United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NORTH FLORIDA SHIPYARD
Respondent.

OSHRC DOCKET
NO. 94-3363

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 2, 1996. The decision of the Judge will become a final order of the Commission on June 3, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 22, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: May 2, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-3363

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SECRETARY OF LABOR, Complainant, v. NORTH FLORIDA SHIPYARDS, INC., Respondent.	OSHRC Docket No. 94-3363

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

North Florida Shipyards, Inc., operates a ship and barge repair facility in Jacksonville, Florida (Tr. 116-117). On July 27, 1994, two employees working for North Florida were using an aerial lift to load steel plates onto a barge. The combined weight of the men and the plates in the lift's basket exceeded the lift's capacity. The lift tilted, causing the basket to strike the pier. The plates spilled out and the lift, unburdened of its load, righted itself sharply. This movement created a catapult effect, which caused the lift to fling one of the employees, Henry Babin, from the basket to the pier. Babin suffered serious injuries and died later that day at the hospital (Tr. 23, 133).

Occupational Safety and Health (OSHA) compliance officer Linda Campbell arrived at North Florida's shipyard on July 28, 1994, and investigated the accident. As a result of her investigation, the Secretary issued a citation to North Florida on October 24, 1994. The citation contains five items, each alleging a serious violation of subsections of §1910.67, which covers "Vehicle-mounted elevating and rotating work platforms."

North Florida contests all items and penalties. In its answer, North Florida denied that the Review Commission had jurisdiction over it under §3(5) of the Occupational Safety and Health Act of 1970 (Act). At the hearing, however, North Florida stipulated that it is an employer engaged in a business affecting commerce as defined in §3(5) of the Act, and is thus under the jurisdiction of the Review Commission.

The Accident

North Florida employs between 200 and 300 employees (Tr. 97). North Florida also hires employees from Ameriforce, Inc., a supplier of temporary employees (Tr. 17). The employees are divided among six departments: the fabrication shop, the machine shop, the electric shop, the paint and labor department, the dry dock department, and the crane department (Tr. 19). North Florida refers to its supervisors as "leadermen" or "leadmen." Leadmen perform typical supervisory duties, such as assigning tasks to crews or individual employees, overseeing the completion of assigned tasks, and disciplining employees for safety infractions (Tr. 16-17).

On July 27, 1994, Henry Babin and Benton J. Carver were working under the supervision of leadman John Taddia. North Florida had hired Babin from Ameriforce, Inc., as a temporary employee. Carver, a first class machinist, welder, and valve technician, was a North Florida employee (Tr. 347). Taddia had worked with Babin sporadically over the previous two years. He had worked with Carver for approximately six months (Tr. 356). July 27 was the first day Babin and Carver had ever worked together (Tr. 154).

Taddia authorized Carver to use the aerial lift to off-load some welding leads from the "Ponce," an ocean-going barge (Tr. 148). Taddia then instructed Carver and Babin, along with four other crew members, to cut steel plates to specified dimensions and to move these plates from the

pier to the deck of the "Ponce" (Tr. 154-155).[1] Taddia's crew worked in pairs, cutting the plates in the fabrication shop and transporting them onto the barge. Some of the crew moved the plates by hand (Tr. 151).

Carver and Babin used the aerial lift shortly before lunch to move a load of steel plates to the barge (Tr.134). They used the lift without receiving authorization from Taddia to do so because, as Carver stated, "[W]e didn't see him, and we agreed that it would be a lot quicker and lot less effort if we just used the high lift . . ." (Tr. 158). After lunch, Carver and Babin again used the lift to move a load of plates. This time, the lift tilted and the accident occurred. Carver and Babin were not wearing safety belts and were not tied off either time they used the lift (Tr. 134, 136).

At the time of the accident, the basket was carrying between 17 and 35 plates, each weighing 17 pounds (Tr. 25).[2] According to the coroner's report, Babin weighed 170 pounds. Carver weighed approximately 235 pounds (Tr. 275). The rated capacity of the aerial lift was 500 pounds (Tr. 30).

The Citation

Item 1: Alleged Serious Violation of §1910.67(b)(1)

The Secretary charges North Florida with a serious violation of §1910.67(b)(1), which provides in pertinent part:

> Unless otherwise provided in this section, aerial devices (aerial lifts) acquired on or after July 1, 1975, shall be designed and constructed in conformance with the applicable requirements of the American National Standard for "Vehicle Mounted Elevating and Rotating Work Platforms," ANSI A92.2-1969, including appendix. Aerial lifts acquired for use before July 1, 1975 which do not meet the requirements of ANSI A92.2 - 1969, may not be used after July 1, 1976, unless they shall have been modified so as to conform with the applicable design and construction requirements of ANSI A92.2-1969.

