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OAH Docket No. 1-1901-

L&I Docket No. 3112

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

John B. Lennes, Jr., Commissioner,  
Department of Labor and Industry,  
State of Minnesota,

Complainant,

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

V.

Minnesota Department of  
Transportation, District 9,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on July 1, 1992 in Courtroom No. 3 at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, in the City of Minneapolis, Minnesota. The record remained open through September 10, 1992 for the receipt of written memoranda.

Julie A. Leppink, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155 appeared on behalf of the Complainant. Donald J. Mueting, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103 appeared representing the Respondent.

The following witnesses testified at the hearing: Linda Huske, Phillip Erickson, Kirk Johnson, Richard Rindal, and Ray Viall.

NOTICE is hereby given that, under Minn. Stat. 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rules Chapter 5215.

STATEMENT OF THE ISSUE

The issue in this contested case proceeding is whether or not the failure of Respondent's employee to wear appropriate personal protective equipment was the result of unpreventable employee misconduct, and if not what penalty for the violation is appropriate.

Based upon all of the proceedings here in, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. On April 25, 1990 the Minnesota Department of Transportation (DOT) maintained a work site at a bridge on Highway 110 where it runs over Highway 52/3 South in the City of Inver Grove Heights, Minnesota. The work to be done involved bridge maintenance which was necessary because there had been a washout at the bridge abutment. The four employees present were to remove gravel from a dump truck with a front-end loader and place it in the area of the washout on the bridge abutment. It takes approximately one half hour to unload one dump truck with a front-end loader. The work had begun at approximately 9:00 a.m. The Respondent had no daily safety meeting prior to the job in question because the job was routine bridge maintenance.

2. At approximately 10:00 a.m. on April 25, 1992, OSHA Senior Safety Investigator Linda Huske was driving south on Highway 52/3. As she looked up at the Highway 110 bridge, she observed an employee on her side of the bridge who was standing on the bridge railing without any fall protection. Ms. Huske pulled off the highway and took several photographs of the employee, Kirk Johnson. He was standing on the railing of the bridge and directing the driver of the front-end loader, who was approaching the dump truck. (Ex. 3). Ms. Huske then proceeded up the embankment and took another photograph of Mr. Johnson on the bridge railing. (Ex. 2). Ms. Huske introduced herself to Mr. Johnson and to the lead worker, Roger Hoff, who was the driver of the front-end loader. She asked Mr. Johnson, who was not wearing any fall protection, to come down from the railing and he did so.

3. There was no fall protection equipment in the dump truck which Mr. Johnson was driving. However, the equipment was available on the job site. There was no need for Mr. Johnson to be on the bridge railing in order

to accomplish the job, and he was not directed to be on the bridge railing. Mr. Hoff, as the lead worker, was responsible for telling Johnson to put on fall protection if it was necessary. If NW. Johnson had fallen from the bridge to Highway 52/3, he would have fallen approximately 16 feet. The bridge railing was approximately ten inches wide and at times Mr. Johnson had his foot over the edge of the railing.

4. Mr. Johnson has been a bridge worker for DOT since 1986. He has had safety training concerning fall protection at a 1986 bridge worker's training school on April 17, 1986 (Ex. A, Ex. F). and at a 1990 bridge worker's seminar on April 12, 1990. (Ex. B; Ex. F) Subsequent to the incident in question, he has had additional training on fall protection on April 25, 1991 and January 28, 1992. Mr. Johnson is an independent person who sometimes needs to be reminded of the rules. He knew that it was not proper to stand on the railing and that this was against his employer's policy. After the incident in question, Mr. Johnson was given an oral reprimand by DOT for his conduct on April 25, 1990.

5. DOT employs a safety administrator for its Metropolitan Division who organizes and helps to conduct safety training and seminars, visits vendors of safety equipment, visits construction sites and is responsible for application

of OSHA rules. DOT conducts safety training for its bridge workers approximately every three months, however not all sessions cover fall protection.

6 DOT has a general policy that employees must comply with OSHA standards but does not have a written work rule or policy specifying when fall protection must be worn by bridge workers and does not have a written policy providing for discipline of employees who fail to use appropriate fall protection when performing bridge work. (Ex. 9).

7. On May 11, 1990, a citation was issued to the Respondent for a violation of 29 C.F.R. 1926.28(a), and a penalty was assessed in the amount of \$720. The violation was described as follows:

Appropriate personal protective equipment was not worn by employees in all operations \*Mere there was exposure to hazardous conditions: fall protection was not provided for the bridge maintenance workers on the Highway 110 bridge over U.S. Highway 52 and Minnesota Highway 3 South, working over traffic approximately 20-feet from the ground.

