



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MOORHEAD BROTHERS, INC.,

Respondent.

OSHRC Docket No. 14-0812

Appearances: Wayne P. Marta, Esq.
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio,
For the Complainant

Corey V. Crognale, Esq.
Ice Miller LLP, Columbus, Ohio,
For the Respondent

Before: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

On January 13, 2014, a truck owned and operated by the Respondent, Moorhead Brothers, Inc. (MBI), was backing up on a two-lane rural road near London, Ohio, when it struck and killed an MBI employee who was on foot.

The Occupational Safety and Health Administration (OSHA) conducted an inspection and on April 8, 2014, issued a one-item Citation and Notification of Penalty (Citation) to MBI

that alleged a serious violation of the construction industry standard at 29 C.F.R. § 1926.601(b)(4)(ii). Section 1926.601(b)(4) provides:

No employer shall use any motor vehicle equipment having an obstructed view to the 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 that it is safe to do so.

The Citation alleged that MBI violated this standard because the truck’s “operator did not have an unobstructed view to the rear of his vehicle and was not directed during the backing operation by an observer.”¹

¹ Section 1926.601(b)(4) is a specification standard that prescribes two alternative means of compliance. The Citation, which the Secretary’s complaint incorporated by reference, expressly addressed only one alternative (use of an observer) and not the other (a reverse signal alarm). Nevertheless, the issues actually tried at the hearing included whether MBI had successfully employed either alternative – the use of an observer or the audibility of the truck’s alarm.

MBI has not argued that the Citation’s description of the alleged violation is flawed by failing to expressly allege a failure to comply with the reverse signal alarm alternative. All the same, the record would amply support the conclusion that a post-hearing amendment would not be inappropriate, because the parties consented to trying the issue of whether MBI complied with the cited standard through that alternative. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984) (finding post-hearing amendment of pleadings pursuant to Fed. R. Civ. P. Rule 15(b) “is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so”) (emphasis in original).

The issue of the compliance with the reverse signal alarm alternative was first clearly joined by MBI’s motion for summary judgment, which was filed over three months before the hearing. MBI sought summary judgment on the ground that there was no genuine dispute of material fact that the truck’s reverse signal alarm was operable on the day of the accident. (By order issued about six weeks before the hearing, the undersigned denied that motion, concluding that dispute of fact existed as to (1) whether the vehicle’s reverse alarm sounded, or (2) that if it did sound, whether it was audible above the surrounding noise level.) Further, in MBI’s prehearing statement filed about two weeks before the hearing, the attorney for MBI identified the operability of the reverse signal alarm as being a focus of the testimony that MBI intended to present at the hearing. (Respondent’s Prehearing Submission, p. 2). And in his opening statement at the hearing, MBI’s attorney focused on anticipated evidence regarding the

MBI timely contested the Citation, and the Executive Secretary of the Occupational Safety and Health Review Commission (Commission) docketed the matter on May 30, 2014. The Commission's Chief Judge thereafter assigned the matter to the undersigned for hearing and decision. The undersigned conducted an evidentiary hearing in Columbus, Ohio, on April 21 & 22, 2015. The parties thereafter simultaneously filed post-hearing principal briefs as well as reply briefs, with briefing completed on July 10, 2015.

The truck involved in the accident was equipped with a reverse signal alarm. The determinative issue is whether the Secretary satisfied his burden to prove by a preponderance of the evidence that the truck's reverse signal alarm was not operating properly such that it was not audible above the surrounding noise level. As described below, the evidence on that issue is in equipoise, and consequently the quantum of evidence falls short of what the Secretary needs to meet his burden. The Citation is accordingly vacated.

FINDINGS OF FACT

A preponderance of the evidence established the following:

1. MBI is a site-clearing contractor headquartered in Blacksburg, South Carolina. MBI also has a business location in Cambridge, Ohio. MBI specializes in site development and right-of-way clearing for railroads, power lines, and gas pipeline easements. (T. 359). MBI employs between 40 and 100 employees depending on its projects at any given time. (T. 360). MBI's business affects interstate commerce.

2. In late 2013, a utility company contracted with MBI to clear a 40-mile long right-of-way for the erection of a new electricity transmission line in Madison County, Ohio. This project was known as the London-Tangy Project. (T. 202, 361). About two miles of the 40-mile

operability of the reverse signal alarm. (T. 20-25). Finally, a central theme of the post-hearing briefs of both parties was compliance with the cited standard's reverse signal alarm alternative.

right-of-way entailed the widening of an existing utility easement, while the remainder involved the initial clearing of a newly established utility easement. (T. 122-23, 202, 261, 361-63).

