



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
MUTUAL ERECTORS INC.
Respondent.

OSHRC DOCKET
NO. 92-1797

**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 October 28, 1993. The decision of the Judge will become a final order of the Commission on November 29, 1993 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 November 17, 1993 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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. / skw
Ray H. Darling, Jr.
Executive Secretary

Date: October 28, 1993

DOCKET NO. 92-1797

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

George Rehkamp, President
Mutual Erectors, Inc.
8749 Heritage Drive
Florence, KY 41042

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00102590056:05



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1365 PEACHTREE STREET, N.E., SUITE 240
 ATLANTA, GEORGIA 30309-3119

PHONE:
 COM (404) 347-4197
 FTS (404) 347-4197

FAX:
 COM (404) 347-0113
 FTS (404) 347-0113

SECRETARY OF LABOR,

Complainant,

v.

MUTUAL ERECTORS, INC.,

Respondent.

OSHRC Docket No. 92-1797

APPEARANCES:

Betty Klaric, Esquire
 Office of the Solicitor
 U. S. Department of Labor
 Cleveland, Ohio
 For Complainant

Mr. George Rehkamp, President
 Mutual Erectors, Inc.
 Florence, Kentucky
 For Respondent *Pro Se*

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On May 7, 1992, the Secretary issued a serious citation to Mutual Erectors, Inc. (Mutual), alleging violations of the Occupational Safety and Health Act of 1970 (Act). The citation resulted from an inspection conducted on April 9 through 13, 1992, by Occupational Safety and Health Administration (OSHA) Compliance Officer Steven Medlock. Four standards were cited: (1) § 1910.184(d) for failure to inspect wire rope slings; (2) § 5(a)(1) of the Act for failure to provide fall protection; (3) § 1926.105(a) or, in the alternative, the steel erection standard of § 1926.750(b)(1)(ii) for failure to provide fall protection; and (4) § 1926.251(a)(1) for use of defective rigging. Mutual asserts that the standards do not apply or that the conditions do not constitute violations.

Mutual is a small steel erection contractor which utilizes heavy equipment and works with manufactured steel products. At the time of the inspection it was engaged in constructing the skeletal steel frame for a single-tiered school addition. That addition had a core and two wings measuring 500 feet by 1,000 feet (Tr. 271). George Rehkamp, president and owner of the company, represented Mutual *pro se*.

Alleged Serious Citation
Items 1 and 4: § 1910.184(d) and § 1926.251(a)(1)

The Secretary charges that Mutual used a defective wire sling and that since a competent person would have removed the sling from use, it was not properly inspected. The Secretary cites the general industry standard for failure to inspect [item 1, § 1910.184(d)] and the construction standard [item 4, § 1926.251(a)(1)] for failure to remove the sling from service. He further relies on the general industry standard to define “defective” in § 1926.251(a)(1). Mutual objects to any reference to the general industry standards, asserting that the general standards are inapplicable to its construction workplace. The standards provide:

§ 1926.184 (d) *Inspections*. Each day before being used, the sling and all fastenings and attachments shall be inspected for damage or defects by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.

§ 1926.251(a) *General*. (1) Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

Section 1910.184(d)

Although items 1 and 4 focus on separate sections of these two standards, the standards themselves prohibit substantially the same conduct. “Rigging equipment” in § 1926.251(a)(1) applies to slings. Both standards contain the same requirements for inspection and removal of defective equipment. The Secretary offers no rationale to explain why the general industry standard is cited when a construction standard pertains to the condition. The fact that a general industry standard contains language which the Secretary prefers does not make that standard applicable. Violations are duplicative when they

involve substantially the same violative conduct. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1986-87 CCH OSHD ¶ 27,829 (No. 84-696, 1987). Although separate conduct is alleged for each of the two violations, the construction standard applies to both of the specified conditions. The construction standard of § 1926.251(a)(1) more specifically pertains to Mutual's operation. Section 1910.184(d) is incorrectly cited. Even were this not so, the mere existence of a condition does not prove that there was a failure to inspect for that condition. The alleged violation of § 1910.184(d) is vacated.

Section 1926.251(a)(1)

Medlock described the wire rope sling he found where Mutual was lifting steel beams (Tr. 30). The sling was a "mechanical fit" sling which measured $\frac{5}{8}$ -inch by 128 inches (Tr. 30). In Medlock's opinion it contained defects caused by broken wires in various "lays" (individual strands of the wire) and by "birdcaging" in the sling (Exh. C-3; Tr. 34). Medlock counted five broken wires in one strand of a lay and 13 broken wires in two strands of a lay (Tr. 44). The sling was "birdcaged" since the strands of the wire rope were no longer tightly twisted but had opened up, allowing the lubrication of the sling's inner core to become dry and corroded (Exh. C-5; Tr. 34, 35).

