

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS  
PENDING COMMISSION REVIEW**

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Burford's Tree, Inc.,

Respondent.

OSHRC Docket No. **07-1899**

Appearances:

Joseph B. Lockett, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee  
For Complainant

J. Larry Stine, Esquire, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Burford's Tree, Inc. (BTI) performs utility, right-a-way mowing, clearing, and tree trimming throughout the southeastern United States. On June 27, 2007, while mowing a right-a-way in a forest area near Wedowee, Alabama, the BTI tractor operator was fatally injured when the tractor rolled over and went into a ravine. As a result of an inspection by Occupational Safety and Health Administration (OSHA) compliance officer James Cooley, BTI received a serious citation on November 2, 2007. BTI timely contested the citation.

The serious citation alleges BTI violated § 5(a)(1) of the Occupational Safety and Health Act (Act) (item 1) for the tractor operator's failure to wear the seat belt and 29 C.F.R. § 1910.269(b) (item 2) for not rendering medical services in a timely manner. The citation proposes a penalty of \$7,000.00 and \$5,000, respectively.

The hearing in this case was held in Anniston, Alabama, on May 20, 2008. The parties stipulated jurisdiction and coverage (Tr. 7). The Secretary withdrew item 2, alleged violation of Section 1910.269(b); leaving the alleged violation of § 5(a)(1) of the Act remaining in dispute (Tr. 5). The parties filed post hearing briefs.

BTI denies the alleged violation and asserts § 5(a)(1), the general duty clause, is not appropriate because the *Powered industrial trucks* standard at 29 C.F.R. § 1910.178 is applicable. If § 5(a)(1) is found applicable, BTI asserts the record fails to impute knowledge of the operator's failure to use a seat belt. Also, BTI claims unpreventable employee misconduct.

For the reasons discussed, § 5(a)(1) of the Act is applicable but a violation is not found based on unpreventable employee misconduct. The alleged violation of § 5(a)(1) is vacated and no penalty is assessed.

### **The Accident**

BTI is a large utility contractor which performs utility, right-a-way mowing, clearing, and tree trimming in Alabama, Georgia, North Carolina, South Carolina, and Louisiana. BTI's office is located in Anniston, Alabama. Mike Burford is president and owner. BTI employs approximately 900 employees (Tr. 41, 102, 116-117, 122-123).

BTI's corporate structure consists of the director of operations Tommie Gardner, and safety officer Dennis Jones, state supervisors and general foremen who oversee the crews, coordinators who assign the crews, and foremen who direct the crews. The state supervisors and general foremen are paid a salary. The coordinators and foremen, like the crew members, are paid hourly (Tr. 102-103, 126).

BTI has as many as 250 crews working at any time. General foremen are responsible for overseeing 8 to 15 crews, depending on the type of work. There are approximately 35 mowing crews, consisting of two to four employees including the foreman (Tr. 103, 116, 122-123).

On June 27, 2007, a BTI crew consisting of foreman Michael Mitchell and tractor operator Ernie Turley, was mowing a right-of-way for the Alabama Power Company in a forest area near Wedowee, Alabama (Tr. 43, 70, 112, 150). Turley, who had been employed for six months, was driving a New Holland tractor. The tractor was towing a bush hog, which is a device capable of mowing brushes and small trees. The area of the right-a-way was cut through a forest which was hilly with steep inclines. The location was five miles from the nearest paved road. The tractor's cab

was equipped with a rollover protective system (ROPS) which is a steel and wire mesh cage designed to protect an employee in a rollover accident (Exhs. C-4, C-6, C-7; Tr. 30-31, 42, 51-53).

At 12:30 p.m., foreman Mitchell was in his truck doing paper work. Turley was operating the tractor, a quarter of a mile away. Because he had not seen Turley for a while, Mitchell drove to the mowing area and saw him lying at the bottom of the ravine, 20 feet from the tractor. For reasons unknown, the tractor had gone off the right-a-way, rolled over at least once, and went into a ravine, approximately 150 feet from the right-a-way. The door to the tractor's cab was open. No one saw the accident. Mitchell called 911 and attempted to assist Turley who was conscious and talking. When the county sheriff and reserve deputy Rodney Walker arrived at the site, a helicopter was called to airlift Turley to the hospital. Turley went into shock and died apparently from being struck in the back by the bush hog (Exh. C-5; Tr. 10-13, 19-20, 32, 34-35, 43-47).

