

SECRETARY OF LABOR,

Complainant,

v.

GREY WOLF DRILLING COMPANY LP,  
RIG 865, and its successors,

Respondent.

OSHRC DOCKET NO. 02-1228

**APPEARANCES:**

For the Complainant:

Jennine R. Lunceford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Neil Martin, Esq., Rachel Powitzky Steely, Esq., Gardere Wynne Sewell, LLP, Houston, Texas

Before: Administrative Law Judge: Robert A. Yetman

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Grey Wolf Drilling Company LP, Rig 865 (Grey Wolf), at all times relevant to this action maintained a place of business at a drilling site between Laredo and San Ignacio, Texas, where it was engaged in oil and gas exploration. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 30, 2002, Robert Sturm, a Grey Wolf employee, was struck by a winch truck backing up across the work site. Mr. Sturm died of his injuries. On April 1, 2002, the Occupational Safety and Health Administration (OSHA) instituted an inspection of the conditions at Grey Wolf's work site. As a result of that inspection, Grey Wolf was issued a serious citation alleging one violation of §5(a)(1) of the Act together with a proposed penalty. By filing a timely notice of contest Grey Wolf brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 3, 2002 a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

**Alleged Violation**

\_\_\_\_\_The citation reads as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a struck by and run over by a winch truck hazard:

At the rig site, the employee(s) toolpusher was exposed to a struck by hazard from a winch truck which was not equipped with a reverse audible warning device.

This occurred on March 30, 2002 with Grey Wolf Drilling Company L.P. Rig 865. Some feasible and acceptable means of abatement, among others, are:

- a. Install reverse audible warning devices (back-up alarms) on all winch trucks (vehicles) which are operated in reverse.
- b. Have the swamper employee guide the trucks traveling in reverse at the rig site.
- c. Have all trucks travel in a forward motion if at all possible.

### **Facts**

Guadalupe Ozuna, an OSHA Compliance Officer (CO), testified that on March 30, 2002, Robert Sturm, a Grey Wolf employee, was struck by a ten wheel winch truck which was backing across Grey Wolf's drilling site (Tr. 28-29, 32-33, 37; Exh. R-1, R-2). According to CO Ozuna, the driver's view was obstructed, in that he could not see the area behind the truck on the driver's side while turning to look over his right shoulder (Tr. 38). Moreover, the driver's view would have been partially obstructed by the winch equipment hanging at the rear of the truck (Tr. 39). The truck was not equipped with a back-up alarm (Tr. 40, 59).

Noel Garza, a truck driver with Grey Wolf, testified that at the time of the accident, he was sitting in a truck parked across from the company trailers when another of Grey Wolf's drivers, Guillermo Arceo, blew his horn and began backing his winch truck. Arceo backed from the area of the oil derrick and through the yard, passing between Garza's truck and office trailers (Tr. 182, 188-90, 280; Exh. C-4, R-2). Garza testified that winch truck drivers generally drive in reverse (Tr. 192-93). According to both Garza and Guillermo Arceo, there is no room to turn trucks around on the work site (Tr. 192, 283). In addition, the work performed with the truck is done with the winch on the back of the truck. In order to be in position to use the winch, the truck must back up against the equipment to be hoisted (Tr. 192). Garza testified that on the day of the accident, he saw Arceo looking back over his right shoulder through the rear window of the cab as he backed his winch truck. Mr. Sturm came out of the toolpusher's trailer and began walking across the yard, while attempting to clip his side shields to his glasses (Tr. 121, 193, 196). Garza realized that Arceo could not see Sturm and began to shout and honk his horn (Tr. 196). Garza testified that the noise level was high at the work site because of the generators and the diesel engines on the trucks and Sturm did not react to his horn (Tr. 194, 196-97). Arceo looked in the direction of the noise when he

heard the honking and shouting, but did not stop in time to avoid the accident (Tr. 283). His truck struck and killed Sturm (Tr. 196-97, 221).

Some, but not all, of Grey Wolf's trucks were equipped with back-up alarms prior to March 30, 2002 (Tr. 218). Mr. Garza testified that he was not trained to operate a truck with a back-up alarm any differently than one without (Tr. 218). In all cases, the driver is supposed to check his mirrors, look back and blow his horn before backing his truck (Tr. 223). Drivers are not given different instructions for backing up for long versus short distances, or for backing with a load versus backing unloaded (Tr. 289). When a winch truck is loaded, however, the driver relies on a "swamper" to direct him when backing up. A swamper, or assistant, is assigned to each vehicle to help the driver with rigging loads to the back of the truck, and to act as a flagman or ground man. The ground man directs the driver as he backs his truck with a load suspended from the rigging, because the driver's back view is obstructed by the load (Tr. 183-85, 213-15). When the swamper directs the truck, he stands to the rear on the passenger side of the truck (Tr. 205-06, 236). When the truck is backing up long distances without a load, as previously stated, the driver generally has the swamper sit in the cab rather than asking him to walk (Tr. 183, 186). Garza testified that the drivers back their trucks up at no more than two to three miles per hour; however, he did not believe that the swampers could keep up with the truck (Tr. 184). In addition, Garza believed that the swampers got tired of walking, and needed a break (Tr. 217).

