United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. PEGASUS TOWER, INC., Respondent.	OSHRC DOCKET NO. 04-1612

APPEARANCES:

For the Complainant:
Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:
Beau Broadus, Brax Broadus, pro se, Pegasus Tower, Inc., Calico Rock, Arkansas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Pegasus Tower Inc. (Pegasus), at all times relevant to this action maintained a place of business at the NBC news station in Madison Wisconsin, where it was constructing a 1300 foot communications tower. Because construction is in a class of activity which as a whole affects interstate commerce, see *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983), Pegasus is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 14, 2004, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Pegasus' Madison work site. As a result of that inspection, OSHA issued citations alleging violations of the Act. By filing a timely notice of contest Pegasus brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On July 27, 2005, a hearing was held in Little Rock, Arkansas. No briefs were requested and this matter is ready for disposition.

Alleged Violation of §5(a)(1)

Citation 1, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

> Hazards associated with falls of up to approximately 940 feet and employees on the ground being struck by falling objects. The hoist line was used to raise and lower an employee when another load was also attached.
>
> Among other methods, feasible and acceptable abatement methods to correct this hazard would be to: Comply with the requirements of OSHA compliance Directive CPL 2-1.29 which contains Interim Inspection Procedures During Communication Tower Construction Activities.

Facts

Citation 1, item 1 alleges that a Pegasus employee rode a load up a tower under construction, a practice that is prohibited by OSHA CPL 2-1.29. Chad Greenwood, a Compliance Officer (CO) with OSHA testified that on June 14, 2004, he arrived on the Madison worksite, where he observed Pegasus employees constructing a communications tower (Tr. 29). According to Greenwood, Pegasus constructed sections of the tower approximately 20 feet in height on the ground. A hoist line was attached to each section and run through a "gin pole," a device similar to a crane boom, which is attached at the top of the partially constructed tower (Tr. 30; Exh. C-4). The hoist assembly was used to stack the tower sections (Tr. 30; Exh. C-7). The hoist assembly was also used for the installation of communications equipment (Tr. 188-89, 217), and transporting personnel (Tr. 48; Exh. C-8). During his inspection Greenwood observed a Pegasus employee, Beau Broadus, riding a load of aluminum transmission conduit as it was lifted with the hoist (Tr. 34, 40-41, 188, 217; Exh. C-5).

Jocko Vermillion testified for OSHA as an expert in tower construction safety. Before joining OSHA Vermillion was involved in the construction of hundreds of communication and broadcast towers as a tower hand, foreman and project manager. He was the vice-president of Summit Tower Services, a tower erection and maintenance company for nine years (Tr. 145-46). Vermillion was familiar with safety practices in the tower erection and testified that those practices were considered in the drafting of CPL 2-1.29 (Tr. 146-52). While in the private sector, Vermillion was an industry representative to the National Association of Tower Erectors (NATE) (Tr. 144).

NATE is a group of over 500 large and small tower contractors, manufacturers, and tower engineers (Tr. 31). OSHA, working with NATE, developed compliance directive CPL 2-1.29, which established

specific conditions under which tower erectors may deviate from OSHA requirements the industry believed were impractical or hazardous, *i.e.* using fixed ladders with attached climbing devices to access high towers (Tr. 31; Exh. C-2, p. 3-4). According to Vermillion, the CPL reflects a compromise between the tower industry and OSHA (Tr. 152). OSHA's position reflected at §1926.552(b)(ii), was that "no person shall be allowed to ride on material hoists except for the purposes of inspection and maintenance." Though it is recognized within the tower industry that loads cannot be controlled, and that employees riding loads are in danger, the industry believed employees could safely ride the hoist line, so long as the rigging was secure and the operator's attention was solely on the employee (Tr. 151-52, 155-57, 187). Paragraph 6.f. of the CPL prohibits using the gin pole to hoist employees and a load simultaneously (Tr. 37; Exh. C-2, p. 7). According to Greenwood, the practice increases the chance that the worker will fall during the hoist, because of, 1) the increased weight on the hoist line, 2) the operator's divided attention, and 3) the possibility that the load will hang up on the tower as it is raised (Tr. 40, 42-44).

