



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.
SENTINEL SYSTEMS, LLC,
Respondent.

OSHRC DOCKET No. 20-0855

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Terrence Duncan, Senior Trial Attorney
U.S. Department of Labor
New York City, New York

For the Respondent:

Douglas J. Kinz, Esquire
Hawthorne, New Jersey

BEFORE: William S. Coleman
U. S. Administrative Law Judge

INTRODUCTION

In 2019, Sentinel Systems, LLC (Sentinel) was one of many contractors involved in the construction of the American Dream Mall complex in East Rutherford, New Jersey. On October 9, a Sentinel employee sustained fatal injuries when the utility vehicle (UTV) he was driving crashed into the front end of an empty flatbed semitrailer that had been left on the lower level of a parking structure. (Stip. ¶ 7, T. 14).

Sentinel reported the work-related fatality to the Occupational Safety and Health Administration (OSHA), and OSHA then assigned a compliance safety and health officer (CO) to

lead an inspection and investigation. (Ex. C-2; T. 37-38). The investigation concluded in March 2020 when OSHA issued to Sentinel a Citation and Notification of Penalty (Citation) pursuant to section 9(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). Sentinel timely contested the Citation and the proposed penalty pursuant to section 10(a) of the Act, thereby bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c).¹ (Stip. ¶¶ 1 & 13; T. 13 & 15).

¹ The Commission’s rules of procedure do not require that the parties present positive evidence showing that the employer has contested a citation or proposed penalty within the fifteen-working-day contest period that section 10(a) of the Act specifies. But the undersigned notes that documentation in the Commission’s electronic case file (which is accessible to the parties) does not affirmatively establish that Sentinel’s contest was timely. *Compare* docket event no. 3 (May 29, 2020) with Complaint ¶ VIII (Aug. 3, 2020); *see also* 29 C.F.R. § 1903.17(a) (indicating that an employer’s notice of contest would be timely if “postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty”). However, the parties’ prehearing stipulations implicitly include the stipulation of fact that Sentinel contested the Citation before the statutory contest period expired. (Joint Preh’g Stmt., Stips. ¶¶ 1 & 13; T. 13 & 15). *Cf. Armstrong Utils., Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC Sept. 24, 2021) (deciding that Commission Judge committed “plain error” by not accepting a stipulation of fact that neither party had thereafter disputed or questioned).

If the Secretary were now to conclude that he stipulated to this fact in error, he would not be precluded from filing a motion to dismiss the notice of contest for having been untimely, even at this late stage of the proceedings. *See Stone Container Corp.*, 9 BNA OSHC 1832, 1833 (No. 15116, 1981) (“As a jurisdictional question, the issue of the timeliness of a notice of contest can be raised by a party or by the Commission, *sua sponte*, at any time during the proceedings”), citing Fed. R. Civ. P. 12(h)(3) (the current version of Rule 12(h)(3) provides: “*Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (observing that “no action of the parties can confer subject-matter jurisdiction,” that “the consent of the parties is irrelevant,” that “principles of estoppel do not apply,” and that “a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings”).

If the Secretary determines to file such a motion to dismiss, he should consider doing so *prior to* the date the decision and report is to be filed with the Commission’s Executive Secretary for docketing pursuant to Commission Rule 90(b)(2). [That date is identified in the cover letter under which this decision is being served on the parties pursuant to Commission Rule 90(a)(2). 29 C.F.R. § 2200.90.] If the Secretary were to file such a motion before the decision is docketed,

The matter was assigned to the undersigned Commission Judge in October 2020, and in June 2021 a three-day evidentiary hearing was conducted remotely utilizing videoconference technology. Post-hearing briefing was completed on September 17, 2021.

The Citation alleged a single violation of a construction industry standard codified at 29 C.F.R. § 1926.21, which is titled “Safety training and education.” The Citation alleges that Sentinel violated subparagraph (b)(2) of that standard, which provides in its entirety as follows: “The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.”

The Citation alleges that Sentinel violated § 1926.21(b)(2) because it “did not provide the Bobcat operators instructions on operating a Bobcat utility vehicle² on pavement with tires that are designed for off-road use only.” Immediately following that description of the alleged violation, the Citation refers to and quotes two provisions from the manufacturer’s Operation and Maintenance manual for the Bobcat UTV (Manual). Those two provisions, as quoted by the Citation, provide as follows:

AVOID INJURY OR DEATH. Read this Operation and Maintenance Manual. Understand all safety signs (decals), precautions and operating procedures before operating this vehicle.

(Ex. C-8 at 11 [page 38 of the Manual in its “Pre-starting Procedure” section]).

This vehicle’s tires are designed for off-road use only, not for use on pavement. Operating this vehicle on paved surfaces (including sidewalks, paths, parking lots and driveways) can alter the vehicle handling and may cause loss of control. Avoid operating the vehicle

then the undersigned would not transmit the report at that time to the Executive Secretary for docketing under Rule 90(b)(2), but rather would likely schedule further proceedings relating to the timeliness of Sentinel’s notice of intent to contest the citation and penalty.