3. On the morning of January 13, 2014, an MBI crew went to a location on Simpson Road (Township Road 104) near London, Ohio, that was to serve as a staging point for MBI's heavy equipment. Simpson Road is a two-lane paved road about two miles long that meanders through farmland on a northwest to southeast axis, with termini at U.S. Route 42 to the northwest and State Road 142 to the southeast. At the location of the fatal accident, Simpson Road is about 22 feet wide, with grassy shoulders that slope down to form drainage ditches on both sides. (Exs. C-4, C-5, C-6, C-7 & C-8; T. 28-32).

4. Four MBI employees arrived at the Simpson Road site around 7:30 a.m. These four employees were the crew Foreman (Nick Yurgevich), a newly hired Laborer (Ryan Godby) who was designated to assist the Foreman, and two other workers (Brent Garner and Alvaro Gutierrez) who were to serve as Flaggers for controlling public traffic on Simpson Road. (T. 118, 201-02, 203-04, 207, 211-12, 221; Ex. C-20; Ex C-12, p. 1). The Foreman was the employee who was killed later that morning.

5. Among the initial activities of these four employees was the placement of about ten used tires to the side of the road at the staging point. (Ex. C-12, p. 2). (MBI would later be delivering tracked vehicles to the staging point -- the used tires would be laid down on the road for the tracked vehicles to drive over in order to avoid damaging the pavement (Ex. C-12, pp. 2-3; T. 259).)

6. At about 8:30 a.m., two other MBI employees arrived at the site in separate vehicles -- the Driver of the truck involved in the fatal accident (Thomas Davis), and the Project Manager (Alan Vuchak). (T. 118, 201-02, 203-04, 207, 211-12, 221; Ex. C-20; Ex C-12, p. 1).

7. The vehicle involved in the fatal accident was a 2002 Sterling model LT9500 three-axle flatbed straight truck that was equipped with a knuckle-boom truck crane. (Exs. C-9, C-14; T. 257). The truck was equipped with a reverse signal alarm that was designed to emit a high pitched beeping sound whenever the truck was put in reverse gear. (T. 345-46, 350).

8. Before the day of the accident, ten timber mats had been loaded onto the truck's flatbed in Cambridge. (Ex. C-15, p. 1; T. 288-89). A single timber mat consists of about five or six pieces of hardwood lumber that are bolted together to create a mat that is about sixteen feet long, four feet wide, and eight inches high. (T. 277-78). (The photographs at Exhibits C-9 and C-10, show the ten timber mats on the truck's flatbed. (T. 284).) During clearing operations, the timber mats are placed over ditches, gullies, wetland areas and the like for heavy equipment to drive over to avoid damaging the earth. (T. 123).

9. Before departing Cambridge for Simpson Road on the day of the accident, the Driver was required to conduct a pre-trip inspection of the truck. As part of that pre-trip inspection, the Driver was required to inspect the truck's reverse signal alarm. The Driver prepared a written record of his inspection that indicated that he had inspected the vehicle and that no deficiencies had been identified. (Ex. C-23, p. 6; T. 292-94). The Driver departed Cambridge about 6:30 a.m. on the approximate 100-mile trip to the staging point on Simpson Road.

10. When the Driver arrived at the staging point, the Foreman instructed him to drive the truck to where the loose tires had been placed on the side of the road and to prepare to offload the timber mats there. (Ex. C-15, p. 2; T. 257, 278-79). The Driver complied and drove southeast on Simpson Road, stopping the truck at the location identified. Both the Foreman and the Laborer who was assisting the Foreman were on foot near where the truck stopped. (Ex. C-11).

11. After the truck stopped, the two Flaggers took their respective positions on Simpson Road to control traffic. The Flaggers were positioned about 300 feet away from the truck in opposite directions on the road. (Ex. C-15, p. 2).

12. The Flaggers, Foreman, and Driver all were able to communicate by radio. (Ex. C-11; T. 231-32). To transmit from an individual radio, a user had to depress the transmission button, but no manipulation was required to receive and hear transmissions. (T. 119, 231-32).

13. After stopping the truck, the Driver exited the truck to untie the straps that had secured the timber mats to the flatbed.

14. As part of the operation of offloading the timber mats by using the truck's knuckleboom, two stabilizers (or outriggers) located on either side of the truck would have to be deployed to stabilize the truck. Deployment of the stabilizers would immobilize the truck on the roadway. (T. 279). The Flaggers would "close the road down to through traffic" during offloading of the timber mats. (T. 206-7, 195-96, 257).

