BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CAROLINA TELEPHONE &
TELEGRAPH, and its successors,

RESPONDENT.

DOCKET NO. OSHANC 98-3647
OSHA INSPECTION NO.301964128
CSHO ID NO.L1703

ORDER

reversed by Superior Court

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 13th day of February, 2002 in Room 124, First Floor, old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr,. Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Board Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Assistant 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. Do the personal protective equipment provisions of 29 CFR 1910.132(a) apply to Respondent's pole climbing training operations?

2. If the personal protective provisions apply, then did the Complainant meet its burden of proving by a preponderance of the evidence that the Respondent knew that the trainees were exposed to a fall hazard when climbing telephone poles without fall arrest devices in the final training exercises?

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)** which provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

2. **29 C.F.R. § 1910.268(a)** which provides:

Application. (1) This section sets forth safety and health standards that apply to the work conditions, practices, means, methods, operations, installations and processes performed at telecommunications centers and at telecommunications field installations, which are located outdoors or in building spaces used for such field installations. "Center" work includes the installation, operation, maintenance, rearrangement, and removal of communication equipment and other associated equipment in telecommunications switching centers. "Field" work includes the installation, operation, maintenance, rearrangement, and removal of conductors and other equipment used for signal or communication service, and of their supporting or containing structures, overhead or underground, on public or private rights of way, including buildings or other structures.

3. **29 C.F.R. § 1910.268(c)** which provides:

Employers shall provide training in the various precautions and safe practices described in this section and shall insure that employees do not engage in the activities to which this section applies until such employees have received proper training in the various precautions and safe practices required by this section. . . . Where training is required, it shall consist of on-the-job training or classroom-type training or a combination of both. . . .

4. **29 C.F.R. § 1910.268(a)(3)** which provides:

Operations or conditions not specifically covered by this section are subject to all the applicable standards contained in this part 1910. See § 1910.5(c).

5. **29 C.F.R. §1910.5(c)**provides:

(c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process. For example, 1915.23(c)(3) of this title prescribes personal protective equipment for certain ship repairmen working in specified areas. Such a standard shall apply, and shall not be deemed modified nor superseded by any different general standard whose provisions might otherwise be applicable, to the ship repairmen working in the areas specified in 1915.23(c)(3).

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in 1910.95 applies to employments and places of employment in pulp, paper, and paperboard mills covered by 1910.261.

5. **29 C.F.R. § 1910.268(g(3)** which provides:

Personal climbing equipment . . . Pole Climbers

(i) Pole climbers may not be used if the gaffs are less than 1 1/4 inches in length . . ..

(ii) The employer shall ensure that pole climbers are inspected by a competent person . . ..

(iii) Pole climbers shall be inspected as required in paragraph (g)(3) before each day's use . . ..

(iv) Pole climbers may not be used when: . . ..

Having reviewed and considered the record and the briefs and the arguments of the parties, Board Members Richard G. Pearson and Janice Smith Gerald of the Safety and Health Review Board of North Carolina reverses

the opinion of the Hearing Examiner and hereby makes the following Findings of Fact, Conclusions of Law, and Order. Chairman Oscar A. Keller, Jr. does not join in this opinion and makes a dissenting opinion affirming the Hearing Examiner but for a different reason than that given by the Hearing Examiner, following this majority opinion.

FINDINGS OF FACT

1. The Board Members adopt the Hearing Examiner's findings of fact numbered 1 through 25.

2. The hazard of falling existed when free climbing an 18 foot telephone pole without fall protection while training.

3. Employees were exposed to the hazard of falling.

4. The hazard created the possibility of an accident in that an employee could fall from a height of 18 feet while free climbing the telephone pole during training.

5. The substantially probable result of falling from a height of 18 feet could be a serious physical injury such as a fractured bone.

6. The employer knew or should have known that the hazard of falling existed when free climbing a telephone pole to a height of 18 feet without a fall arrest system during training.

7. Using fall protection or a fall arrest system would have reduced or eliminated the hazard of falling while climbing a telephone pole to a height of 18 feet during training.

8. A hearing was scheduled and held on December 16, 1998 before the Honorable R. Joyce Garrett. At the beginning of the hearing the Complainant withdrew the alternative citation of Item 1(a) as a violation of N. C. G. S. § 95-129(1), the general duty clause.