In examining the tractor, deputy Walker testified the cab was not damaged but there was a small bend in the top of the open door. Upon checking the seat belt, he said that he could not clip the belt into the receiver. The receiver was partially full of dirt and debris. Based on his observations and inability to clip the seat belt, Walker testified the seat belt had not been used in "quite some time" (Tr. 15-16, 20-21).

OSHA compliance officer Cooley and another OSHA inspector initiated an inspection into the accident on July 3, 2007 (Tr. 40). Upon examining the seat belt, Cooley testified he also could not fasten it. He said the buckle portion of the seat belt was not bent or disfigured. He concluded the seat belt had not been fastened and did not fail during the accident. He did not observe any dirt and debris in the seat belt (Exhs. C-2, C-8, C-9; Tr. 55-56, 96-97).

Based on OSHA's inspection, BTI received the serious citation on November 2, 2007, for the operator's failure to wear the seat belt.

## **Discussion**

### Item 1 - Alleged Violation of § 5(a)(1) of the Act

The citation alleges that BTI's operator failed to use the seat belt while operating the tractor. Section 5(a)(1) of the Act provides:

Each employer -

shall furnish to each of his employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

BTI disputes the application of § 5(a)(1) and whether the Secretary has established BTI's knowledge of the Turley's failure to use the seat belt.

#### Application of § 5(a)(1)

BTI argues 29 C.F.R. § 910.178, *Powered industrial trucks*, standards preempt the application of § 5(a)(1) of the Act. Tractors such as involved in Turley's accident are specifically covered by § 1910.178(a)(1). Under § 1910.178(a)(2) which incorporates ANSI Standard B56.1-1969, the Secretary stipulates seat belts are not required (Tr. 194). Therefore, BTI asserts that Section 5(a)(1) cannot be applicable.

A citation alleging a violation of § 5(a)(1) is not appropriate when a specific OSHA standard applies to the practice, condition or hazard. Section 1910.5(c) which governs the applicability of standards provides, in part, that

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.

Section 1910.5(c)(2) provides, in part, that

...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 . . . to the extent that none of such particular standards applies.<sup>1</sup>

“A citation under § 5(a)(1) will not be vacated where the hazards presented is not entirely covered by any single standard . . . or where a specific standard does not address the particular hazard for which the employer has been cited.” *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012 (No 13390, 1981). A general standard is not preempted by a specific standard unless both address the same particular hazard. *Williams Enterprise of Ga., Inc.*, 832 F2d 567, 570 (11th Cir, 1987).

BTI's preemption argument is rejected. The 1969 ANSI standards are silent on the subject of seat belts. It does not mention seat belts. There is no standard that requires or rejects the use of

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<sup>1</sup>Also, it is noted § 1910.5(f) provides that “An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.”

seat belts on powered industrial trucks. Therefore, since no specific standard protects against the hazard associated with the lack of seat belts, § 5(a)(1) is not precluded from application.<sup>2</sup>

#### Section 5(a)(1) Violation

To establish a violation of this provision, the Secretary must show that (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees, (2) either the employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993). Additionally, because a § 5(a)(1) violation is classified as a “serious” violation under § 17(k) of the Act,<sup>3</sup> the Secretary must show that the employer knew or should have known with the exercise of reasonable diligence of the presence of the violative condition.

BTI does not dispute that the failure to use a seat belt is a hazard and it recognizes that the lack of seat belts can cause serious injury or harm. The wearing of seat belts would abate the hazard. Other than claiming lack of knowledge, BTI does not dispute the elements in establishing a violation of Section 5(a)(1).<sup>4</sup> There is no dispute the tractor was equipped with a seat belt and the seat belt was not worn by Turley. The operator’s manual for the New Holland tractor involved in the accident at issue specifically states:

**Always** use the seat belt when the roll bar is raised. Seat belts save lives when they are used. Do **not** use the seat belt when the roll bar is lowered. (Exh. C-10, p.2).

Warning: Always use the seat belt with a safety cab or ROPS frame installed. Do not use a seat belt if the tractor is not equipped with a safety cab or ROPS. (Exh. C-10, p.4).

The tractor at issue was equipped with an elaborate ROPS purchased by BTI for \$10,000 (Tr. 109-110). ROPS is designed to keep the operator within the ROPS. If the seat belt is not worn

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<sup>2</sup>The Secretary has long made it known that § 5(a)(1) would be cited for the failure to use seat belts on powered industrial trucks. See *Standard Interpretation* notice, May 22, 1998 (Exh. C-18).