---

[1] Carver testified that the plates measured 12 inches by 26 inches (Tr. 135). North Florida's safety director, Morris Wakeham, testified that the plates were 8 inches by 32 inches (Tr. 27). Because Carver actually cut the plates to specifications, his testimony is accepted over Wakeham's. The dimensions of the plates have no relevance in the determination of the issues in this case.

[2] Carver believed that he and Babin had loaded 17 to 20 plates in the basket (Tr. 135). Jacksonville Sheriff's Detective G. H. Goff counted 35 steel plates scattered on the pier during his investigation of the accident (Tr. 208).

Section 3.1.4 of ANSI A92.2-1969 provides in pertinent part:

> Manufacturers shall attach to all aerial devices a plate or plates located in a readily accessible area, clearly visible, stating the following:
>
> (1) Make, model, and manufacturer's serial number.
>
> (2) Rated capacity.

On July 6, 1994, North Florida leased a Snorkelift TB-A60RT Work Platform from Prime Equipment.[3] The aerial lift was equipped with four-wheel drive and a rotating work platform, or basket (Exhs. C-15, C-16; Tr. 164-166). The lift's rated capacity of 500 pounds was marked at three separate places on the lift. Prime Equipment had placed decals marked:

UNRESTRICTED
PLATFORM CAPACITY
500 LBS.

at the base of the entrance to the basket and on the basket's controls (the upper controls) (Exh. C-17; Tr. 167-169, 188-189). The third rated capacity sign was on the manufacturer's plate located above the ground controls (the lower controls) at the base of the lift (Exh. C-8). Safety director Wakeham remembers seeing the rated capacity decal at the basket's entrance two days before the accident (Tr. 87-88, 90). After the accident, the decal at the basket's entrance and the decal at the upper controls were missing (Tr. 181-182, 261-262).

The Secretary contends that North Florida used the aerial lift without the rated capacity decals in place, thus violating §1910.67(b)(1). North Florida conjectures that the decals came off during the accident. A few days after the accident, Wakeham found a decal marked "500 LBS." lying in some water on the pier. North Florida presumes that when the lift catapulted, it flung the decals off the basket (Tr. 89-90). North Florida also speculates that someone deliberately scraped the decals off the basket for some unknown reason (Tr. 190).

The Secretary has the burden of proving its allegation by a preponderance of the evidence.

> 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

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[3] At the hearing, the aerial lift was variously referred to as a Snorkelift, a high reach, and a high lift.

> 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).

North Florida does not contest the Secretary's contention that §1910.67(b)(1) applies to the aerial lift, the first element in the burden of proof. The Secretary has failed to establish the second element of its burden of proof, that North Florida did not comply with the standard's terms. It is undisputed that before, during, and after the accident, the manufacturer's plate marked with the make, model, serial number, and rated capacity, was located above the ground controls at the base of the lift.

The Secretary claims that the manufacturer's specifications provide for the rated capacity to be posted in the basket. North Florida is not, however, charged with violating the manufacturer's specifications. The citation and complaint charge that North Florida violated §3.1.4 of ANSI A92-1969 as incorporated by §1910.67(b)(1). That section mandates that the manufacturer attach "a plate or plates" with the required information to all aerial devices. The section is in the disjunctive: one plate satisfies the requirement. The plate must be "located in a readily accessible area, clearly visible." The manufacturer's plate was on the side of the lift above the ground controls. It was accessible and visible (Exh. C-7). The Secretary claims in his brief that the written information on the plate is "barely legible." While it is true that it is difficult to make out the rated capacity from the photograph of the plate (Exh. C-8), eyewitnesses to the plate had no trouble reading it. Mark Phillips, a service manager with Prime Equipment, testified that he could read the plate and that it was "highly visible" (Tr. 182). Compliance officer Campbell testified that she could read the rated capacity on the plate (Tr. 310-311). North Florida has satisfied the terms of §1910.67(b)(1).

Furthermore, even if the standard required the posting of the rated capacity in the lift's basket, the Secretary has failed to prove that the decals were not posted in the basket at the time of the accident. Wakeham testified without contradiction that he saw a rated capacity decal in the basket two days before the accident. The Secretary did not establish that the decals were not in place up to the time the lift tilted.