15. With the two Flaggers in place and the truck stopped on the road, but before the Driver had begun offloading the timber mats, the Project Manager arrived at the worksite in his personal vehicle. (T. 209-11). He drove past the Flagger stationed to the southeast and drove his vehicle to where the truck was stopped, where he spoke with the Foreman and the Driver. (T. 211). The Project Manager informed them that the adjacent property owner wanted MBI to access his property about 50 yards behind where the truck was stopped, and that the Driver would need to back up the truck "a little bit" to offload the timber mats there. (T. 213-14; Ex. C-11, pp. 3-4; Ex. C-12, p. 2; Ex. C-15, p. 2; Ex. C-18).

16. The Project Manager then drove away from where the truck was stopped and traveled the approximate 300 feet to where the northwest Flagger was stationed. (T. 221-23, 211-14).

17. After the Project Manager had driven away, the Foreman instructed the Driver to back up the truck to the point that the Project Manager had identified. (Ex. C-15, p. 2). The Foreman also instructed the Laborer who was assisting the Foreman to move some of the used tires on the side of the road to that same area. (Ex. C-12, p. 2).

18. When the Driver last saw the Foreman before the accident, the Foreman was on the side of the road, in front and to the right of the truck, and he was picking up two of the loose tires. (Ex. C-11, p. 4; Ex. C-15, pp. 2-3). When the Laborer helping the Foreman last saw the Foreman before the accident, the Foreman was in front of the truck and was rolling loose tires. (T. 119; Ex. C-12, p. 3).

19. The truck had an obstructed view to the rear. (T. 20, 108; Ex. C-10). The temperature was about 40°F, it was windy, and there was no precipitation. (T. 256; Ex. C-4; Ex. C-12, p. 3; Ex. C-24, p. 19). The windows of the truck's cab were closed. (Ex. C-15, p. 5). There was no public traffic, construction equipment, farm equipment, or any other extraneous noise source in the vicinity of the truck. (T. 255-56).

20. No one was acting as an observer to instruct the Driver that it was safe to move the truck in reverse, and the Driver did not raise any concern that there was no observer. The Driver looked alternately in both side mirrors and did not see any person or any vehicular traffic. He put the truck in reverse and began to back up the truck, continuing to alternate his view out the two side mirrors. (Ex. C-11, p. 6-7; Ex. C-15, p. 3). The truck struck the Foreman after traveling in reverse for about 25 feet, while the Foreman was in the roadway moving loose tires.

(Ex. C-11, pp. 6-7). The Foreman had not transmitted by his radio or otherwise informed the Driver that he had moved to behind the truck, and the Driver was unaware that the Foreman had moved from in front of the truck to behind it. (Ex. C-11, p. 9).

21. When the Driver realized he had run over something he stopped the truck, exited the truck and saw the Foreman and the loose tires that the Foreman had been moving under the truck's four left rear wheels. (Exs. C-11 & C-15; T. 313). The Foreman died before he could be extricated from under the truck. (T. 90).

22. The Driver could not recall the speed at which the truck was moving when it struck the Foreman. (Ex. C-11, p. 7). The Driver did not recall hearing the reverse signal alarm while the vehicle was in reverse. (Ex. C-11, p. 9; Ex. C-15, p. 5).

23. The Laborer helping the Foreman move the loose tires did not see the accident and he did not recall hearing anything before the accident. (Ex. C-12, pp. 3-4).

24. At the time of the accident, the Project Manager and the two Flaggers were all about 300 feet away from the truck. None of them recalled hearing the truck's reverse signal alarm before the accident. (Ex. C-11; T. 221-22, 228, 254-55).

25. The Project Manager believed that the Foreman had the responsibility to serve as the observer for the Driver whenever the truck was moving in reverse. (T. 230-33, 281-82).

26. Trooper Frost of the Ohio State Highway Patrol arrived at the accident scene and interviewed the Driver as part of the state's investigation. The trooper asked the Driver, "Does your truck have an audible warning when in reverse?" The Driver responded, "Yes, but sometimes it doesn't work." The trooper then asked the Driver whether MBI was "aware of this problem." The Driver replied, "No, because they only fix the big problems." (Ex. C-11, p. 6; T. 47). The trooper then asked the Driver 16 more questions that were unrelated to the operation of

the reverse signal alarm, and then the trooper asked the Driver, “Did [the Foreman] yell or did you hear anything” before he felt the truck impact the Foreman. The Driver responded simply, “No.” (Ex. C.11, p. 9). The Driver never said to Trooper Frost that the reverse signal alarm was not working on the day of the accident. (T. 64).