<sup>3</sup>*Plum Creek Lumber Company*, 8 BNA OSHC 2185 (No. 78-1485, 1980) (an other than serious classification can not be applied to a violation of § 5(a)(1) of the Act).

<sup>4</sup>Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

there is a danger of the operator being thrown clear of the ROPS (Exh. C-10; Tr. 60). Warning signs on the tractor's door instructs operators to read and understand the manual before using the tractor (Exhs. C-11, C-12). Also, BTI agrees its policy is that seat belts should always be used. In its Tailgate Safety Program, it provides that:

**Seat Belts:** -shall be worn whenever a piece of company equipment is in use.(Exh. C-15).

Thus, a violation of § 5(a)(1) is established if knowledge of the violative condition is imputed to BTI.

#### BTI's Knowledge

In order to establish an employer's knowledge of a violation, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). In essence, the employer's knowledge must be shown to be either actual knowledge or constructive knowledge.

It is undisputed that BTI's general foreman, James Varnon, did not have actual or constructive knowledge of Turley's failure to use a seat belt or that the seat belt was inoperable. Varnon who oversaw approximately 20 crews including foreman Mitchell's crew, testified he never observed Turley or Mitchell operating a tractor without a seat belt. Also, the daily equipment inspection reports prepared by Mitchell did not indicate a problem with the seat belt (Tr. 156, 160, 164).

Foreman Mitchell who supervised Turley admitted that he did not check the functionality of the seat belt on the day of the accident (Tr. 70-71). BTI does not dispute that the seat belt was inoperable. According to his statement, Mitchell had never checked the seat belt in the tractor although it was part of his job as foreman (Exh. C-17). If he had checked it, he would have known it was inoperable and could not have been used. Mitchell's constructive knowledge of Turley's failure to use the seat belt is established by Mitchell's failure to inspect the seat belt.

BTI disputes whether Mitchell's constructive knowledge as foreman can be imputed to BTI. BTI notes that Mitchell was paid on an hourly basis and operated more as "co-worker than a supervisor" (Tr. 86, 103).

The record in this case shows that Mitchell meets the criteria as a supervisor whose knowledge can be imputed. The substance of the delegation of authority, not the title of the

employee, is controlling in determining whether an employee is a supervisor. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1577, 1583 (No. 91-2626, 1992) (a leadman’s knowledge imputable to an employer despite his status as bargaining unit employee). An employee such as Mitchell who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *A.P. O’Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman). The Commission has noted that the power to hire and fire employees is not controlling in determining supervisory status. It is sufficient to establish supervisory status by showing the foreman’s duties included supervising the activities of his crew, taking the necessary steps to complete the job assignments, and ensuring the work was done in a safe manner. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

Mitchell’s position as foreman qualifies him as a supervisor for the purpose of imputing knowledge to BTI. He was placed by BTI in charge of the worksite. He supervised Turley’s activities in accomplishing the job and was responsible for Turley’s safety. In his interview statement, Mitchell describes his duties as “To bush hog power lines in safe manner. Oversee paperwork and crew members’ safety.” (Exh. C-17). He also states he has the power to hire and fire an employee on his crew and is required to inspect the tractors in accordance with a checklist he is given by BTI. BTI concedes that each foreman is responsible for his crew’s safety and conduct daily safety briefings before starting the job (Tr. 105-106). Thus, Mitchell exercised sufficient control over the worksite as foreman to be considered a supervisor and his constructive knowledge regarding Turley’s failure to use the seat belt is imputed to BTI.

BTI’s reliance on the Fifth Circuit decision<sup>5</sup> in *W.G. Yates & Sons Construction Co., Hvy. Div. v. OSHRC*, 459 F3d 604, 608-609 (5<sup>th</sup> Cir. 2006), *on remand*, 22 BNA OSHC 1196 (No. 03-2162, 2008) is misplaced because Mitchell was not the exposed employee and the citation does not allege as the basis Mitchell’s malfeasance. The citation in issue involves the operator’s failure to use the seat belt and not the foreman’s exposure to an unsafe condition or his failure to inspect the seat belt. The *W.G. Yates* case and other cases cited by BTI involve the issue of whether a “supervisor’s knowledge of his own malfeasance is imputable to the employer where the

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<sup>5</sup>This case arises in the Fifth Circuit. The Commission is bound to follow the law of the circuit to which a case would likely be appealed. *Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104 n.7 (No. 00-1077, 2003).

employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." The Fifth Circuit declined to impute such knowledge.

