

1-1901-8471-2

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,

v.

Rainbow, Inc.

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on February 3, 1994, in Courtroom No. 3 at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The record remained open until April 27, 1994, for receipt of written memoranda.

Carl Warren, Esq., Nancy Moersch and Mark Traynor, Student Attorneys, University of Minnesota Civil Practice Law Clinic, 190 Law Center, 229 - 19th Avenue South, Minneapolis, Minnesota 55455, appeared on behalf of the Complainant. Stephen A. Melcher, Esq., Fabyanske, Svoboda, Westra, Davis & Hart, 1100 Minneapolis Centre, 920 Second Avenue South, Minneapolis, Minnesota 55402, appeared representing the Respondent.

The following witnesses testified at the hearing: Robert Bastyr, Robert Walker and Greg Selle.

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, with 30 days following 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 a safety belt with a lanyard attached, while driving a Condor aerial lift, is a violation of 29 C.F.R. 1926.556(b)(2)(v).

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

FINDINGS OF FACT

1. On June 29, 1993, the Minnesota Department of Labor and Industry conducted an unannounced occupational safety and health inspection at 235 N Hamline Avenue, St. Paul, Minnesota, where a gymnasium was being constructed. The inspection was in response to a reported imminent danger on the roof of construction site caused by a non-Rainbow employee. Rainbow Inc., was engaged in the business of painting as a subcontractor at the site. (T. 13.)

2. At approximately 1:00 p.m., OSHA Senior Safety Investigator, Robert Bastyr entered the work site in search of the supervisor for Kraus Anderson the general contractor of the project, in order to get permission to investigate the reported violation. At that time he observed an aerial lift operation about 30 feet up in the air with a person in the basket. He observed that the person wasn't wearing a safety belt and lanyard. (T. 15-16.) This inspection conducted was not cited by Mr. Bastyr as a violation.

3. Mr. Bastyr left the building to get his camera. He then returned inside the building and took photographs of an employee in the Condor aerial lift, which was then closer to the floor. (Exs. 2 and 3, T. 111.) Mr. Bastyr again left the building to call the supervisor from Kraus Anderson. (T. 56)

4. Upon reentering the building, Mr. Bastyr observed the Condor aerial lift being driven across the floor in an east-west direction about four to six feet off the ground. (T. 63, 99.) He saw an employee in the basket with his shirt hanging over his pants and observed that there was no body belt with a lanyard attached in the basket.

5. Mr. Bastyr approached Bob Walker, the operator of the aerial lift that was moving across the floor and asked Mr. Walker why he wasn't wearing a safety belt and lanyard. Mr. Walker replied that he had a lanyard but he didn't know where it was. He believed that it was only necessary to wear one when he was working on the aerial lift, not merely moving it across the floor. (T. 127.) Mr. Walker has worked for Rainbow, Inc. for three years and had been a lift operator for 15 years. He is a foreman for Rainbow, Inc.

6. At the time Mr. Bastyr observed Mr. Walker, he had been moving the aerial lift at a low speed over plywood sheathing so he wouldn't damage the soft asphalt beneath him. Mr. Walker would move the aerial lift about five feet and then jump out and move the plywood in front of the aerial lift. He repeated this procedure as he moved across the floor. (T. 104.) The boom was in its lowered position. (T. 99.) While driving the lift he had one hand on the controls and used the other for steering. (T. 98.) He was wearing a hard hat.

7. After Mr. Bastyr was finished questioning Mr. Walker he took a picture of the basket on the aerial lift. (Ex. 4.) The guardrail on the lift is 42 inches high. (T. 16.) Mr. Walker cooperated fully with Mr. Bastyr at all times and answered all questions asked of him.

8. Mr. Walker is familiar with the Operation and Safety Manual of the Self-Propelled Condor Aerial Work Platform (Ex. 8) and the Rainbow Inc. Employee Safety Handbook. (Ex. 9.) Both require a safety belt and lanyard. Neither sets out any height exceptions for using a safety belt and lanyard. A lanyard is usually attached to a "D" ring located about 3 inches below the top guardrail. It can also be attached to the middle rail, 21 inches from the top rail or possibly to the floor.