Brax Broadus, the hoist operator, testified that the load of conduit Beau Broadus rode with on June 14, 2004, was eleven feet long and weighed approximately 100 pounds (Tr. 217). During the hoist, a trolley man on the ground controlled the load with a trolley, or tag line pulled by a pickup truck, which is intended to keep the fragile aluminum conduit a safe distance from the tower (Tr. 217-18, 233). If the trolley man failed to keep the load clear, Brax Broadus would stop the hoist until he could clear the load (Tr. 217). As the load approached the top block of the gin pole it became impossible to maintain adequate clearance from the tower, because the trolley line was also attached to the top block (Tr. 218, 254, 257). According to Brax and Beau Broadus, a man was needed on top to keep the aluminum line from dragging against the tower (Tr. 218, 242). Beau Broadus admitted that his presence on the ball would not necessarily ensure that conduit would not be damaged during the hoist (Tr. 241).

It is undisputed that Pegasus was aware of the provisions set forth in CPL 2-1.29 (Tr. 32). Brad and Brax Broadus, were aware that Beau Broadus was on the load (Tr. 45, 218). Beau Broadus did not believe that the prohibition against riding a load applied to the conduit because, in his opinion, a "load" had to weigh between five hundred to a thousand pounds (Tr. 251). He would not ride a load over five hundred pounds (Tr. 253).

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the

exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

As noted above, the citation alleges that a Pegasus employee rode a load up a tower under construction, a practice that is prohibited by OSHA CPL 2-1.29. Riding a materials hoist is a hazardous practice which has been identified and specifically prohibited by OSHA under Subpart N of the construction standards. On this record, it is clear that the tower erection industry, in effect, lobbied for and received an industry wide variance allowing its employees to ride hoist lines under specific conditions clearly spelled out in CPL 2-1.29. Those conditions include a requirement that "no other load" be attached to the hoist line while it is in use to raise or lower employees. The evidence establishes that Pegasus, through Beau Broadus, was aware that riding a load was hazardous. Pegasus was also aware of the prohibition contained in the CPL against using the hoist line to raise a load while it is in use as a personnel hoist. Nonetheless, Pegasus chose to ignore the prohibition in this case because the conduit being hoisted was not very heavy and because the employee riding up with the conduit might be able to prevent the conduit from being damaged in transit.

CPL 2-1.29 flatly prohibits the use of a hoist line to simultaneously hoist materials and personnel. There is no exception in the CPL allowing the hoisting of very light or very fragile loads while the hoist is also being used for hoisting personnel. Pegasus maintains that a man needs to be present when the load approaches the top block on the gin pole to alert the operator to problems and to push the conduit away from the tower. Pegasus did not explain why that man could not be hoisted to a work position on the tower near the top block prior to the materials lift, a practice that is both feasible and allowed under the CPL.

This record establishes that Pegasus was aware that riding the hoist line during the hoisting of a load was a hazardous practice likely to cause death or serious physical harm. A feasible means of abating or reducing the hazard is to lift personnel separately from materials. The violation is established.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The factors to be considered in determining gravity include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

A gravity based penalty of $2,500.00 was originally calculated by the CO. The proposed penalty was reduced to $1,000.00, as Pegasus is a small employer (Tr. 102, 106). As the CO noted a number of violations at the Pegasus work site, and because Pegasus was previously cited for similar violations of the Act, the CO did not make any deductions in his proposed penalty for either good faith or history (Tr. 103-05). One employee was exposed for several minutes (Tr. 97). The probability of an accident occurring was remote, in that in addition to the hoist operator, the trolley line operator, was attempting to keep the load and its rider from contacting the tower (Tr. 99-100). The severity of an employee's injuries in the event of an accident, however, would be high. The proposed penalty is appropriate and $1,000.00 will be assessed.

