

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,

v.

Tire Centers, LLC,
Respondent.

OSHRC Docket No. **12-1773**

Appearances:

Joseph B. Luckett, Esquire, U.S. Department of Labor, Office of Solicitor, Nashville, Tennessee
For the Secretary

Melissa A. Bailey, Esquire, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C.
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (Act). On March 4, 2012, the Occupational Safety and Health Administration (OSHA) inspected the Decatur, Alabama worksite of Tire Centers, LLC (Tire Centers) in response to a fatality that occurred the previous day. On August 9, 2012, OSHA issued two citations to Tire Centers with a total proposed penalty of \$11,000.00. Tire Centers filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Birmingham, Alabama on April 17 and 18, 2013.

Prior to the hearing, the parties reached an agreement resolving Citation No. 1, Items 2a and 2b as serious with a \$3,000.00 penalty; and Citation No. 2, Items 1 and 2 as other than serious with no penalty (Tr. 7; Secretary's brief, p. 11). Remaining for disposition is Citation No. 1, Item 1 which was amended to allege a serious violation of 29 C.F.R. § 1926.177(f)(10) for

Tire Centers's failure to ensure that employees stayed out of the trajectory zone when multi-piece rim wheels were being handled.¹

The parties filed post-hearing briefs on July 1, 2013. For the reasons set forth below, the undersigned vacates Item 1 of Citation No. 1.

Jurisdiction

The parties stipulated that Tire Centers is an employer within the meaning of the Act and that the Commission has jurisdiction over this matter (Tr. 10-11). On this basis, the undersigned finds that at all relevant times Tire Centers was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The undersigned also finds that the Commission has jurisdiction over the parties and subject matter in this case.

Background

OSHA Compliance Officer (CO) Jennifer McWilliams began her inspection of Tire Centers on Sunday, March 4, 2012 (Tr. 18-19). The inspection was in response to the reported fatality of Tire Centers's employee, Joseph Sparks, on March 3, 2012. McWilliams inspected the accident site at the Decatur service center and discussed the accident with Jeff Davis, the service center manager² (Tr. 19-21). As a result of the inspection, McWilliams determined that a tire and rim explosion had occurred on the jobsite (Tr. 26-27).

Tire Centers is a wholly owned subsidiary of Michelin and a franchise operation of Michelin Retread Technology (Tr. 202). Tire Centers has approximately 1900 employees nationwide with 14 at the Decatur service center. Of the 14 Decatur service center employees, 9 are non-management employees (Exh. C-1). The Decatur service center provides service for large off-the-road (OTR) tires. It also has an on-site tire service shop for light-duty passenger vehicles. The Decatur service center is closed on Saturday and Sunday (Tr. 19, 24, 51-52). The OTR tires serviced by Tire Centers are used on very large pieces of earthmoving equipment, which are typically utilized at a mine or quarry (Tr. 23, 168-69; Exh. R-11). Approximately 99% of the work on the OTR tires was performed at the customer's site, not at the Tire Centers service center (Tr. 117-18, 133).

¹ An Order Granting Secretary's Motion to Amend the Citation was issued March 1, 2013.

² Also present were Jarrett Robinson, Tire Centers's director of environmental health and safety, and Dave Buchanan, Tire Centers's technical trainer (Tr. 21).

Sparks had been an OTR tire service technician since 1989 (Tr. 169). He worked for Tire Centers for 10 years. Prior to working for Tire Centers, Sparks worked for McGriff Tire and Cobra Tire. On Saturday, March 3, 2012, Sparks was the “on-call” service technician for OTR tires. That morning, he had been working at the customer’s location and returned to the Decatur service center to get an additional tire for the customer’s dump truck (Tr. 24). A video from Tire Centers’s surveillance camera was reviewed to determine the sequence of events that morning. Sparks arrived at the service center at approximately 9:57 a.m. The angle of the camera was such that it did not show him working on the tire, but showed him going in and out of the building between 9:57 a.m. and 10:33 a.m. At 10:33 a.m., the camera on the side of the building near Sparks’s work area was knocked to a different angle and stopped recording (presumably as a result of the tire explosion). The tire Sparks was handling was 24 inches wide, with a 35-inch diameter multi-piece rim wheel, and over 85 inches at its external diameter. The rim wheel components consisted of a wheel base, inside flange, outside flange, bead seat band, O-ring, and lock ring (Tr. 25-26, 30, 33). Tire Centers conducted an investigation of the accident and determined there was an explosion of the tire and rim (Tr. 194-95).

