Secretary of Labor,
Complainant,

v. OSHRC Docket No. **00-1289**
EZ

R. P. Industries, Inc.,
Respondent.

APPEARANCES

Carla J. Gunnin, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Gary W. Parkes, Executive Vice President
R. P. Industries, Inc.
Franklin, Tennessee
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

R. P. Industries, Inc. (RPI), prepares construction sites by clearing trees and foliage, and grading the sites. On June 14, 2000, Occupational Safety and Health Administration (OSHA) compliance officer Michael Leek conducted an inspection of RPI's worksite in Florence, Alabama, in response to an employee complaint concerning a heavy equipment accident that occurred on June 9. As a result of Leek's inspection, the Secretary issued a citation to RPI on June 16, 2000.

Item 1 of the citation alleges RPI committed a serious violation of § 1926.95(a), by failing to ensure that its employee wore seat belts while operating heavy equipment. Item 2 of the citation alleges a serious violation of § 1926.602(a)(9)(i), by failing to ensure that a scraper was equipped with an operable horn.

This case was assigned for E-Z proceedings. The hearing was held on October 16, 2000, in Birmingham, Alabama. RPI asserts the affirmative defense of unpreventable employee misconduct regarding item 1. For the reasons set out below, items 1 and 2 are affirmed.

Background

In May 2000, RPI began work on a 33 acre site in Florence, Alabama. RPI was preparing the site for the construction of a shopping plaza. On June 9, RPI employees were operating three Caterpillar scrapers, which scrape dirt with a blade into a load that is then dumped. The scrapers were involved in an accident, which is described in a report made by RPI safety manager Ken Strickler (Exh. C-1):

> Caterpillar Model 613C Scraper #1--Unloaded traveling on a job site haul road from the drop pad to the borrow area to pick up another load of dirt.
>
> Caterpillar Model 621F Scraper #2--Driven by Cecil Sprague--Following Scraper #1--unloaded traveling on a job site haul road from the drop pad to the borrow area to pick up another load of dirt.
>
> Caterpillar Model 613C Scraper #3--Loaded with dirt traveling on a job site haul road from the borrow area to the drop pad to deposit his load of dirt.
>
> Scraper #3 had just obtained his load of dirt and was headed back towards the drop pad area--as he re-entered the haul road he encroached into the lane of Scraper #1.
>
> Scraper #1 swerved to the left to pass Scraper #3.
>
> Scraper #2, following Scraper #1, attempted to avoid a rear end collision with Scraper #1, veered sharply to the left and exited the established roadway.
>
> Scraper #2, in exiting the established roadway, entered rough, rutted terrain that caused Scraper #2 to become uncontrollable. The driver of Scraper #2 was ejected from the operating position and fell to the ground. Scraper #2 continued on and stalled out about 50 yards further on.
>
> Scraper #2 driver (Cecil Sprague) sustained multiple serious injuries from the fall and was taken to Eliza Memorial Hospital in Florence, AL.
> . . .
> Driver of Scraper #2 was not wearing his seat belt. All three of the scrapers involved have operator safety belts installed.

Sprague's injuries included a "broken right collar bone, broken right shoulder blade, broken ribs, punctured right lung, 2 broken vertebrae in spine, [and] abrasion to face and right forearm[.]" (Exh. C-1).

OSHA compliance officer Michael Leek arrived at RPI's site on June 14, 2000, and spoke with RPI superintendent Alfred Hodges and RPI heavy equipment operator Jerry Swinea (Tr. 12). Leek's inspection was prompted by an employee formal complaint that alleged that the scrapers were traveling at excessive speeds on the day of the accident. Leek observed Swinea operating a bulldozer. At Leek's request, Hodges stopped Swinea and asked him if he was wearing a seat belt. Swinea admitted that he was not (Tr. 13, 53).

Leek asked Swinea to operate the scraper that Sprague had been operating the day of the accident. Leek checked the functioning of the scraper's brakes and other features (Tr. 17). Based upon his inspection, Leek was unable to determine whether the scrapers were traveling at excessive speeds on the day of the accident, but he did recommend that RPI be cited for failing to ensure that its equipment operators wore seat belts and for having a scraper equipped with an inoperable horn.

The Citation

> 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 § 1926.95(a)

The Secretary alleges that RPI committed a serious violation of § 1926.95(a), which provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation alleges that on two occasions, RPI employees were operating heavy equipment without wearing seat belts, "exposing employees to the hazard of falling out of the machines." It is undisputed that Sprague was not wearing a seat belt while operating the scraper at the time of the accident and that Swinea was not wearing a seat belt while operating the bulldozer on the day of Leek's inspection (Exh. C-1; Tr. 53).