27. Trooper Brian Alloy of the Ohio State Highway Patrol was also involved in the state’s accident investigation. Trooper Alloy is designated as a Motor Carrier Enforcement Officer, and in that capacity he is involved in enforcing state and federal department of transportation (DOT) motor carrier safety regulations for commercial vehicles. (T. 72). Trooper Alloy inspected the truck for compliance with applicable DOT regulations at the scene of the accident between 11:05 a.m. and 12:21 p.m. (T. 76).

28. Before Trooper Alloy began his vehicle inspection, he learned from Trooper Frost that the Driver had said that the truck’s reverse alarm did not always work. (T. 49). This prompted Trooper Alloy to check the operability of the reverse signal alarm, even though the state and federal regulations that he is involved in enforcing do not require commercial vehicles to be equipped with operable reverse signal alarms. (T. 79, 290, 292). During his inspection, Trooper Alloy observed that when the truck was put in reverse gear, its white backup lights illuminated and its reverse signal alarm sounded. (T. 81, 85-88). He annotated his written inspection report consistent with these observations, as follows: “Back up/reverse lights and audible warning operable.” (Ex. R-6, p. 2).

29. The state highway patrol completed its accident investigation and cleared the accident site around 12:21 p.m. (Ex. R-5, p. 1). The Driver was driven back to Cambridge in another vehicle by MBI’s Safety Manager (Kiley Mullinax), who had driven to the worksite from Cambridge after learning of the accident. (Ex. C-15, p. 5).

30. On January 13, 2014, after the truck's return to MBI's Cambridge location, the Safety Manager tested the truck's reverse signal alarm and it was operable. (T. 347).

31. While the Ohio State Highway Patrol was conducting its accident investigation, it notified the OSHA Area Office in Columbus of the fatal accident. (T. 64-65). Compliance officer (CO) Stanley Kauchak was dispatched to investigate. The CO arrived at Simpson Road at about 12:30 p.m., only minutes after the highway patrol had cleared the accident site and everyone had departed. (T. 168; Ex. R. 5, p. 1). A local farmer showed the CO the location on Simpson Road where the accident had occurred, and the CO went there and took some photographs of the scene. (Exs. C-4 through C-8 inclusive). The CO then undertook to contact personnel from MBI in an effort to formally open an inspection with MBI that day. (T. 127-28; Ex. R-1, ¶4).

32. The CO was able to reach MBI's Project Coordinator (Shawn Greer) by telephone sometime that afternoon and informed him that he wanted to open an inspection. (Ex. C-2, p. 2). The Project Coordinator responded that he would check with his supervisor and that he would telephone the CO after having done so. After some time passed without hearing back, the CO telephoned the Project Coordinator. The Project Coordinator then told the CO that he and all the other MBI personnel were traveling back to Cambridge after "a rough day for the company," and that they would not reverse course to meet with the CO that day. (T. 127-28; Ex. C-2, p. 2).

33. The following day, January 14, 2014, the CO spoke by telephone with the President of MBI, who was in South Carolina, to discuss the matter of formally opening an inspection with MBI. The President told the CO that if he went to MBI's office in Cambridge the personnel there would give the CO "full cooperation." (T. 128-29). As a result, the CO again spoke with the Project Coordinator by phone. The Project Coordinator suggested that the CO travel to

MBI's office in Cambridge that day, and he told the CO that MBI would cooperate fully in the CO's investigation. As a result, the CO traveled to MBI's location in Cambridge that day.

34. Before the CO arrived at MBI's Cambridge location on January 14, 2014, MBI's Safety Manager again tested the vehicle's reverse signal alarm, and again determined that it was operable. (T. 347).

35. The CO arrived at MBI's Cambridge office on January 14, 2014, and formally opened the OSHA inspection. The CO interviewed some of the MBI employees who had been at the worksite at the time of the fatal accident, but he did not interview the Driver, who had been admitted to the hospital due to mental health concerns arising out of the fatal accident. (T. 129-30, 184; Ex. R-1, ¶5). The CO took photographs of the truck involved in the fatal accident. (Exs. C-9 & C-10). The CO did not request that the operation of the reverse signal alarm be demonstrated.

36. At the time of his visit to Cambridge on January 14, 2014, the CO did not know that the Driver had told Trooper Frost that the reverse alarm sometimes did not work. The CO also did not know that Trooper Alloy had tested the alarm and found it to be operable. (T. 193). During the CO's visit on January 14, 2014, no one from MBI volunteered that the Safety Manager had twice tested the reverse signal alarm at Cambridge, once on January 13 and again on January 14, 2014, and that it had been operable both times. (T. 175-78, 194-95). At the conclusion of the CO's visit, the Safety Manager asked the CO whether MBI could return the truck to service, and the CO responded affirmatively. (T. 347).