Later on the day of the accident, Dennis Doggett received a call from the customer who told him Sparks had not returned with the tire. Doggett has been a tire service technician with Tire Centers for three years. He and Sparks were the only employees who handled OTR tires for the Decatur location. When Doggett was unable to reach Sparks by phone, he went to the Decatur service center and saw Sparks’s body on the ground under the tire handler.³ Doggett moved the tire handler over approximately 5 feet and could then see that Sparks had not survived. This was approximately three hours after the explosion of the tire (Tr. 27-28, 98, 106-07).

Photographic evidence reveals that, at the time of the explosion, the tire was in a vertical position held by the two “hands” of the boom truck’s tire handler. After the explosion, the components of the multi-piece rim wheel were strewn across various areas in the service yard. The wheel base, which weighed about 400 pounds, was found approximately 43 feet from the work area, and the outside flange found 49 feet from the work area. Sparks’s death appeared to

³ Due to the size and weight of the tires and rim wheel, a boom truck with a tire positioner (or tire handler) attached to the truck’s boom is used to lift and move the tire. The tire handler has jaws or “hands” which grip the tire on each side of its outer diameter. Each “hand” is attached to an arm that is attached to the crossbar that is connected to the truck’s boom (Tr. 105; Exh. C-2, C-4).

result from being hit in the chest and abdomen by a flange and the bead seat band (Tr. 29, 35-38, 42, 44-45; Exhs. C-2, C-5 - C-8).

At the hearing, Doggett explained how a multi-piece rim is mounted on a tire. First, the wheel base is placed horizontally on two blocks so that it is a few inches off the ground. Next, the first flange ring is put on the wheel base and the tire is placed on the wheel base; then, the second flange ring, the bead seat band, the O-ring and the lock ring are attached. Afterwards, 5 to 10 psi of air is added to the tire to fully seat⁴ the components. At this time, the lock ring is lightly tapped with a hammer to ensure all the components are fitting together properly. During the “seating” the tire can either be horizontal on blocks or moved to a vertical position held by the tire hands. Once the tire is seated, the valve core is inserted and a 12-foot compressed air line (whip line) is attached to inflate the tire up to 30 to 45 psi for transportation to the customer’s site. The whip line allows the technician to stand a safe distance from the tire – out of the trajectory or “no zone.” If the components do not fully seat, then the tire is deflated, all the component parts are removed and cleaned, and the process is started over. Doggett also explained that the tire handler, with its two hands, forms a “100% safety cage”⁵ (Tr. 100-110, 120).

Doggett testified that because the air compressor on Sparks’s truck was turned off, it was likely that Sparks had inflated the tire and was getting ready to load the tire onto the truck at the time of the accident. Doggett guessed that Sparks noticed something was wrong and tried to fix it while standing in the trajectory. He could see the hammer on the ground just above Sparks’s hand. While looking at the rim pieces scattered throughout the work site, Doggett noticed that a 6 to 7 inch portion of the 35-inch lock ring was “twisted like a pretzel” indicating the lock ring might not have fully seated. Doggett assumed Sparks had walked into the “safety cage” to hit the rim with a hammer because he found Sparks under the tire handler with the hammer near his hand (Tr. 121, 123, 126-27; Exh. C-2).

As a result of McWilliams’s inspection, OSHA issued Item 1 of Citation No. 1 for a violation associated with the tire explosion. As noted above, Item 1 of that citation was amended to allege a violation of 29 C.F.R. § 1926.177(f)(10), which is at issue in this proceeding.

⁴ “Fully seated” means that all the rim components fit tightly together, with no gaps (Tr. 110).

⁵ The safety cage Doggett referred to is a “box” formed by the tire being held vertically by the tire hands, the two arms of the tire handler, and the back crossbar (which is attached to the boom) (Tr. 11-12, 193-94).

DISCUSSION

The Secretary has the burden of establishing the employer violated the cited standards.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The standard cited here is found in Subpart N which covers materials handling and storage standards.

Citation No. 1, Item 1 (as Amended)

This item alleges a serious violation of 29 C.F.R. § 1910.177(f)(10), which states, in pertinent part:

(f) *Safe operating procedure—multi-piece rim wheels.* The employer shall establish a safe operating procedure for servicing multi-piece rim wheels and shall assure that employees are instructed in and follow that procedure. The procedure shall include at least the following elements:

.....
(10) Whenever multi-piece rim wheels are being handled, employees shall stay out of the trajectory unless the employer can demonstrate that performance of the servicing makes the employee's presence in the trajectory necessary.

