

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

**COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,**

COMPLAINANT,

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

v.

ORDER

**CAROLINA TELEPHONE AND
TELEGRAPH COMPANY,**

[Reversed by Review Board](#)
[Affirmed by Superior Court](#)

RESPONDENT.

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the Safety and Health Review Board of North Carolina, on December 16, 1998 in the Old YMCA Building, Room 124, 1st Floor, 217 West Jones Street, Raleigh, North Carolina..

The Complainant was represented by Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice.

The Respondent was represented by Jack H. Derrick, Senior Attorney, Carolina Telephone and Telegraph Company, 14111 Capital Boulevard, Wake Forest, North Carolina 27587.

At the time of the Hearing Complainant moved to withdraw the portion of the citation pleading in the alternative a violation of NCGS § 95-129(1), the general duty clause, and there being no objection such Motion is GRANTED.

The only remaining issue to be heard is whether there was a serious violation of 29 CFR 1910.132(a), with an appropriate penalty of \$ 963.00 , based on Respondent failing to provide protective equipment when necessary whenever hazards capable of causing injury and impairment were encountered; specifically in Respondent's training facility safety harness fall protection or work positioning equipment was not used for employees required to free climb to a height of eighteen feet during final examination. (The original citation referenced a free climb to a height in excess of eighteen feet during final examination; upon Complainant's motion, without objection, at the time of Hearing "in excess" was deleted from the Citation.)

Respondent asserts that 29 CFR 1910.132(a) is not applicable to the telecommunications industry. Further, Respondent asserts that if 29 CFR 1910.132(a) is applicable then Respondent's activities are not in violation of such standard.

DISCUSSION

Respondent trains employees in pole climbing at its Rock Mount facility. During the training, which lasts about a week, the trainees learn pole-climbing techniques and practice climbing 6 foot, 12 foot and 18-foot poles. Trainees practice their pole climbing using full fall arrest protection; however, before a trainee can be certified as a pole climber, the trainee must demonstrate the ability to free climb to the 18-foot height; during such free climbing the trainee wears pole climbers with gaffs but does not wear fall arrest equipment. A trainee is not asked to free climb at any level until the trainee had become proficient at climbing and performing activities at that level. Respondent asserts that the free climbing with no fall arrest device is an essential part of the training program. Free climbing is sometimes required in field work conditions.

Respondent contests the applicability of 29 CFR 1910.132(a).

Respondent acknowledges that training was the only activity conducted during the pole climbing training courses. It argues that such training in pole climbing involves skills which will be necessary to work on telephone poles in the field and is therefore 'work' within the ambit of the telecommunication standards. The telecommunications standard by its own language requires that the term "work" be interpreted consistently with the application of the standard. As set forth in 29 CFR § 1910.268 the special industry standards applicable to telecommunications

"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 communications 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."

Section 1910.268(a)(3) 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).

Section 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.

...

(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.

Respondent asserts that training of pole climbers is exempt from § 1910.132(a) because § 1910.268 allows the 'free climbing' of poles while working in the field. 1910.268(g)(1) provides

Safety belts and straps shall be provided and the employer shall ensure their use when work is performed at positions more than 4 feet above ground, on poles, and on towers...

Based on a strict reading of the definition of field work and center work in §1910.268(a) "training" does not fall within the definition of "work". In fact §1910.268(c) imposes on each employer the obligation to train employees in "the various precautions and safety practices described in this section" and to not permit employees to "engage in the activities to which this section applies until such employees have received proper training..."

§1910.268(c) further provides

Where training is required, it shall consist of on-the-job training or classroom-type training or a combination of both. The employer shall certify that employees have been trained by preparing a certification record which includes the identity of the person trained, the signature of the employer or the person who conducted the training, and the date the training was completed....

Although Respondent's expert witness was of the opinion that 29 CFR 1910.132(a) was not applicable to telecommunication training, the testimony of an expert is not necessarily controlling. Further the applicability of a standard is a matter of law and not of fact. Accordingly, based on strict analysis of the standards the personal

protective equipment provisions of 29 CFR 1910.132(a) are applicable to Respondent's pole climbing training operations.

The Occupational Safety and Health Act should be liberally construed to provide protection to workers. 29 CFR 1910.132(a) is designed to cover those areas which are uncovered after the promulgation of specific safety standards in the telecommunications industry. The specific standards providing for safety protection in the telecommunications area cannot achieve the goal of adequately protecting telecommunications employees in every conceivable situation. The provisions of 29 CFR 1910.132(a) complements the specific standards pertaining to the telecommunications industry.