37. After formally opening the inspection on January 14, 2014, the CO contacted the Ohio State Highway Patrol and requested the reports that the state patrol had completed in connection with its investigation. Sometime before January 27, 2014, the CO received from the

highway patrol the written records of the statement that the Driver provided to Trooper Frost, when the Driver said that the reverse signal alarm did not always work. The CO also received a one-page vehicle inspection report that Trooper Alloy had prepared, which bore the pagination “Page 1 of 1.” (Ex. C-13). That one-page document did not contain any reference to Trooper Alloy having tested the reverse alarm as part of his inspection. (Ex. C-13).

38. The Ohio State Highway Patrol also generated another version of Trooper Alloy’s report that was comprised of three pages, not just one page like the version of the report provided to the CO. The CO did not receive a copy of this three-page version of the report during the course of his investigation. The third page of the three-page version of that report contains Trooper Alloy’s observation that the reverse signal alarm was operable. (T. 131-34, 173; Exs. C-13 & C-14; Ex. R-1, ¶7; Ex. R-5, p. 3).

39. On January 27, 2014, the CO returned to MBI’s Cambridge office and interviewed the Driver. (T. 136; Ex. C-15). The CO asked the Driver about the operability of the truck’s reverse signal alarm, and the Driver said that “sometimes he hears the alarm and sometimes he doesn’t,” and then added that the reason he might not have heard the alarm was that “[i]n summer he runs [with] windows down and in winter the windows are left up.” (Ex. C-15, pp. 4-5; T. 177-78). The Driver told the CO that he did not remember hearing the alarm on the day of the accident (Ex. C-15, pp. 4-5), but he never said that the reverse signal alarm had not worked on the day of the accident. (T. 181). The Driver also told the CO that no one had ever served as a spotter or observer for him when he backed up the truck. (Ex. C-15, p. 3; T. 138-39). The CO did not ask the Driver whether he had performed a pre-trip inspection of the truck on the day of the fatal accident, and did not ask whether he had tested the operability of the reverse signal alarm as part of any such pre-trip inspection. (Ex. C-15).

40. Also while in Cambridge on January 27, 2014, the CO asked MBI's Safety Manager to demonstrate the truck's reverse signal alarm for him. The Safety Manager put the truck in reverse and twice backed it up a short distance. The CO was standing to the rear of the truck, and he did not hear the reverse alarm sound either time. (T. 191-93). From his position in the cab of the truck, the Safety Manager also did not hear the alarm sound. (T. 333-34). The Safety Manager then exited the cab and moved "up and under the back end of the truck" near the speaker, and from that nearby position he was able to hear the alarm, but it was emitting only a "very faint sound."² (T. 333-36). The temperature at the time was about 17°F, with winds making it feel near zero degrees, and there was ice on the alarm's speaker, which led the Safety Manager to conclude that the speaker could not vibrate and emit noise at its normal volume because it had "frozen up" after having been returned to service on January 14, 2014. (T. 198, 333-36, 348-51). MBI replaced the truck's reverse signal alarm later that day. (T. 337).

41. The Driver never reported to MBI that the reverse signal alarm sometimes did not operate. (Ex. C-11). The Driver had a commercial driver's license and he knew that if safety equipment did not work consistently, that it was his responsibility to report it for repair. (T. 343).

42. On December 16, 2014, the attorney for MBI secured an affidavit from Trooper Alloy that included a copy of the trooper's three-page vehicle investigation report that included the trooper's note, "Back up/reverse lights and audible warning operable." (Ex. R-7). The existence of the trooper's three-page report first became known to the CO and to the attorney for the Secretary in the course of the CO's deposition on December 17, 2014. (T. 172-73).

² In an affidavit that had been filed in support of MBI's motion for summary judgment, the Safety Manager stated that the reverse alarm had been "barely audible" during the demonstration on January 27, 2014. (Mullinax Affidavit dated 1/15/2015, ¶ 9).

DISCUSSION

The parties have stipulated to facts that establish the jurisdiction of the Occupational Safety and Health Review Commission (Commission) and coverage of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). (T. 13-14). The evidence of record is consistent with those stipulations.