There is no dispute that the standard applies. Further, the parties stipulated that at the time of the accident Sparks was "in between the two arms of the tire handler, the back crossbar and the tire itself. In other words, he was inside the box formed by those four pieces." (Tr. 11-12; Exh. R-1). Thus, Sparks was in the trajectory⁶ (Respondent's brief, p. 12; Secretary's brief, p. 10; Tr. 193-94). Tire Centers does not assert that it was necessary for Sparks to be in the trajectory to do his work. As Sparks was in the trajectory and there is no evidence that it was necessary for him to be there, the standard was violated. The Secretary has met the first three elements of his burden of proof.

The Secretary also must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). No one was present when Sparks handled

⁶ "Trajectory means any potential path or route that a rim wheel component may travel during an explosive separation, or the sudden release of the pressurized air, or an area at which an air-blast from a single piece rim wheel may be released. The trajectory may deviate from paths which are perpendicular to the assembled position of the rim wheel at the time of separation or explosion." 29 C.F.R. § 1910.177(b).

the tire; therefore, actual knowledge cannot be established. When actual knowledge cannot be established, the Secretary may meet his burden by presenting evidence of constructive knowledge. The Secretary may prove constructive knowledge by showing that the employer's safety program was deficient and therefore the violative conduct was reasonably foreseeable. *See ComTran Group, Inc.*, 2013 WL 3814935, *6, *13 (11th Cir. July 24, 2013); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814-15 (No. 87-692, 1992).

The Secretary alleges Tire Centers had constructive knowledge of the violation because its safety program was deficient; essentially arguing Tire Centers did not exercise reasonable diligence (Secretary's brief, pp. 13-14). Several factors are considered to determine if an employer exercised reasonable diligence. These include the "employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of a violation." *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001) (citations omitted). For a safety program to be effective, it is necessary to include reasonable supervision to detect violations of work rules. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (citations omitted). However, an employer is not required to detect every violation. *Id.*

Both parties agree that Tire Centers had a work rule to stay out of the trajectory and that its employees were trained in that rule (Secretary's brief, p. 16; Respondent's brief, p. 21). Tire Centers's safety program included training materials from the Tire Industry Association (TIA), especially for commercial and earthmover tire service (Tr. 158). Tire Centers's safety manual, "Servicing Multi-Piece and Single-Piece Rim Wheels Policy and Program," included information from tire manufacturers, the OSHA standards, and other similar source documents (Tr. 160-61; Exh. R-9). Additionally, the OTR technicians receive monthly safety training, daily safety briefs, monthly safety tips, and safety alerts (Tr. 112, 161, 197-98; Exhs. R-7, R-8, R-9).

Jarrett Robinson, Tire Centers's Director of Environmental Health and Safety, a safety professional for 20 years, 6 of those with Tire Centers, testified about Tire Centers's training and safety program, and his investigation of the fatality accident. Robinson testified that although tire service technicians are not required to be TIA certified, it is a goal to obtain certification (Tr. 207). TIA's records show that Sparks was certified in 2007 and recertified in 2010 as a TIA Commercial Tire Service Technician (Tr. 64; Exh. C-12). Robinson's investigation of the

fatality accident revealed Sparks's training manual was in his service truck and included highlighting and notations by Sparks (Tr. 169-76; Exhs. R-12 through R-16). As a result of his investigation, Robinson concluded that Sparks was in the trajectory when the tire exploded and the rim parts separated (Tr. 155-56, 179-80, 193-94, 199).

The undersigned observed Robinson's demeanor on the witness stand and found him to be credible and knowledgeable regarding Tire Centers's training and safety program. Robinson reiterated that one of Tire Centers's cardinal safety rules is to stay out of the trajectory because it is a very hazardous area, and this cardinal safety rule is included in all of the various training and safety documents (Tr. 161-63; Exh. R-6). For example, the February 9, 2012 safety tip signed by Sparks noted: "[S]tay clear of the 'Trajectory Zone' when inflating or inspecting rim components. Restraining devices such as a tire cage or boom WILL NOT contain the air blast in the event of an explosion" (Tr. 165-66; Exh. R-7).

