

SECRETARY OF LABOR,

Complainant,

v.

THOMANN ASPHALT PAVING CORP.,

Respondent.

DOCKET NO. 02-1705

APPEARANCES:

For the Complainant: Vivien V. Ranada, Esq.
William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York

For the Respondent: Robert G. Walsh, Esq.
Blasdell, New York

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Jurisdiction

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Sections 651-678) (“the “Act”).

Respondent, Thomann Asphalt Paving Corp. (Thomann), at all times relevant to this action maintained a place of business at the Perry High School, in Perry, New York, where it was engaged in excavation, site preparation and paving. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Eric K. Ho, Ho Ho Ho Express, Inc., Houston Fruitland, Inc.*, 20 BNA OSHC 1361, 2002 CCH OSHD ¶32,692 (Nos. 98-1645 & 98-1646, 2003), *citing*, *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Thomann is, therefore, an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 18, 2002, a Thomann employee was killed in a rollover accident at Thomann’s

Perry work site. After being notified of the fatality, the Occupational Safety and Health Administration (“OSHA”) initiated an inspection. As a result of that inspection, Thomann was issued citations alleging violations of the Act. By filing a timely notice of contest Thomann brought this proceeding before the Occupational Safety and Health Review Commission (“the Commission”). Prior to the opening of the hearing, the parties settled all but Citation 1, Item 1, alleging a violation of Section 5(a)(1) of the Act (Tr. 5). On October 7-9, 2003 a hearing was held on that matter in Buffalo, New York. The parties have submitted briefs on the remaining issue and this matter is ready for disposition

Facts.

On March 18, 2002 Thomann was excavating an area at the Perry site, preparing for the installation of infrastructure for a proposed addition (Tr. 73, 352-53; Exh. C-4). Soils excavated from the area were trucked to one of two dumping sites, one to the north and one to the south of the tennis courts located west of the existing school (Tr. 74-75, 102; Exh. C-4). The spoil piles infilled an area beside an elevated two-lane road, creating an extended plateau level with the road and dropping off at a slope of approximately 35° (Tr. 79-81, 402, 404; Exh. C-4, C-5, C-6). A 27,800 pound bulldozer was then used to level and compact the dirt at each spoil pile (Tr. 75, 104, 353). A Bomag roller then sealed the top of the soils to facilitate run-off (Tr. 77, 105, 354, 357-58). The sides and edges of the spoil piles’ slopes were not compacted (Tr. 127).

At the end of the work day, a Thomann employee, Dave Drysdale, was driving the Bomag roller south along the edge of a paved road which ran between the north and south spoils areas (Tr. 81, 270, 360, 362, 365; Exh. C-4). Salvatore Lima, a heavy equipment operator who passed Drysdale on the road, testified that the roller was partially on the pavement and partially on the grassy area bordering the road (Tr. 360, 362, 365). Lima estimated that the roller was about eight feet from the edge of the flat grassy area (Tr. 377). Short of the southern spoil pile the Bomag roller slid off the side of the grassy embankment and rolled over, pinning Drysdale underneath (Tr. 108, 124, 403-04, 480; Exh. C-5, C-7).

The Bomag roller/compactor was not equipped with a rollover protective structure (“ROPS”), although it was an option available for the equipment (Tr. 14, 22-23, 29, 240; Exh. C-2). Scott

Conway, Thomann's shop supervisor (Tr. 12), testified that three of Thomann's excavating compactors have ROPS installed but that two others do not (Tr. 17, 31). Conway was not aware of any requirement that ROPS be installed on all roller/compactors (Tr. 45). He was aware that compactors posed a danger of rolling over if operated improperly or if on unstable conditions such as on the side of a hill (Tr. 25-26).

Dexter Orwat, Thomann's superintendent (Tr. 64), testified that when operating the roller, operators are instructed to roll perpendicular to the slope to prevent the machine from sliding off the edge (Tr. 70-71, 85-86, 96). They are told to drive slowly,¹ and to consider the stability of the material being rolled as well as the proximity of the slope (Tr. 83-85). According to Orwat, an experienced operator can tell how close to the edge the roller can safely be driven by the feel of the material under the roller (Tr. 84-85). Orwat had heard of compactors rolling over; specifically, he knew of one that slid off the side of a road into a ditch (Tr. 92-93). Orwat stated however, that there was no reason for the roller to get close enough to the incline at the Perry work site to be in danger of rolling (Tr. 106-09). Orwat testified that it was up to Dave Thomann, the owner who also supervised jobs, to determine whether a given job required the use of a roller equipped with ROPS (Tr. 91-92). Orwat nonetheless believed that ROPS would, in most circumstances, prove a hindrance to the operator. Because operators must wear seatbelts when operating ROPS-equipped compactors, their vision is obstructed by the roller (Tr. 112-13). According to Orwat, the operator needs to be able to stand up in his seat to see where he is going (Tr. 113-14).