Alleged Violation of §5(a)(1)

Citation 1, item 2 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

> Hazards associated with tower collapse and falls of up to approximately 940 feet and employees on the ground being struck by falling objects.
>
> Among other methods, feasible and acceptable abatement methods to correct this hazard would be to: Comply with the requirements of OSHA compliance Directive CPL 2-1.29 which contains Interim Inspection Procedures During Communication Tower Construction Activities, USAS B30.5, ANSI B30.7, TIA-1019 which contains Structural Standards for Steel Gin Poles used for installation of Antenna Towers and Antenna Supporting Structures and other industry standards. Deficiencies included, but were not limited to: 1. The end of the hoist line had two wire rope clips fastened to it. 2. The personnel load capacity of the gin pole was not known or posted. 3. The gin pole was not attached to the tower as designed by a registered professional engineer. 4. There were no as-built drawings approved by a registered professional engineer that showed the lifting capacity of the gin pole.

Facts

Citation 1, item 2 alleges that components of Pegasus' lifting assembly, *i.e.*, the gin pole and the means of attaching the gin pole to the tower, were neither engineered nor examined by an engineer, so that the capacity of the hoisting assembly could not be determined prior to making material or personnel lifts. The Secretary also alleges the terminal loop at the end of the hoist cable was not constructed in a recognized manner, precluding accurate calculation of the lifting capacity of the hoist assembly.

Greenwood testified that it was not possible to determine the load capacity of the hoist assembly because the terminal loop on the hoist line had not been attached to the thimble in a recognized manner

(Tr. 46). The line was threaded around a thimble and the tag end folded back upon itself. Two clamps were attached to the lengths of rope above the thimble. Between the clamps, the strands of one rope appear to have been split, and the other passed through the strands. The end of the tag line was wrapped with duct tape and secured to the main line above the uppermost clamp (Tr. 46; Exh. C-6).

Pegasus maintains that the end connection was a "Flemish eye" (Tr. 48, 141). The Rigging Manual for Ironworkers describes the manner of constructing a Flemish eye splice (Tr. 172; Exh. C-15, p. 9). The splice is constructed by splitting off three strands of wire rope while leaving the core and the remaining strands intact. The two sets of strands are bent into the desired size loop and locked together at the bottom of the noose with an overhand wrap. The strands are re-woven, laying the strands into the rope grooves back towards the throat of the loop (Tr. 50-53, 184; Exh. C-15). Any fibre core is then cut out, and the tag ends secured with a compression fitting.[1] Generally the Flemish eye is created in a manufacturing shop where the compression clamp can be applied under pressure (Tr. 53). Alternatively, the strand wires may be "broomed" out, wrapped around the rope body and secured with a "seizing strand," copper wire or friction tape. The Rigging Manual states that the alternative method may be accomplished in the field (Exh. C-15, p. 10).

Brax Broadus testified that he learned how to install a Flemish eye from a rigger's manual (Tr. 210-11). Broadus stated that he split off three strands of wire rope and wove the strands from the bottom of the noose up to the throat as described in the rigger's manual (Tr. 212). According to Broadus, the Flemish eye he constructed looked different from that in the manual because after reaching the throat, he wove the excess wire strands back into a single wire rope which he then attached with two wire rope clips to tighten the noose around the thimble, and to keep the tag end from getting hung up (Tr. 212-13). Beau Broadus testified similarly (Tr. 242-45). According to Brax Broadus, he, Beau and his father Brad all took part in the construction of this Flemish eye (Tr. 219).

Both COs Greenwood and Vermillion testified that the end connection at the Pegasus site looked nothing like any Flemish eye they had seen (Tr. 49-50, 169). Vermillion testified that the end connection was not a recognized splice in the industry and constituted a recognized hazard (Tr. 158, 160). Because the splice is not recognized by the industry, its strength cannot be rated, and its load capacity cannot be

[1] Pegasus maintains that a 3/4" wire rope finished with a manufactured Flemish eye and a pressure fitting would not fit through the gin pole's top lock, or "rooster head" (Tr. 214-15, 247). It is unnecessary to reach this issue, however, as it is clear from the evidence that a Flemish eye or other recognized end connection can be constructed in the field.

calculated (Tr. 158-62). The parties agree that pulling the strands of a wire rope apart weaken that part of the rope (Tr. 163-64, 244).