To establish a violation of 29 CFR 1910.132(a) Complainant must establish that the Respondent had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard warranting the use of personal protective equipment. Con Agra Flour Milling Co., 16 BNA OSHC 1137, 1140, 1993 CCH OSHD 30,045, p 41,232-33 (No. 88-1250, 1993), rev'd on other grounds, 31 F3d 653 (8th Cir. 1994); Armour Food Co., 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD 29,088, p 38,881 (No. 86-247, 1990). Evidence of industry custom and practice will aid such a determination.

The Undersigned finds that the Complainant has established that the trainees undergoing training were exposed to a hazard and that it was physically feasible for the employees during such training to be protected by fall protection devices. However, Complainant did not carry the burden with respect to establishing the requisite knowledge. Respondent established that the pole climber's job in the field included, at times, free climbing work without fall restraint devices being present and presented expert opinion that free climbing during training helps alleviate fear and promotes a safer free climb experience in the field. Respondent also presented evidence that other facilities in North Carolina training pole climbers in the telecommunication area use less fall protection for its trainees than does Respondent. Based on the industry position that there is an on the job need that justifies the hazard of exposing experienced trainees to a fall without any fall arrest device protection in the name of training, 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.

FINDINGS OF FACT

Based upon the stipulations at the time of the Hearing, the record and the evidence presented at the Hearing, the Undersigned makes the following Findings of Fact:

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for compliance and with enforcement of the Occupational Safety and Health Act of North Carolina (the "Act"). Complainant brings this action pursuant to North Carolina General Statute 95-133.
2. Respondent is an entity duly organized and existing under the laws of the State of North Carolina. Respondent is engaged in the telecommunication business.
3. Respondent is an "employer" within the meaning of NCGS §95-127(10) . Respondent's employees relative to the Citation are "employees" within the meaning of NCGS §95-127(9).
4. All parties are properly named in the Citation as amended.
5. This Court has jurisdiction over the parties and the subject matter of this Hearing.
6. All notices required by the Act and by any applicable procedural and substantive rules have been given.
7. Neither party has any procedural objection to this Hearing.
8. Respondent is a corporation duly organized and existing under the laws of the State of North Carolina and maintains a place of business in Wake Forest, North Carolina. Respondent is engaged in telecommunication operations. Respondent conducts telephone pole climbing training at its technical training facility in Rocky Mount, North Carolina (the "Facility").
9. Beginning on December 2, 1997 Safety Compliance Officer Edward Lewis conducted an inspection ("Inspection") at Respondent's Facility. Respondent consented to the Inspection.
10. The Inspection was initiated by a complaint and was limited in scope to the substance of the complaint items.
11. As a result of the Inspection, Complainant issued to Respondent Citation 1 Item 1 which alleged a serious violation of 29 CFR 1910.132(a) or in the alternative a serious

violation of NCGS 95-129(1), bearing a proposed penalty of \$963.00. The pleading in the alternative was withdrawn at the time of the Hearing.

12. Pole climbing is one of the instruction areas covered at the Facility.

13. The poles at the Facility are equipped with fall restraint or fall arrest gear.

14. The fall arrest gear used at the Facility for training consists of a davit at the top of the pole which swings freely through 360 degrees to which is attached a fall arrest device which is in turn attached to the climber with a steel cable and full body harness.

15. During the course of instruction in pole climbing, employees use fall arrest and work positioning equipment while developing their pole climbing skills.

16. Should the climber wearing the fall arrest device fall, the device will lower the climber to the ground at a controlled rate of descent.

17. Fall arrest gear is used only at the Facility during training and is not used in the field during work.

18. Complainant does not assert that free climbing of poles is not a permitted activity while pole climbers work in the field.

19. At the Facility various other safety measures in addition to fall arrest devices are also taken with respect to training pole climbers, such as the spreading of approximately 1 ½ feet of saw dust on the ground beneath the poles.

20. Training at the Facility is by highly skilled pole climbing instructors.

21. Trainees in the telephone climbing course must wear a full body harness with fall arrest gear attached when climbing at heights above 4 feet until they have demonstrated proficiency at heights of 6 feet, 12 feet and 18 feet and while performing each required operation. Proficiency must be demonstrated to the instructor's reasonable satisfaction.

22. When a trainee has satisfied the instructor that the trainee can climb safely to a particular height and perform functions at the particular height, then the trainee is permitted to free climb to that height, but not higher, and perform those functions, but no others.

23. While free climbing the trainee uses pole climbers with gaffs which are attached to the climber's feet and lower legs and which are used by pole climbers to actually climb poles in the field. Upon reaching the designated height the trainee must 'safety off' with the appropriate safety belts and straps.