² Bobcat Company manufactured the UTV involved. (Ex. C-8; T. 299).

on pavement. If it is unavoidable, travel slowly and avoid sudden turns or stops.

(Ex. C-8 at 14 [page 49 of the Manual in its “Operating Procedure” section]).

These same two Manual provisions were quoted in identical fashion in the “Recommended Abatement Action” section of a “Violation Worksheet” that the CO had prepared before the Citation was issued. (Ex. C-1 at 1; T. 130, 159). The Violation Worksheet thereby indicates that the CO had concluded that Sentinel could have averted violating the standard if Sentinel had provided its UTV operators with instructions and training that conformed to the two quoted Manual provisions.

Accordingly, the inclusion of these two Manual provisions in the Citation’s description of the alleged violation is regarded as constituting a particularized description of how Sentinel allegedly failed to instruct employees on the recognition and avoidance of unsafe conditions associated with driving the UTV on pavement with tires that are designed for off-road use only. *See* section 9(a) of the Act (requiring that a citation “describe with particularity the nature of the violation”); Commission Rule 34(a)(2)(ii) [29 C.F.R. § 2200.34(a)(2)(ii)] (requiring that the Secretary’s subsequent complaint state “with particularity” the “circumstances of each ... alleged violation”). The Secretary’s complaint therefore fairly alleges that Sentinel’s instructions on operating the Bobcat UTVs on pavement with tires that were designed for off-road use only did not meet the requirements of § 1926.21(b)(2) because Sentinel (1) failed to instruct the operators to read the Manual and understand all safety signs (decals), precautions and operating procedures before operating the UTV, and (2) failed to instruct the operators to travel slowly and avoid sudden turns and stops when driving on paved surfaces in order to avoid the hazard of losing control of the UTV.

The two principal issues presented, and the decisions thereon, are as follows:

- What instructions and training, if any, did Sentinel provide on driving the Bobcat UTVs on paved surfaces with tires that were designed for off-road use only?

Decision. A preponderance of the evidence established that Sentinel authorized only nine managerial employees to operate the Bobcat UTVs and that each authorized operator had prior experience operating similar vehicles. The evidence established further that Sentinel (1) instructed each to review the manufacturer’s Manual, (2) instructed each to drive no faster than 15 m.p.h. at the American Dream Mall construction site, and (3) assessed the knowledge and competence of each in individual test drives at the construction site.

- Did the Secretary prove by a preponderance of the evidence that a “reasonably prudent employer” in the same circumstances would have done more to instruct the nine authorized operators on driving the Bobcat UTVs on paved surfaces with tires that were designed for off-road use only?

Decision. No.

The sole alleged violation is vacated because the Secretary has not proven that Sentinel failed to provide instructions that a reasonably prudent employer would have provided on driving the Bobcat UTVs on paved surfaces with tires that were designed for off-road use only.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that evidence respecting a matter of fact was not presented or was not preponderant, the following facts were established by at least a preponderance of the evidence:

1. Sentinel is a company organized under the laws of the state of New Jersey with its principal office and place of business in Hewitt, New Jersey. (Stip. ¶ 2; T. 13). Sentinel is engaged in construction activities, including providing specialty coating work such as waterproofing. (Stip. ¶¶ 2 & 3; T. 13).

2. The American Dream Mall complex in East Rutherford, New Jersey was under construction in 2019. The completed complex was to include such indoor features as an amusement park, a waterpark, and a ski slope. The footprint of the construction site was many acres. (Tr. 292-93, 297-98).

3. The general contractor for the construction project was PCL Construction Services, Inc. (PCL). (Stip. ¶ 5; T. 13, 262, 292). Throughout 2019, there were as many as approximately one hundred subcontractors operating at the construction site. (T. 298). Sentinel was one of those subcontractors and began work there in early 2019. (T. 296-97). Sentinel was involved mainly in applying specialty waterproof coating at the indoor waterpark, installing resinous flooring at the indoor amusement park, and installing epoxy flooring in a parking garage. (T. 13-14, 296-97; Stip. ¶ 5; Ex. C-9 at 2). Sentinel deployed about one hundred employees to the project. (T. 297).

Delivery of Bobcat UTV to Sentinel in August 2019

4. The composition of the surfaces for vehicular travel at the sprawling construction site was in constant flux and included earthen, gravel, and paved surfaces. (Tr. 307, 363-364).

5. In August 2019, Sentinel purchased three all-terrain Bobcat Company utility vehicles (UTVs), model 3400 XLS, to facilitate movement of employees, equipment, and materials around the American Dream Mall construction site. (Ex. C-3 at 2; T. 246-47, 299-300, 364). Many other contractors were using similar vehicles at the site. (T. 299).