Mitchell's presence on the worksite and his failure to inspect the seat belt is sufficient to establish Mitchell's constructive knowledge of Turley's failure to use the seat belt and such construction knowledge is imputed to BTI. Mitchell as foreman was placed in a position by BTI of ensuring the employee safety.

#### Unpreventable Employee Misconduct

BTI asserts unpreventable employee misconduct as to Turley for failing to use the seat belt. In order to establish the affirmative defense of unpreventable employee misconduct, BTI must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated the rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

##### 1. Safety Rule

BTI has a written safety manual (Exhs. R-3). BTI's company policy requires seat belts to be worn whenever its vehicles or pieces of equipment including tractors equipped with seat belts are operated by employees (Tr. 176, 180). Seat belts must be worn when they are provided (Tr. 112-113, 130).

OSHA acknowledges that BTI has a specific work rule requiring the use of seat belts (Tr. 91-92).

##### 2. Communication

BTI's safety training starts when a prospective employee fills out an application and is informed about the company's safety policies and personal protective equipment (PPE) requirements (Exh. R-2; Tr. 111). Employees are instructed that they are not to operate equipment if it is nonfunctional which includes inoperable seat belts (Tr. 189).

Foreman Mitchell was trained and instructed in the company's seat belt policy and that each piece of equipment should be inspected daily and removed from service if any parts were not in working order (Exh. C-17; Tr. 132-133, 153). Employees including Turley attend weekly safety programs and each foreman conducts a daily safety briefing (Tr. 105). To ensure effective communication regarding safety issues, the safety meetings are documented on the employees'

weekly time sheets (Tr. 105). Employees also receive “tailgate safetygrams” with their paychecks which they must sign and return (Exh. R-5; Tr. 131-132).

Safety officer Jones conducts full day safety training sessions which Mitchell attended, where seat belts and other safety issues were discussed (Tr. 132-133, 153). Turley was scheduled to attend one such session, but failed to do so because he brought his children and thought the class would only last an hour (Tr. 141). Turley left and did not return (Tr. 55, 141). Although Turley failed to attend the formal 8-hour safety course, he did attend a weekly safety training sessions including a session on April 14, 2007 that focused on seat belts. Turley and Mitchell signed the acknowledgment showing that they attended the training session (Exh. C-15, Tr. 64-65).

OSHA concedes that BTI has communicated its work rule regarding seat belts to employees (Tr. 91-92).

### 3. Monitoring

BTI’s safety department, headed by Jones, has field safety officers who train employees, enforce safety rules and check equipment (Tr. 104-105). Jones and his staff conduct regular surprise safety audits in the field (Tr. 137). A company mechanic testified the company maintains a stock of spare seat belts which he has replaced in the field (Tr. 158-159).

James Varnon, general foreman to whom Mitchell reported, also conducted safety inspections when he visited the crews he oversaw in the field (Tr. 158). According to Varnon, he visited each crew “at least twice a week, sometimes more” (Tr. 156). Varnon testified that he has been requested by crew members to replace broken seat belts (Tr. 158). Varnon said he never observed Turley or Mitchell working in a tractor without a seat belt (Tr. 160). Varnon was unaware that the seat belt on Turley’s tractor was not working (Tr. 164).

Although foreman Mitchell apparently did not check the seat belt, he was required to perform daily inspections of all equipment and submit the inspection reports to BTI weekly (Exh. C-16).

The record establishes BTI’s safety monitoring.

### 4. Enforcement

BTI’s safety policy was enforced. Company president, Mike Burford, personally fired an employee for failing to wear a seat belt (Exh. R-6; Tr. 65, 180). Additionally, other employees have been written up and even terminated for violations of company safety rules (Exh. R-7; Tr. 108-109, 118-119, 135).

Both safety director Jones and general foreman Varnon testified they enforced safety policies (Tr. 127, 168-169). Varnon has written up and discharged employees for safety violations. All employees are informed that violation of safety rules can result in discipline including termination (Exh. R-7; Tr. 136-137).

According to BTI, every employee has the authority to shut down an operation if he perceives a safety violation (Tr. 106, 117, 128, 191).

BTI has established employee misconduct.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED:

1. Citation no. 1, item 1, alleged serious violation of § 5(a)(1) of the Act, is hereby vacated and no penalty assessed, and
2. Citation no. 1, item 2, alleged violation of § 1910.269(b), is withdrawn by the Secretary.

\s\ Kens S. Welsch  
**KEN S. WELSCH**  
**Administrative Law Judge**

**Date: October 14, 2008**