Guillermo Arceo testified that he had already backed his truck approximately 75 to 100 feet when he hit Mr. Sturm (Tr. 280, 290). Arceo estimated that he was driving approximately four to five miles per hour (Tr. 282). His swamper was sitting, resting, in Arceo's truck at the time of the accident (Tr. 166-69, 280, 284).

When the driver is backing without a load, his view through the rear window is obstructed to the left rear of the truck, the area of the truck which struck Mr. Sturm (Tr. 210, 211). However, he can check his mirror to see that area behind the truck to the driver's side (Tr. 210). Nonetheless, both Garza and Arceo testified that it is not the practice of Grey Wolf's drivers to use their side mirrors when backing long distances (Tr. 211, 290). Instead, drivers backing long distances look over their shoulders through the back window of the truck. In that position, they cannot see objects to the rear on the driver's side of the truck (Tr. 211, 291). In addition, the winch truck driver cannot see the ground directly in back of the truck, and his view may be partially obscured by the poles on the rear of the truck (Tr. 229). Garza testified that, while backing, trucks have the right-of-way because the driver has so many blind spots (Tr. 203, 223-25). According to both Garza and Arceo it is the employee's responsibility to stay alert and to avoid moving vehicles (Tr. 203, 223). In safety meetings, employees were told that "if you don't see the truck driver,

the truck driver can't see you" (Tr. 203, 223-24, 279). Robert Sturm, the toolpusher, was in charge of conducting the daily safety meetings (Tr. 202).

CO Ozuna testified that he had investigated two other fatalities attributed to the absence of back-up alarms (Tr. 34-35). The accidents in both cases occurred in the construction industry (Tr. 35). Ozuna stated that the construction standard specifically requires back-up alarms on vehicles where the rear view is obstructed (Tr. 93). Section 1926.601(b)(4) states that "[n]o employer shall use any motor vehicle equipment having an obstructed rear unless, (i), the vehicle has a reverse signal alarm audible above the surrounding noise level, or (ii), the vehicle is backed up only when an observer signals safety to do so." (Tr. 94).<sup>1</sup> Ozuna testified that Grey Wolf was aware of the hazard posed by trucks backing without audible alarms (Tr. 44). Grey Wolf's safety manual states:

SAFE BACKING – The first rule in avoiding backing accidents is to look for parking space where backing will be unnecessary.

1. If you must look back, always check to be sure your path is unobstructed. Obtain a flagman if necessary or if it is required by the type of vehicle being driven. Keep a continual check on clearances so as to avoid objects while backing.

(Tr. 49-50; Exh. C-1; ¶9.1). In addition, Grey Wolf provided Ozuna with a copy of the Accident Prevention Reference Guide published by the International Association of Drilling Contractors (IADC) (Tr. 52-56; Exh. C-2). That document provides:

- K. When a vehicle is to be maneuvered in confined areas, precautions should be taken to ensure that the way is clear and that the driver can see the entire area. If the driver does not have clear visibility, help should be obtained from someone who has an unobstructed view.
- L. When possible, park so backing is not required. If you must back, follow these guidelines:
  1. Clear the rear.
  2. Sound your horn before you start to move.
  3. Back immediately; never trust the scene you checked to stay the same.
  4. Back slowly.
  5. As you back, check both side mirrors.
  6. Do not ever back further than necessary.
  7. Always back to the driver's side.

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<sup>1</sup>The government has taken the position that the construction standard (1926.601(b)(4)) does not apply to Respondent's work activities and, therefore, has cited its general duty clause because no standard applies to the oil and drilling industry (Tr. 80).

8. Use a ground guide.
9. Always park so the first move in the vehicle is forward.

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### **Discussion**

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

Grey Wolf admits that it recognizes the cited hazard (Grey Wolf's brief, p. 5). It argues, however, that it had procedures in place which were intended to address the hazard, and that the Secretary failed to prove that the additional abatement measures suggested were feasible means of eliminating or materially reducing the danger of an employee being struck by a backing winch truck, citing a non-binding ALJ decision, *Performance Site Mgmt.* 19 OSHC (BNA) 2054; 2002 OSHD (CCH) ¶32,623 (No. 01-0956, 2002). Grey Wolf also raises the affirmative defense of unpreventable employee misconduct.