6. Sentinel purchased the three UTVs from a dealer called Bobcat of North Jersey. (Ex. C-8 at 2). The record evidence does not indicate the nature of the corporate relationship that this dealer had with Bobcat Company (e.g., licensee, subsidiary, etc.). (T. 305-06). On August 29, 2019, a representative of the Bobcat dealer delivered the first of the three Bobcat UTVs to Sentinel at the American Dream Mall construction site. Sentinel's owner and president, Mr. Matthew Kiburz, and Sentinel's Director of Field Operations, Mr. Roscoe Woodard, were present to accept

delivery. Kiburz was present because he wanted to hear the dealer representative's instructions. Kiburz had instructed Woodard to be present because Woodard would be responsible for training Sentinel's UTV operators. (T. 306, 309, 365-66).

7. In conjunction with the delivery of the UTV, the dealer representative trained both Kiburz and Woodard on the UTV's use and operation. (T. 305-06, 320, 364-65; Sec'y Br. 5, n.1). The dealer representative tailored that training to the conditions that were present at the American Dream Mall construction site. (T. 320, 350-51, 364-365).

8. The Bobcat dealer representative advised Kiburz and Woodard that even though the UTVs were capable of much higher speeds, the conditions at the American Dream Mall construction site were such that the UTVs ought to be driven at speeds of no more than 10 to 15 m.p.h., particularly on paved surfaces. (T. 306, 365, 379, 387).

9. The Bobcat dealer representative showed Kiburz and Woodard the manufacturer's 144-page Manual.³ The Bobcat dealer representative told Kiburz and Woodard that operators who were not familiar with the vehicle should read the Manual. (Ex. C-1 at 4; Ex. C-5; T. 148-49, 196-97, 306, 396).

10. An explanatory list of symbols in the Manual's "Safety Instructions" section explains that provisions in the Manual that are preceded by the "safety alert symbol" of an exclamation point inside an equilateral triangle [] denotes a safety warning that should be read carefully. (Ex. C-8 at 8). The explanatory list also explains that provisions in the Manual that are marked by " WARNING" in large-sized typeface denotes the following: "The signal word WARNING on

³ Only sixteen pages of the 144-page Manual were offered and received in evidence at Exhibit C-8.

the utility vehicle and in the manuals indicates a potentially hazardous situation which, if not avoided, could result in death or serious injury.” (Ex. C-8 at 8).

11. On page 38 of the Manual, in its “Pre-starting Procedure” section, an item that is preceded by “⚠ WARNING” in large-sized typeface, provides as follows in regular-sized bold typeface:

AVOID INJURY OR DEATH

The Bobcat Utility Vehicle is not a toy and can be hazardous to operate. This vehicle handles differently than other vehicles, such as motorcycles or cars. A collision or rollover can occur quickly, even during routine maneuvers like turning, or driving on hills or over obstacles, if you fail to take proper precautions.

- **Read this Operation and Maintenance Manual. Understand all safety signs (decals), precautions and operating procedures before operating this vehicle.**

(Ex. C-8 at 11).

12. On page 49 of the Manual, in its “Operating Procedure” section, the Manual states the following in regular-sized typeface (*not* preceded by “⚠ WARNING” or other conspicuous designation):

Operating on Pavement

This vehicle’s tires are designed for off-road use only, not for use on pavement. Operating this vehicle on paved surfaces (including sidewalks, paths, parking lots and driveways) can alter the vehicle handling and may cause loss of control. Avoid operating the vehicle on pavement. If it is unavoidable, travel slowly and avoid sudden turns or stops.

(Ex. C-8 at 14).

Instructions and Training on UTV Operation

13. Sentinel decided that only management level employees would be authorized to operate the three Bobcat UTVs, and Sentinel authorized nine of them to do so. (Stip. ¶ 9 & 10; T. 14, 307-09, 366). Matthew Kiburz and Roscoe Woodard, both of whom the Bobcat dealer

representative trained when the first UTV was delivered, were among those nine management employees. (Stip. ¶ 9; T. 14). At the time of the fatal crash on October 9, 2019, only seven of the nine authorized operators had driven the UTVs. (Stip. ¶ 10; T. 15). The two authorized operators who had not driven the UTVs were Al Strumolo, who is Sentinel's Safety Manager, and Brad Kiburz. (Stip. ¶¶ 10 & 11). (The record does not reflect what familial relation, if any, existed between Brad Kiburz and Sentinel's president, Matthew Kiburz.)

14. Sentinel recognized that operators of the Bobcat UTVs may encounter the hazard of losing control of the UTV when operating it on paved surfaces because the UTV's tires were designed for off-road use only. (T. 306-07, 365, 372-73).

15. Woodard provided to each authorized UTV operator (other than himself and Matthew Kiburz) a one-to-one orientation and instruction on operation of the Bobcat UTV. In the course of doing so, each of those seven employees informed Woodard that he had experience operating similar type vehicles. (T. 366-367, 397-98). The decedent's prior experience was reputed to have included driving similar vehicles recreationally and in organized race events. (T. 347, 349-350, 369).