9. Judge Garrett's order, filed with the Review Board on October 13, 2000, dismissed Citation No. 1, Item 1(a) the alleged serious violation of 29 CFR 1910.132(a) on the basis that "Complainant did not carry its burden of proof in establishing requisite knowledge, and therefore did not carry its burden of proof to establish a violation of the cited standard".

10. The Complainant timely filed an appeal with the Review Board on November 9, 2000.

11. The Respondent timely filed a cross appeal with the Review Board on November 20, 2000.

12. The Chairman of the Review Board entered an Order granting Complainant's Petition for Review on November 12, 2000 and Respondent's cross-petition on November 21, 2000.

13. Both parties filed their respective briefs on appeal.

14. On April 2, 2001 all proceedings were stayed until further notice from the Review Board.

15. The case was next scheduled for and heard at the February 13, 2002 quarterly meeting of the Review Board.

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 as a matter of law when she found that the Complainant did not carry its burden of proof with respect to the requisite knowledge of the hazardous condition.

3. The Commissioner has proven by the preponderance of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.132(a), as alleged in Citation 1, Item 1a, for the failure to provide protective equipment when necessary whenever hazards capable of causing injury and impairment were encountered.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion, the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schoss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

A threshold question at issue in this appeal is whether 29 CFR1910.132(a) applies to the Telecommunication Industry and specifically whether it applies to the training of employees and requires the wearing of fall protection while being trained to climb a telephone pole to a height of 18 feet. The Occupational Safety and Health Act recognizes that the climbing of poles is a necessary function of telephone company employees and allows the use of pole climbers with gaffs in 29 C.F.R. § 1910.268(g)(3) which is found in the Telecommunication standards. If a specific standard for a particular industry covers a situation, then it shall prevail over a general industry standard that might cover the same situation. 29 C.F.R. 1910.5(c)(1). When working in the field the general industry standard does not require the wearing of fall protection while climbing telephone poles and the specific standard of 29 C.F.R. § 1910.268(g)(3) prevails.

However, if a standard promulgated for a particular industry does not cover a situation, then the general standard will apply. 29 C.F.R. § 1910.5(c)(2). By its own terms, the Telecommunications Standards apply to work conditions etc. performed at telecommunications centers and at telecommunications field installations. 29 C.F.R. § 1910.268(a). A training facility is neither a telecommunication center nor a telecommunication field installation. Therefore, 29 C.F.R. § 1910.268(g)(3) does not apply and 29 CFR1910.132(a) applies when employees are being trained to climb telephone poles to a height of 18 feet.

Respondent argues that fall protection equipment is not the type of personal protective equipment covered by 29 CFR1910.132(a). The federal Review Commission confronted this issue and held:

> The examples of personal protective equipment mentioned in section 1910.132(a) are merely illustrations, not an exhaustive list. Standards and regulations under the Act are to be broadly and reasonably construed to effectuate the Act's express purpose, which is "to assure so far as possible every working man and women (sic-woman?) in the Nation safe and healthful working conditions and to preserve our human resources." (citations omitted). The purpose of section 1910.132(a) is to promote the safety and health of employees through the use of personal protective equipment, including personal protective equipment not specifically mentioned. Although the standard is ambiguous as to whether fall hazards are recovered, (sic-covered?) we see nothing in it or its subpart that suggests that those are not hazards of "processes or environment" under the standard. The term "environment" need not be read to cover only hazards such as climatic or air-borne hazards. "Environment" is synonymous with "surroundings," and has been defined as " the surrounding conditions, influences, or forces that influence or modify[.] Webster's Third New Int'l Dictionary

760 (1986 ed.). The work environment often includes elevated areas from which an employee could fall and be injured by "physical contact".

Hackney, 1984 OSHD 42,111 at 42,113 (RC 1994). We find this reasoning persuasive and fall protection equipment is the type of personal protective equipment contemplated by 29 CFR1910.132(a).

Having decided that fall protection is covered by 29 CFR1910.132(a) and that 29 CFR1910.132(a) applies to the telecommunications industry we now turn to whether the Commissioner has proven by a preponderance of the evidence and by substantial evidence that the Respondent violated 29 CFR1910.132(a).