Dave Thomann testified that he was not aware of any requirement that compactors have ROPS (Tr. 228). Sometimes compactors are seen with ROPS; often they have no ROPS (Tr. 241). According to Thomann, ROPS might be required when rolling an embankment with a "sheepsfoot" compactor; however, Thomann never performed that kind of work (Tr. 229-30). Thomann was aware that compactors can roll over if an operator improperly rolls parallel to an embankment (Tr. 230-32). He also recognized that it would be hazardous to get too close to a leading edge, which might fall away (Tr. 232-33). In order to abate any hazard associated with the edges of embankments, Thomann employees are instructed to comply with applicable safety rules (Tr. 231-

¹ According to Scott Conway, a roller/compactor generally operates between three and eight miles per hour (Tr. 50).

32). Specifically, employees are trained to roll perpendicular, never parallel, to an edge (Tr. 231). Only trained, competent operators are allowed to maneuver the roller/compactors (Tr. 235). Employees are monitored on a daily basis, and those who fail to comply with the rules are corrected (Tr. 234, 236-38). Thomann had never before had a rollover on one of his jobs (Tr. 233).

Matthew Burkart is a civil engineer and president of Aegis Corp., a consulting firm providing engineering and safety services (Tr. 132-34). Burkart has nearly 40 years of experience in the construction industry and is a member of the National Safety Council, the American Society of Civil Engineers, and the American Society of Safety Engineers, among other organizations. Burkart served as Chairman of the ANSI Accredited Standards Committee between 1984 and 2000 (Tr. 135-37; Ex. C-8). Burkart testified that the rollover hazard posed by heavy equipment has long been recognized in the construction industry, referring to: 1) Army Corps of Engineers regulations requiring the use of ROPS on “self-propelled construction equipment such as front-end loaders, backhoes, rollers, and compactors;” 2) regulations of the State of New York’s Board of Standards and Appeals which require that “all earth moving, excavating or grading equipment or machines,² whether mounted on crawlers or wheels,” which are sold or offered for sale in New York State or used at any location in New York State be equipped with ROPS by January 1, 1973; and 3) a 1998 OSHA letter of interpretation which states:

. . . it is OSHA’s position that the hazard of equipment rollover is a “recognized” hazard within the meaning of the General Duty clause (section 5(a)(1) of the Occupational Safety and Health Act), and that ROPS and seat belts are feasible in many situations to reduce this hazard for compactors and skid steer equipment.

(Tr. 171-79; Exh. C-9, C-10, C-11). According to Burkart, a rollover hazard has long been recognized in the construction industry, though no specific solution to the problem has been formulated (Tr. 210).

Burkart acknowledged that there is little danger of a rollover occurring where a compactor is operating on a solid base with no embankment (Tr. 181). Where there is no exposure, Burkart did not believe ROPS were necessary (Tr. 151). He opined however, that ROPS could have materially reduced the rollover hazard present on the Perry work site and should have been used in the

² Burkart believed that the roller compactor fell under the category of excavating and grading equipment (Tr. 177).

circumstances under which Thomann was working, *i.e.*, where the compaction equipment was operating near embankments on uncompacted spoils subject to giving way (Tr. 169-70, 180-81).

Compliance Officer (“CO”) Colin Sargent agreed that not all roller/compactors need to be equipped with ROPS (Tr. 316-17). The CO stated that it is OSHA policy to cite only employers operating rollers without ROPS in unsafe conditions (Tr. 316). OSHA has previously cited an employer for failing to install ROPS on a Bomag tandem roller operating “adjacent [to] inclines of sufficient length and steepness to allow the self-propelled steel drum roller to overturn” (Tr. 310-12; Exh. R-10). Sargent concluded that ROPS were required on the roller/compactor involved in the accident at Thomann’s Perry work site, as it was rolling filled material and was being operated adjacent to a slope when it rolled (Tr. 281).