(Ex. 7).

8. An unadjusted penalty of \$1200 was arrived at based upon an assessment of the severity of a potential injury at "E" on a scale of "A" to "F" A severity level of "E" is appropriate when a concussion with loss of consciousness and possible brain damage could occur, multiple contusions affecting an arm and/or legs with possible internal injuries could occur, a dislocation of a back, shoulder, or hip is possible and fractures of various body parts is possible. (Ex. 8, p. 50-51).

9. The probability of an injury was assessed at an 8 on a scale of 1 -

10. Employee exposure was rated at a 1 since only one employee was exposed. Proximity to the hazard was rated at a 2 because the employee would have little chance of recovery. Duration of the hazard was rated at 1 since duration was estimated to be from 10 to 50 percent of the normal work day.

The work conditions were rated a 2 since there were two or more conditions that could effect the probability, namely the with of the railing, the precarious footing and the position of the employee. The injury or illness information was rated a zero since it showed a low frequency. The employee control factor was rated a 2 since the injury could happen without warning. (Ex. 1).

10. The unadjusted penalty of \$1200 was then reduced by 40 percent by awarding penalty credits to the Respondent. DOT received the maximum credit for good faith-safety and health of 20 percent because its safety program was rated effective. It received the maximum five percent credit for good faith record keeping since its injury records were judged to to in good order. It received the maximum credit of five percent for good faith-attitude because it had a good overall attitude and a willingness to abate. DOT received no credit for size since it has over 700 employees. It also received a ten percent credit for history since it has few files open with the OSHA division. The final penalty then was \$720.

11 . The Respondent filed a timely Notice of Contest in this matter. On June 29, 1990, the Complainant served a Summons and Notice to Respondent and a Complaint upon the Respondent. The Respondent served its Answer on July 18, 1990. On May 14, 1992, the Complainant served a Notice of and Order for Hearing and Notice to Employees upon the Respondent. -The Notice set the hearing date for June 17, 1992; however the hearing was continued to July 1, 1992 at the request of the Respondent.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. That the Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Ming. Stat. 182.661, subd. 3 and 14.50.

2. That the Department gave proper notice of the hearing in this matter, and the Department has fulfilled all relevant, substantive and procedural requirements of law or rule.

3. That the Respondent is an employer as defined by Minn. Stat. 182.651, subd. 7.

4. That Minn. Stat. 182.653, subd. 3 requires each employer to comply with occupational safety and health standard or rules promulgated pursuant to Chapter 182 of the statutes.

5. That the Department has adopted the federal standard set out at 29 C.F.R. 1926.28(a) which provides as follows:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

6. That the Respondent was in violation of 29 C.F.R. .5 1926.28(a) cm

the date of the inspection, and this conduct also violated Minn. Stat. 182.653, subd. 3.

7. That the violations proved are "serious" within the meaning of Minn. Stat. 182.651, subd. 12.

8. That under Minn. Stat. 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer and history of previous violations.

9. That the fine assessed by the Department was appropriate except that the probability factor used in calculating the unadjusted penalty should have been 7 instead of 8 since no points should have been assigned for the duration factor. Accordingly, the appropriate penalty in this matter is \$660.

10. That an employer is not responsible for violations which are the result of unpreventable employee misconduct.

11. That the burden of proof to show the affirmative defense of unpreventable employee misconduct is upon the employer.

12. That the employer has failed to prove by a Preponderance of the evidence that the violation was the result of unpreventable employee misconduct.

13. That the foregoing Conclusions of Law are based on the reasons set out in the Memorandum which follows and which is incorporated herein by reference.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The citation is hereby AFFIRMED.

2. The Respondent, the Minnesota Department of Transportation, shall forthwith pay to the Commissioner of Labor and Industry the sum of \$660.

Dated: September 1992.

GEORGE A. BECK  
Administrative Law Judge

Reported: Taped and transcript prepared by Jeffrey J. Watzak

MEMORANDUM

DOT has admitted that a violation of the personal protective equipment standard occurred at its work place on April 25, 1990. Employee Kirk Johnson was standing on a railing of a bridge abutment, in a precarious position,

without any fall protection. There is no doubt that Johnson was exposed to a hazard. The evidence also indicates that the lead worker or temporary foreman, Roger Hoff, saw Johnson on the bridge railing and failed to tell him to get down or to put on personal protective equipment. The employer argues, however the violation was the result of unpreventable employee misconduct and that therefore the citation should be dismissed. DOT also argues that the calculation of the penalty was improper.