In Prestige Farms, OSHANC No. 93-2619, 6 NCOSHD ____ (1995), the Board set out the elements that the Commissioner must prove for a violation of the general industry personal protective provision, 29 CFR 1910.132(a):

> Following the principals of these precedents, the following elements must be proven in order to show a serious violation of 29 CFR1910.132(a), the personal protective provision for general industry:
>
> 1. A hazard existed;
>
> 2.employees were exposed;
>
> 3. the use of the personal protective equipment would have eliminated the hazard;
>
> 4. the hazard created the possibility of an accident;
>
> 5. the substantial probability of an accident would be death or serious physical injury and
>
> 6. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.
>
> If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered six above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

Prestige Farms, OSHANC No. 93-2619, 6 NCOSHD ____ (1995).

The Commissioner is required to prove each and every element of a violation by a preponderance of the evidence. If the commissioner fails to meet its burden of proof on any one of the above elements then the violation cannot be sustained.

It is clear from the evidence in the record that the hazard of falling existed in climbing poles without fall arrest systems, that employees were exposed, the use of the fall arrest system would have eliminated the hazard of falling, that there was a possibility of an accident and that if an employee fell from 18 feet the result could be serious physical injury. The issue in this case is element numbered 6 above, whether the employer knew of the condition or conduct that created the hazard. The Hearing Examiner stated that:

> Complainant did not carry its burden to show that a reasonable person familiar with the circumstances unique to the particular industry would recognize the need of providing fall arrest devices in the final training exercises which are a prerequisite to receiving pole climbing

> certification. Further, Complainant did not show that Respondent itself had actual knowledge of the need for fall arrest devices as part of the final training exercises which are a prerequisite to receiving pole climbing certification.

Hearing Examiner Order, p. 5.

The Hearing Examiner applied the wrong interpretation of the knowledge requirement that the Complainant is required to prove. This is a question of law and the Board is free to substitute its own judgment. The knowledge element that the Commissioner is required to prove is that the Respondent knew that there was a fall hazard in the climbing of an eighteen foot pole without a fall arrest system and there is ample evidence in the record that they knew there was a fall hazard. The Court of Appeals has spoken to what importance to give industry practice:

> The practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry...

Daniel Construction Company, 2 NCOSHD 311, 315-317 (RB 1985), 73 N.C. App. 426, 326 S.E. 2d 339 (1985).

The Commissioner has met her burden of proving by a preponderance of the evidence and by substantial evidence in the record all of the above listed 6 elements and Respondent had committed a serious violation of 29 CFR1910.132(a).

As is required by N.C.G.S. 95-138 , after giving due consideration to the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board Members assess no penalty for the serious violation of 29 CFR 1910.132(a) committed by Respondent.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's September 17, 2000 Order in this cause be, and hereby is, **REVERSED** with respect to the holding dismissing Citation 1 Item 1 as a violation of 29 CFR 1910.132(a) and **ORDERS** that Respondent has committed a serious violation of 29 CFR 1910.132(a) with no penalty.

This the 19th day of June, 2002.

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RICHARD G. PEARSON, MEMBER

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JANICE SMITH GERALD, MEMBER

Chairman Oscar A. Keller, Jr., dissenting:

I respectfully dissent. I could not vote to uphold this citation because I feel that it would be infringing on the right and duty of employers to train their employees to their satisfaction that the employees are properly trained.

The employees are paid during the training and are covered by insurance during the training so that they are covered if they fall. Carolina Telephone has the right to be satisfied that the employees are able to climb the telephone poles without fall protection before they go out in the field.

Section 29 CFR 1910.132(a) does not apply to training of telecommunication employees in free climbing telephone poles. It would do a disservice to the Respondent to not allow it to train its employees so that they may be able to safely perform their work duties in the field. The only personal protective equipment that is required by 29 C.F.R. § 1910.268(g) when a telephone worker is climbing 18 foot telephone poles in the field are safety belts, straps and pole climbing boots with gaffs. It is necessary to train the employee under conditions which simulate what the employees would encounter in their work in the field. 29 C.F.R. § 1910.268(c) mandates that the Respondent "shall provide training in the various precautions and safe practices described in this section and shall insure that employees do not engage in the activities to which this section applies until such employees have received proper training . . ". 29 C.F.R. § 1910.268(c). If Respondent sends an employee out in the field to free climb a telephone pole without any fall protection other than that required by 29 C.F.R. § 1910.268(g) and does not first train the employee in free climbing the pole and an employee falls and breaks a leg or is killed, then the Respondent could be in violation of the Act for not providing the proper training. In addition, Respondent would know that it could have prevented a death of an employee by training the employee in free climbing. Respondent could also incur serious financial legal liabilities for the injury or death. If the employee is unable to free climb without fall protection during training, the employee would not be certified as a pole climber and would not be sent out into the field to climb telephone poles and would not have fallen and been injured or killed. A necessary element of any training is the ability to weed out those that cannot learn to perform the job safely and to prevent them from endangering their lives and the lives of their co-workers.