Accordingly, item 1 of the citation alleging a violation of §1910.67(b)(1) is vacated.

Item 2: Alleged Serious Violation of §1910.67(c)(2)(ii)

The Secretary alleges that North Florida violated §1910.67(c)(2)(ii), which provides:

Only trained persons shall operate an aerial lift.

As a threshold matter, North Florida contends that this standard is inapplicable to the cited condition because the maritime standards, and not §1910.67, govern North Florida's work. Section 1915.2(a) provides:

> Except where otherwise provided, the provisions of this part apply to all ship repairing, shipbuilding and shipbreaking employments and related employments.

North Florida is in the business of ship repair. Therefore, the maritime standards contained in §1915 apply to it. North Florida argues that §1915.117(b) applies to the cited condition. Section 1915.117(b) provides:

> Only those employees who understand the signs, notices, and operating instructions, and are familiar with the signal code in use, shall be permitted to operate a crane, winch, or other power operated hoisting device.

The maritime standard addresses operators of "a crane, winch, or other power operated hoisting device." The aerial lift in question is not a crane or a winch. While power operated, it is not a hoisting device in the sense of hauling or raising materials and equipment. The aerial lift is designed as a work platform for one or more employees (Exh. C-15). Even if the aerial lift could be construed as a "hoisting device," §1915.117(b) does not specifically address aerial lifts, while §1910.67(c)(2)(ii) does.

> General standards remain applicable where they "provide meaningful protection to employees beyond the protection afforded" by specific standards. *See Quinlan*, 15 BNA OSHC at 1782, 1991-93 CCH OSHD at p. 40,485, citing 1987-90 CCH OSHD ¶29,152 (No. 83-132, 1990). *See also Dravo Corp. V. OSHRC*, 613 F. 2d 1227, 1234 [7 OSHC 2089] (3d. Cir. 1980) (general industry standards apply if there is no specific construction, maritime and long shoring, agricultural standard governing the hazardous condition).

Country Concrete Corp., 16 BNA OSHC 1952, 1954 (No. 93-1201, 1994).

Section 1910.67(c)(2)(ii) is more specific than the maritime standard, §1915.117(b), and is applicable to the conditions cited in item 2.

The Secretary contends that North Florida allowed Carver and Babin to operate the aerial lift without having received training. Section 1910.67(c)(2)(ii) does not describe the nature and scope of the training required, nor does it require the employer to document the training. All that the standard requires is that the operator of the aerial lift receive training sufficient to enable him to operate the lift safely.

The record establishes that learning to safely operate an aerial lift is not a difficult task. Assistant foreman Thomas Moody testified that he could teach someone to use an aerial lift in "maybe an hour" (Tr. 410). Leadman Doug Gordon testified that he could teach someone to operate an aerial lift in 10 to 15 minutes: "It's basically pretty simple. A kid that could run a Nintendo could operate a high reach" (Tr. 424).

On the day of the accident, Carver was operating the upper controls in the basket of the aerial lift. Babin did not operate the lift (Tr. 158). Carver had been instructed in the safe operation of an aerial lift during on-the-job training. He had been operating aerial lifts for about 5 years at the time of the accident (Tr. 139-140).

The Secretary's case rests on mistaken assumptions made by the compliance officer. North Florida informed compliance officer Campbell that three of its supervisory personnel had received instructions on the safe operation of aerial lifts from Prime Equipment. Prime Equipment's instructions were part of a program called "Train the Trainer." Under this program, the three supervisory employees in turn trained North Florida's employees in the use of aerial lifts (Tr. 269). Campbell asked John Shiffert, North Florida's vice-president, which employees were trained by the three supervisory employees. Shiffert replied that he had no documentation regarding who was trained. In Campbell's testimony as to why she recommended that North Florida be cited for violating §1910.67(c)(2)(ii), she stated, "I could get no documentation as to who was trained by these three people" (Tr. 270). As noted, *infra,* the standard does not require that the employer document the training.