To prove a violation of an OSHA safety or health standard promulgated under § 5(a)(2) of the Act, the Secretary must establish by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Id.*, 9 BNA OSHC at 2131, n. 17. Circumstantial evidence may be sufficiently probative to establish a fact by a preponderance of the evidence. *See, e.g., Okland Constr. Co.*, 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (deferring to Commission judge’s finding of fact where the circumstantial evidence supported both the judge’s reasonable inference as well as a contrary reasonable inference). Indeed, “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (internal quotation marks omitted), quoting *Rogers v. Mo. Pac. R. R. Co.*, 352 U.S. 500, 508, n. 17 (1957).

Applicability of § 1926.601(b)(4)

The cited standard, § 1926.601(b)(4), is in 29 C.F.R. part 1926. Part 1926 is applicable to construction work. The record evidence establishes that MBI's work on the London-Tangy Project was "construction work," so that the standards of part 1926 were generally applicable.

The starting point for determining whether an employer is engaged in construction work is 29 C.F.R. § 1910.12. Paragraph (a) of that section provides that the "standards in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work." Paragraph (b) of that section defines the term "construction work" in part as follows: "For purposes of this section, *Construction work* means work for construction, alteration, and/or repair, including painting and decorating." Paragraph (d) of § 1910.12 further defines the term "construction work" to "include[] the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of the existing transmission and distribution lines and equipment."

The London-Tangy Project involved the erection of a new electric transmission line, and thus falls squarely within the definition of "construction work" set forth in § 1910.12(d).

Commission precedent holds that "Part 1926 applies ... to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work." *Snyder Well Serv., Inc.*, 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982); *see also Nat'l Eng'g & Contracting Co. v. OSHRC*, 838 F.2d 815, 818 (6th Cir. 1987) (citing *Snyder Well* in upholding Commission's determination that employer was engaged in construction work). MBI's work in clearing the right-of-way in preparation for the erection of the new electricity transmission line was an integral and necessary part of the London-Tangy

Project. MBI's work on that project was thus "construction work" as defined in § 1910.12, so that the standards prescribed in 29 C.F.R. part 1926 applied to that work.

Paragraph (a) of § 1926.601 limits the scope of the cited standard to motor vehicles "that operate within an off-highway jobsite site, not open to public traffic." MBI contends that the standard does not apply because the fatal accident occurred when the truck was backing up on a public road, and thus was not operating "within an off-highway jobsite, not open to public traffic." (Resp't Br., 10). This argument is rejected.

After the truck came to a stop, the Flaggers were set up to control public traffic. As part of the unloading of the timber mats, the truck's stabilizers would have to be deployed, which would immobilize the truck in the roadway. The Flaggers would halt all public traffic while the truck was immobilized in the road and the Driver unloaded the timber mats to the side of the road (off the pavement) by using the truck's knuckle boom. (T. 206-7, 195-96, 257, 279). Because the truck's delivery of the timber mats would involve closing the road to public traffic at least temporarily, the truck would necessarily be operating within an "off-highway jobsite, not open to public traffic" within the meaning of § 1926.601(a). Moreover, because the truck's knuckle boom was to transfer the timber mats to the side of the road, and thus off the public road, the truck was operating within an "off-highway jobsite." It does not matter that at the time of the accident, the Flaggers had apparently not yet temporarily closed the road to public traffic, and the truck was not yet actually offloading the mats to an off-highway location. All that matters is that the vehicle involved in the fatal accident at times operates on off-highway jobsites not open to public traffic. *Gerard Leone & Sons, Inc.*, 9 BNA OSHC 1819, 1820-21 (No. 76-4105, 1981) (concluding that § 1926.601 "applies to trucks that operate off highway even if they do not operate exclusively off highway, regardless of where they are generally operated or where

they are operated at a particular time,” and holding that “section 1926.601 applies to motor vehicles ... used on construction sites regardless of whether they are being used on or off highway at any particular time”); *see also AIC Marianas*, 24 BNA OSHC 1716, 1720 (No. 12-0484, 2012) (ALJ) (concluding that where worksite adjacent to public roadway was cordoned off with traffic cones so that there was no public traffic, worksite was “off-highway” and “not open to public traffic” under § 1926.601(a)).

Because the truck is a motor vehicle with an obstructed view to the rear that operates within an off-highway construction site, § 1926.601(b)(4) applies.

Proof of Non-compliance with § 1926.601(b)(4)

It is worth noting at the outset that while the “circumstances of an accident may provide probative evidence of whether a standard was violated,” *Williams Enters. Inc.*, 13 BNA OSHC 1249, 1253 (No. 85-355, 1987), “the mere occurrence of an accident does not compel the conclusion that a standard had been breached.” *Concrete Constr. Corp.*, 4 BNA OSHC 1133, 1135, n. 3 (No. 2490, 1976).