16. Woodard's orientation and instruction to each authorized operator included information about everything the Bobcat dealer representative had covered with Kiburz and Woodard. (T. 365-66, 371-72). Woodard instructed the operators (a) not to drive faster than 10 to 15 m.p.h. at the construction site, and (b) to drive in two-wheel drive mode when driving on paved surfaces for better handling on those surfaces. (T. 205, 334, 370-73; Ex. C-5 at 4). Woodard also rode with each authorized operator on a test drive around the construction site to assess their understanding and competence in operating the UTV. (T. 334, 365, 373-375).

17. After providing individual instruction and after riding with each operator in a test drive, each operator expressed confidence to Woodard that he would be able to operate the UTV safely. (T. 373-74). Woodard instructed each operator to review the Manual, which was in the UTV's glove box. (T. 371, 397-98).

18. There is no evidence that any of the authorized UTV operators failed to comply with Woodard's instruction to review the Manual. (T. 371-73).

19. There is no evidence that any of Sentinel's authorized UTV operators failed to understand all safety signs (decals) on the UTV or failed to understand all precautions and operating procedures described in the Manual.

20. There is no evidence that any of Sentinel's authorized UTV operators failed to understand that operating the UTVs on paved surfaces with tires that were designed for off-road use could alter the vehicle's handling and could cause a loss of control.

21. There is no evidence that any of Sentinel's authorized UTV operators failed to understand that to avoid losing control of the UTV when driving on paved surfaces they should avoid making sudden stops and turns.

22. There is no evidence that any of Sentinel's authorized UTV operators failed to understand not to drive faster than 15 m.p.h. anywhere on the construction site.

23. There is no evidence that driving at speeds of up to 15 m.p.h. does *not* constitute traveling "slowly" within the meaning of the Manual's instructions to "travel slowly" on paved surfaces.

24. There is no evidence that making sudden turns or stops when travelling on paved surfaces at speeds of up to 15 m.p.h. could result in losing control of the UTV.

25. There is no evidence of any instance of a Sentinel employee driving the Bobcat UTVs faster than 15 m.p.h. at the construction site. (T. 376).

26. There is no evidence of any instance of a Sentinel employee making sudden stops or turns in the Bobcat UTVs on any type of surface at the construction site.

27. Up to the time of the fatal crash, no authorized operator was known to have operated a UTV in an unsafe manner. (T. 372).

Fatal Crash on October 9, 2019

28. The fatal crash occurred on October 9, 2019, at about 2:15 p.m. on the concrete ground floor of a parking structure located near the mall complex's "Building E." (Ex. R-1 at 1 & 3; Ex. C-1 at 3). The general contractor (PCL) managed this area and had directed subcontractors to use this part of the parking structure as a staging area for construction materials. (T. 263, 328-29; Ex. R-1 at 3).

29. The flatbed semitrailer involved in the fatal crash is fairly depicted in the photographs in Exhibit C-11. At about noon on the day of the fatal crash, a semitruck brought the loaded flatbed semitrailer to the staging area and dropped it off for offloading. (Ex. C-7). Because the semitrailer had been uncoupled from the semitruck, the semitrailer's front end was exposed and was supported by the front landing gear. (See photo, Ex. C-11 at 7; Ex. C-7). The precise location where the semitrailer was dropped off was in the right lane of a passageway that had floor markings indicating two-way traffic. Even though the parking structure's concrete floor was marked for vehicular traffic, at the time of the crash this area of the parking structure was part of an active construction zone and was not a public thoroughfare. (T. 267-68; Ex. R-1 at 3).

30. The semitrailer was dark colored, but its two long sides and its back end were marked with reflective tape/decals in alternating colors of red and white. The trailer's front end (into which the decedent crashed) had no reflective tape/decals or other reflective material. (Ex. C-11).

31. By about 1:30 p.m. on the day of the fatal crash, the construction material on the flatbed had been completely offloaded, and so when the crash occurred about 45 minutes later the flatbed was empty. (Exs. C-7 & C-11). The semitrailer's location was not demarcated by traffic cones or the like. (Ex. C-11; T. 286). According to local police who arrived at the scene shortly after the crash, some overhead lights in the vicinity of the semitrailer were unlit and some other overhead lights illuminated on and off sporadically. (Ex. R-1 at 3; Ex. C-11; T. 263, 271, 349). Even though some of the overhead lights at the time of the crash were likely not fully functional, the ambient natural light that came in from the open sides of the parking structure provided sufficient light such that the front end of the semitrailer probably would have been discernable to a reasonably attentive approaching driver. (*See* photos at Ex. C-11).

32. A superintendent for the project's general contractor, PCL, had a face-to-face conversation with the decedent moments before the crash, at a location in the parking structure that was about 200 feet from the parked semitrailer. The superintendent told police that the decedent drove away from that location at a speed of about 10 m.p.h. and that moments later he heard the collision. (Ex. R-1 at 3; Ex. C-3 at 1-2). There were no passengers in the UTV.

33. An employee of another subcontractor told the CO that he observed the UTV traveling past his location in the parking structure and that moments later he heard the collision and immediately went to the decedent's aid. (Ex. C-3 at 2; T. 95). Emergency medical personnel transported the decedent to a hospital, where he died later that evening. (Stip. ¶ 7; Ex. R-1 at 8; Ex. C-11 at 8-9; T. 231-32, 313).