Campbell asked a Mr. Garcia, one of the three employees that Prime Equipment instructed under the "Train the Trainer" program if he had trained Babin. Garcia said he had not (Tr. 270). This information lacks probative value for two reasons. First, the record does not disclose whether either of the other two trained supervisory employees instructed Babin in the safe operation of the

aerial lift. Second, it is undisputed that Carver, and not Babin, operated the lift on the day of the accident (Tr. 158). Also, there is no evidence that Babin had ever operated the aerial lift. The standard does not require that anyone riding in the basket of an aerial lift be trained in its safe operation. It requires that "[o]nly trained persons *shall operate* an aerial lift" (emphasis added). Carver testified without contradiction that he had been trained in the safe operation of the lift.

The Secretary attempted to bolster his case through the testimony of John Cooprider, who had worked as a first class welder for North Florida (Tr. 220). Cooprider testified that he operated aerial lifts while working for North Florida and that he had never received any training before the accident (Tr. 223-224). Cooprider stated that he first used an aerial lift at North Florida sometime in 1989, five years before the accident which gave rise to this case (Tr. 240). He gave no other specific dates as to when he operated an aerial lift for North Florida.

The citation issued by the Secretary in this case is quite specific regarding the incident in which the Secretary alleges North Florida violated §1910.67(c)(2)(ii). Item 2 of the citation states:

> At Tangent C pier at Barge "Ponce," employees were operating a Snorkelift Mobile Unit, (Model TBA60RT) without sufficiently being trained in safe operations a aerial lifts, on or about July 27, 1994.

The record establishes that Carver, the only operator of the aerial lift at the time of the accident, had been trained in the lift's safe operation. Cooprider's testimony is unfocused as to the times and places that he used the aerial lift. The Secretary cannot use this testimony to prove a specific allegation which has been conclusively refuted by North Florida.

The Secretary also attempts to cast doubt on North Florida's training by raising an incident that occurred on July 21, 1994. On that day, North Florida experienced a problem with the Snorkelift. North Florida employee Demetrio Thompson and his co-worker could not operate the lift from the basket once they had gotten the basket in the air. Charlie Lawson, a mechanic for Prime Equipment, made a service call and discovered that the emergency switch in the basket was not turned on (Tr. 197-198). The Secretary argues that this proves that Thompson was not trained in the operation of the lift.

Such an inference is not warranted. North Florida foreman Moody testified that he brought the basket to the ground using the ground controls. Moody got in the basket and attempted to

operate the lift using the upper controls. He was unsuccessful (Tr. 403). Moody turned the emergency switch on and off, but could not operate the lift from the basket. Moody speculated that there may have been a short in the switch and that Lawson just assumed that he did not know to turn on the emergency switch (Tr. 405-406). This malfunctioning incident is too inconclusive to establish that North Florida failed to train its employees in the operation of an aerial lift.

The Secretary has failed to prove that North Florida violated §1910.67(c)(2)(ii). Item 2 is vacated.

Item 3: Alleged Serious Violation of §1910.67(c)(2)(v)

The Secretary alleges that North Florida committed a serious violation of §1910.67(c)(2)(v), which provides:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

It is undisputed that neither Babin nor Carver were tied off either of the times they used the Snorkelift to transport the steel plates on July 27, 1994. North Florida contends that the violation of §1910.67(c)(2)(v) resulted from unpreventable employee misconduct by Carver and Babin. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

1. Established Work Rule

North Florida had an established work rule requiring its employees to tie off when working from an aerial lift (Tr. 61, 65).

2. Adequately Communicated to Employees

North Florida adequately communicated this rule to its employees. The morning of the accident, safety director Wakeham held a mandatory safety meeting in which he reiterated that safety belts and lanyards must be used when in the basket of the lift. Carver and Babin both attended the meeting (Exh. R-3; Tr. 58). The North Florida employees who testified acknowledged that they knew the safety rule (Tr. 141, 224-225, 337, 377, 422, 434).

3. Steps Taken to Discover Violations

Wakeham testified that he spends 30 to 40 hours a week walking the shipyard monitoring for safety violations (Tr. 392). Wakeham has three or four full-time assistants who also monitor for safety violations (Tr. 97, 100-101, 115, 147). The leadmen oversee the employees in an effort to discover safety violations (Tr. 337-338, 422, 440).

In the present case, Babin and Carver used the aerial lift twice on July27, each time for a job the took about 5 minutes (Tr. 141). The duration of the exposure to the hazard was quite short. Taddia, the leadman who assigned Carver and Babin to move the plates, was not aware that they were using the lift (Tr. 343). North Florida took adequate steps to discover violations. Its failure to discover Carver and Babin's violation of the tie-off rule that occurred over a total of 10 minutes is not evidence of a lack of diligence in this instance.