Alternative end connections recognized in the industry include a wire rope turnback, where the wire rope is secured around the thimble using wire rope clips, U-bolts or fist grips, applied according to manufacturer's specifications (Tr. 163, 170-72, 184; Exh. C-16). The load bearing capacity of wire rope secured to manufacturer's specifications has been tested and so can be used to calculate the capacity of the hoisting rig (Tr. 163; Exh. C-16). According to Greenwood, other contractors also use a wedge socket, a two part device consisting of a metal sleeve and a wedge coming in from the bottom (Tr. 54, 56). The wire rope is passed through the sleeve, around the wedge and back through the sleeve (Tr. 56). The downward pressure from the load pulls the wedge into the sleeve, locking the wire into place (Tr. 56). Pegasus had a wedge socket on site, but believed that its end connection was safer (Tr. 54-55). Brad Broadus told Greenwood that he was concerned that the wedge would catch on something during the lift, causing the load to come loose (Tr. 55-56).

It is undisputed that the gin pole was not designed by a professional engineer. Pegasus had no "as-built" drawings stating the pole's safe working capacities (Tr. 34, 79, 83). Pegasus obtained the gin pole approximately 30 years ago from a contractor, George Georgeoff, who obtained it from another contractor, "Pop" Tyner (Tr. 84, 263, 266). The gin pole was manufactured as a boom for an "old friction crane rig," and was altered for use as a gin pole (Tr. 263, 268). Brax Broadus testified that he and his father had previously tested the gin pole to 20,000 pounds, by picking a load of approximately 20,000 pounds on a fully built 1000 foot tower and letting it sit suspended two or three feet off the ground overnight (Tr. 220-23). Brax Broadus stated that Pegasus conducted this test approximately 10 years ago, but has used the gin pole without incident numerous times since then on loads of up to 18,000 pounds (Tr. 223-24). Beau Broadus testified that the gin pole was tested each time it was used (Tr. 263-65). Beau Broadus testified that Pegasus used a "dynamometer" to test the hoist assembly to 15,000 pounds prior to starting work on this tower (Tr. 265).

Vermillion testified that he never worked with a gin pole which was not designed by a registered professional engineer (Tr. 178). In the telecommunications industry an engineer calculates the needs of each specific job and designs both the exact construction of the gin pole and its means of attachment to the tower to meet the specifications of that job (Tr. 180-81). As-built drawings are provided to the engineer after construction, enabling him to certify that the lifting capacity of the gin pole is as designed (Tr. 87, 183; *See,* **TIA Standard – Structural Standards for Steel Gin Poles Used for Installation of Antenna Towers and Antenna Supporting Structures, TIA-1019,** Annex C, Evaluation of Existing Gin Poles).

The safe personnel load capacity of the hoist assembly was not calculated and posted so as to enable the hoist operator to determine the capacity of the hoist at a glance (Tr. 34, 38, 76). Pegasus posted a sign stating that it was using a 3/4 inch load line with a break strength of 60,000 pounds and a safe working load of 15,000 pounds (Tr. 62; Exh. C-9). According to both Greenwood and Vermillion, the personnel load capacity of the hoist line should have been calculated based on the strength of the weakest component in the hoisting assembly, whether it be the end connection[2] or the strength of the gin pole (Tr. 58, 64, 88, 174). Calculation of the load capacity of this hoist assembly was impossible, however, because of Pegasus' failure to have its gin pole or its gin pole attachment engineered, or to use a recognizable end connection (Tr. 79-81, 85, 88, 175-79).

Discussion

As in the preceding violation, the Secretary bears the burden of proving that the cited conditions and activities presented a recognized hazard likely to cause death or serious physical harm, and that a feasible means existed to eliminate or materially reduce the hazard. A recognized hazard may be a practice, procedure or condition under the employer's control that is known to be hazardous either constructively, i.e., by the industry in general, or actually, by the cited employer in particular. *Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD ¶27,605 (No. 82-388, 1986). It is clear from the record that Pegasus recognizes the hazard posed by lifting loads in excess of its hoist mechanism's rated capacity. Pegasus maintains, however, that it took all feasible steps to ensure that the capacity of its hoisting mechanism and its component parts was adequate.