The Secretary refers to sections of the general industry standard of § 1910.184 which governs slings. Contrary to Mutual's contention, reference to the general industry standards, as well as to those of manufacturers or others, can properly provide guidance in interpreting construction standards. *Pace Constr.*, 14 BNA OSHC 2216, 2221-22, 1991 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991). A reasonably prudent employer would know that a general industry standard covering the same equipment could apply. Here, the Secretary suggests that the term "defective rigging equipment" in § 1926.251(a) must be understood in terms of the requirements of § 1910.184. Specifically, he relies on the requirement that wire rope slings "shall be immediately removed from service" if the sling has "ten randomly distributed broken wires in one lay, or five broken wires in one strand in one rope lay" [§ 1910.184(f)(5)(i)] or if there is "kinking, crushing, birdcaging or any other damage resulting in distortion of the wire rope structure" [§ 1910.184(f)(5)(iii)].

Broken Wires

Mutual admits that the sling had broken wires. It refers to § 1926.251(c)(4)(iv) to support its claim that they were less than the number prohibited by § 1926.251(a)(1). That sub-section of the cited standard specifies that wire rope should not be used if, “in any length of eight diameters, it has more than 10 percent of its wires visibly broken,” or if the rope shows other signs of “excessive wear, corrosion, or defect.”

The Secretary’s argument that § 1926.251(c)(4)(iv) pertains only to wire rope and not to a wire rope sling is rejected. Read in context, that section applies to wire rope and wire rope slings and not merely “running wire” as Medlock suggests. As stated, reference to the general industry standards may be helpful and is appropriate when there is an ambiguity in the standard at issue. Such ambiguity does not exist as to the number of broken wires which necessitates removal of a sling under § 1926.251. That figure is specified in the cited standard as 10 percent. There is no proof that more than 10 percent of the wires in the length were broken. Thus, the wire rope sling was not “defective” because excessive wires were broken.

Birdcaging

Without reference to the broken wires, did the birdcaging present in Mutual’s sling alone constitute a defect which required it to be removed from service? Medlock identified two areas which were birdcaged. One area near the eye of the sling was opened up (birdcaged) to a significant degree and had corrosion showing from the other side (Exhs. C-3, C-4; Tr. 37). The inner core could be seen through the open coils (Tr. 37). A second area in the interior of the sling was also birdcaged (Exh. C-5; Tr. 38). In support of his position that a birdcaged sling was “defective,” the Secretary referred to the § 1910 standard. He also relied on “Sling Inspection Criteria”¹ written by a local sling manufacturer. The Criteria included as one of its guidelines that “. . . birdcaging or other damage which distorts the rope structure” requires removal from service (Tr. 149). Medlock took courses on rigging and had on-the-job experience with rigging in his previous work

¹ Although identified, the “Sling Inspection Criteria” was not introduced into evidence.

(Tr. 25). Rehkamp also had experience using rigging, but at the time of the inspection he was unfamiliar with manufacturers' standards or with the OSHA regulations governing sling inspections (Tr. 30). Medlock's opinion that the birdcaged sling constituted defective rigging was also supported by other evidence and is the more persuasive testimony. The amount of distortion in the coils caused by birdcaging could not be classified as "slight" damage (Tr. 149-150). The birdcaged sling was "defective" under the standard, and it should have been removed from service.

Classification and Penalty

Mutual's employees used the sling to lift steel which weighed at least 1,500 pounds (Tr. 42, 48). Medlock testified that it was impossible to know how much weight Mutual's sling could carry in its damaged condition. If undamaged, it could be expected to carry at least 4,000 pounds (Tr. 53, 125). A failure of the sling could cause steel beams to fall on exposed employees resulting in their serious injury or death. To prove that a violation is serious, it is only necessary to show that an accident is possible and that death or serious physical harm would be the likely result. Mutual's small size and the fact that it has not been previously inspected mitigate towards a reduced penalty. The unstructured nature of its safety training, its failure to have a written safety program, and its failure to provide its employees with any formal safety instructions specifically relating to their work militates towards an increased penalty (Tr. 222, 223). The likelihood of an accident is an important factor in determining the gravity of the violation. *See, e.g., Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069 (3rd Cir. 1979). That likelihood is considered moderate. Considering these factors, a serious violation of § 1926.251(a)(1) is affirmed and a penalty of \$300 is assessed.

Item 2: § 5(a)(1) of the Act

The Secretary abandoned his original citation to § 1926.28(a).² For the same reason, *i.e.*, potential falls would be less than 25 feet, the Secretary correctly asserts that the steel

² In his complaint the Secretary amended item 2 of the citation to substitute the allegation of § 5(a)(1) for that of § 1926.28(a). In his brief the Secretary acknowledged that § 1926.28(a) does not apply to falls of less than 25 feet under the rationale of *L. E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987).

erection standards do not apply. The issue remains whether Mutual violated § 5(a)(1) of the Act because its employees were exposed to fall hazards³.