9. Mr. Bastyr filled out the inspection report on June 29, 1993, and issued the citation on July 13, 1993. A penalty of \$352 was assessed against Rainbow Inc. for violation of 29 C.F.R. 1926.556(b)(2)(v). The violation is described as follows:

A body belt with lanyard attached to the boom or basket was not worn by employees working from an aerial lift: Building Interior. Employee was driving a condor aerial lift #6B from east to west and was not wearing and using a safety belt and lanyard while machine was in operation.

(Ex. 5.)

10. An unadjusted penalty of \$1,100 was arrived at based upon an assessment of the severity of a potential injury at "D" on a scale of "A" to "F". A severity level of "D" is appropriate under circumstances where an injury could result in the loss of 1-10 work days. (T. 32, 73.) A "D" injury would be a broken wrist, ankle, rib or sternum or a head injury with a loss of consciousness. (T. 77-78, Ex. 6, app. VI-C.)

11. The probability of an injury was assessed at 3 on a scale of 1-10. Employee exposure was rated a 1 since only the one employee was exposed. Proximity to the hazard was rated a 1 since Mr. Walker was near the railing of the basket but not hanging off the edge. Duration of hazard was rated zero since duration was estimated to be less than 10% of the work day. The work conditions were rated zero since there was nothing near the basket of the aerial lift to increase the probability that an accident would occur. The employee control factor was rated a 1 since something inadvertent would have happened such as someone bumping him. (Ex. 1, T. 33-34.)

12. The unadjusted penalty of \$1,100 was then reduced by 68 percent by awarding penalty credits to the Respondent. Rainbow Inc. received 18 percent credit for good faith. In each of the six good faith areas, Rainbow Inc. received 3 out of 5 possible points. The inspector concluded, as to good faith, that if the foreman (Mr. Walker) was not following rules then employees under him would not have any incentive to do so. Rainbow also received 40 percent credit for the size of the company and a full 10 percent credit for history, since it has few files open with the OSHA division. (T. 39.) The final penalty then was \$352. (Ex. 1.)

13. Respondent filed a timely Notice of Contest in this matter on July 29, 1993. On September 22, 1993, the Complainant served a Summons and Notice and a Complaint upon the Respondent. The Respondent served its Answer on November 17, 1993. On December 6, 1993, the Complainant served a Notice of Order for Hearing and Notice to Employees upon the Respondent. The Notice set the hearing date for February 3, 1994.

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

CONCLUSIONS OF LAW

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

2. 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. The Respondent is an employer as defined by Minn. Stat. § 182.651 subd. 7.

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

5. The Department has adopted the federal standard set out at 29 C.F.R. 1926.556(b)(2)(v) which provides as follows:

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

6. The Complainant has the burden of establishing an OSHA violation by a preponderance of the evidence.

7. The Complainant has not met that burden since it has not been shown that the standard applies to the facts of this case.

8. The Respondent was not in violation of 29 C.F.R. 1926.556(b)(2)(v) and therefore is not required to pay the fine of \$352.

9. 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 VACATED.

2. The penalty is hereby DISMISSED.

Dated this 13th day of May, 1994.

/s/

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

The Department of Labor and Industry (hereinafter "Complainant") alleges that an employee of Rainbow Inc. (hereinafter "Respondent") violated 29 C.F.R. 1926.556(b)(2)(v) by driving a Condor aerial lift across the floor of the worksite without attaching a safety belt and lanyard to the basket. Mr. Walker admits he was not wearing a lanyard while driving the aerial lift. However, Respondent claims the cited standard does not apply because 1) the employee was not "working" from the aerial lift, and 2) Complainant's interpretation of the standard is unreasonable. The Respondent also argues that alleged violation was not properly classified as serious.