34. The left side of the UTV's hood rode underneath the front end of the semitrailer's flatbed. The UTV's left front roof pillar impacted the left front side of the flatbed, smashing the windshield and collapsing the roof pillar. (T. 262, 266; Ex. C-11).

35. There is no indication that the decedent braked or swerved the UTV in an attempt to avoid crashing into the semitrailer. (T. 271, 378-79). It is reasonably inferable from the surrounding circumstances that the decedent did not discern the presence of the parked semitrailer before crashing into it.

DISCUSSION

The parties have stipulated to facts that establish Sentinel to be an “employer” as defined in section 3(5) of the Act and thus subject to the compliance provisions of section 5(a). (Joint Preh’g Stmt. at 5; Findings of Fact ¶ 1). 29 U.S.C. §§ 652(5), 654(a).

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or with the exercise of reasonable diligence could have known of the violative condition. *See Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff’d in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

The parties made the prehearing stipulation that only the second element (noncompliance) is in dispute. (Joint Preh’g Stmt., Stip. ¶ 15). The parties also stipulated that the Secretary was “not litigating the cause of the accident that precipitated OSHA’s investigation.” (Joint Preh’g Stmt., Stip. ¶ 14; T. 15). *Cf. Boeing Co.*, 5 BNA OSHC 2014, 2016 (No. 12879, 1977) (observing that “whether a violation occurred did not depend on the cause of the particular accident” that precipitated the inspection and investigation).

The cited standard, § 1926.21(b)(2), has two parts. The first of those two parts requires that construction employers "instruct each employee in the recognition and avoidance of unsafe

conditions” that the employee may encounter on the job.⁴ See *El Paso Crane & Rigging Co.* (*El Paso Crane*), 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993) (describing the “first part” of § 1926.21(b)(2) being the requirement to “instruct each employee in the recognition and avoidance of unsafe conditions”); *Mod. Cont'l Constr. Co. v. OSHRC*, 305 F.3d 43, 50 (1st Cir. 2002) (“The purview of [§ 1926.21(b)(2)] is not limited to training for hazards expressly identified by OSHA regulation”).

In this case, the Secretary’s theory of the alleged violation is grounded in the “first part” of § 1926.21(b)(2).⁵ The Citation’s precise description of the alleged violation is:

a. Storage Area Building E/Parking Garage: The employer did not provide the Bobcat operators instructions on operating a Bobcat utility vehicle on pavement with tires that are designed for off-road use only, on or about 10/9/2019.

1. AVOID INJURY OR DEATH: Read this Operation and Maintenance Manual. Understand all safety signs (decals), precautions and operating procedures before operating this vehicle (page 38).

2. This vehicles [sic] tires are designed for off-road use only, not for use on pavement. Operating this vehicle on paved surfaces (including sidewalks, paths, parking lots and driveways) can alter the vehicle handling and may cause loss of control. Avoid operating the vehicle on pavement. If it

⁴ The “second part” of § 1926.21(b)(2) requires construction employers to instruct each employee “in the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.” See *Bardav, Inc.*, 24 BNA OSHC 2105, 2111 (No. 10-1055, 2014) (stating that the excavations standard [29 C.F.R. 1926, subpt. P] triggered the employer’s duty under § 1926.21(b)(2) to instruct employees who worked in excavations on the requirements of the excavations standard).

⁵ The Secretary does not contend that Sentinel violated the second part of § 1926.21(b)(2). In other words, the Secretary does not contend that Sentinel failed to instruct employees about any OSHA standard that applies to the operation of a “utility vehicle on pavement with tires that are designed for off-road use only” as the Citation describes. See *Bardav, Inc.*, described in footnote 4, *supra*.

is unavoidable, travel slowly and avoid sudden turns or stops
(page 49).

As described at the outset, the Secretary's complaint (which incorporated by reference the allegations of the Citation) fairly alleges that Sentinel's instructions on operating the UTVs on "pavement with tires that are designed for off-road use only" did not meet the requirements of § 1926.21(b)(2) because Sentinel (1) failed to instruct employees to read the Manual and understand all safety signs (decals), precautions and operating procedures before operating the UTV, and (2) failed to instruct employees to travel slowly and avoid sudden turns and stops when driving on paved surfaces in order to avoid the hazard of losing control of the UTV.

The Hazard that Triggered an Obligation to Instruct Employees

"Because section 1926.21(b)(2) does not specify exactly what instruction the employees must be given, the Commission and the courts have held that an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011 (No. 90-2668, 1992). "An employer's obligation to instruct and train is dependent upon the specific conditions, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000) (applying the first part of § 1926.21(b)(2)), *aff'd*, 285 F.3d 499 (6th Cir. 2002).