Contrary to what the majority's opinion states, a training facility is included in the 29 C.F.R. § 1910.268(a) definition of covered applications. The Telecommunications Standards apply to work conditions etc. performed at telecommunications centers and at telecommunications field installations. Training is included in "work conditions, practices, means, methods, operations, installations and processes performed at telecommunications centers and at telecommunications field installations". 29 C.F.R. § 1910.268(a). A training center is a telecommunication center and/or a telecommunication field installation. The federal Review Commission has interpreted the terms "telecommunications center" and "telecommunications field installations" to be words of illustration rather than words of limitation.

> It is clear . . . that telecommunications workers are expected to be trained to work safely at distances closer to energized power lines than most other workers. Because of this expectation about the skill level of telecommunications employees, we believe that the applicability of the telecommunications standards at section 1910.268 was intended to hinge primarily on function and the nature of the work operation being performed, rather than on the location where the work was being performed. We read the terms "telecommunications centers" and "telecommunications field installations" merely to reflect the fact that these are the types of geographical locations at which telecommunications activities generally take place rather than to geographically restrict the applicability of section 1910.268.

New England Telephone Company, 1980 OSHD 29,989, at 30,000 (RC 1980). The same work activities, the climbing of telephone poles, take place at a training center that take place in the field and applying the interpretation of the federal Review Commission, the training of workers at a training center certainly falls within the activities regulated by the Telecommunications Standard, 29 C.F.R. § 1910.268.

The preamble to the Telecommunications Standard makes it clear that employees must be trained to safely climb telephone poles.

> The final rule further clarifies the intent of the proposal by requiring such instruction to include apprising the employee of the necessary safety precautions and emergency procedures associated with telecommunications work.

40 Federal Register at 13,347. An employer would be in violation of the training requirements if it sent an employee out in the field to free climb a telephone pole before first training that employee to free climb the pole and to prevent those employees who did not have the skills to free climb from going up a telephone pole at all.

Reading 29 C.F.R. § 1910.268(g) which covers the personal protective equipment used in climbing, together with 29 C.F.R. § 1910.268(c) which covers training indicates that there is a specific telecommunications standard that cover the personal protective equipment used in training of the telecommunication workers and that the general personal protective equipment provision, 29 CFR § 1910.132(a) does not apply. 29 C.F.R. § 1910.5(c)(1) states:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process.

The regulation then gives an example of a personal protective equipment provision that applies to ship repairman and states that this standard will not be modified or superceded by any different general standard. This is the exact situation that we have in this case, a specific personal protective equipment provision, 29 C.F.R. § 1910.268(g) sets out the personal protective equipment that employees must use when climbing telephone poles and it is not modified or superceded by 29 C.F.R. § 1910.132(a). It makes no difference for the application of 29 C.F.R. § 1910.268(g) whether the employees are climbing telephone poles while working in the field or training to learn to work in the field.

In addition, 29 C.F.R. § 1910.268(a)(2) lists the activities to which the communication standards do not apply. Conspicuously absent is the word "Training". The Commissioner knows how to delineate the areas to which the standards do not apply and she has chosen not to exclude the training of employees from the application of the standards. Given the fact that telecommunications employees are expected to be trained at a higher skill level that other workers, it would be shocking to have training excluded from the application of the Telecommunication Standards. If the training of employees, in particular, training in the free climbing of telephone poles, is to be excluded from the reaches of the Telecommunication Standards, due process would require that the Commissioner spell that out in the standard, preferably after going through a rule making process with input from the different stakeholders.

For these reasons, I would hold that 29 C.F.R. § 1910.268(g) applies to the training of telecommunication workers in the climbing of telephone poles and that 29 C.F.R. § 1910.132(a) does not and I would dismiss the citation.

This the 19th day of June, 2002.

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OSCAR A. KELLER, CHAIRMAN