BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DWH PAINTING COMPANY, INC.,

RESPONDENT.

DOCKET NO. OSHANC 2004-4356
OSHA INSPECTION NO. 306921982
CSHO ID NO. Y8949

ORDER

THIS MATTER was scheduled for hearing before the undersigned on September 21, 2004 in Raleigh, North Carolina. The Complainant was represented by Sonya M. Calloway, Assistant Attorney General, and Respondent was represented by Jay M. Wilkerson, Conner Gwyn Schenck, PLLC.

Complainant's witnesses were as follows: Clyde Hutchins, President, Hutchins Construction, Inc.; Gary Thorpe, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division; Clifford Decker, Falls Village Golf Club; Jeffrey Ladd, former deputy with the Durham County Sheriff's Office. Respondent's witness was Wallace Burke, DWH Painting Company, Inc.

ISSUES PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated North Carolina General Statute 95-129(1) of the Occupational Safety and Health Act of North Carolina by exposing employees to being struck by an unsecured load on an improperly loaded truck?

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.21(b)(2) by failing to instruct each employee in the recognition and avoidance of unsafe condition(s) applicable to the work environment to control or eliminate any hazard(s) or other exposure to illness or injury?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat. §§ 95-129(1) provides as follows:

> Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.

2. N.C. Gen. Stat. §§ 95-127(18) provides as follows:

> A 'serious' violation shall be deemed to exist in a place of employment … unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

3. 29 CFR 1926.21(b)(2) provides as follows:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

After hearing and receiving the evidence, considering the arguments of counsel and reviewing post-hearing submissions, the undersigned makes the following

FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 *et seq*., the Occupational Safety and Health Act of North Carolina (the Act).

2. Respondent is a corporation based in Durham that is engaged in the business of painting subcontracting and supplying labor to various local general contractors.

3. DWH Painting Company, Inc., hereafter DWH, contracted with Hutchins Construction, Inc., hereafter Hutchins, to install prefabricated metal panel walls on a golf cart shed that Hutchins was constructing at Falls Village Golf Club in Durham, North Carolina.

4. DWH paid wages to Wallace Burke, hereafter Burke, to work with Adolfo Loriga Reyez, hereafter Reyez, to fulfill the contract it had with Hutchins. Both men were employees of DWH on September 11, 2003.

5. DWH was responsible for workers compensation insurance for Burke and Reyez.

6. DWH had sole hiring and firing authority for its employees working on the golf cart shed.

7. DWH accepted the obligation to train Burke and Reyez.

8. DWH was responsible for supervising the work of Burke and Reyez.

9. On September 11, 2003, Burke and Reyez were engaged in the installation of the prefabricated corrugated panels on one side of the golf cart shed. Burke was asked to secure the site as Hurricane Isabel was threatening. Burke noticed that one of the stacks of panels was no longer strapped together and the individual panels might be picked up and blown by wind.

10. Burke determined that the panels should be moved to a safer location and proceeded to move his personal pickup truck to the area next to the panels that was flat and level. Burke fashioned a makeshift platform that was laid across the toolbox and tailgate of the pickup. The platform was constructed of two ten-foot ladders. Burke and Reyez then stacked the panels on top of the two ladders.

11. There were 30 panels, each 12 feet long and approximately 3 feet wide, and they weighed 36 pounds apiece. The panels were stacked on top of each other and together weighed approximately 1,080 pounds.

12. DWH has published a "Driving Policy" that is part of its Safety Program. This policy provides, among other things, that "Cargo will be secured and all doors locked while in route…." The "Material Handling Suggested Guidelines" of the Safety Program state that "Hand operated and motorized vehicles should be adequate for the load and operation." Further, the Material Handling guidelines state that "Employees should be trained in the proper operation of material handling equipment."

13. Despite the policies cited immediately above, Burke did not secure the load of panels even though he had rope available in the truck.

14. In the opinion of Safety Compliance Officer, Gary Thorpe, North Carolina Department of Labor, Occupational Safety and Health Division, hereafter CSO Thorpe, who investigated the accident that occurred and that was the subject of this hearing, the truck was overloaded.