To establish non-compliance with § 1926.601(b)(4), the Secretary must prove that MBI did not comply with either of the alternative means of compliance the standard allows. *E.g.*, *H. B. Zachry Co. (Int’l)*, 8 BNA OSHC 1669, 1675 (No. 76-2617, 1980). MBI asserts that it complied with both alternative means of compliance.

MBI asserts first that the evidence establishes that MBI had designated the Foreman to act as the dedicated observer for the Driver, and that MBI therefore complied with the “observer” alternative permitted by § 1926.601(b)(4)(ii). (Resp’t Br., 9-10). While there is evidence that MBI had designated the Foreman to act as the observer for the Driver of the backing truck (*e.g.*, T. 281, 317-18), MBI recognizes that the evidence showed that the Foreman did not perform any duties as a spotter/observer for the backing truck. (Resp’t Br., 9-10). Although MBI may have

intended to comply with the standard by having the Foreman act as an observer, MBI's intent to comply is not the equivalent of actual compliance. The only reasonable view of the evidence is that MBI did not comply with the standard because no person actually performed the duties of an observer under § 1926.601(b)(4)(ii).³

Turning to the issue of whether MBI complied with the "audible alarm" compliance alternative of § 1926.601(b)(4)(i), the Secretary argues that the evidence "showed it was more likely than not that the back-up alarm had failed to sound" at the time of the fatal accident.

³ MBI raised the affirmative defense of unpreventable employee misconduct in its answer, and indicated at the close of the hearing that it was continuing to interpose that defense. (T. 387-88).

At the close of the hearing, the undersigned cautioned both attorneys that arguments not made in their respective principal post-hearing briefs would be deemed abandoned. (T. 391-93). The undersigned expressly informed MBI's attorney that "if in your brief in chief you fail to present any complete argument respecting the affirmative defense of [un]preventable employee misconduct, then I will at that point deem that affirmative defense to be abandoned, and ... I won't address it." (T. 391-92).

Nowhere in its two post-hearing briefs does MBI even use the term "unpreventable employee misconduct" or attempt to demonstrate that it established any of the four elements of that affirmative defense. *Danis-Shook Joint Venture XXV*, 319 F.3d 805, 812 (6th Cir. 2003) (describing the elements of unpreventable employee misconduct affirmative defense); *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2220 (No. 09-0004, 2014) (consolidated) (describing the employer's "more rigorous" burden of proof when "unpreventable *supervisory* misconduct" is involved).

However, MBI's principal brief does include the following argument: "Since [the Foreman] failed to properly perform his duties as a spotter, so too, should the Citation be vacated in MBI's favor." (Resp't Br., 10). This solitary sentence is the only place in MBI's closing briefs that even vaguely alludes to the unpreventable employee misconduct defense. This nebulous conclusory allusion in that single sentence is insufficient to avoid forfeiture or abandonment of the affirmative defense. *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1181-82 (D.C. Cir. 2014) (ruling that a claim that was mentioned in a brief "only in a cursory manner" was forfeited); *L&L Painting Co.*, 23 BNA OSHC 1986, 1989, n. 5 (No. 05-0055, 2012) (treating an issue not argued in brief to be abandoned).

Even if the defense had not been abandoned or forfeited, the record evidence was insufficient to make even a *prima facie* case on the defense. At the close of the evidence, the Secretary argued there was insufficient evidence to support the affirmative defense of unpreventable employee misconduct, and moved to strike the defense on that ground. The undersigned denied that motion to strike, but erred in doing so. (T. 386-93).

(Sec’y Br., 15). The Secretary relies principally on (1) the Driver’s statement to Trooper Frost on January 13, 2014, that the truck’s reverse alarm “sometimes ... doesn’t work,” and that he did not hear anything before the truck struck the Foreman, (2) the Driver’s statement to the CO on January 27, 2014, that he did not hear the alarm at the time of the fatal accident and that “sometimes he hears the alarm and sometimes he doesn’t,” and (3) the failure of the reverse alarm to emit an audible noise in the CO’s presence on January 27, 2014. (Exs. C-11 & C-15; T. 191-93).

The Driver did not testify at the hearing. The Secretary introduced in evidence the Driver’s out-of-court statements to Trooper Frost and to the CO as statements of a party-opponent pursuant to Fed. Rule Evid. 801(d)(2)(D). (T. 42-44). Rule 801(d)(2)(D) provides that an out-of-court statement is not hearsay evidence by definition if the statement is offered against a party-opponent and “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” The evaluation of the reliability of an employee’s statement that is admissible under Rule 801(d)(2)(D) was addressed in *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991), where the Commission noted that such statements “are not inherently reliable,” but identified several factors that may make them “likely to be trustworthy,” including:

- (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made;
- (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly;
- (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted.