Pegasus used its own means of splicing a Flemish eye, believing it was an improvement on the splice set forth in the Rigging Manual for Ironworkers. Pegasus did not bother to post the personnel load capacity of its gin pole, as its calculated safe working load of 15,000 far exceeded the weight of any personnel the hoist might carry. Pegasus eschewed the services of a professional engineer, substituting its own testing to establish the capacity of its hoist. While the Secretary did not show that Pegasus's gin pole assembly was hazardous, she did establish that its gin pole attachments were not engineered, and that its end connections did not comply with standard connections recognized for crane rigging. Pegasus maintains that the abatement suggested by the Secretary would not add to the safety of its hoisting operations, which were completed without incident. The question this judge must answer, however, is

[2] For example, a properly made Flemish eye retains 95% of the break strength of a wire rope clip, here 60,000 pounds (Tr. 50). At the hearing Brax Broadus figured the safe working load of the 3/4" line he was using was roughly 11,000 pounds (Tr. 216). In fact, the safe working load of a 60,000 pound line with a proper Flemish eye is one fifth or the rated break strength, or 11,400 pounds. The safe personnel lifting capacity is ½ the safe working load or 5,700 pounds (see, Tr. 50, 68, 69-74).

whether the precautions suggested by the Secretary are recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the employer's worksite." *Cerro Metal Products Division, Marmon Group, Inc.*, 12 BNA OSHC 1821, ¶27,579 (No. 78-5159, 1986).

Pegasus's safe completion of the job on which these citations were based does not establish that the cited rig was as safe as it could, or should have been. The industry standards contained within ANSI B30.7; USAS B30.5; and TIA–1019 were each developed to ensure that a margin of safety is provided for employees working with systems utilizing hoist drums, cranes and gin poles, respectively. OSHA's CPL 2-1.29 merely combines recognized industry safety standards that are specifically applicable to the installation of communications towers. The standardization of construction and rigging practices recognized as providing an acceptable margin of safety allows employers and inspectors to determine whether a given hoist system will perform within its projected capacity. When an employer refuses to utilize standard practices it is impossible to assess whether its rig provides said margin of safety. As noted above, Pegasus used a crane rig altered for use as a gin pole without the approval of a registered professional engineer. It failed to obtain engineering approval for its proposed means of attaching the gin pole to the tower. It constructed an "improved" Flemish eye end connection which may, or may not, have retained the same percentage of lift capacity as a Flemish eye constructed to industry standards.

Fortunately, Pegasus' lifting assembly proved adequate for the loads it was required to hoist on this job. Nonetheless, the record establishes that Pegasus shortcut industry practices set forth in CPL 2-1.29, by eliminating steps recognized in the industry as necessary for the safe construction of communication towers. The violation has been established.

Penalty

OSHA originally proposed a gravity based penalty of $5,000.00 for this item (Tr. 108). Each tower section weights several thousand pounds (Tr. 59). Should any part of the hoist assembly fail during a lift, the load would fall. In falling, the load could strike one or more of the guy wires which stabilize the tower, causing it to collapse (Tr. 59, 76, 85). Failure of the hoist would likely result in serious injury to some or all of Pegasus' eight employees (Tr. 28, 107). Should any part of the hoist assembly fail during a personnel lift, the employees being hoisted would fall to the ground (Tr. 60, 76). Two Pegasus employees were observed riding the hoist line while it was rigged in this manner (Tr. 48; Exh. C-8). Pegasus employees were exposed to the cited conditions for the entire length of the job (Tr. 107). CO Greenwood felt that there was a good chance that an accident could occur as a result of the deficiencies in the hoist assembly's engineering (Tr. 108).

The gravity of the violation is overstated as the CO apparently did not take into consideration that Pegasus took alternative precautions, testing the lift capacity of the hoist assembly to 15,000 pounds. Taking into account the reduced likelihood of an accident occurring, along with the other relevant factors a penalty of $1,500.00 is appropriate and will be assessed.

Alleged Violation of §1926.100(a)

Citation 1, item 3 alleges:

> 29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:
>
> A hard hat was not worn by an employee working at and around the base of the tower.