John P. Coniglio is a principal with Occupational Safety and Environmental Associates, a construction consulting firm (Tr. 383). Coniglio is a certified safety professional and a code rule enforcement officer for the State of New York (Tr. 384-85). In addition, Coniglio is an authorized OSHA instructor and a member of a number of professional safety associations (Tr. 385-99). Coniglio testified that, to form an opinion in this matter, he reviewed documents containing commercial specifications for roller/compactors published by the International Standards Organization (Tr. 415; Exh. R-18) and the Society of Automotive Engineers (“SAE”) (Tr. 415, Exh. R-19). He reviewed SAE performance criteria for ROPS (Tr. 419; Exh. R-20) as well as safety manuals for roller/compactors issued by Association of Equipment Manufacturers, and the Construction Industry Manufacturers Association (Tr. 420; Exh. R-21, R-22). None of the documents Coniglio reviewed indicate that ROPS are a required safety feature for such heavy equipment (Tr. 416, 419, 421).³ Coniglio further testified that the State of New York does not, in practice, require construction firms working on state authorized contracts to provide roller/compactors with ROPS (Tr. 429-30).

Coniglio agreed that any piece of heavy equipment can tip over under extreme conditions or if used improperly, *i.e.*, at a high speed, especially going down an incline or being too near an

³ Both safety manuals note that “the danger of sliding and/or tipping on steep slopes is always present” (Exh. R-21, p. 22, R-22, p. 19). The manuals warn the operator to avoid side-hill travel and drop-offs. (Exh. R-21, p. 22-23, R-22, p. 19-20).

unstable edge (Tr. 441-42, 451, 453, 459). He recommends the use of ROPS in waste sites, where the operator would be capping uncompacted waste with changing terrain (Tr. 459). For these jobs, the industry has designed special-purpose compactors, such as a sheep's foot compactor, which has large metal bumps that grip the soil and is intended for work on grades (Tr. 432, 454). Such equipment is supplied with ROPS and a seat belt (Tr. 455).

In Coniglio's opinion, the industry has deliberately refrained from requiring ROPS on all compactors after weighing the competing requirements and hazards involved with the operation of such equipment (Tr. 431-32, 453). Coniglio noted that operators have trouble seeing over the drum of many roller/compactors as they are currently designed (Tr. 431-32). Because seatbelts must be used on all equipment with ROPS, the installation of ROPS would necessarily interfere with the operator's line of sight (Tr. 431).

In this case, the job to be performed did not call for the compaction of sloped areas (Tr. 457). Under these circumstances, Coniglio opined that the hazard was best addressed with the use of well trained knowledgeable operators (Tr. 432). Coniglio testified that Thomann's operators were operating safely, rolling perpendicular to the edges of the spoil pile and working a safe distance from the edge (Tr. 433, 435, 458)

Discussion

Serious Citation 1, Item 1, alleges:

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 the hazard of being crushed.

a) Perry High School Project. On or about 3/13/02, an employee was operating a Bomag (BW 213D) single-drum vibratory roller without a roll-over protection structure (ROPS). Among other methods, one feasible and acceptable abatement method to correct this hazard is to install a rollover protective structure (ROPS) as originally provided with this roller by the manufacturer, and to install ROPS on any other similar equipment.

provides:

The promulgation of specific standards for rollover protective structures for compactors and rubber-tired skid-steer equipment is reserved pending consideration of standards currently being developed.

In the absence of a specific standard, Thomann was cited under Section 5(a)(1), which requires:

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

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).

The Secretary maintains that the construction industry recognizes the rollover hazard for roller/compactors operating on or near loosely compacted slopes (Secretary's Post-Hearing Memorandum, p. 11-12).⁴ There is little question that this hazard is recognized in the industry. Every one of the witnesses testifying knew of at least one compactor that had rolled over. Both

⁴ To the degree that the citation implies that use of this type or roller without ROPS is, by itself, a recognized hazard, it would create a absurd situation. When the standards were initially promulgated in 1972 the Secretary, in essence, said that a blanket ROPS requirement for such equipment was under consideration. The Secretary declined to have a blanket ROPS requirement for this type of equipment when the standard was initially covered. 29 C.F.R. §1926.1000(1)(2). OSHA could have done so easily and clearly at that time. Indeed, the reluctance of OSHA to do so was reiterated in an opinion letter of 1998, in which OSHA said it was still under consideration. A total of over thirty years have elapsed and apparently, the Secretary is still considering whether there should be a blanket requirement to have ROPS on roller-compactors. Under these circumstances, the lack of ROPS could hardly be considered to be a "recognized hazard."