Sentinel recognized that because the UTV's tires are designed for off-road use only, operating them on paved surfaces presented the hazard of losing control of the vehicle. (Findings of Fact ¶¶ 8, 12 & 14). Sentinel does not contend otherwise. The presence of that hazard triggered Sentinel's obligation under § 1926.21(b)(2) to instruct its employees in the recognition and avoidance of that hazard. *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *11 n.19 (OSHRC Feb. 28, 2019) (in a matter involving the first part of § 1926.21(b)(2), stating that the

presence of an identified hazard is a “threshold requirement of showing” that the employer “was obligated to provide” training that addressed that hazard); *cf. Bardav, Inc.*, 24 BNA OSHC at 2110 (in a matter involving the second part of § 1926.21(b)(2), ruling an employer must “provide excavation safety instructions under § 1926.21(b)(2) to employees engaged in excavation work, regardless of whether the potential hazards posed by excavations are actually present”).

Evidence Insufficient to Prove Sentinel Provided Inadequate Instructions or Training

The Commission has noted that the command of § 1926.21(b)(2) “is so general and potentially subjective that the Commission and courts have seen fit to read into it a reasonableness standard.” *El Paso Crane*, 16 BNA OSHC at 1424. And so, “to establish noncompliance, the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances.” *Id.* “A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry.” *Associated Underwater Servs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012). “[I]ndustry practice is relevant to [the ‘reasonably prudent employer’] analysis, but it is not dispositive.” *Id.*, citing *W.G. Fairfield*, 19 BNA OSHC at 1235-36.

Sentinel Provided Instructions

Section 1926.21(b)(2) “requires that employers take ‘some positive action’ to train employees with respect to the specific conditions they may encounter at the particular worksite.” *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), quoting *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2009 (No. 90-1505, 1992), *aff’d*, 663 F.3d 1164, 1168 (10th Cir. 2011).

The Secretary first argues that a preponderance of the evidence established that Sentinel provided no instructions or training whatsoever to the UTV operators. (Sec’y Br. 14-16). The evidence on which the Secretary relies to support this argument involves (1) what the investigating

CO understood Sentinel's Safety Manager (Al Strumolo) to have said to him in an email dated November 26, 2019 and in several telephone conversations (on Oct. 10 & Dec. 2, 2019, and Jan. 22, 2020 [T. 124-29]), and (2) what the CO understood Sentinel's owner and president (Matthew Kiburz) to have said to him in one telephone conversation on January 29, 2020. The CO understood that both Strumolo and Kiburz told him that Sentinel had provided absolutely no instructions or training to the UTV operators. (E.g., T. 39, 52).

This argument is rejected. As discussed below, the evidence relied on by the Secretary in support of this argument is insufficiently weighty to establish by a preponderance of the evidence that either Strumolo or Kiburz told the CO that Sentinel gave no instructions or training to the UTV operators.

According to the CO, Strumolo's email to the CO on November 26, 2019 was Strumolo's response to the CO's telephonic request that Strumolo provide certain written policies to OSHA. (T. 114-17). Strumolo attached to the email documentation of some written Sentinel policies, and in the body of the email he wrote that Sentinel does not "have a policy in place for the use of [the UTV] as we looked at it as motor vehicle." (Ex. C-6). Strumolo testified that by writing this he was intending to inform the CO that, unlike the documentation of the *written* Sentinel policies that he had attached to the email, that he was not attaching documentation of any *written* policy on UTV use because Sentinel had no *written* policy. (T. 238-41).

Then, in a telephone conversation with Strumolo on December 2, 2019, the CO recalled asking Strumolo what policies Sentinel had in place for the UTV. (T. 51; Ex. C-3 at 2). Strumolo plausibly testified that he understood the CO again to be asking about any *written* policies, and so Strumolo responded to the CO's oral inquiry in the negative. (T. 245).

And then, in a later telephone conversation with Strumolo on January 22, 2020, the CO asked Strumolo what training had been provided to the UTV operators. (T. 52). Strumolo testified that he understood the CO to be asking what training Strumolo himself had provided to the operators, and so he told the CO that “I did not conduct the training on the Bobcat,” explaining in his testimony that this training function was not within the scope of his duties as Sentinel’s Safety Manager. (T. 250-51). Strumolo testified that he believed that the CO had been previously informed that Woodard was the individual at Sentinel who was responsible for training the UTV operators, and he further recalled having personally informed the CO that Woodard was responsible for that training. (T. 252, 284-85). In contrast, the CO interpreted Strumolo’s response to his question to have been that the *company* had not provided training on the UTV. (Ex. C-4 at 2; T. 52).

The CO’s only substantive communication with Sentinel’s president (Matthew Kiburz), was a telephone conversation on January 29, 2020. The CO testified that Kiburz told him that “they didn’t provide any training or instructions” to the UTV operators and that the only qualification for any operator was to be age 16 and have a driver’s license. (T. 39; Ex. C-4 at 3). The CO’s contemporaneous handwritten notes of this conversation indicate that Kiburz said to the CO: “I did not train my [employees] on Bobcat use.” (Ex. C-4 at 3; T. 45). Mr. Kiburz testified that he told the CO that he did not personally train the UTV operators, but that he also informed the CO that Woodard had trained the operators and he testified further that he (Kiburz) provided the CO with Woodard’s cell phone number. (T. 320-21, 330-31). The CO’s contemporaneous handwritten notes do not reflect Kiburz having mentioned Woodard to the CO, but Kiburz testified that their telephone conversation addressed multiple matters that are not reflected in the CO’s contemporaneous handwritten notes. (T. 320-21). The CO confirmed that his notes of the

telephone conversation were not comprehensive, and he allowed that Kiburz might have informed him of Woodard's contact information during that telephone conversation. (T. 118-20).