The evidence shows that Tire Centers provided both initial and ongoing training, with specialized training for tire technicians and a general emphasis on cardinal safety rules. Kevin Rohlwing, TIA's Senior Vice President of Training, testified as an expert witness. The undersigned qualified Rohlwing as an expert with respect to the content of TIA's training materials, how those contents are communicated, and the training materials generally used by commercial tire centers (Tr. 227-28). Rohlwing testified that TIA training included classroom instruction on safe procedures, a written examination, and a hands-on skills demonstration (Tr. 222, 230-35). The undersigned finds Rohlwing knowledgeable and credible, as he testified with confidence and expertise.

The ongoing training implemented by Tire Centers is evident by Doggett's testimony. Doggett had no previous experience with the type of tire handler Tire Centers used; therefore, Sparks trained him on how to use the tire handler and to stay out of the trajectory. He was told to never stand between the tire hands. According to Doggett, he never stood in the trajectory unless it was necessary, for example, to bolt the tire to the machine. Doggett testified that staying out of the trajectory is a cardinal safety rule and violation of the rule could result in automatic termination. He admitted he entered the trajectory only once, early in his on-the-job training with Sparks, and Sparks reprimanded him and told him he could be fired for that safety violation. Doggett is TIA certified and received TIA training three times since he began working for Tire Centers, most recently in April 2012 (Tr. 111, 119-21, 131, 135).

As a part of its safety program, Tire Centers had employees accompany service technicians on service calls. Robinson confirmed that experienced service technicians or managers accompany service technicians on service calls to observe and assess a service technician's proficiency on the job and safety compliance, although no documentation of the observations was required (Tr. 178, 182). Gary Brand, salesman at the Decatur service center accompanies OTR tire technicians at the Decatur service center. Brand has worked at the Decatur service center for 12 years, and worked with Sparks for 14 years at Tire Centers and other companies. Brand has 37 years of experience with OTR tires. He frequently accompanied the OTR service technicians, including Sparks on their service calls. According to Brand, he never observed Sparks break a safety rule. Brand also accompanied Doggett on OTR service calls for an entire workday; usually three times a week, and watched him at work. Brand knew how to do the actual work on OTR tires. Because Doggett only entered the trajectory when necessary, Brand never had a reason to correct him (Tr. 116-19). While he had no power to hire or fire an employee, Brand corrected employees he saw engaged in unsafe behavior. He also discussed his observations with service center manager Jeff Davis.

A preponderance of the evidence shows Tire Centers had a work rule, adequately trained its employees and took steps to discover safety violations. The Secretary argues, however, that Tire Centers did not take steps to discover safety violations and did not enforce its disciplinary policy. The Secretary contends that because Brand was not TIA certified and had not been a service technician for 25 years, he was not qualified to provide safety oversight for an OTR technician⁷ (Secretary's brief, pp. 8, 14, 16-17). Tire Centers asserts its safety program included adequate, ongoing evaluation of a service technician's skills and it has a progressive disciplinary policy for non-compliance with its safety rules. Tire Centers argues that its recurring training and recertification was one way to reassess an employee's skills. Further, Tire Centers contends Brand's observations made while accompanying service technicians were a routine, ongoing means to observe a technician's work and monitor compliance with safety rules (Respondent's brief, pp. 22-24).

⁷ The Secretary points out that Brand and Sparks were friends, which affected Brand's testimony (Secretary's brief, p. 16). However, other than stating the fact that Brand was a friend of Sparks, the Secretary did not provide evidence to show how this friendship affected his ability to observe Sparks's work for safety violations or that his testimony was slanted because of the friendship. The undersigned is not persuaded that the friendship affected Brand's testimony.

The undersigned finds, given that most of an OTR technician's work is at a customer's site, having Brand routinely accompany service technicians is a reasonable way to determine if OTR technicians comply with company safety policy. Brand was a tire service technician prior to becoming a sales manager and had a total of 37 years of experience with OTR tires. He was Mr. Sparks's supervisor at two prior companies. Further, Doggett confirmed that Brand knew how to work on the tires. Brand was the eyes and ears of Tire Centers, enabling it to observe the OTR technician's behavior and compliance with its safety program. The Secretary's implication that Brand is not qualified to observe an OTR technician is unsupported. There is no requirement that the individual observing an OTR technician for safety compliance also must be a certified technician. The undersigned finds that Brand was capable of determining whether a technician complies with Tire Centers's safety rules, especially regarding the trajectory.