safety experts agreed that all heavy equipment, including roller/compactors, can roll over if operated too near an unstable edge. The question at issue in this case is whether “knowledgeable persons familiar with the industry” would acknowledge that the use of ROPS was a “necessary and valuable step for a sound safety program” in the specific circumstances existing at the Perry work site, *see Cerro Metal Products Division, Marmon Group, Inc.*,¹² BNA OSHC 1821, 1986 CCH OSHD ¶27,579 (No. 78-5159, 1986), or whether Thomann’s instructions to its operators, requiring them to stay away from the edges of inclines and to roll perpendicular to the edges of the spoil piles, were an adequate means of reducing the hazard.

An employer satisfies his duty under Section 5(a)(1) if he takes all precautions recognized as necessary to prevent reasonably predictable exposure to recognized hazards. In this case, the Secretary failed to establish, by a preponderance of the evidence, that the installation of ROPS on roller/compactors was a recognized safety precaution necessary to prevent rollovers in the conditions present at Thomann’s work site. It is clear that ROPS are not always required on roller/compactors.

There are no industry wide standards requiring the use of ROPS on all roller/compactors, and OSHA has specifically refrained from requiring rollover protection on compactors. In practice, ROPS are installed on some, but by no means all, roller/compactors⁵. Complainant’s own expert agreed that, despite the Army Corps of Engineers regulations, New York standards and OSHA directives on which he relied in forming his opinion, ROPS are *not* required on all roller/compactors, because the rollover hazard associated with such equipment is non-existent unless the compaction equipment is operated near embankments or on uncompacted spoils subject to giving way. The Secretary failed to carry her burden of establishing that knowledgeable persons within the industry would regard the additional measures, *i.e.*, the installation of ROPS, as a necessary and appropriate measure in the particular circumstances existing at Thomann’s work site.

Moreover, for the following reasons, the Secretary failed to show that the actions taken by Respondent in training and instructing its employees not to operate rollers too near edges or soft earth were deficient. In this case, Dave Thomann and Dexter Orwat testified that the operation at the

⁵ As testified to by Orwat, while the seating on such machinery is more secure than a howdah, when ROPS is installed, the use of seatbelts is mandatory.

Perry school did not involve compacting slopes or require employees to operate roller/compactors near the edges of uncompacted soils. The cited roller/compactor was used solely to seal the top of a flat, previously-compacted, spoil pile. The uncontradicted testimony of Thomann and Orwat establishes that Thomann's operators were trained not to roll compactors near the leading edge of a fill, and to roll perpendicular, never parallel, to the edge. Employees were closely supervised and corrected when they failed to follow the rules. The Secretary does not argue or point to any evidence suggesting that Respondent's training, diligence in discovering violations, or discipline of employees was inadequate.

It is well established that where, as here, the employer has a mechanism designed to eliminate a hazardous condition which arises from the behavior or misbehavior of employees, the burden is on the Secretary to establish that the employer's measures were inadequate. Indeed, this principle has long been recognized in general duty clause cases. Where an employer was charged with a general duty violation involving employees for its alleged failure to prevent employees from riding on the running board of a front-end loader, the United States Court of Appeals for the District of Columbia held that;

[A]n actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, even when the conduct has led to injury. The record must additionally indicate that demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred.

National Realty and Const. Co., Inc., 489 F.2d 1257 (D.C.Cir.1973), 1 BNA OSHC 1422, 1428. Avoiding slopes and drop-offs is recognized by the literature and by safety experts as an effective means of eliminating the rollover hazard. The Secretary's allegation that Thomann's workplace was not free from the cited recognized hazard cannot be sustained where the evidence shows that Thomann issued unambiguous and well communicated safety rules reasonably calculated to eliminate the hazard, *i.e.*, prohibiting the use of the compactor near embankments or on uncompacted soils. *See, e.g., Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1982 CCH OSHD ¶26,128 (No. 76-2636, 1982), *Davey Tree*, 11 BNA OSHC 1898, 1984 CCH OSHD ¶26,852 (No. 77-2350, 1984). Respondent's description of its safety program, training and instructions to experienced employees, while far from perfect, stands unchallenged on this record. In addition, the Secretary