The employer relies upon the case of H. B. Zachery Company v. Occupational Safety and Health\_Review Commission, 638 F.2d 812, 59 ALR Fed 377

(5th Cir. 1981) to state the requirements of the affirmative defense of unpreventable employee misconduct. That case indicates that the actions of the employee must be a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge. The 5th Circuit stated that the evidence of the employer safety program must be considered in deciding if the defense is made out. 59 ALR Fed at 387. An alternative statement of the defense of unpreventable employee misconduct is that (1) the employer had established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when the violations have been discovered. Jensen Construction Company 7 OSHC 1477, 1979 OSHD 1 23,664 (1979); Stuttgart-Machine Works, Inc., 9 OSHC 1366, 1981 OSHD 1 25 1 216 5RWKVWHLQ 2FFXSDWLRQDO 6DIHW\ DQG +HDOWK /DZ 117 (3d ed. 1990).

DOT argues that it had a work rule about fall protection which was communicated to its employees by two formal training sessions in 1986 and 1990 where fall protection for bridge workers was covered. It points out that Mr. Johnson attended those sessions and that he admitted that he was aware of the need to wear protective equipment when he was in danger of a fall. The employer argues that an employee cannot be expected to recite the specific OSHA standard on fall protection and that a requirement of daily safety meetings would not be appropriate. While that may be true, in this case the only evidence of a specific work rule was a general requirement that DOT employees comply with OSHA standards. As the Complainant points out, work rules generally must be specific to the hazard for which the defense is being asserted. R & R Builder's Inc. 15 OSHC 1383, 1388, 1991 OSHD if 29,531 (1991) For example, in Zachery, supra, the written work rule required crane operators to maintain a minimum distance of ten feet from energized overhead

wires. Without some specificity of this nature accomplished through safety bulletins or other materials, an employer cannot demonstrate an adequate safety program. Although the employee in this case indicated that he was aware of the employer's policy in regard to fall protection, testimony to the contrary would be unlikely to be given by a present employee. The employer has failed to show that it had an established work rule designed to prevent the violation.

Neither has the employer demonstrated that it has adequately communicated the "rule" to its employees. The record indicates the employee had attended only two bridge worker training sessions in the five years prior to the inspection. The amount of time devoted to fall protection appears to have been under four hours for both of the sessions combined. Although there was an indication that irregular safety meetings were held approximately three or four times a year, there is no evidence that fall protection was discussed at any of these meetings. In Zachery, supra, the safety program consisted of

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1. As the Respondent points out, citation to only one loose-leaf service creates a problem for counsel and the Administrative Law Judge. It is suggested that citations be made to the CCH service, which is maintained by the Office of Administrative Hearings) also and, of course, to the appellate case law where it is available.

safety films , regularly scheduled safety meetings , and the distribution of safety bulletins and materials , including a specific work rule . Nonetheless, the court found a deficiency in the communication and enforcement of the rule because the employee skipped safety meetings and the supervisor failed to enforce the rule on the day of the accident. DOT has failed to show that it adequately communicates its "rule" concerning fall protection to its employees in a way that would excuse it from the violation which occurred in this case. Without an adequate training program, an employer- cannot claim a lack of knowledge of its departure from its work policy. Danco Construction Co. v. Occupational Safety and Health Review Commission 586 F.2d 1243, 1247 (8th Cir. 1978) DOT has not demonstrated a safety program which is adequate to support a conclusion that Mr. Johnson's behavior was unexpected in light of his prior training.

In order to establish the affirmative defense, the employer must also show it has taken steps to discover violations and effectively enforce the rule when violations have been discovered. Stuttgart, supra. DOT points out that it did give the employee, Mr. Johnson, an oral reprimand for his behavior. Beyond this, however, there is no indication that DOT has ever enforced its policy concerning fall protection by reprimanding, suspending, or discharging any employee. Additionally, in this case, as in Zachery, supra the supervisor at the work site failed to effectively enforce the safety rule in question which raises the question of whether or not the supervisor was sufficiently familiar with the policy. The employer acknowledges that the burden of proof to prove unpreventable employee misconduct rests upon the employer. This defense is available where an employer can demonstrate a effective safety program which includes education and enforcement of work rules. DOT has failed to make that showing in this hearing.

The calculation of the penalty in this matter was inappropriate in one respect. The investigator testified that the severity/probability rating used

to calculate the penalty was based in part on an exposure of at least ten percent of the work day. The record indicates, however, that the exposure in this case was very likely less than ten percent of the work day. Accordingly, no points should have been rated for duration of the hazard and the probability of an injury should have been assessed at 7. This results in a reduction of the penalty from \$720 to \$660. With that recalculation, this citation is affirmed.

GAB