**Feasibility.** The record establishes that it is the practice of Grey Wolf's drivers to check their rear view mirrors, and sound the horn before backing. While backing, the driver looks over his right shoulder, and so cannot see what is happening on the left-hand side of the truck. No flagman is used when the winch truck is unloaded or when the truck is backed for long distances. In the latter event, as in this case, the swamper (flagman) is allowed to ride in the cab of the truck. Because Grey Wolf recognized that the driver's rear view is limited, it warns its employees to watch out for backing vehicles, and to yield the right-of-way to such vehicles. Respondent argues that these measures adequately address the hazard, and maintains that the occurrence of an accident is insufficient to show that its protective measures constitute a violation of §5(a)(1). The Secretary, however, maintains that the use of a flagman and the installation of audible reverse warning alarms are feasible means of further abating the hazard and would materially reduce the danger of an employee being struck.

It is clear that both back-up alarms and flagmen are feasible precautions, in the sense that implementation of both protective measures is possible. Grey Wolf has retrofitted all its trucks with alarms (Tr. 179), and already employs flagmen to assist drivers.<sup>2</sup> It is Grey Wolf's contention, however, that the

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<sup>2</sup>Grey Wolf's contention that driving forward is not possible on the restricted work site is accepted in the absence of substantial evidence to the contrary.

suggested protective measures may not have prevented the March 30 accident. Because of the overall noise level on the site, Mr. Sturm may not have heard a backup alarm. Further, Respondent argues, a flagman, or swamper, may not have seen Mr. Sturm approaching from the driver's side of the truck in time to warn Mr. Arceo. The question to be decided, however, is not whether this accident would have been prevented, but rather, whether the recommended precautions are recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the employer's worksite." *Cerro Metal Products Division, Marmon Group, Inc.*, 12 BNA OSHC 1821, 1986, CCH OSHD ¶27,579 (No. 78-5159, 1986).

No evidence was introduced bearing on this industry's recognition of the value of back-up alarms. However, it was established that both Grey Wolf and the International Association of Drilling Contractors (IADC) specifically recognize that, because of changing conditions on the work site, it is essential that a driver backing up have a *continuous* unobstructed view of the entire area. Both Grey Wolf's safety manual and the IADC accident prevention guide recommend that the help of a flagman be enlisted if the driver cannot maintain a clear view of the area. (Ex. C-1, C-2). The evidence establishes that both Grey Wolf itself, and the industry in general recognize that the use of a flagman is a necessary and valuable step in avoiding the hazard created by backing vehicles. The Secretary has shown that there was a feasible means of abating the cited hazard, and established the cited violation.

**Employee Misconduct.** Grey Wolf contends that Mr. Sturm violated its work rule requiring that employees yield the right-of-way to backing trucks. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: (1) established work rules designed to prevent the violation; (2) adequately communicated those work rules to its employees (including supervisors); (3) taken reasonable steps to discover violations of those work rules; and (4) effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

It is undisputed Grey Wolf recognized the hazard created by operating a vehicle in reverse without using a flagman to keep a continual check of those areas in the truck's path. However, as the evidence makes clear, Grey Wolf failed to institute a work rule requiring that drivers use flagmen when backing. Instead, flagmen were allowed to ride in the truck, while drivers relied on pedestrian employees to be alert, and to yield the right-of-way to backing trucks. The Commission has consistently found that mere admonitions to "be careful" and reminders about a potential hazard are insufficient to abate an unsafe condition. *See, El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6, 7 (No. 90-1106, 1993); *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997). Especially

here, where it has been shown that an effective means of abatement was recognized by and available to the employer, the employer cannot escape liability by relying on general warnings requiring employees to watch for and avoid hazardous situations. Thus, Respondent has failed to meet the first requirement for establishing the employee misconduct defense. Moreover, Respondent has failed to present any convincing evidence in support of elements 2, 3, and 4 listed above.

Accordingly, Respondent has failed to make out the affirmative defense of employee misconduct.

#### Penalty

\_\_\_\_\_ In determining an appropriate penalty, the gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). In determining the gravity of a violation the Commission should consider: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). The evidence establishes that it was the routine practice of Grey Wolf's drivers to back long distances with the flagman riding in the cab of the truck, exposing pedestrian employees to the hazard of being struck by a backing vehicle. An employee struck by a truck would, in all likelihood, suffer severe injury up to and including death. In this instance an employee was killed. Because of the regular exposure of Grey Wolf employees and the severe nature of probable injuries, the gravity of this violation is high. The proposed penalty of \$5,000.00 is deemed appropriate.

#### **Findings of Fact**

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All findings of fact inconsistent with the decision are hereby denied.

#### **Conclusions of Law**

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.
2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Respondent violated the provisions of Section 5(a)(1) of the Act as alleged and said violation was serious within the meaning of the Act.

#### **ORDER**

1. Citation 1, item 1, alleging violation of §5(a)(1) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.

/s/  
Robert A. Yetman  
Judge, OSHRC

Dated: March 12, 2003