

**Secretary of Labor,
Complainant,**

v.

**Piggly Wiggly Alabama Distribution
Company, Inc.,
Respondent.**

OSHRC Docket No. **00-0187**

APPEARANCES

	Carla J. Gunnin, Esq. Office of the Solicitor	J. Larry Stine, Esq. Wimberly, Lawson , Steckel, Nelson & Schneider,
P.C.	U. S. Department of Labor Birmingham, Alabama For Complainant	Atlanta, Georgia For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Piggly Wiggly Alabama Distribution Co., Inc. (Piggly Wiggly), operates a grocery distribution warehouse in Bessemer, Alabama. On July 29, 1999, an employee was killed when the forklift he was on fell from the back of a trailer as a yard mule driver (a hostler) was moving the trailer away from the dock. Occupational Safety and Health Administration (OSHA) compliance officer Phyllis Battle conducted an inspection of the facility from July 30 to August 4, 1999. As a result of her inspection, the Secretary issued three citations to Piggly Wiggly.

Item 1 of citation no. 1 alleges a serious violation of 29 C.F.R. § 1910.178(m)(7) for failing to ensure that a trailer's brakes were set and its rear wheels chocked during loading and unloading.¹ A penalty of \$5,000 is proposed. Item 1 of citation no. 2 alleges a willful violation of 29 C.F.R. § 1910.178(l) for failing to train operators in the safe operation of powered

¹ The Secretary originally cited item 1 as a violation of 29 C.F.R. § 1910.178(k)(1). She moved at the hearing to amend item 1 to allege a violation of 29 C.F.R. § 1910.178(m)(7). Piggly Wiggly did not object and the court granted the Secretary's motion. The Secretary also moved to withdraw item 2 of citation no. 1, which alleged a serious violation of 29 C.F.R. § 910.178(q)(7). The court granted the Secretary's motion (Tr. 7-9).

industrial trucks. A penalty of \$70,000 is proposed. Item 1 of citation no. 3 alleges an other-than-serious violation of 29 C.F.R. § 1904.2(a) for failing to complete the OSHA No. 200 forms with the required details. No penalty is proposed.

The parties stipulated to coverage and jurisdiction (Tr. 6). Piggly Wiggly denies the allegations. This case was heard on April 25 and 26, 2000, in Birmingham, Alabama. The parties have filed post-hearing briefs.

For the reasons set out below, the willful citation and the other-than-serious citation are vacated. The serious citation for failing to use wheel chocks is affirmed.

Background

Piggly Wiggly operates a large grocery distribution center in Bessemer, Alabama, that serves Piggly Wiggly and other grocery stores throughout the region (Tr. 405). The center operates 24 hours a day, 7 days a week, and employs approximately 500 employees, plus an additional 60 to 70 temporary employees from Perform Staffing, a staffing agency (Tr. 239, 405).

The distribution center is a large warehouse that has a loading dock approximately 1,000 feet long with 142 doors along one side (Tr. 332-333). Different doors and sections of the interior are devoted to grocery, produce, frozen foods, and non-food items such as health and beauty aids (Tr. 332, 341). The loading dock faces a large paved yard that inclines slightly from the center toward the dock (Tr. 383). Tractor-trailers are parked at the docks for delivery and loading (Tr. 333).

Each door of the loading dock is equipped with a dock plate that is moved into position when the trailer docks to facilitate the movement of forklifts and pallet jacks into and out of the trailer (Tr. 68, 234). The dock plate is raised when a trailer is ready to be moved away from the dock. If a trailer pulls away from the dock before the dock plate has been removed, it falls, making a loud noise, approximately 115 decibels (Tr. 232-233, 382).

To move a trailer, the hostler, also known as the yard mule operator, backs a vehicle called a yard mule up underneath the front end of the trailer, making a connection with the yard mule's fifth wheel. Next, the hostler connects the air hose from the trailer to the tractor to raise it and release the brakes (Tr. 230-231). The trailer is then ready to be moved.

Starting each day at approximately 4:00 a.m., vendors begin making deliveries of produce, frozen foods, groceries, and other merchandise (Tr. 210, 406). Employees use forklifts and pallet jacks to unload the merchandise (Tr. 165). This shift ends at approximately 12:30 p.m. (Tr. 210).

Starting about 2:00 p.m., employees called “pullers” start selecting items from the warehouse to fill orders for the stores. Employees load the merchandise into empty trailers backed up to the loading dock, according to the “wave sheet,” which is a master schedule for loading. The employees continue to load the trailers throughout the night (Tr. 212-213). Once the trailers are loaded, the drivers deliver the trailers to the grocery stores, help unload the merchandise, and return to the distribution center (Tr. 310). Piggly Wiggly ships 60 to 70 tractor-trailer deliveries out of the center each day (Tr. 378).