4. Enforcement of Safety Rules

North Florida implements a four-step disciplinary procedure for enforcing its safety rules. North Florida's employee handbook sets out the guidelines for the four steps (Exh. R-4, pp. 16-17):

FIRST INFRACTION - Verbal or written warning

SECOND INFRACTION - Written warning and/or one day suspension without pay

THIRD INFRACTION - Two weeks suspension without pay or discharge

FOURTH INFRACTION - DISCHARGE

North Florida introduced nine copies of notices of safety violations issued in 1993 to employees who were written up for violations (Exh. R-9). While it is evident that North Florida has a good enforcement program on paper, the harder question is whether it effectively enforces its safety rules in practice. The existence of North Florida's written disciplinary program is undisputed; the actual enforcement of the program was the subject of contradictory testimony.

John Cooprider, the former North Florida employee who testified that he had not received aerial lift training, also testified that North Florida's tie-off rule was routinely violated. Cooprider stated that he worked from aerial lifts while not tied off "very, very often" (Tr. 225). According to Cooprider, North Florida employees violated the rule "seventy-five percent of the time. Regularly," and these violations occurred on a weekly basis (Tr. 229). Not only did the crew members violate

the rule, so did the leadmen. Cooprider testified that at various times he worked alongside leadmen Donnie Fine, Doug Gordon, James Cole, and Duane Higgins in an aerial lift basket, and that no one tied off (Tr. 226, 447-449). The only leadman who had ever told Cooprider to tie off was Bob Budziak (Tr. 225, 446). Although Cooprider knew that he was supposed to tie off when working from an aerial lift, he failed to do so because, "It was not common. Other people weren't. I figured, 'Why should I?' My leaderman wasn't enforcing it either. He was there with me" (Tr. 242).

While the other credible witnesses support Cooprider's allegation that at times the tie-off rule was violated, they report a much lower incidence of the violation. Taddia testified that he had discovered two or three employees in the year before the accident who were not tied off. He reprimanded them verbally and they put on their safety belts (Tr. 365-366). Leadman Doug Gordon remembered only one person in the previous ten years who was not tied off. Gordon reprimanded the employee who immediately tied off (Tr. 425-427). He denied that he had ever been in an aerial lift with Cooprider when they were not tied off (Tr. 422). North Florida's project manager Oland Cutchin, Jr., had caught one employee who was not tied off. Cutchin reprimanded the employee who corrected the violation at once (Tr. 436-437). Carver stated that he had seen several of his co-workers not tied off while working in the basket of an aerial lift. When the leadmen caught them working without belts, the leadmen reprimanded the employees and made them put on the safety belts (Tr. 145-146). Carver knew the consequences if Taddia caught Babin and him working in the lift without belts (Tr. 147):

> Q.: Were you worried--did you think that your leadman was going to reprimand you if he saw you doing exactly what you did; a quick trip not tied off?
>
> A.: He would reprimand us, yes.
>
> Q.: Do you think he would have reprimanded you then if he had seen you?
>
> A.: In the high lift without a belt? Yes, ma'am.

North Florida employee Bounkanh Xayarath's testimony lies at the other end of the spectrum from Cooprider. Xayarath testified eagerly for North Florida, volunteering twice that North Florida had a tie-off rule before being asked about it (Tr. 376, 377). He stated adamantly that he had never

in his 12 years with North Florida seen anyone operate an aerial lift from the basket without being tied off (Tr. 384). The Secretary questioned Xayarath regarding his use of the safety belt (Tr. 379):

Q.: Every time you have been up in the high reach, have you worn a safety belt?

A.: Yes.

Q.: Every single time?

A.: All the time.

Q.: All the time?

A.: All the time.

Q.: And are you always tied off when you're up there?

A.: Yes, ma'am.

The Secretary undercut Xayarath's certitude when he produced a notice of violation issued by North Florida to Xayarath for failing to wear his safety belt while working from an aerial lift (Exh. R-9; Tr. 31).

The testimonies of both Cooprider and Xayarath are discounted. Each presents a version of North Florida's workplace that is at odds with the more credible evidence in the case. Neither Xayarath's claim that North Florida's employees tie off one-hundred percent of the time, nor Cooprider's allegation that the employees violate the tie-off rule seventy-five percent of the time, comports with the balance of the record. Neither claim is plausible. North Florida itself adduced evidence that its employees had at times violated the tie-off rule (Exh. R-9). The notices of safety violations refute both Xayarath and Cooprider's allegations. They prove, contrary to Xayarath's testimony, that the tie-off rule was not always followed. They establish, despite Cooprider's testimony, that the tie-off rule was enforced.