15. Burke, recognizing that the load was capable of shifting, proceeded to drive his loaded truck very slowly over relatively flat and level ground to an area next to the building that was being constructed in order to move the stack of panels to an area that he felt would be better. Burke testified that he was concerned about where Reyez was during the period that he was driving the truck with the load of panels. He noted that he had told Reyez to remain at the point where the panels were loaded to clean up that area. During the drive, Burke checked for Reyez's location on more than one occasion because of his concern for the hazard he recognized. Burke also testified that he was concerned for danger to himself as well, if the panels had slid forward into the cab of the truck.

16. As Burke approached the building, the front of the truck went down a slight depression in the ground and the panels slid off the truck and struck Reyez, seriously injuring him and leading to his death approximately six days later.

17. Following an investigation by SCO Thorpe, Respondent was cited for violations of N.C. Gen. Stat. 95-129(1) and 29 CFR 1926.21(b)(2). The violations were grouped for being similar or related hazards.

18. In order to prove a violation of the general duty clause, N.C.Gen.Stat. §§ 95-129(1), the Department of Labor must prove:

> a. the employer failed to keep its workplace free of a hazard;
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> b. the hazard was recognized;
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> c. the hazard was causing or likely to cause death or serious physical injury;
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> d. there were feasible measures that could have been taken to reduce materially the likelihood of death or injury;
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> e. employees were exposed to the hazard;
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> f. and the hazard created the possibility of an accident;
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> g. the employer knew or should have known of the presence of the hazardous condition.

Commissioner of Labor v. Metric Constructors, NCOSHD Vol. 7, filed 7/30/1999).

19. With regard to item a. above, Complainant established that an unsecured load that exceeded the load capacity of the truck being used to move that load was at the site of the workplace and that constitutes a workplace that has not been kept free of hazards.

20. With regard to item b. above, Complainant established that Burke drove very slowly as he moved the panels with the pickup and that he checked for the location of Reyez to ensure that he was not close to the truck. These facts, as well as Burke's concern for his own safety with the load shifting toward the cab, demonstrate precautions taken and that Burke recognized a hazard.

21. With regard to item c. above, Complainant established that an unsecured, overweight load exceeding 1,000 pounds was transported on a site where another employee was working and that load slid off the truck causing death to the other employee. These facts establish that the hazard was causing or likely to cause death or serious physical injury.

22. With regard to item d. above, SCO Thorpe testified that Burke could have used other means to transport the panels, including hand carrying the panels, securing another proper sized truck to transport them or using the rope Burke possessed to secure the panels. Although Burke testified that the panels were difficult to carry over the terrain because of debris, uneven ground, and wind, and also that he would have had to wrap the truck with the rope, this testimony did not suffice to rebut SCO Thorpe's testimony that feasible alternatives existed to reduce materially the likelihood of death or serious injury.

23. With regard to item e. above, Complainant established that employees were exposed to the hazard both by showing the harm that Reyez suffered but by Burke's testimony that he was concerned about himself if the panels slid forward. Further, Burke admitted to SCO Thorpe that Reyez was supposed to meet him at an area very close to where the panels slid off and struck Reyez.

24. With regard to item f. above, Complainant established that the hazard created the possibility of an accident by virtue of the serious accident that occurred as a result of the transporting of the unsecured, overweight load.

25. Respondent, in its post hearing submission, does not contest the establishment of the above factors, but does contest the final factor 'g.'

26. Respondent argues in its post hearing submission that it must be, and was not, the responsible employer in order to be properly charged with violating the general duty clause. With regard to this contention, the findings of paragraph numbers 3, 4, 5, 6, 7 and 8 were established by Complainant. Thus, DWH was the responsible employer.

27. Respondent argues that Burke was not a DWH supervisor, and if he was not a DWH supervisor, then the final element for Complainant to prove cannot be proved if Complainant cannot establish that Burke is a supervisor.