It is entirely possible that a person in the Driver’s position would attempt to deflect culpability for the tragic accident in response to questions from law enforcement. It is significant

that in contrast to his statement to Trooper Frost on the day of the accident, the Driver did not tell the CO that the alarm did not always work. Rather, he told the CO that he did not always hear the alarm, explaining that he keeps the truck's windows closed in the winter.

If the Driver had testified at the hearing, he likely would have been thoroughly questioned about instances of the alarm malfunctioning prior to the fatal accident. He likely would also have been queried about the written record of the inspection of the truck that he signed on the day of the accident, and about what precisely he did in the conduct of that inspection. (Ex. C-23, p 6). Such probing questioning might well have provided significant evidence to support the conclusion that the alarm was not operating audibly at the time of the accident, but it could also have lent support to the opposite conclusion. And obviously, because the Driver did not testify, there was no opportunity to observe his demeanor or to assess the reliability or credibility of his recollections.

It is impossible to assess what impact the Driver's testimony might have had on the critical issue of whether the alarm malfunctioned at the time of the accident. The Driver's bare statement that the alarm "sometimes ... doesn't work" begs many questions that have been neither asked nor answered.

Credible direct evidence establishes that the alarm did not malfunction during any of the three separate times it was tested in the near aftermath of the accident. This evidence included Trooper Alloy's testimony that the alarm was operable when he tested it during his inspection shortly after the accident. Although Trooper Alloy's testimony appeared to be heavily influenced by the fact that his written report stated that the alarm was operable, he testified with confidence that "if I put in my notes that it worked, then it worked." (T. 86-88). That testimony was decisive, reliable, and credible. (T. 86-88). Moreover, Trooper Alloy's observation that the

alarm was operable during his inspection is consistent with the un-contradicted and credible testimony of MBI's Safety Manager that the alarm worked properly when he inspected it in Cambridge on both January 13 and 14, 2014. (T. 347).

There is no direct evidence that the alarm was *not* operating properly at the time of the accident. Neither the Driver nor anyone else present at the time of the accident is on record as stating that the reverse alarm did *not* sound on the day of the accident. The fact that no one present at the time of the accident could recall having heard the reverse alarm constitutes only circumstantial evidence that the alarm may have malfunctioned and was not audible above the surrounding noise level.

A finding on whether the alarm was operating properly at the time of the accident turns wholly on circumstantial evidence. There is indeed circumstantial evidence that supports the reasonable inference that the alarm was *not* audible above the surrounding noise at the time of the accident, most significantly the following: (1) that moments after the accident, the Driver reported that the alarm "sometimes ... doesn't work" and that he had not heard anything at the time of the accident; and (2) that the Driver's report of inconsistent operation of the alarm was corroborated two weeks after the accident when the CO and Safety Manager experienced the alarm malfunction.

However, given that the alarm was audible when tested immediately after the accident, and that there is no direct evidence that the alarm was not audible above the surrounding noise at the time of the accident, the circumstantial evidence likewise supports the reasonable inference that the truck's alarm did sound and was audible above the surrounding noise.⁴

⁴ Sadly, backover fatalities at construction worksites happen even when a construction vehicle's reverse alarm is functioning properly. In material that OSHA caused to be published in the Federal Register in 2012, OSHA noted that out of 25 construction-related backover fatalities

Based upon the foregoing, the undersigned concludes that the circumstantial evidence that the alarm malfunctioned at the time of the fatal accident, is in equipoise with the circumstantial evidence that it did not malfunction. Consequently, the Secretary has failed to meet his burden of persuasion on that issue. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC 1462, 1464 (No. 03-0997, 2006) (concluding that Secretary did not meet her burden of proof on a matter where the evidence was “essentially in equipoise”); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (observing that the “burden of persuasion” answers “which party loses if the evidence is closely balanced”).

The Secretary having thus failed to satisfy his burden to prove that MBI did not comply with § 1926.601(b)(4)(i), the Citation must be vacated.

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding.

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.601(b)(4), is VACATED.

/s/

WILLIAM S. COLEMAN
Administrative Law Judge

Date: September 29, 2015

that were described in data compiled by NIOSH, “the backup alarm on the vehicle was functioning properly” in 15 of them, “suggesting that backup alarms may not be sufficient to prevent backover incidents.” Reinforced Concrete in Construction, and Preventing Backover Injuries and Fatalities, 77 Fed. Reg. 18973, 18980 (March 29, 2012).