Three business days later, on February 3, 2020, the CO spoke with Woodard by telephone, and in the ensuing conversation Woodard described the training and instructions he provided to the UTV operators. The CO described Woodard's account of the training that he provided as being "completely different from what" he understood Strumolo and Kiburz had said to him in earlier communications (i.e., that Sentinel had provided no training at all to the UTV operators). (T. 59-60; Ex. C-5 at 1).

Despite Woodard's account having been "completely different" from what the CO understood Strumolo and Kiburz to have said to him previously, the CO apparently did not thereafter contact either Strumolo or Kiburz to inquire about the perceived contrary information Woodard provided. Nor did the CO interview any of the employees that Woodard said he had trained to inquire what, if any, instructions or training Woodard had given them. (T. 121-24). The CO spoke with Strumolo multiple times, but there is no evidence that the CO ever asked Strumolo whether Woodard had trained him on the UTV operation. And while Strumolo testified at the hearing, he was never asked whether Woodard had trained him on the UTV operation.

The CO testified that he did not interview any of the other five living individuals whom Woodard said he had instructed because the CO believed that both Strumolo and Kiburz had told him that Sentinel had not trained the UTV operators at all. (T. 122, 184-85). The CO apparently wholly disbelieved Woodard's description provided over the phone on February 3, 2020 of the training and instructions that Woodard said he had provided to the operators, and the CO instead apparently fully credited his understanding that both Strumolo and Kiburz had told him that Sentinel had provided no training or instructions whatsoever. (T. 121-24).

Woodard's hearing testimony about the training and instructions he provided to the authorized UTV operators was neither contradicted nor corroborated by any of six living individuals whom Woodard testified that he had trained. It is therefore unknown to the undersigned trier of fact how any of those six managers would have responded under oath and subject to cross examination to questions about what, if any, training they had received from Woodard. And it is similarly unknown to the undersigned trier of fact whether any such testimony on that subject would have been regarded to be reliable and credible.

There was no persuasive evidence to contradict Woodard's detailed testimony of the instructions and test drives that he provided to the authorized operators. Woodard's testimony and the corroborative testimony of Strumolo and Kiburz established that the authorized operators of the Bobcat UTVs were all trusted and experienced management employees, and that each authorized operator had prior experience in driving similar types of vehicles. The evidence established further that Woodard (1) instructed them to review the Manual, (2) instructed them not to exceed speeds of 10 to 15 m.p.h. at the construction site, and (3) evaluated their knowledge and competence in operating the UTV in demonstration drives over the construction site's varied terrain and vehicular surfaces.⁶ (See Findings of Fact ¶¶ 15–18).

⁶ The Secretary argues further that Sentinel's responses to the Secretary's interrogatories, which Woodard verified on March 29, 2021, constitute an admission that Sentinel did not provide training or instruction to two of the managers who were authorized UTV operators—Strumolo and Brad Kiburz. (Ex. C-9 at 3; Stip. ¶ 10) (Sec'y Br. 16-17; Sec'y Reply Br. 3). In Sentinel's verified response to the Secretary's interrogatory that requested Sentinel to identify employees that Sentinel had instructed, Sentinel did not list either Strumolo or Brad Kiburz. Woodard plausibly testified that he did not include these two managers in the verified interrogatory response because even though both were authorized operators, neither had driven the UTV (a fact to which the parties have also stipulated in Stip. ¶ 11). (T. 410-11). In view of Woodard's plausible explanation for purposefully not including Strumolo and Brad Kiburz in the list of employees that Sentinel had trained, and in further view of the absence of any evidence to corroborate a finding that Woodard

Sentinel's Instructions Not Proven Inadequate

The Secretary argues alternatively that if Woodard provided the instructions and training to which he testified, such instructions and training would not meet the requirements of § 1926.21(b)(2). (Sec'y Br. 18-23; Sec'y Reply Br. 4-5).⁷

Where an employer rebuts the allegation of a violation § 1926.21(b)(2) “by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.” *A.H. Sturgill Roofing, Inc.*, 2019 WL 1099857, at *11.