> 28. Burke was a DWH supervisor for the following reasons:
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> a. When SCO Thorpe was doing his onsite investigation, DWH's Vice President introduced Burke as a supervisor with the company.
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> b. Burke identified himself to SCO Thorpe as a supervisor.
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> c. Burke admitted that he gave directions to Reyez who was his unskilled helper.
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> d. Burke admitted that he had given weekly tool talks to employees for safety instruction, and he admitted that he had scheduled a tool box talk for the end of the day of the accident.
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> e. Burke admitted that he had on at least one occasion stopped a job because of a safety concern.
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> f. Burke exercised supervisory discretion over his and Reyez's activities in that he decided to move the panels as well as how to move them.

29. Burke's knowledge of the safety concern is imputed to his employer, DWH.

30. Respondent argues that Burke was not acting within the authority delegated to him, even if he was a supervisor.

31. Burke was acting within his authority for the following reasons:

> a. The movement of the panels was integral to their installation on the golf cart shed whether they were being moved immediately prior to physical installation or whether they were being moved to a location closer to their eventual installation at a later time. The movement of the panels from their drop off area was required to accomplish installation. Thus, this activity was within the duties delegated to Burke.
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> b. Burke gave directions to his unskilled assistant, Reyez.
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> c. Burke assumed responsibility for securing the site to prepare for Hurricane Isabel.
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> d. Burke conducted tool talks to ensure compliance with safety rules.
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> e. Burke had previously stopped work on at least one occasion because he was concerned about safety and had not been challenged for this action.

32. Respondent argues that the Federal Occupational Safety and Health Review Commission has held that once employer knowledge is shown (now established by imputation), then the employer may rebut that evidence by showing that the employer took reasonable measures to prevent the occurrence of the violation. In particular, it states that the employer must 1) demonstrate that it had prescribed work rules that satisfy the requirements of the cited standard and 2) that it had adequately communicated and 3) enforced such rules, including taking action to discover violations of such rules by monitoring employees' adherence to safety rules.

33. As previously found, DWH had prescribed work rules that addressed the securing of loads and overweight issues (See Complainant's Exhibit 4).

34. Evidence was admitted to show that the rules for securing of loads was communicated in that one of Respondent's trucks was shown to have had its ladders tied to a roof rack. There was no other evidence to show that the particular work rules at issue in this case were communicated to Reyez. There was not sufficient evidence to show monitoring and enforcement of the rules to rebut the Complainant's evidence of employer knowledge. Thus, Respondent did not rebut the Complainant's proof of employer knowledge.

35. Respondent argues that the Federal Occupational Health and Safety Review Commission has ruled that "hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program." Essentially, Respondent argues the defense of employee misconduct based on an isolated, unpredicted, idiosyncratic act.

36. The elements of the defense of isolated employee misconduct are as follows:

> a. Respondent had work rules designed to prevent the violation
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> b. The rules were adequately communicated to the employees
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> c. Respondent had taken steps to discover violations of work rules
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> d. Respondent effectively enforced the rules when violations had been discovered

Commissioner of Labor v. Carolina Steel Corporation, 98-3677

37. As previously found, Respondent had work rules designed to prevent the violation in question and there was evidence to demonstrate that other employees, but not Reyez, had received copies of the rules.

38. Further, the evidence admitted by Respondent as to what it had done to discover violations and to enforce the rules when violations were found was not addressed directly at the hearing. SCO Thorpe admitted that Respondent's Safety Plan met a "Basic" designation and that the Respondent deals effectively with English-Spanish communication problems. SCO Thorpe indicated that the Respondent "very much tries" to operate safely and was "safety oriented." However, there was little if any evidence admitted to show what actions DWH took to discover violations and to enforce them when discovered other than to hold tool box talks, which in this case, had not been done on the site of the accident.

39. The fact that there is no evidence of Reyez having been informed of the work rules that were violated suggests either that the Respondent failed to use care in documenting the receipt of the safety materials or that Reyez never received the materials. The fact of Reyez's mortal injury is evidence that he had not been trained adequately to appreciate hazards.