To prove a violation of § 5(a)(1), the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the employer or the employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

Hazard and Knowledge

On April 9, 1992, two of Mutual's employees, Brian Lynam and Dave Simmons, worked at the north end of the classroom annex. The men were bolting up and installing purlins. Purlins are the structural steel members running from beam to beam to which sheet metal roofing would later be attached (Tr. 55). In performing this work, the men moved along an area which ranged from a height of less than 11 feet, at the lowest purlin, to 22 feet 4 inches at the peak-end purlin (Exh. C-6; Tr. 55). Medlock observed, photographed, or videotaped the employees at heights of 12 feet, 18½ feet, and 20 feet. Employees remained in each position for "5 to 10 minutes" before moving to the next purlin (Tr. 61, 211). Although Lynam had his safety belt on, he had no lanyard attached to it, having taken it off the morning of the inspection (Tr. 215). He had used it "a few times on and off" the week before the inspection (Tr. 216). Simmons was not wearing a safety belt or lanyard (Exhs. C-7, C-8, C-9; Tr. 62-63).

³ Mutual primarily relied on a Commission judge's unreviewed decision in *Building Erectors, Inc.*, 12 BNA OSHC 1384, 1985 CCH OSHD ¶ 27,286 (No. 84-758S, 1985). *Building Erectors, Inc.*, is Mutual's parent company (Tr. 253). In *Building Erectors*, the judge vacated a § 1926.28(a) allegation because he felt compelled to follow the then-precedent of *Adams Steel Erec., Inc.*, 11 BNA OSHC 2073, 1984-85 CCH OSHD ¶ 26,976 (No. 77-4238, 1984). In *Adams Steel*, the Review Commission determined that only Subpart R contained standards applicable to a steel erection company. This position does not reflect the current state of the law. After the judge's decision in *Building Erectors*, *Adams Steel* was reversed on appeal. [*Donovan v. Adams Steel Erection*, 766 F.2d 804 (3d Cir.1985)]. The holding in *Adams Steel* was later rejected by the Commission in *Bratton Corp.*, 14 BNA OSHC 1893, 1987-90 CCH OSHD ¶ 29,152 (No. 83-132, 1990). Rehkamp repeatedly questioned whether "the law had changed." His understanding was that "if the law had not changed" his employees were not required to tie off at heights of less than 25 feet (Tr. 254, 255). Since *Adams Steel* and *Building Erectors* no longer reflect the current interpretation of the standards, the law has changed.

Employees were exposed to a fall hazard at these heights. Was the hazard recognized? Medlock, who was qualified as an expert in fall protection, discussed an analysis of construction fall fatalities from OSHA's database. That analysis covered fatality reports from 1985 through 1990 and showed that a significant number of the fatalities occurred from falls of less than 25 feet (Exh. C-10; Tr. 78-80). Ray Shinkle, an instructor and business agent for Ironworkers Local 44, trained apprentices, journeymen, and ironworkers in fall protection (Tr. 241). He emphasized that employees should have fall protection at heights above six feet (Tr. 242). In his opinion, falls of less than 25 feet were a recognized hazard in the steel erection industry (Tr. 247). Shinkle testified that 75 percent of the union's injuries resulted from falls from heights of between 11 and 22 feet (Tr. 248). Rehkamp's opinion did not markedly differ. Although Mutual had documented difficulties in enforcing its work rule, it required employees to be tied off "whenever they're on steel" (Tr. 264). Yet noting that the majority of its work is at heights of less than 25 feet (Tr. 256-257), Rehkamp claimed to hire people with "enough common sense to know when to tie off below 25 feet" (Tr. 256-257, 265). Rehkamp agreed that a fall of between 11 to 22 feet could result in death or serious physical harm (Tr. 265). Rehkamp was regularly at the jobsite directing his employees' work (Exhs. C-15, C-16). He reminded employees "once or twice" to tie off (Exh. C-13). The evidence establishes that a fall hazard existed, that the hazard was recognized by Mutual and by the steel erection industry, and that Mutual had knowledge of his employees' repeated failures to use fall protection.