24. After each trainee, while wearing safety harness and fall arrest device, demonstrates proficiency at each level and at each function at each level the trainee must then demonstrate competence without the safety harness and fall arrest device at the same level.

25. In the field, free climbing of telephone poles is necessary because some poles are, based on the terrain or surrounding construction, inaccessible by bucket truck or ladder.

26. In the field, the installation of steps on telephone poles is not used because, according to Grif Bond ("Bond"), Respondent's Manager-Environmental Health and Safety, steps result in an unsafe situation, creating an attractive nuisance to children and others without proper training who attempt to climb poles.

27. Bond personally contacted and/or visited the facilities which provide the majority of the training for pole climbing for employees of governmental agencies and companies in the State of North Carolina.

28. Tim Childers ("Childers") a safety district supervisor, with 23 years experience with Complainant (having also been a compliance officer) and having received extensive safety training, testified for the Complainant. Childers had contacted two individuals in the telecommunications business to discuss training of pole climbers; Childers identified himself as being with OSHA; neither individual was an employee of Respondent; although Childers did not recall the name of either person he testified that they were with the 'Bell companies' (one in Atlanta and one in western North Carolina); Childers further testified that one of the persons was a safety representative of his company and the other a field representative; Childers was informed by one of the persons that at his company fall arrest device was used during pole climbing training and that no training took place without use of fall arrest device. Childers did not visit the pole training school referenced by the person he interviewed. Neither person contacted by Childers was a trainer.

29. . Childers did not visit Respondent's pole training school, but had visited a pole training school about 3 years previously (that school did not use fall arrest devices and was not a telecommunications training school).

30. Childers is not trained in pole climbing and has no experience or expertise in training others to climb poles.

31. Bond visited the pole climbing school at Central Carolina Community College. Bond's testimony was that: (a) the climbing school at Central Carolina Community College is conducted in concert with the North Carolina Telephone Association and is the location for pole climbing training of most employees of North Carolina telephone companies other than Southern Bell, Respondent and Central Telephone Company (Central Telephone Company trains its employees at Respondent's facility); (b) Central Carolina Community College is also the training facility used by the State of North Carolina and various federal governmental agencies; (c) Central Carolina Community College does not use any fall arrest gear in its training and conducts all such training in the free climb mode; (d) the training for Southern Bell is a stair step methodology in which the trainee trains at 6/12/18 feet in a harness, and free climbs at 18 feet. There was no persuasive testimony that the testimony of Bond was materially incorrect.

32. Respondent has fall arrest equipment at its training facility that meets or exceeds the safety equipment of other employers in North Carolina.

33. Bond acknowledged that there had been some falls during the final free climbing at the end of the training program, the resulting injuries being back injury and sprain/fracture to foot.

34. Bond asserted that it was better for an employee to experience the first free climb in the controlled training environment rather than in the field where the surrounding environment may be more hostile, such as on a hill side or in an area where other hazards were on the ground surrounding the pole. Childers was of the opinion that there should be no free climbing when fall arrest equipment is available and that including such free climbing as part of training was not necessary.

35. Using the fall arrest device during the final climb would not increase the risk of a fall by the trainee and would control the descent if, in fact, a trainee did fall.

36. In Bond's opinion requiring that the trainee free climb, after having been trained in accordance with the program criteria, in the controlled environment helps give the trainee confidence and alleviates in part the trainee's fear of fall; no statistical evidence was presented; no reports of specifically conducted studies were presented.

37. Respondent called as a witness a self employed safety consultant ("Consultant") who had 30 years experience in telecommunications and had climbed poles; Consultant was qualified, without objection, as an expert in general industry safety

and pole climbing for electrical and telecommunications for both field work and training.

38. Consultant acknowledged that falling while free climbing is a recognized hazard.

39. Consultant was of the opinion that free climbing in the controlled training environment was a proper part of the training of pole climbers, and was an important part of the training for the ultimate safety of the pole climber in the field and training would be less effective if fall arrest devices were used during the required free climb.

40. The telecommunications industry does not recognize that free climbing in a controlled environment, with the instructor present and the ground prepared with a thick layer of saw dust, during the last stages of training of pole climbers is a hazard which should be guarded against using fall arrest devices.

41. There is a possibility of a fall during a free climb at 18 feet, the probable result of which will be sprain/fracture (serious injury).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Undersigned concludes as a matter of law the following:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.
2. With respect to the alleged serious violation of 29 CFR 1910.132(a), in this matter 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.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED as follows:

Citation 1 Item 1 for violation of 29 CFR 1910.132(a) be and the same is hereby **DISMISSED**.

This the 17th day of September 2000

R. Joyce Garrett, Hearing Examiner