“An employer's instructions are adequate under section 1926.21(b)(2) if they are specific enough to advise employees of the hazards associated with their work and the ways to avoid them.” *Superior Custom Cabinet Co., Inc.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997), quoting *El Paso Crane*, 16 BNA OSHC at 1425 nn. 6 & 7. “[S]ection 1926.21(b)(2) does not limit the employer in the method by which it may impart the necessary training.” *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1620 (No. 89-2019, 1992); *see also GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863 n.5 (No. 93-1122, 1996) (noting that the “Commission has not required safety rules to be written as long as the safety rule is clearly and effectively communicated to employees”), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). “A reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees, and would make at least some effort to

had *not* trained either of those authorized operators, the verified interrogatory response is insufficient evidence to establish by a preponderance that Sentinel did not instruct either Strumolo or Brad Kiburz on use of the UTV in the manner that Woodard described in his testimony.

⁷ Certain arguments in the Secretary's post-hearing brief asserting that Sentinel's instructions were deficient because they did not address provisions in the Manual other than the two provisions quoted in the Citation are not adjudicated herein. (*See* Sec'y Br. 20-23). Those asserted deficiencies are outside the scope of the pleadings, and none were tried with the parties' expressed or implied consent. (*See* T. 340-343, 402-06). *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (observing that an unpleaded issue may be adjudicated only where the parties actually tried the unpleaded issue and they expressly or impliedly consented to do so).

assure that the employees did, in fact, understand the instructions.” *Pressure Concrete Constr. Co.*, 15 BNA OSHC at 2015. “The employer's safety program as a whole is relevant to determining whether there was compliance with” § 1926.21(b)(2). *El Paso Crane*, 16 BNA OSHC at 1425 n.9.

“Employers cannot count on employees' common sense and experience to preclude the need for instructions” under § 1926.21(b)(2). *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 811 (6th Cir. 2003). Nevertheless, “[m]ore generalized instructions may be permissible in light of an employee's specialized training and experience, just as they may be inadequate in light of an employee's lack of experience, poor safety history, or lack of supervision.” *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1896 (No. 12-1045, 2016) (assessing adequacy of instructions to employees for the purpose of determining whether the employer should be charged with constructive knowledge of a violative condition by reason of operating an inadequate safety program).

The evidence is insufficient to establish that a reasonably prudent employer faced with the circumstances and conditions confronting Sentinel would have done more in instructing employees on the recognition and avoidance of hazards associated with driving the UTV on paved surfaces with tires designed for off-road use only. The circumstances and conditions facing such a “reasonably prudent employer” include the following: (1) only trusted managerial employees were authorized to operate the UTVs, (2) each operator had prior experience operating similar vehicles, (3) the UTV dealer representative had advised the employer that operators who were not familiar with the UTV should review the Manual, (4) each operator was instructed to read the Manual, (5) each operator was instructed not to exceed speeds of 15 m.p.h. at the construction site, and (6) each operator’s competence and confidence in operating the UTVs safely at the construction site was evaluated in a test drive at the construction site.

The Secretary has not presented substantial evidence of any deficiency in the instructions and training Sentinel provided to the UTV operators about operating the Bobcat UTVs on paved surfaces with tires that were designed for off-road use only. The CO testified that he believed the instructions Woodard said he provided were deficient because they did not include instructions to avoid sudden turns and stops when driving on paved surfaces as the Manual warns. (T. 157-59, 190; *see also* Sec’y Reply Br. 4). But Woodard’s testimony that he instructed the operators not to drive faster than 10 to 15 m.p.h. as a means for avoiding sudden turns and stops was uncontroverted. (T. 152-153, 156, 159, 305-07, 365, 371-73). There is simply no evidence that a reasonably prudent employer would have done more to instruct the experienced and trusted authorized UTV operators about operating the UTVs on paved surfaces with tires that were designed for off-road use only. *See H.C. Nutting Co. v. OSHRC*, 615 F.2d 1360 [8 BNA OSHC 1241, 1241-42] (6th Cir. 1980) (unpublished) (ruling that the alleged violation of § 1926.21(b)(2) “against a backdrop of reasonable industry practice” was not established where there was “no evidence ... as to industry practices,” the CO “was not presented as an expert witness in the area,” “no specific OSHA standards require that the steps suggested by the CO be taken,” and the Secretary did not contend that the Act’s general duty clause required such steps).

To the contrary, the uncontroverted evidence was that the UTV operators drove the UTVs in conformance with the provisions of the Manual on which the Secretary relies. (T. 370-71). That evidence is probative on the issue of whether the instructions and training Sentinel provided met the requirements of the cited standard. *See Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1067, 1991) (determining that violation of § 1926.21(b)(2) for alleged failure to adequately train employees on “rigging and signaling” in crane operations was not proven where crane operators testified that the employees did good jobs in rigging and signaling,

leading the Commission to conclude that “the performance of those employees establishes that they were trained in rigging and signaling”), *aff’d*, 978 F.2d 744 (D.C. Cir. 1991) (unpublished).

Accordingly, as described above, the evidence is insufficient to establish that Sentinel failed to provide instructions and training that a reasonably prudent employer under the same circumstances would have provided with respect to operating the Bobcat UTVs on paved surfaces with tires designed for off-road use only. The evidence is thus insufficient to establish that Sentinel failed to comply with the cited standard in the manner alleged.

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ordered that Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2), having not been proven, is VACATED.

/s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: August 2, 2022