Facts

Brad Broadus refused to wear a hard hat during the OSHA inspection, indicating that, as the owner of the company, the OSHA standards did not apply to him (Tr. 90; Exh. C-10). Brad Broadus worked directly beneath the tower where overhead work was proceeding. Had a tool or material fallen from the tower, Broadus could have been struck and suffered severe injury or death (Tr. 91, 109).

Discussion

The facts in this matter are not disputed. Respondent argues only that as Pegasus' owner, Brad Broadus, was not subject to OSHA regulations. As the stated purpose of the Act is ". . . to assure so far as possible every working man and woman in the nation safe and healthful working conditions. . .", it has been long accepted that owners, family members, and corporate officers are "employees" for purposes of the Act while performing work for the employer. *See, et seq.; Howard M. Clauson*, 5 BNA OSHC 1760, 1977-78 CCH OSHD ¶21,759 (No. 76-2669, 1977)(ALJ), *Hydraform Products Corp.*, 7 BNA OSHC 1995, 1979 CCH OSHD ¶23,825 (No. 78-5274, 1979)(ALJ). While working in his business, Brad Broadus must personally comply with applicable safety regulations. Any different holding would result in an owner, or partial owner, working under unsafe conditions, a result which Congress did not intend.

Penalty

A penalty of $1,000.00 was proposed for this violation, after the penalty factors discussed above were considered (Tr. 109). That penalty is appropriate and will be assessed.

Alleged Violation of §1926.1051(a)

Citation 1, item 4 alleges:

> 29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment or personnel hoist was provided:
>
> A ladder was not provided for an employee who climbed a tree and then leaped to another tree.
>
> The cited standard provides:
>
> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Facts

During the inspection, Greenwood observed Brax Broadus, Pegasus' hoist operator, climb to the top of a 16 foot tall tree to free a tag line (Tr. 92-93; Exh. C-11). Brax Broadus freed the tag line and then jumped 5 to 6 feet into a second tree to untangle the line (Tr. 92; Exh. C-12). Greenwood testified that a fall from that elevation could have resulted in serious injury (Tr. 94).

Brax Broadus testified that there was too much brush piled up around the trees to use an A-frame type ladder, and that the trees were too small to support a ladder leaning against them (Tr. 236-37). He admitted that the brush could have been cleared with a tractor, or that a scissors lift could have been used to access the trees (Tr. 236-38).

One employee was exposed to the cited hazard (Tr. 110). The likelihood of an injury occurring was high as Brax Broadus could just as easily have fallen to the ground as successfully jumped from tree to tree (Tr. 111). A penalty of $1,400.00 was proposed for this item.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the cited employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *See, e.g., Offshore Shipbuilding, Inc.*,18 BNA OSHC 2170, 2171, 2000 CCH OSHD ¶32,137 (No. 99-0257, 2000).

When read in its entirety, it is apparent that the cited regulation is intended to apply to anticipated employee access to multi-level work areas. *Point of access* is defined as "all areas used by employees for work-related passage from one area or level to another. Such open areas include doorways, passageways, stairway openings, studded walls, and various other permanent or temporary openings used for such

travel." Section 1926.1051(b) requires employers to install stairways and ladders required by this subpart before employees begin their work.

Though it is clearly a foolhardy and dangerous practice, OSHA never anticipated, and the standard does not specifically address the practice of employees leaping from tree to tree. It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, (3rd Cir. 1980). The cited practice is clearly hazardous, and this judge is not persuaded that the use of a ladder would have been infeasible. However, the language of the standard does not contemplate nor address such wholly unreasonable conduct.

Item 4 is, therefore, vacated.

ORDER

1. Serious citation 1, item 1, alleging a "serious" violation of §5(a)(1) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

2. Serious citation 1, item 2, alleging a "serious" violation of §5(a)(1) is AFFIRMED, and a penalty of $1,500.00 is ASSESSED.

3. Serious citation 1, item 3, alleging a "serious" violation of §1926.100(a) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

4. Serious citation 1, item 4, alleging a "serious" violation of §1926.1051(a) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated:October 27, 2005