BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1282512**
ROLCOM, INC. **dba ROLCOM CORPORATION** **240 N. OTT STREET** **CORONA, CA 92882** **Employer**	**DECISION**

Statement of the Case

Rolcom, Inc. (Employer), installs cell phone towers. On December 1, 2017, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Christopher Casteel (Casteel), inspected Employer's work site at 12000 Monarch Street, Garden Grove, California. On February 28, 2018, the Division cited Employer for failing to obtain a project permit, for failing to implement an effective Injury and Illness Prevention Program, and for allowing employees to climb on the edge of an aerial basket to gain greater working height.

Employer filed timely appeals of the citations, contesting the existence of all the violations. Further, Employer appealed the correctness of the classification and the reasonableness of the proposed penalty for Citation 2. Employer also asserted numerous affirmative defenses.[1] At hearing, Employer withdrew its appeal of Citation 1, Item 1.

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board in West Covina, California, on October 15, 2019. David W. Donnell, attorney for Donnell, Melgoza & Scates LLP, represented Employer. Martha Casillas, Staff Attorney, represented the Division. The matter was submitted for decision on March 25, 2020.

Issues

1. Did Employer allow employees to sit or climb on the edge of an aerial basket to gain greater working height?

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 10926000, Denial of Petition for Reconsideration (May 26, 2017).)

2. Did Employer fail to correct unsafe conditions, work practices or work procedures in accordance with its written Injury and Illness Prevention Program?

Findings of Fact

1. Employer had a written safety program that included procedures for identifying and evaluating work place hazards. The written program included the identification of "fall hazards" as among the hazards associated with cellular tower installation.

2. On the day of the inspection, employees were working in an aerial device in order to install a cell phone tower.

3. Employer had in place a fall arrest system, in which employees would be placed into full harnesses and tied off to the T-arm of the cell tower.

4. Employees sometimes would use the railing of the basket in the aerial device to relieve pressure on the harness.

5. Employer performed a Job Hazard Analysis for the project, which includes inspecting the site for fall hazards and ensuring equipment is available to mitigate the hazard.

Analysis

1. Did Employer allow employees to sit or climb on the edge of an aerial basket to gain greater working height?

In Citation 2, Item 1, Employer was cited for a violation of California Code of Regulations, title 8, section 3648, subdivision (e),[2] which is located in the article regulating "Elevating Work Platforms and Aerial Devices," and provides:

> Employees shall not sit or climb on the edge of the basket or use planks, ladders or other devices to gain greater working height.

In the citation, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 1, 2017, employer allowed employees to climb on edge of basket or other devices to gain greater working height (2 employees standing on mid-rails),

[2] All section references are to the California Code of Regulations, title 8, unless otherwise specified.

on JLG AWP lift (model 860-sj-Serial number 0300237958) at a jobsite located at 7274 Lampson Ave, Garden Grove, CA, 92841.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) To support a violation of section 3648, subdivision (e), the Division must prove two things: that an employee sat or stood on the basket rail and that the purpose in doing so was to gain greater working height. Gaining greater working height is an essential element.

The Division contends that the violation of the safety order is established by the testimony of Casteel and seven photographs taken by Casteel at the time of his inspection. In his testimony, Casteel describes seeing an employee standing on the edge of a basket. The basket was located approximately 50 feet off the ground as employees were installing a cellular telephone tower (Tower). The photographs show a personnel basket attached to a telescoping arm, with two employees in the basket. The basket is positioned amidst an array of equipment that is itself attached to and a part of the Tower. The basket is bright orange, which makes it somewhat distinguishable in some of the more high resolution photographs, but in many of the photos the employees cannot be clearly seen because they are located behind Tower equipment, boxes, and cables, or because the photos are taken from the ground, making it difficult to show detail. In some photos, an employee's foot can be seen touching the railing of the basket. In none of the photos are the employees' bodies clearly shown.

Joseph Ghattas (Ghattas), Employer's Technical Services Manager, was on the work site the day of the alleged violation and credibly testified on behalf of Employer. Ghattas has been in the telecommunications industry for 19 years. He is a certified "Qualified Telecommunications Worker" and is authorized to administer practical examinations to tower technicians by the National Wireless Safety Alliance. Ghattas explained that the employees Casteel saw in the basket that day were using a Fall Arrest System, which consisted of a harness attached to the Tower. On cross examination, Ghattas explained that the employees are tied off to a "T arm" on the Tower.[3] These harnesses were acting as fall protection and are used by employees to position themselves into places the basket could not reach, in order to install the Tower equipment. Ghattas explained that employees are essentially sitting in the harnesses, hanging with their feet dangling. Ghattas further explained that while hanging from the harnesses, employees often find

[3] According to Ghattas's testimony, the T-arm is also called a T-Boom or T-Bar and is part of the Tower structure.

places to put their feet to maneuver themselves and to release the pressure of the harnesses on their bodies.