RPI argues that the cited standard does not apply to the cited conditions. RPI notes that the cited standard makes no mention of seat belts, and does not seem to address the hazards associated with the failure to wear seat belts. RPI argues that the applicable standard is § 1926.602(a)(2), which requires, "Seat belts shall be provided on [earthmoving equipment]."

RPI's argument is reasonable. As drafted, § 1926.95(a) does not appear to contemplate the use of vehicular seat belts. However, the court is required to follow Commission precedent, and it has been Commission precedent for almost 20 years that the language of § 1926.95(a) encompasses seat belts.

In *Ed Cheff d/b/a Ed Cheff Logging*, 9 BNA OSHC 1883 (No. 77-2778, 1981), the Commission considered whether seat belts are a form of protective equipment within the meaning of § 1910.132(a), the general industry standard whose language is identical to that of § 1926.95(a). The Commission held that seat belts are a form of protective equipment within the meaning of the standard, stating, "[W]e find no basis here to exclude seat belts from the category of protective equipment." *Id.*, 9 BNA OSHC at p. 1888.

Furthermore, § 1926.602(a)(2) is not more applicable to the cited conditions than § 1926.95(a). Section 1926.602(a)(2) requires only that seat belts be provided in the vehicles, not that they be used. It is undisputed that the scrapers and bulldozers were equipped with seat belts. The issue is not whether seat belts were installed, but whether they were being used. Section 1926.95(a) requires that protective equipment "shall be provided, used, and maintained." It is the court's determination that the cited standard, § 1926.95(a) applies to the cited conditions.

It has been established that at least two employees, Sprague and Swinea, were in noncompliance with the requirements of the standard. They were exposed to hazardous conditions when they failed to comply with the cited standard by not wearing their seat belts.

Employer knowledge is established by showing the employer either knew or, with the exercise of reasonable diligence, could have known of the violative conditions. RPI had several management personnel on the site. Superintendent Hodges, senior project manager Donald Harris, and assistant project manager Chris Bailey were all regularly at the site (Tr. 69, 74, 87). RPI contends that it is not possible for its supervisors to observe whether or not its employees are wearing seat belts while operating heavy equipment (Tr. 83). Because the wearing of seat belts cannot be verified visually by the supervisors, reasonable diligence requires some additional means of verification. After the June 9 accident, RPI was on notice that its employees were not following its rule regarding seat belt use. With reasonable diligence, RPI should have known that its employees were continuing to violate the rule.

RPI contends that its employees' noncompliance with § 1926.95(a) resulted from unpreventable employee misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g.*, *Precast Services, Inc*., 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

RPI has a written safety program that it distributes in pamphlet form to each employee upon being hired (Exh. R-2). Page 24 of the pamphlet contains safety rules for motor vehicles. Rule 2 states:

Seat belts will be worn at all times.

Respondent's exhibit R-2 contains signature pages signed by Cecil Sprague and Jerry Swinea. RPI holds weekly safety meetings, where the use of seat belts is discussed (Tr. 52). Swinea testified that he understood it was RPI's policy to require its employees to wear seat belts while operating heavy equipment (Tr. 60).

RPI has demonstrated that it had an established work rule requiring the use of seat belts, and that it was effectively communicated to its employees. RPI has failed, however, to show that it had taken steps to discover violations.

Leek testified that when he and superintendent Hodges discovered that Swinea was not wearing a seat belt while operating the bulldozer, Hodges stated, "Well, they usually don't wear them" (Tr. 13). Swinea testified that after the June 9 accident, RPI held a safety meeting specifically addressing the wearing of seat belts (Tr. 52). Despite the recent accident and the safety meeting, Swinea testified that between the June 9 accident and the June 14 OSHA inspection, he failed to wear a seat belt while operating RPI's heavy equipment two or three times (Tr. 61). Swinea stated that it was not unusual for him to forget to use seat belts when operating motor vehicles (Tr. 67).

Project manager Harris estimated that only half of the heavy equipment operators in the construction industry wear seat belts (Tr. 83, 85). It was his opinion that it is impossible to enforce the use of seat belts (Tr. 85).