40. To the extent that Respondent contends that it "could not reasonably have been expected to detect or prevent the hazard" as in *Commissioner of Labor v. Romeo Guest Associates, Inc.*, 96-3513 due to what it argues was idiosyncratic behavior of Burke, the analysis in *Secretary of Labor v. Complete General Construction Company*, OSHRC Docket No. 02-1896 is helpful. *Complete General* addressed what it labeled "unpreventable employee misconduct." There the Respondent contended that it had a valid defense because of "an incidence of isolated employee misconduct based on the idiosyncratic conduct of the foreman …." In that case, the ALJ applied the same four elements as stated above and suggested that a more stringent proof was required for the defense to succeed when a supervisor's conduct is involved:

> Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. (Citing *United Geophysical Corporation*, 9 BNA OSHC 2117, 2122-2123 (No. 78-6265, 1981)

41. There was no evidence to explain why Burke chose to construct the platform of ladders that was used to move the panels, nor his reason for not putting the panels *inside* the bed of the truck. In addition, there was no explanation for why Burke felt that he would be required to wrap the entire truck if he used the rope to secure the panels or why wrapping the bed would have necessarily been unavailable.

42. Burke knew there was danger associated with his transporting an unsecured load. When he approached the area where the panels fell, he testified that the front wheel of the truck went down. Before the wheel followed the downward curve of the ground, Burke should have noted an increased danger and stopped before proceeding. Even if Respondent's contention that the method of loading the panels was idiosyncratic and unpreventable (which the undersigned does not find), Burke, as a supervisor of Respondent, missed an opportunity a reasonable supervisor would have taken to make sure that he could go down the slight incline safely before proceeding. Respondent should have expected its supervisor to take this preventive action.

43. Respondent failed to prove the defense of isolated or unpreventable employee misconduct.

44. With regard to Complainant's Citation 1b, an alleged violation of 29 CFR 1926.21(b)(2), the Court finds:

> a. The DWH Safety Program is comprehensive in its scope.
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> b. Respondent maintained records indicating the employees who had been trained.
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> c. There is no evidence that Reyez ever acknowledged that he had received a copy of the DWH Safety Program.
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> d. There is no evidence that Reyez was ever instructed about the Driving Policy, the Vehicle Usage Policy or the Material Handling Suggested Guidelines.
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> e. Reyez's accident could have been avoided by his having been trained about improperly loaded cargo vehicles and unsecured loads.
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> f. The failure to properly train Reyez about improperly loaded cargo vehicles and unsecured loads created the hazard that an improperly secured load would fall and injure an employee.
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> g. Reyez was exposed to the hazard of the improperly secured load falling from the truck.
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> h. The hazard of the improperly secured load created a possibility of an accident in that the load could slip and fall on someone.
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> i. The substantially probable result of an accident could be death or serious physical injury in that a load of over a thousand pounds falling on an employee could cause broken bones and/or death as is evidenced by the fact that Reyez died as a result of injuries sustained when the improperly secured load fell on him.
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> j. The Respondent knew or should have known that the load had not been properly secured on the truck in that its supervisor, Burke, is the person who participated in and supervised the loading of the truck and his knowledge as a supervisor is imputed to Respondent the employer.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant proved by a preponderance of the evidence that Respondent violated Citation 1, Item 1a and the penalty and its adjustment was properly calculated in accordance with Complainant's *Field Operations Manual*.

4. Complainant proved by a preponderance of the evidence that Respondent violated Citation 1, Item 1b by failing to train Adolfo Loriga Reyez in the recognition of hazards associated with improperly loaded cargo vehicles and unsecured loads and that the violation was grouped with Item 1a because it involved similar or related hazards.

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Item 1a is affirmed as a serious violation of N.C. Gen. Stat. 95-129(1) and a penalty of $263 is hereby imposed.

2. Citation 1, Item 1b is affirmed as a serious violation of 29 CFR 1926.21(b)(2) with no additional monetary amount imposed.

3. The penalty shall be paid within twenty (20) days of the filing date of this Order.

This the 7th day of January, 2005.

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Reagan H. Weaver
Administrative Law Judge