In this situation, the burden is on the Complainant to establish an OSHA violation by a preponderance of the evidence. The Complainant must show 1) the cited standard or rule applies, 2) there was a failure to comply with the cited standard, 3) an employee had access to the violative condition, and 4) the employer knew or could have known of the condition with the exercise of reasonable diligence. Astra Pharmaceutical Products, Inc., 1981 OSHD CCH 25,578 (1981), aff'd. in part, rev. in part, 681 F.2d 69 (1st Cir. 1982), Rothstein, Occupational Safety and Health Law, section 102 (3d ed. 1990). Complainant has not met the burden of proof because he has not shown that the standard applies to the facts of this case.

In addressing whether the standard applies, both parties cited the case Secretary of Labor v. Salah & Pecci Construction Co., Inc., 1978 WL 7061 (O.S.H.R.C. 1978). The issue in that case was whether an employee who was being lowered in an aerial lift was "working" within the meaning of standard 29 C.F.R. 1926.556(b)(2)(v). In Salah, the Administrative Law Judge concluded that the standard applies only when the employee is performing work and not while being lowered or raised to a work position. The Commission reversed the decision because it believed the term "working" within the meaning of section 1926.556(b)(2)(v) includes the act of being transported in an aerial lift from a work level. In coming to that conclusion, the Commission relied on its decision in Gilles & Cotting, Inc., 76 OSAHRC 30/D9, 3 BNA OSHC 2002, 1975-1976 OSHD para. 20,448 (No. 504, 1976) where it said that one basis for finding access to a hazard is where employees in the course of their normal means of ingress and egress to their work places are in a "zone of danger."

Salah is instructive, but distinguishable from the case at hand. First, all, the evidence indicates that in order to move the aerial lift across the floor, it was easiest for Mr. Walker to leave the lift boom in its fully lowered position. An aerial lift moving only a few miles per hour and stopping every few feet at a constant height of four to six feet off the ground is readily distinguishable from a situation where the basket is being raised and lowered at substantial heights as occurred in Salah. The Respondent was not "working from" the lift, he was merely moving it across the floor. Once a

person enters the basket to be raised into a position to work, the interpretation from Salah would apply.

The Complainant's interpretation of "working", namely doing a task necessary to complete the project, broadens the meaning of the term beyond the intent and purpose of the standard. "Working from an aerial lift" must mean

something more than merely driving the lift across the floor on the ground to move it to a different location. It implies being at a height which is a part of the zone of danger as indicated by the Commission in Salah. "Working" also implies an activity, such as painting, where the employee is in danger of losing his balance. The purpose of the standard is to protect employees from the hazard of a fall from a dangerous height. Although the inspector testified that the driving height was dangerous and might result in a serious injury, it seems unlikely (as the Respondents' witnesses testified) that a fall from four to six feet would cause fractures of the ribs, sternum, wrist or ankle or a concussion with loss of consciousness.¹ This is especially true where the driver was standing with his feet planted to drive the lift and was wearing a hard hat. Additionally, because the lanyard is six feet long, it is uncertain what protection it would offer, if any, at a height of four to six feet. To apply the rule regardless of height ignores the reason for the rule. The standard is not undermined if by not applying it to a situation where a hazard which can be prevented by a lanyard is not present.

The basis for finding access to a hazard under the "zone of danger" argument as the Commission did in Gilles, is not applicable in Respondent's case. In Gilles, the Commission ruled that actual exposure to danger is not necessary; one need only demonstrate that the employee is in a "zone of danger." To make a finding that Respondent was in such a "zone" is simply not reasonable when the evidence indicates that the employee is protected from a fall by a guardrail of 42 inches and where the aerial lift is moving only a few feet at a time with the employee's hands braced on the driving controls and feet firmly planted on the bottom of the basket. To construe this situation as one requiring additional protection from the hazard of a fall would be unreasonable.

GAB

¹ If a violation had been proved, the violation should properly have been rated a "C" rather than a "D". A "C" classification includes injuries such as a concussion with no loss of consciousness, a contusion of the scalp, a

relatively severe single bruise, a crushed finger or toe, or a fracture of a single bone in the hand, finger, foot or toe.