To support a violation of section 3648, subdivision (e), the Division must prove that an employee sat or stood on the basket rail and that the purpose in doing so was to gain greater working height. The evidence provided by the Division herein is intended to show both elements. However, the evidence is inconclusive. The evidence is just as likely to show an employee in a Fall Arrest System, maneuvering into position around a basket railing or using that railing to temporarily relieve pressure from the harness of the Fall Arrest System. It cannot be said that the Division's evidence has more convincing force or greater probability of truth than the explanation provided by Employer. In short, there is *some* evidence to support the Division's allegation, but not a *preponderance* of the evidence.

Accordingly, the Division failed to establish a violation of section 3648, subdivision (e), and Citation 2 is dismissed.

2. Did Employer fail to correct unsafe conditions, work practices or work procedures in accordance with its written Injury and Illness Prevention Program?

In Citation 1, Item 2, Employer was cited for a violation of section 1509, subdivision (a), which provides:

> (a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

In Citation 1, Item 2, the Division specifically references subdivisions (a)(4) and (a)(6) of section 3203, which provide:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> …
>
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards…

…

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard…

In the citation, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on December 1, 2017 at a jobsite located at 7274 Lampson Ave, Garden Grove, CA, 92841, employer failed to effectively implement their written Injury and Illness Prevention Program (IIPP), in that, the employer failed to correct unsafe conditions, work practices, and work procedures in accordance with the procedures contained in their written Injury and Illness Prevention Program, which states: "Supervisors/Foremen (correction of hazards/ensuring compliance) The supervisors and/or foremen will establish an operating atmosphere to insure that safety and health is managed in the same manner and with the same emphasis as production, cost and quality control. This will be accomplished by… Never short-cutting safety for expediency, nor allowing workers to do so …"

Instance 1.
Employer representatives (foreman and tower safety manager) failed to identify and evaluate workplace hazards to identify unsafe conditions and work practices (allowing field technician and foreman to climb onto rails of aerial lift platform at a height of approximately 50') in accordance with the written procedures of their written Injury and Illness Prevention Program, which is essential to their overall program.

Instance 2.
Employer representatives (foreman and tower safety manager) failed to correct unsafe work conditions and/or work practices (allowing field technician and foreman to climb onto rails of aerial lift platform at a height of approximately 50') in accordance with the written procedures of their Injury and Illness Prevention Program, which is essential to their overall program.

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective IIPP. Section 3203, subdivision (a)(4), requires that employers include in their IIPP "procedures for identifying and evaluating work place hazards." (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

"These procedures must include 'scheduled periodic inspections to identify unsafe conditions and work practices.'" (*Id.*) The safety order "contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes." (*Id.*) What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include "scheduled periodic inspections." (*Id.*)

Employer's alleged violation of section 1509, subdivision (a), is based on the Division's allegation that Employer allowed its technicians to climb onto the basket rails. In doing so, according to the Division, Employer failed to identify such as a workplace hazard[4] and failed to correct the hazard when Employer became aware of the unsafe work practice[5].

To the extent the Division is alleging Employer failed altogether to identify and correct a hazard, the evidence points to the contrary. When engaged in the installation of Tower equipment, Employer requires its employees to connect to the Tower with harnesses. As related and discussed above, this acts as a system to protect employees from falls and demonstrates that Employer has identified a fall hazard while its employees are performing their installation duties. This is further corroborated by Division's Exhibit 19, Employer's Job Hazard Analysis (JHA) for the Tower installation at issue herein, which identifies "fall hazard" as a "potential hazard," and instructs employees to use "proper PPE and procedures" as a "preventative measure." Employer's JHA also has a check list which includes inspecting the site for fall hazards and ensuring equipment is available to mitigate the hazard, thereby correcting the identified hazard. Therefore, Employer has identified falls as a hazard, and a violation of section 1509 cannot be sustained on that basis.

Neither can a violation of section 1509 be sustained on the allegation that Employer failed to correct a hazard. On direct examination, Casteel was asked to identify how in particular Employer violated section 1509. He said that Employer failed to follow its own Injury and Illness Prevention Program, which has several references to taking "no shortcuts to expedite production" and prohibits the use of "makeshift elevations in man lift." This contention by Division seems to be based on an underlying premise that Employer violated section 1509, subdivision (a), by allowing its employees to use the railing to gain greater working height. As discussed above, that is not the case. In short, the evidence does not show that Employer took shortcuts to expedite production or allowed the use of makeshift elevations in a personnel platform. To the extent the Division is alleging such, the citation is dismissed as discussed above.

[4] See Citation 1, Item 2, instance 1.
[5] See Citation 1, Item 2, instance 2.

The preponderance of the evidence supports a finding that Employer identified the fall hazard caused by installing Tower equipment. The preponderance of the evidence does not support a finding that Employer allowed its employees to use the rail to gain height. Accordingly, the Division has not met its burden of proof, and the citation is dismissed.

Conclusion

The evidence does not support a finding that Employer violated section 3648, subdivision (e).

The evidence does not support a finding that Employer violated section 1509, subdivision (a).

ORDER

It is hereby ordered that Citation 1, Item 2, is dismissed.

It is hereby ordered that Citation 2, Item 1, is dismissed.

It is further ordered that the penalties are dismissed as set forth in the attached Summary Table.

Dated: 04/22/2020

SAM E. LUCAS
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**