Although RPI's official policy is to require the use of seat belts for operators of heavy equipment, its actual expectation was that its employees would ignore the seat belt requirement. This expectation resulted in RPI disregarding its duty to exercise reasonable diligence in enforcing the seat belt rule. RPI took no steps to discover violations. Therefore, RPI's affirmative defense of unpreventable employee misconduct must fail.

RPI likens the requirement to wear a seat belt while operating heavy equipment to state laws that require drivers of motor vehicles to wear seat belts. RPI states that 32% of drivers fail to fasten their seat belts while driving. Assuming that RPI's statistic is accurate, it does not support its position that RPI was not in violation of § 1926.95(a). A driver who is not wearing a seat belt and who gets stopped by a law enforcement officer risks receiving a ticket and paying a penalty for his or her violation. The fact that almost a third of the driving population is willing to take this risk does not mean that the law should not be enforced.

The Secretary has established that RPI committed a violation of § 1926.95(a). The violation was cited as 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).

Sprague's injuries, including broken bones, a collapsed lung, and abrasions, illustrate well the serious physical harm that can result from a failure to wear a seat belt. The violation is serious.

Item 2: Alleged Serious Violation of § 1926.602(a)(9)(i)

The Secretary alleges that RPI committed a serious violation of § 1926.602(a)(9)(i), which provides:

> All bidirectional machines, such as rollers, compactors, front-end loaders, bulldozers, and similar equipment, shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn shall be maintained in an operative condition.

The citation states:

> Caterpillar scraper, company number 4010 was not equipped with an operational horn, exposing employees to the hazard of being struck by the scraper.

Leek testified that he requested Hodges to direct Swinea to operate Sprague's scraper so he could check its brakes. After determining that the brakes were functioning, Leek asked Swinea "as a matter of routine" to sound the horn. Leek discovered that the horn was inoperable (Tr. 17). Although the scraper was not being operated at the time of Leek's inspection, it was available for use. Hodges testified that if it had not been raining the day of the inspection, the scraper would have been running (Tr. 100).

RPI does not dispute that the standard applies, but argues that it was confused regarding what was being cited in this item. It is RPI's position that Leek gave the impression that he was concerned about the backup alarm on the scraper, and not the horn. However, it is clear from Hodges's testimony that the misunderstanding was on his part.

Hodges stated, "[T]here was a misunderstanding. I wasn't aware that the horn was missing up front. However, we did have a couple or three machines where the backup horns didn't work, and that's what I thought he was talking about (Tr. 91). Later, Hodges reiterated

that Leek had referred to the scraper's horn and that it was Hodges who had incorrectly focused on backup alarms (Tr. 98-99):

> Q.: What did [Leek] tell you about the horn on the scraper?
>
> Hodges: It was not working and I thought he was talking about the backup alarm horn.
>
> Q.: On the scraper that Mr. Swinea was operating?
>
> Hodges: We had some [backup alarms] that weren't working. So I misunderstood that instead of being the front horn, that it would be the backup alarm.

RPI's misunderstanding of what the Secretary cited in item 2 does not constitute a defense to the alleged violation. The citation clearly states the standard that RPI allegedly violated and specifically refers to the horn of the scraper. Leek's testimony that the horn was not operational is unrefuted. While Swinea and Hodges testified that they do not recall Swinea being asked to sound the horn, neither of them could testify that the horn was, in fact, operational (Tr. 62, 98).

The Secretary has established that the scraper was in noncompliance with § 1926.602(a)(9)(i). RPI generally had a crew of 15 employees on the site (Tr. 79). The potential hazard to these 15 employees is that the operator of the scraper would be unable to alert them if they were in dangerous proximity to the scraper (Tr. 17). The violation is serious.

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.

The parties stipulated that RPI employed between 100 and 150 employees at the time of the accident (Tr. 102). RPI has no previous history of OSHA violations (Tr. 22). RPI is credited with good faith for having a written safety program and holding regular safety meetings. The gravity of the violations is high. Sprague's serious injuries demonstrate the risk to which

employees are exposed when they fail to wear seat belts. The failure to have an operable horn could result in the ability to alert employees that the scraper is in dangerous proximity to them.

Upon consideration of the foregoing factors, it is determined that the appropriate penalty for item 1 of the citation is $3,500.00. The appropriate penalty for item 2 is $1,500.00.

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 the citation, alleging a serious violation of § 1926.95(a), is affirmed and a penalty of $3,500.00 is assessed, and

2. Item 2 of the citation, alleging a serious violation of § 1926.602(a)(9)(i), is affirmed and a penalty of $1,500.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: November 21, 2000