discipline the workers involved or the hatch boss (Tr. 127, 132, 133) but that the hatch boss and perhaps the two employees had been "counseled on the matter." (Tr. 132). Without presenting any evidence as to what the "counseling" consisted of or whether it included any action which could be considered as disciplinary, the mere fact that the hatch boss (and perhaps the two employees) were counseled does not fulfill the Secretary's burden of showing that the safety rule was not sufficiently enforced. Even if *Ocean Electric*, supra., permitted an inference of inadequate enforcement to be raised as it might under *Collins*, supra., in the Second Circuit, the inference itself would not be sufficient to fulfill the Secretary's burden in light of the evidence of "counseling." Moreover, the two employees who continued working atop the containers without using the Eddie system could reasonably have considered the supervisor's instructions as overriding the safety rule. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1816 (No. 87-0692, 1992). I thus find that the Secretary has failed to show that the employees working without their Eddie systems was not the result of unpreventable employee misconduct.[5] The alleged violation cannot stand.

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[4](...continued)
was no action taken by management against [the hatch boss] or the crew members for the violation of the work rules." (Sec. supp. brief, p. 3.)

[5] Even if Mr. Mitchell's knowledge was imputed to Respondent, the Secretary has conceded that Respondent did not fail to communicate appropriate safety rules to Mr. Mitchell and the two stevedores. She argues only that Respondent did not enforce the appropriate safety rules. Thus, whether Mr. Mitchell was a supervisor is moot.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1918.32 (b) as alleged in item 1 of Citation 1 issued to Respondent.

ORDER

1. Citation 1, Item 1 is VACATED.

Michael H. Schoenfeld
Judge, OSHRC

Washington, D.C.

Dated: