UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
SOUTHWEST REFRACTORY
Respondent.

OSHRC DOCKET
NO. 92-2345

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 December 2, 1993. The decision of the Judge will become a final order of the Commission on January 3, 1994 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 December 22, 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:

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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

Date: December 2, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2345

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
Complainant,

v.

SOUTHWEST REFRACTORY, INC.,

Respondent.

OSHRC
DOCKET NO. 92-2345

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Kenneth D. Bodenhamer, Esq.
Bodenhamer & Levinson, P.A.
Tulsa, Oklahoma
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On July 1, 1992, Southwest Refractory, Inc. ("Southwest"), was cited for a serious violation of 29 C.F.R. § 1910.184(c)(9) which requires that employees be kept clear of suspended loads and loads about to be lifted by a sling. A penalty of $5000 is proposed. The citation was issued after OSHA safety compliance specialist, Jorgell Henry, conducted an investigation of an accident that occurred at Southwest's Sapulpa, Oklahoma site on April 23, 1992, which resulted in the death of a Southwest employee (Tr. 4-5, 16-20, 31-32).

Callidus Technologies ("Callidus") hired Southwest to apply refractory material to the inside of a 17,000 pound, U-shaped steel pipe that Callidus had shipped to Southwest's Sapulpa site; the pipe was twelve feet long, fifteen feet wide, and six feet in diameter (Tr. 9-11, 17, 28, 58; Exhibits C-3 & C-4). During the refractory process, the pipe had to be lifted and turned over so that refractory material[1] could be applied to the other side of the pipe

[1] Refractory material is a heavy, cement-based, liquid lining which is applied to the internal walls of various pipes and vessels in order to insulate and protect the unit (Tr. 28-29, 58-59).

(Tr. 11-12, 28-30, 70). Southwest hired Mobile Crane Services, Inc. ("Mobile") to lift the pipe. Mobile, an independent contractor, provided a 35-ton crane, a crane operator, and a rigger to perform the lifting operations (Tr. 42-43, 59-61, 69-70).

On the morning of April 23rd, Mobile's crew had already flipped over approximately nine pieces of equipment for Southwest before turning to the Callidus pipe (Tr. 61-62, 74). The rigger, a Mobile employee, rigged the pipe using a sling which consisted of a choker and ball cable attached to the lifting lugs on the side of the pipe (Tr. 26-30, 45-46, 72, 76; Exhibits C-1 through C-4).[2] The pipe was resting on its side on top of several timbers which had to be relocated underneath the pipe once it was lifted and turned over; two Southwest employees assisted with this task (Tr. 11-12, 30-31, 62, 70-71, 76-77). When John Fellows, one of these employees, crouched down underneath the suspended pipe to shift some of the timbers, the pipe fell on him, pinning him to the ground; he subsequently died from the injuries he sustained (Tr. 4-5, 12-13, 17, 30-32).

Section 1910.184(c)(9) requires that employees be kept clear of suspended loads as well as loads about to be lifted. There is no question that Fellows was exposed to a hazard as he worked near the suspended pipe and his failure to stay out from under the load clearly violated the mandate of the cited standard (Tr. 33-36). The record demonstrates that Southwest was well aware of the fact that working around or underneath a suspended load posed a serious hazard to employees. Both Phillip Stonecipher, Southwest's vice president of administration, and Jack Sligar, Jr., Southwest's project superintendent on the day of the accident, testified that Southwest had made a serious effort to ensure that its employees stayed clear of loads during lifting operations by constantly warning them when they got too close and repeating this admonition at regular safety meetings (Tr. 62-65, 73-75, 79-80).

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[2] There was some dispute at the hearing over whether the rigger performed this task alone or with the assistance of Robert Brown, a Southwest employee who was present at the scene of the accident (Tr. 48-49, 54, 60-61, 69-72, 76, 78). In either case, it seems unlikely that Brown would have done any more than simply assist, at the rigger's direction, in attaching the pipe to the cables. It is the rigger who, as safety compliance specialist Henry described it, "hooks the cables and things to...whatever they're lifting" and Southwest specifically requested that Mobile provide a rigger for this purpose on the day of the accident (Tr. 45-46, 52, 60-62, 69-70, 72, 78). Southwest employees apparently receive no training in this type of work (Tr. 62).

Having shown that the cited standard applies to the cited condition, that the terms of the standard were not met, and that Fellows was exposed to a serious hazard which was recognized as such by Southwest, the Secretary has satisfied his burden of proving a violation. *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1116, 1991 CCH OSHD ¶ 29,394 (No. 88-1877, 1991), *aff'd*, 15 BNA OSHC 1634 (No. 91-1413, D.C. Cir. 1992).

In its defense, Southwest maintains that because Mobile was in charge of all lifting operations that day, the responsibility for the cited violation belongs to it and not Southwest. Southwest had employed Mobile on jobs such as this one since 1982 and, apparently, never had a safety problem with them (Tr. 59-60, 79). It was not unreasonable, therefore, for Southwest to have expected Mobile to follow safe procedures when performing any work related to that for which it had been hired.[3] *Sasser Electric & Mfg. Co.*, 11 BNA OSHC 2133, 2136, 1984 CCH OSHD ¶ 26,982 (No. 82-178, 1984), *aff'd*, 12 BNA OSHC 1445 (No. 84-1961, 4th Cir. 1985) ("*Sasser*") ("[W]hen some of the work is performed by [an independent contractor], an employer is justified in relying upon the [contractor] to protect against hazards related to the [contractor's] expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely."). *See also Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1900 n.3, 1992 CCH OSHD ¶ 29,854 (No. 89-1394, 1992).

Southwest, however, was not cited for failing to rig the Callidus pipe properly or for operating the crane in an unsafe manner. Southwest was cited for failing to keep its own employees clear from a suspended load, a condition which cannot be said to have come within the exclusive control of Mobile and, in fact, was a hazard which, as noted *supra*, Southwest had taken steps to address in its workplace. The responsibility, therefore, for ensuring that Southwest employees kept clear of the suspended pipe belonged to Southwest and cannot, under these circumstances, be passed off to Mobile. *Cf. Sasser* at 2136

[3] Indeed, when the compliance officer suggested ways in which Southwest could have abated the hazard, e.g., by rigging a safety device to the ends of the pipe to balance it, he was identifying adjustments that would have been made during the rigging process, an operation which clearly came within the scope of Mobile's expertise and as such, under its control (Tr. 40-41, 60-61).

(maintaining safe clearance between crane and power lines directly related to crane operation and therefore, was the responsibility of the crane operator, not the hiring employer).

Southwest contends that because it *did* address this hazard in its workplace, Fellows was well aware of the risks involved in working underneath a suspended load and, therefore, his actions on that day constituted an act of unpreventable employee misconduct. In order to establish this affirmative defense, an employer must show that it had a specific workrule in place to address the hazard on which the violation is based, that it effectively communicated established workrules to its employees, that it made an effort to discover any violations of these rules, and that the rules were enforced when violations were committed. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991 CCH OSHD ¶ 29,807 (No. 87-692, 1991). *See also Archer-Wester Contrac. Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶ 29,317 (No. 87-1067, 1991), *aff'd*, 15 BNA OSHC 1953 (No. 91-1311, D.C. Cir. 1992).

According to Stonecipher, Southwest employees have been trained to stay clear of suspended loads and loads about to be lifted since the company's inception in 1982 and this rule was communicated to employees during routine safety meetings as well as prior to each lifting job (Tr. 63-64). Project superintendent Sligar confirmed that he warned his employees on the day of the accident to keep clear of the loads being lifted that day, noting in particular that the Callidus pipe was extremely heavy and off-balance because only one side of it had been refractorized (Tr. 70, 73-75). In addition, Sligar testified that he had specifically warned Fellows earlier that morning about staying clear of a load when he observed Fellows trying to push a board underneath a pipe with his foot (Tr.75).[4]

The combined testimony of these two employees demonstrates that Southwest did indeed have a workrule in place to address the hazard at issue here and that Southwest had effectively communicated this rule to its employees. But while both Sligar and Stonecipher made it clear that Southwest employees were closely monitored when working in and around suspended loads and loads about to be lifted, neither indicated whether the employees who

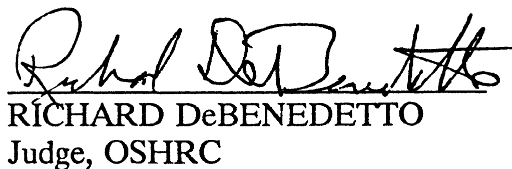
[4] It was also revealed at the hearing that Fellows had been employed by Mobile before coming to work for Southwest and was arguably well-acquainted with the risks involved in lifting a heavy load (Tr. 74-75).

violated this rule were disciplined accordingly. At the hearing, Stonecipher explained that under Southwest's enforcement scheme, the violating employee would first be given a warning and if the employee continued to violate the rule, he would be terminated (Tr. 62-63). He also testified that this particular rule was violated frequently and Southwest employees had to be "constantly reminded" to keep clear of the loads (Tr. 64-65). Despite these frequent violations and constant reminders, though, Stonecipher stated that he was not aware of a written reprimand ever having been issued to a Southwest employee and did not know of any employee who had ever been terminated for violating this workrule (Tr. 64-65). Similarly, Sligar testified that whenever employees got too close to a load, they were "immediately run off", but failed to indicate whether disciplinary action was ever taken in these instances (Tr. 79-80).

Southwest, therefore, has failed to prove that the enforcement mechanisms identified by Stonecipher were actually implemented with regard to discovered workrule infractions. Accordingly, an unpreventable employee misconduct defense has not been established and the alleged violation must be affirmed. Because exposure to this hazard could result in serious injury or even death, as was the case here, the violation was properly characterized as serious. Upon consideration of the penalty factors outlined in § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $3,000 is appropriate.

Based upon the foregoing findings and conclusions, it is

ORDERED that the citation is affirmed, and a penalty of $3,000 is assessed.



RICHARD DeBENEDETTO
Judge, OSHRC

Dated: November 24, 1993
Boston, Massachusetts