The testimonies of Taddia, Gordon, Cutchin, and especially Carver are deemed credible. They were consistent with each other and with the evidence. Carver was the only one of the four who was not in a supervisory position. Carver took full responsibility for deciding to use the aerial lift and not tie off. He admitted that he knew of North Florida's tie-off rule and he knew that his leadman would reprimand him if he caught him. North Florida could have done little short of following Carver around every minute in order to ensure that he followed all the safety rules.

North Florida has established its unpreventable employee misconduct defense. Item 3, alleging a violation of §1910.64(c)(2)(v) is vacated.

Item 4: Alleged Serious Violation of §1910.67(c)(2)(vi)

Item 4 alleges a serious violation of §1910.67(c)(2)(vi), which provides:

> Boom and basket load limits specified by the manufacturer shall not be exceeded.

The rated capacity of the aerial lift was 500 pounds. Carver and Babin loaded at least 17 plates into the basket (Tr. 135). Each plate weighed 17 pounds (Tr. 25). Therefore, the plates in the basket weighed at least 289 pounds. Babin weighed 170 pounds and Carver weighed approximately 235 pounds (Tr. 275). Thus the basket was carrying a total load of at least 694 pounds at the time of the accident. There is no dispute that Carver and Babin exceeded the rated capacity of the aerial lift when they attempted to transport the steel plates on July 27.

Carver testified that he and Babin decided on their own to use the aerial lift to transport the plates (Tr. 138, 158). Carter knew of North Florida's work rule requiring employees to obtain authorization before using the aerial lift (Tr. 141). He acknowledged that he and Babin should have asked Taddia if they could use the aerial lift, but that they failed to do so (Tr. 149, 158). Taddia did not know that Carver and Babin were using the lift to transport the plates (Tr. 343).

The Secretary contends that North Florida had other leadmen in the area that knew Carver and Babin were using the lift to move the plates. The Secretary bases this contention on the police report of Detective Goff, who interviewed leadmen Mark Chaney, Ronald Goettel and Jody Beal (Exh. C-22, pp. 7-8). Although these leadmen noticed the Snorkelift as the accident occurred, or in the instant immediately preceding it, none of them observed the men in the Snorkelift in time to prevent the accident from happening.

The Secretary has failed to establish that North Florida had actual or constructive knowledge that Carver and Babin were using the aerial lift, or that they had loaded the basket in excess of its rated capacity. Item 4 is vacated.

Item 5: Alleged Serious Violation of §1910.67(c)(2)(ix)

Section 1910.67(c)(2)(ix) provides:

> Articulating boom and extensible boom platforms, primarily designed as personnel carriers, shall have both platform (upper) and lower

> controls. Upper controls shall be in or beside the platform within easy reach of the operator. Lower controls shall provide for overriding the upper controls. Controls shall be plainly marked as to their function. Lower level controls shall not be operated unless permission has been obtained from the employee in the lift, except in case of emergency.

The Secretary alleges that the upper controls of the aerial lift were not "plainly marked as to their function." Campbell testified that she could not read the words that explained the functions of the upper controls. The illegibility resulted from some paint overspray which had obscured the words (Exhs. C-10, C-11, C-12; Tr. 277-278).

The photographs of the control panel for the upper controls are enlarged and grainy. It is difficult to make out much detail in the photographs. Exhibits C-10, C-11, and C-12 fail to establish conclusively that the words on the panel were illegible.

Carver, who actually used the upper controls, testified that he could read the words on the control panel despite the slight overspray (Tr. 137). His testimony contradicts that of Campbell, and raises doubt as to whether the cited standard was violated. The Secretary has failed to prove by a preponderance of the evidence that North Florida violated §1910.67(c)(2)(ix).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of the citation is vacated and no penalty is assessed,
2. Item 2 of the citation is vacated and no penalty is assessed,
3. Item 3 of the citation is vacated and no penalty is assessed,
4. Item 4 of the citation is vacated and no penalty is assessed, and
5. Item 5 of the citation is vacated and no penalty is assessed.

/S/ KEN S. WELSCH

KEN S. WELSCH
Judge

Date: April 24, 1996