As the Commission stated in *Dover Elevator Co.*, "where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required." *Dover*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993) (citations omitted). Here, Tire Centers had a clear and specific rule to stay out of the trajectory, which was consistently communicated in multiple ways to its employees. Further, Sparks was an experienced OTR tire technician when he was hired by Tire Centers. He completed TIA training and had been certified and recertified by TIA. Brand had observed him on many occasions and never observed a safety violation; in particular, he never saw him work in the trajectory zone. The undersigned finds that based on Sparks's experience, training, certification and lack of prior unsafe behavior, Tire Centers had no reason to expect him to be in the trajectory unnecessarily or that he needed additional supervision or training.

The Secretary relies on two Michelin audit forms to show Tire Centers's Decatur service center did not follow its own safety policy (Exhs. C-9, C-10). The testimony adduced regarding the meaning of the audits' contents was vague and speculative (Tr. 53-56, 77, 180-83). Therefore, this evidence was not helpful in the analysis of this case.⁸

The undersigned disagrees with the Secretary's allegation that Tire Centers did not enforce its disciplinary policy. Commission precedent allows consideration of both pre- and

⁸ The undersigned has considered all of the parties' arguments and finds that any argument that was not specifically addressed herein to be unpersuasive and unsupported by a preponderance of the evidence.

post-inspection discipline. *See American Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012). Robinson testified that a violation of a cardinal safety rule is dealt with more severely than a violation of other rules, but does not require the termination of an employee (Tr. 189, 196). Tire Centers submitted 29 disciplinary action documents as evidence of its progressive disciplinary program for safety infractions. These actions include terminations and written warnings over a three-year period both before and after the inspection date. For example, one action dated July 12, 2011, was for the termination of a tire service technician because he was in the trajectory, a violation of one of Tire Centers's cardinal safety rules (Tr. 85-86; Exh. R-17).

The Secretary points out that none of the disciplinary actions were for an employee at the Decatur service center. However, Robinson stated he was not surprised there was not a recent disciplinary action for the Decatur center because it was a smaller service center and the managers there pushed a strong safety message (Tr. 189-90, 206). The Secretary presented no evidence of an instance where Tire Centers had not followed its own disciplinary program. The undersigned finds Tire Centers had a progressive disciplinary policy that it adequately enforced. Further, the undersigned finds that Tire Centers has shown that it has a strong safety training program, with a particular emphasis on the hazard of working in the trajectory. Tire Centers's program included ongoing monitoring of safety violations and a program of progressive discipline that included terminations for safety violations.⁹

The Secretary has not shown that Tire Centers's safety policy was deficient and, therefore, has not established knowledge.¹⁰ Accordingly, the Secretary has failed to establish a prima facie case. Item 1 of Citation No. 1 is vacated.

⁹ Longstanding Commission precedent holds that an employer is not held to a standard of strict liability; instead, an employer is responsible for the conditions it can reasonably prevent. *See Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1868-69 (No. 16147, 1981) (citations omitted). In the instant case, the loss of life is tragic; however, a work-related accident does not automatically result in a violation of an OSHA standard.

¹⁰ Tire Centers argues that if a violation is established, the violation was the result of unpreventable employee misconduct. As the Secretary has not proven his case, it is not necessary for the undersigned to address the affirmative defense of unpreventable employee misconduct. However, the evidence reveals that TCI has met the elements for the defense as it has established a work rule to prevent the violation; it adequately communicated the rule to its employees; it took reasonable steps to discover violations of the rule; and it effectively enforced the rule. *See Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted).

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 findings of fact and conclusions of law, it is hereby ORDERED that:

- (1) Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.177(f)(10), is VACATED;
- (2) Items 2a and 2b of Citation No. 1, alleging serious violations of 29 C.F.R. § 1910.253(b)(5)(ii)(G) and 29 C.F.R. § 1910.253(b)(4)(iii), are AFFIRMED as serious and a penalty of \$3,000.00 is assessed;
- (3) Item 1 of Citation No. 2, alleging an other than serious violation of 29 C.F.R. § 1910.178(l)(4)(iii), is AFFIRMED as other than serious and no penalty is assessed; and
- (4) Item 2 of Citation No. 2, alleging an other than serious violation of 29 C.F.R. § 1910.305(g)(2)(iii), is AFFIRMED as other than serious and no penalty is assessed.

SO ORDERED.

/s/ _____

Sharon D. Calhoun
Administrative Law Judge

Date: September 24, 2013
Atlanta, Georgia