

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-4832  
Summary Calendar

---

BAYTOWN CONSTRUCTION COMPANY,  
INC.,

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION, AND LYNN MARTIN  
SECRETARY OF LABOR,

Respondents.

---

On Petition for Review of an Order of the  
Occupational Safety and Health Review Commission  
(89 2912 5)

---

(January 6, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*

Baytown Construction Company, Inc., was cited by the Secretary of Labor with a serious violation of a safety standard promulgated under the Occupation Safety and Health Act, 29 U.S.C. § 651, et seq., following an accident in which one of its employees was electrocuted. The citation was affirmed by an Administrative Law

---

\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Judge and by the Occupational Safety and Health Review Commission. Baytown has petitioned for review of the decisions affirming this citation. We grant review, and we affirm.

I

Baytown is a construction and pipe-laying company in Nederland, Texas. On October 31, 1988, a Baytown employee, Robert Tatum, was electrocuted. Tatum had been unloading pipe from a crane when the crane's cable became energized by an overhead 7,620 volt powerline. The cable energized the attached pipe, which then transmitted the electricity to Tatum. Tatum had been employed by Baytown for approximately one week, and his training consisted of being told to wear a hardhat and gloves and to keep his hands out of pipes.

After an OSHA investigation four days after the accident, Baytown was cited for violation of 29 C.F.R. § 1910.180(j)(1)(i), which requires a minimum of ten feet clearance between any crane part and powerlines. The compliance officer conducting the investigation inspected the workplace and interviewed several witnesses. The officer noted that the crane's boom was fully extended and on the ground parallel to the powerline. Furthermore, fresh burn marks were on the wire rope approximately one foot below the boom at the end of the crane. The officer further noted that several strands of the wire rope were completely burned through.

Baytown contested this citation for violation of section 191.180(j)(1)(i), and a hearing before an ALJ was set. After twice

receiving a continuance, Baytown sought a third one. Baytown alleged that it had learned the previous day that a different matter was set for trial in a different city beginning January 22, 1990, which was the day before the hearing was scheduled to be held. Baytown requested a continuance because its lead counsel and several witnesses would be at this trial and unable to attend the hearing. The ALJ, however, denied the request and proceeded with the hearing. After hearing testimony from the OSHA compliance officer, the ALJ stated that he would continue the hearing if Baytown desired. Baytown rejected this offer.

After hearing all the evidence, the ALJ determined that Baytown was in violation of section 1910.180(j)(1)(i). The ALJ thus affirmed the citation, and Baytown appealed to the Occupational Safety and Health Review Commission. The Commission affirmed the decision of the ALJ, and Baytown has now petitioned this court for review of this decision.

## II

On appeal, Baytown first argues that the denial of a motion for a continuance was a prejudicial error of procedure. Baytown also argues that the Secretary failed to establish a prima facie case that it violated section 1910.180(j)(1)(i). Finally, Baytown argues that it presented substantial evidence to support its defense of unavoidable employee misconduct.

On the other hand, the Secretary argues that Baytown's motion for a continuance was properly denied. The Secretary also argues

that the Commission's finding that Baytown violated section 1910.180 is supported by substantial evidence. Finally, the Secretary argues that the Commission properly rejected Baytown's unpreventable employee misconduct defense.

### III

#### A

We quickly dismiss with Baytown's first argument. The grant or denial of a continuance is within the sound discretion of the trial judge. Harmon v. Grande Tire Co., Inc., 821 F.2d 252, 256 (5th Cir. 1987). Baytown had previously been granted two continuances. Furthermore, the ALJ offered to continue the hearing after one witness's testimony to allow Baytown time to present its witnesses. Even though this was Baytown's purpose for initially requesting the continuance, Baytown refused this offer. We find no abuse of discretion in the decision of the ALJ to deny Baytown's third motion for a continuance.

#### B

Baytown next argues that the Secretary failed to establish a prima facie case. Baytown argues that the ALJ relied almost entirely on hearsay testimony and that no witness presented credible evidence as to whether any serious violation occurred. We uphold the ALJ's findings of fact if they are supported by substantial evidence on the record considered as a whole. Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1029 (5th Cir. 1989). We do

not reweigh the evidence or independently evaluate evidentiary conflicts. Id.

After reviewing the evidence, the ALJ concluded that the crane or its load contacted the line once when Tatum was electrocuted and again after the accident. The ALJ based his conclusion on the following factors: loud pops heard by the employee witnesses; the testimony that the crane contacted the powerline after the accident; the burn marks on the crane cable; and the expert testimony that electricity of 7,620 volts arcs no more than half an inch. Taken as a whole, the ALJ concluded that this evidence established that Baytown failed to comply with section 1910.180(j)(1)(i). We conclude that the findings of the ALJ are supported by substantial evidence.

C

Baytown also argues that it presented ample evidence to prove its defense of unpreventable employee misconduct because the crane operator/foreman was experienced, well trained in safety procedures, and had attended a safety meeting just one month prior to the accident. Baytown argues that it was justified in relying on the safety education it provided to the crane operator and in relying on the crane operator's safe work history, and that it should not be held responsible for the crane operator's actions.

The ALJ concluded first that Baytown did not actually make an unpreventable employee misconduct defense, but that even if it had

it failed because it did not show that it took all reasonable precautions to prevent an accident such as the one that occurred. Tatum, who was instructed to watch the powerline and helped move the pipe into position, had been hired only one week before the accident, had never been to a regular safety meeting, and had not received training concerning cranes, powerlines, or the responsibilities of a spotter. The ALJ and the Commission found that although Baytown had a safety program and work rules requiring cranes to maintain a minimum of ten feet clearance from energized powerlines, the rules were inadequately communicated. This finding is supported by substantial evidence. Accordingly, Baytown's third argument on appeal must also fail.

#### IV

We conclude that the ALJ did not abuse its discretion in denying Baytown's motion for a continuance. We further conclude that the findings of the ALJ that Baytown violated section 1910.180(j)(1)(i) and that the accident was not unavoidable employee misconduct are supported by substantial evidence. The decision of the Commission is therefore

A F F I R M E D.