

BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

INSTEEL WIRE PRODUCTS COMPANY,
and its successors

RESPONDENT.

DOCKET NO. OSHANC 96-3452
OSHA INSPECTION NO. 125231118
CSHO ID NO. T3261

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 2:00 P.M. on the 17th day of December, 1997 in the Utilities Commission Hearing Room # 2115, Dobbs building, 430 North Salisbury Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Henry Whitesides, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

John C. Sullivan, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Michael C. Lord of Maupin, Taylor & Ellis, P.A., Raleigh, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1910.132(a) by allowing its employees to work on the top of wire rolls stacked on the bed of a flatbed trailer 12 feet 8 inches above a concrete pad without personal fall protection?
2. Did the Hearing Examiner below err when she found that the Respondent was in nonserious violation of 29 CFR 1910.132(a) for allowing its employees to use a flatbed trailer as a working platform without the protection of standard railings rather than in nonserious violation of 29 CFR 1910.23(c)(1) as the parties had stipulated?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ... unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation".
2. 29 CFR 1910.132(a). The standard reads as follows:

Protective equipment, including personal protective equipment . . . shall be provided, used and maintained . . . whenever it is necessary by reason of hazards of processes or environment . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through . . . physical contact.

3. 29 CFR 1910.23(c)(1) which provides:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e) (3) of this section) on all open sides except where there is entrance to a ramp stairway or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

- (i) Persons can pass,
- (ii) There is moving machinery, or
- (iii) There is equipment with which falling materials could create a hazard.

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The employer (Respondent), Insteel Wire Products Company, is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
4. On April 16, 1996 in response to a complaint complainant sent Health Compliance Officer, Mark Tschieda, to inspect respondent's premises.
5. The complainant issued a citation on May 22, 1996, alleging serious violations of 29 CFR 1910.23(c)(1), in that respondent failed to provide guard rails on the flat bed of the semi-trailer to safeguard (a) the employees working on top of the wire mesh rolls 12 feet, 8 inches above the ground and (b) the employee standing on the other flat bed 4.87 feet above the ground handing the two employees on the rolls some materials. In the alternative, the complainant cited the company for serious violations of 29 CFR 1910.132(a) for both of the instances cited above.
6. A hearing was scheduled and held on May 23, 1997 before the Honorable Ellen R. Gelbin. At the beginning of the hearing the parties stipulated that if Citation 1, Item 1(a) were upheld as a serious violation, the penalty would be \$500.00. The parties further stipulated that the Respondent was in nonserious violation of 1910.23(c) (1) for Citation 1, Item 1(b) and as part of that agreement the Complainant deleted the alternative citation of Item 1(b) as a violation of 29 CFR 1910.132(a).
7. Judge Gelbin's order, filed with the Review Board on June 20, 1997, affirmed Citation No. 1, Item 1(a) as a serious violation of 29 CFR 1910.132(a) with a penalty of \$500.00. Judge Gelbin's order affirmed the alleged serious violation cited in Citation 1, Item 1(b) as a nonserious violation of 29 CFR 1910.132(a) with no penalty. The order also vacated the alternative allegation of Citation 1, Items 1(a) and (b) pursuant to 29 CFR 1910.23(c) (1).
8. Judge Gelbin's also ordered that the violation of 29 CFR 1910.132(a) should be immediately abated by using the off-load procedure to re-bind the wire mesh rolls on the ground, or in the alternative, by issuing personal protective equipment to the employees who respondent requires or allows to work on top of the wire mesh rolls stacked onto flat bed trailers or by the use of any other method reasonably calculated to prevent its employees from falling from the top of said rolls.
9. At the hearing the Hearing Examiner did not take testimony regarding certain aspects of the abatement process; including the abatement process required to comply with Respondent's alleged violation of 29 CFR

1910.132(a) for allowing its employees to work on the top of wire rolls stacked on the bed of a flatbed trailer 12 feet 8 inches above a concrete pad without personal fall protection.

10. The Respondent timely filed an appeal with the Review Board on July 21, 1997.

11. The Respondent filed a brief with the Review Board on October 27, 1997 and the Complainant filed its brief with the Review Board on November 24, 1997.

12. The Complainant filed a motion to file an amended brief and an amended brief on December 15, 1997.

13. On December 17, 1997, the issues on appeal were heard by the full Review Board.

14. At the beginning of the hearing the Chair ruled that the Board would postpone deciding complainant's motion to file an amended brief and would address the motion in its order.

CONCLUSIONS OF LAW

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

2. The Hearing Examiner erred when she failed to honor the stipulation of the parties and found the Respondent to be in nonserious violation of 29 CFR 1910.132(a) rather than in nonserious violation of 29 CFR 1910.23(c)(1) for using the flatbed truck as a platform as the parties had stipulated.

3. The testimony at the hearing did not adequately address the violation of 29 CFR 1910.132(a).

DISCUSSION

The Board encourages settlement at any stage of the proceedings. Board Rule .0701(a). In order to encourage settlement the Board honors the stipulation of the parties when those stipulations comply with the purposes of the NIOSH Act. To effect that purpose the Board will remand the case back to the hearing examiner to correctly honor the stipulation of the parties.

Pursuant to N.C.G.S. § 95-135 (i), the Board "may allow the introduction of newly discovered evidence or in its discretion the taking of further evidence on any question or issue". (emphasis added). Pursuant to that authority, the Board in its discretion will also remand the case back to the Hearing Examiner to take additional testimony concerning the abatement procedure required to comply with Respondent's alleged violation of 29 CFR 1910.132(a) in allowing its workers to work on top of the bales of wire on the flat bed truck without any fall protection. The Hearing Examiner is the one who heard the case and as the factfinder is the one who can best take additional evidence on the issue of the abatement process.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the case be remanded to the Hearing Examiner to correctly honor the stipulation of the parties and to take additional testimony concerning the abatement procedure required to comply with Respondent's alleged violation of 29 CFR 1910.132(a) for allowing its employees to work at a height of 12 feet 8 inches on the top of wire rolls stacked on the bed of a flatbed trailer without personal fall protection. In light of this remand complainant's motion to allow an amended brief is moot.

This the 13th day of May, 1998.

ROBIN E. HUDSON, CHAIR

HENRY M. WHITESIDES, MEMBER

KENNETH K. KISER, MEMBER