Feasibility

At the heights noted, it was feasible to provide various types of fall protection. Because of muddy conditions and a lack of cooperation from the general contractor, Rehkamp believed that "[a]nything other than lanyards and safety belts, just was not practical, not even possible" (Tr. 261). The Secretary presented evidence as to the feasibility of various other types of fall protection. Even accepting Rehkamp's position, however, safety belts and lanyards could have been used. Employees could have tied to the steel members when bolting the purlins; they could have used lanyards with a lifeline strung through supports when moving along on the steel. Mutual enforced use of such fall

protection in both instances later during the inspection period (Exh. C-12; Tr. 83, 84). Mutual argues that it cannot always require employees to use fall protection at heights of less than 25 feet and remain economically competitive. Belts and lanyards were available at the jobsite. There was no showing that using a safety belt system presented "extreme cost" which Mutual, as a business entity, "cannot absorb." *Faultless Div., Bliss & Laughlin Indus., Inc.*, 674 F.2d 1177, 1190 [10 BNA OSHC 1481] (7th Cir. 1982). Safety belts were feasible fall protection.

Classification and Penalty

A fall from structural steel at the stated heights to the ground below could result in serious injury or death. The statutory penalty considerations have been discussed. A serious violation of § 5(a)(1) of the Act is affirmed. A penalty of \$1,000 is assessed.

Item 3: § 1926.105(a) Or, In The Alternative, § 1926.750(b)(1)(ii)

The Secretary argues in the alternative that Mutual violated either the general industry standard of § 1926.105(a) or a steel erection standard of § 1926.750(b)(1)(ii) by failing to use safety nets or other fall protection.⁴ Mutual argues that when working at heights of above 25 feet, it required its employees to tie off.

The standards require:

.105(a) Safety nets shall be provided . . . where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

.750(b) Temporary flooring--skeleton steel construction in tiered buildings.
(1)(ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet.

This violation allegedly occurred on or about March 26, 1992, when Lynam and Simmons were installing purlins at the lunchroom/office "core" portion of the addition. The heights at that portion of the building ranged from 21 feet to 34 feet (Exh. C-6; Tr. 101). Medlock did not observe the operation. The Secretary's proof is based upon the employees'

⁴ By Order dated December 14, 1992, the Secretary's motion to amend in the alternative was granted.

testimony at the hearing and upon signed interview statements from the two employees (Exhs. C-15, C-16). Each employee testified that he did not tie off while bolting purlins during a two-week period around March 26, 1992 (Exhs. C-15, C-16; Tr. 200, 216). Rehkamp, their supervisor, was usually present (Tr. 218, 222). He gave instructions to the employees while they were on the structural steel without safety belts or attached lanyards (Exhs. C-15, C-16). Employees were subject to falls up to 34 feet at the core area.

Only General Standard Applies

The annex is a single-tiered building. It is not a structure in which a skeleton steel framework is erected in vertically stacked steel columns (Tr. 103-104). The steel erection standards of Subpart R do not apply to single-tiered buildings even where the height of the building exceeds 30 feet. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161, 1993 CCH OSHD ¶ 30,042 (Nos. 90-1620 & 90-2894, 1993); *contra Builders Steel Co. v. Marshall*, 622 F.2d 368 (8th Cir. 1980). Since the specific industry standards do not apply, Mutual must comply with the general industry standard of § 1926.105(a).

The § 1926.105(a) standard provides that safety nets are required where other safety devices are impractical, “not that safety nets are required unless other devices are practical.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶ 30,059 (Nos. 89-2883 & 89-3444, 1993). Safety nets are “the device of last resort, required if the other enumerated devices, including belts, are impractical.” *Falcon, supra* 16 BNA at 1189, 1993 CCH at p. 41,337. Thus, if one of the other methods specified in the standard can be used, it should be used. *State Sheet Metal Co., supra*. The Secretary sustains a violation of § 1926.105(a) by showing that employees were subject to falls of 25 feet or more; that none of the safety devices listed in the standard was used; and, if safety belts are proposed as abatement, that safety belts were practical. The Secretary bears the burden of proof on each issue.

Hazard and Practicality

Two of Mutual’s employees were subject to falls of greater than 25 feet when they installed purlins at the core area. Although they may have worn safety belts, since their

lanyards were not worn or connected, they were not protected. Employees could have tied off during the bolting process and could have used a lifeline system similar to the one which was later installed. It own work rules, as well as those of its industry, recognize the validity of using safety belts in these circumstances. The Secretary has established that Mutual violated § 1926.105(a).

Classification and Penalty

Employees subject to falling 21 to 34 feet to the ground below would likely suffer severe injury or death. The violation is serious. Upon consideration of the factors previously discussed, a penalty of \$1,000 is assessed.

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 on the foregoing decision, it is ORDERED:

1. That the violation of § 1910.184(d) is vacated;
2. That the violation of § 5(a)(1) of the Act is affirmed, and a penalty in the amount of \$1,000 is assessed;
3. That the violation of § 1926.105(a) is affirmed, and a penalty of \$1,000 is affirmed; and
4. That the violation of § 1926.251(a)(1) is affirmed, and a penalty of \$300 is assessed.

/s/ Nancy J. Spies

NANCY J. SPIES

Judge

Date: October 20, 1993