The period between the time the merchandise has been delivered and the trailers’ return to the distribution center and the time when the night shift employees arrive to begin loading is known as set-up (Tr. 211, 218). During set-up, the hostler moves the empty trailers around the yard into position for loading. The hostler moves the trailers according to the wave sheet so that they will be in the proper order for loading (Tr. 227, 335). Also during the set-up period, cleaners (or trailer strippers) enter the trailers to clean them and remove damaged or returned merchandise and freezer boxes (Tr. 165-167).

On July 29, 1999, hostler Michael Akers was in the process of moving a trailer from door 142, the last door on the loading dock. Akers testified that he had backed the yard mule up to the trailer and connected the air hose to release the brakes. Akers sounded his horn and slowly pulled away. When he was approximately 105 feet away from the dock, a forklift on which employee Miles Blackman was sitting fell out of the back of the trailer. Blackman was killed in the fall (Tr. 301-302).

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge

of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1910.178(m)(7)

The Secretary alleges that Piggly Wiggly committed a serious violation of 29 C.F.R. § 1910.178(m)(7), which provides in pertinent part:

Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading.

Piggly Wiggly acknowledges that the Secretary established three of the four elements of the alleged violation. The standard applies to the cited conditions. Piggly Wiggly did not have any wheel blocks available for use (Tr. 27). It was a management decision by Piggly Wiggly not to use wheel blocks. Piggly Wiggly argues, however, that the Secretary failed to establish employee exposure to a hazard because, the company asserts, there is no hazard.

Battle testified that the standard is designed to prevent “trailer creep,” which occurs when the movements of powered industrial trucks entering and exiting the trailer during loading or unloading cause the trailer to move away from the dock, leaving a gap between it and the dock floor. The operator of the powered industrial truck may be unaware that the trailer has crept forward and fall into the gap (Tr. 29).

Piggly Wiggly argues that improved brake technology has eliminated the hazard of trailer creep. Director of operations Dale Reynolds testified that trailers now in use are equipped with air brakes which are run off hoses powered by the tractor engine. When a trailer is disconnected from the air hose, the trailer sinks, the brakes lock, and the trailer does not move until the air hose is reattached. Piggly Wiggly also argues that there is a slight upward incline moving away from the dock which would prevent the trailer from rolling away (Tr. 236-238).

Piggly Wiggly’s argument is rejected. Once the Secretary promulgates a standard, the standard presupposes the existence of a hazard when its terms are not met. *Del-Cook Lumber Company*, 6 BNA OSHC 1362, 1365 (No. 16093, 1978). An employer is not free to disregard the requirements of a standard because it believes the standard is unnecessary. Piggly Wiggly

adduced the testimony of its director of operations and its director of human resources in support of its position that trailer creep could not occur in its facility. These witnesses are not experts in brake technology and, as management personnel for Piggly Wiggly, they are biased. Piggly Wiggly is asking the court to question the wisdom of the standard, which the court will not do.

The Secretary has established that Piggly Wiggly violated 29 C.F.R. § 1910.178(m)(7). The violation is alleged as serious. Piggly Wiggly argues that if a violation is found, it should be classified as other-than-serious.

In order to establish that a violation is “serious” under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

In its brief, Piggly Wiggly states, “[I]mproved brake technology effectively eliminated the hazard of trailers moving during loading and unloading” (Piggly Wiggly’s brief, p.11).

Approximately one month before Blackman’s death in the instant case, a forklift operator working at a distribution center in Florida was crushed to death when his forklift fell into the gap created when the trailer he was unloading crept forward. The truck and trailer were conventional models. *Michaels Stores, Inc.*, OSHRC Docket No. 99-1322 (ALJ Spies, July 17, 2000). The facts differ in that the trailer in *Michaels* was still attached to the truck, but it remains an example of a trailer equipped with a modern braking system that crept forward during unloading. An accident resulting from trailer creep is a possibility, and the likely result of such an accident is death by crushing. The violation is properly classified as serious.

Citation No. 2

Item 1: Alleged Willful Violation of 29 C.F.R. § 1910.178(l)

The Secretary alleges that Piggly Wiggly committed a willful violation of 29 C.F.R. § 1910.178(l), which provides:

Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.

The citation states:

On or about 7/29/99 the employer did not devise methods to insure that employees operating powered industrial trucks, such as yard mules and forklifts, were trained in safe operating methods. Employees were exposed to [sic] struck by and crushing hazards while operating fork trucks inside a container trailer that was subject to being moved with little or no notice to workers. Yard mule operators routinely move container trailers without checking to insure that other employees have finished fork truck activities within the trailer.

Although the standard addresses training, the Secretary attempted to establish her case by proving Piggly Wiggly's safety procedures were inadequate. In her brief she states, "It is the Secretary's position that there was not a safe operating procedure in place related to the movement of the yard mule while employees who were operating powered industrial trucks were loading and unloading the trailers" (Secretary's brief, p.5).

Until approximately two months before the accident, the hostler would prepare to move a trailer by backing the yard mule up under the trailer and connecting the trailer to the fifth wheel of the yard mule. The hostler would connect the air hose to raise the trailer and release the brakes. The hostler would then pull away from the dock and move the trailer to another location.

In May of 1999, Piggly Wiggly added two new steps to the procedure. Now after the hostler connected the air hose, he would honk his horn, wait a few seconds, and then pull away slowly. He was also to listen for the sound of the dock plate falling. Honking the horn was meant to alert any employee still in the trailer that it would be moving in a few seconds. Listening for the dock plate to drop was meant to alert the hostler that someone might still be in the trailer as it was moving away from the dock (Tr. 244-245).

The Secretary argues that these procedures were insufficient to ensure that an employee was not in the trailer as it pulled away. Honking was inadequate because the compressor running in the refrigerated trucks effectively drowned out the sound of the horn for anyone who was

inside the trailer. Having the hostler listen for the dock plate to drop was inadequate because the center is so loud there is no guarantee that the hostler would hear it. In fact, the dock plate had not been raised when Akers pulled away with the trailer that Blackman was in. The dock plate fell to the yard floor, but Akers failed to hear it.

The problem for the Secretary is that the cited standard addresses training, yet her evidence and argument focus on the adequacy of procedures. She states in her brief (p. 5):

In order to comply with this standard, the first thing that is necessary is that there is an effective safe procedure in place regarding operation of the powered industrial trucks. Part of the safe operation of the powered industrial trucks is the movement of these trucks without anyone being injured in the process.

The court disagrees. The issue of whether Piggly Wiggly had adequate safe procedures is a separate issue from whether Piggly Wiggly trained its employees in these procedures. The record establishes that the hostler was trained to sound the horn and listen for the dock plate, and the forklift drivers were trained to listen for the horn (Tr. 314, 318, 437-438).

The cited training standard does not apply to the cited conditions. Item 1 is vacated.

Citation No. 3

Item 1: Alleged Other-than-Serious Violation of 29 C.F.R. § 1904.2(a)

The Secretary alleges that Piggly Wiggly committed an other-than-serious violation of 29 C.F.R. § 1904.2(a), which provides:

Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred.

Battle reviewed Piggly Wiggly's OSHA 200 logs for 1997, 1998, and 1999, and determined that there was no listing of any of the Power Staffing temporary employees (Exh. C-2; Tr. 59-60). Piggly Wiggly does not dispute that no temporary employees are listed, but argues that it is Power Staffing's responsibility to record its employees' illnesses and injuries in its own OSHA 200 logs.

The Secretary has failed to prove a violation of the cited standard. She presented no evidence that any temporary employee actually suffered a recordable injury or illness during the three years she reviewed. The only temporary employee the record establishes as being injured during that time is the decedent, Miles Blackman. Blackman was killed on Thursday, July 29, 1999. Battle began her investigation of the fatality on July 30 and ended it on August 4, 1999. Piggly Wiggly had 6 working days, until August 5, to record the fatality in its OSHA 200 log. The failure to record Blackman's death cannot be the basis for the cited item. The Secretary has failed to adduce evidence of any other injury or illness of a temporary employee. Item 1 is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Piggly Wiggly employs approximately 500 employees. The Secretary presented no evidence regarding Piggly Wiggly's OSHA history or its good faith (Tr. 31).

The gravity of item 1 of citation no. 1 is high. The failure to ensure that a trailer's wheels are blocked increases the likelihood that an accident will occur. The results of a powered industrial truck falling between a moving trailer and the dock are almost always severe. A penalty of \$5,000.00 is appropriate.

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 that:

1. Item 1 of citation no. 1, alleging a serious violation of 29 C.F.R. § 1910.178(m)(7), is affirmed and a penalty of \$5,000.00 is assessed;
2. Item 2 of citation no. 1, alleging a serious violation of 29 C.F.R. § 1910.178(q)(7), is withdrawn by the Secretary;
3. Item 1 of citation no. 2, alleging a willful violation of 29 C.F.R. § 1910.178(l), is vacated; and
4. Item 1 of citation no. 3, alleging an other-than-serious violation of 29 C.F.R. § 1904.2(a), is vacated.

/s/

KEN S. WELSCH

Judge

Date: October 5, 2000