

SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET NO. 96-1619

BLACK CONSTRUCTION CORPORATION,

Respondent.

APPEARANCES:

For the Complainant:

J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Robert D. Peterson, Esq., Rocklin, California

Before:      Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

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

Respondent, Black Construction Corporation (BCC), at all times relevant to this action maintained a place of business at the Harmon Substation Switch Gear Project, Harmon, Guam, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 2, 1996 the Occupational Safety and Health Administration (OSHA) initiated an inspection of BCC's Harmon work site. As a result of that inspection, BCC was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest BCC brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 28-31, 1997, a hearing was held in Agana, Guam. During the hearing the Secretary withdrew Citation 1, item 5 (Tr. 7). Subsequently the Secretary withdrew Citation 1, item 4 (Complainant's post-hearing brief, p. 2). The parties have briefed the remaining issues and this matter is ready for disposition.

**Alleged Violation of §1926.20(b)(4)**

Serious citation 1, item 1 alleges:

29 CFR 1926.20(b)(4): The employer permitted employees not qualified by training or experience to operate equipment and machinery.

A) At the Harmon Power Substation switch gear project an employee was not trained to operate a truck with a hydraulic boom.

The cited standard provides:

The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.

Facts

On May 2, 1996, the driver of a flat bed truck with a hydraulic boom, Ernesto Santiago, was electrocuted at the Harmon substation when the extended boom of the truck came into contact with an overhead bus bar (Tr. 26, 46, 61; Exh. G-2j). Johnny Cruz investigated the accident pursuant to a contract between OSHA and the government on Guam (Tr. 24).

Cruz testified that BCC produced certification indicating that Santiago had been trained to operate heavy equipment and a backhoe; BCC provided no documentation establishing that Santiago was trained to operate the boom truck (Tr. 135, 153, 370). Co-workers Arturo Collera and Jose Aguillar and safety officer Silvestra (Beth) DeGuzman all testified that they knew Santiago as a backhoe or dump truck driver (Tr. 496, 528, 725). In a signed statement, BCC employee Eduardo Baluyut stated that although Santiago normally operated a backhoe, BCC might assign Santiago to other equipment if they were short of drivers (Exh. G-4).

Baluyut was certified to operate the truck boom; Baluyut stated that his training included instructions always to lower and secure the boom. Baluyut stated that a properly trained operator would not forget to lower the boom and secure it before moving the truck (Tr. 91-93, 371; Exh. G-4).

Santiago's supervisor, Ernie Sanchez, told Cruz that although Santiago worked as a backhoe driver, he was also experienced operating the boom truck (Tr. 159, 567, 579). At the hearing Sanchez testified that Santiago had been driving the boom truck since 1993 (Tr. 566). Specifically, for a week during the three week period prior to the accident, Santiago operated the boom truck at BCC's City Bank project on a daily basis, loading equipment onto the flat bed with the boom to take it from the yard to the job site (Tr. 579-80). Co-workers Arturo Collera and Jose Aguillar testified that they had seen Santiago operating the boom on the truck on four or five occasions (Tr. 501, 528, 533-34).

Reynaldo Collera, a dispatcher for BCC, testified that he had been assigning Santiago to operate BCC's boom trucks for a year prior to the accident, and had himself seen Santiago operate the boom in the yard at least 30 times (Tr. 695-700).

Discussion

The evidence establishes that Ernesto Santiago had experience operating the boom truck. The Secretary maintains, however, that his experience was insufficient to meet the requirements of the standard.

The Commission has held that “qualified” person for purposes of §1926.20(b)(4) is:

[O]ne who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.

*Herbert Vollers, Inc. (Vollers)*, 4 BNA OSHC 1798, 1799; 1976-77 CCH OSHD ¶21,230 (No. 9747, 9176)[adopting definition of “qualified” set forth in §1926.32(1)]. In *Vollers*, the Commission found that the driver of a 3616D loader tractor was not “qualified,” despite significant experience on similar machinery, and more than 100 hours of experience on the loader tractor. The Commission noted that the driver’s operation of the loader tractor was “incidental” to his regular duties as a tandem-truck driver; he drove the loader tractor only if a regular operator was not available. *Id.* at 1800. The Commission also noted that the driver received no specific instructions from his foreman or supervisor describing the safety rules pertaining to the operation of the loader tractor. *Id.* at 1801.

Most recently, in *Esprit Constructors, Inc. and C.T. Taylor Company, Inc. (Esprit)*, 1997 CCH OSHD ¶31,373 (Nos. 96-0730, 96-0731, 1997), Administrative Law Judge Michael Schoenfeld held that §1926.20(b)(4) was violated where a roller compactor operator was not qualified under the employer’s own scheme of vetting and testing equipment operators.

Here, as in *Esprit*, the equipment operator, Santiago, was not qualified under BCC’s own certification program. BCC had certified Santiago to operate heavy equipment, and a backhoe, but not the boom truck, as it had Eduardo Baluyut. As in *Vollers*, Santiago operated the boom truck only when a qualified driver, such as Baluyut, was not available. Operation of the boom truck was incidental to Santiago’s normal duties as a backhoe operator. Santiago’s supervisor, Sanchez, provided Santiago with no specific safety instructions pertaining to the safe operation of the boom truck, because as far as Sanchez was concerned Santiago was capable of operating the truck.

The record establishes that, under BCC’s own system of certifying equipment operators, Santiago was not qualified to operate the boom truck. Santiago received no training, nor was he ever required to demonstrate his ability to solve or resolve problems relating to the operation of the boom truck before being assigned to drive it. The Secretary has established the cited violation.

Penalty

A penalty of \$5,000.00 was proposed. It is clear that the cited violation was “serious;” failure to properly train heavy equipment operators could lead to a fatal accident, such as that suffered by Santiago. The Secretary failed to introduce evidence of BCC’s size, history of prior violations, and/or good faith. It does appear, however, that BCC had an extensive safety program, including extensive general safety policies and procedures (Exh. G-15), and site specific procedures and hazard analysis [though removal of debris after roofing was not specifically addressed] (Tr. 652; Exh. G-10).

Taking into account the relevant factors, I find that the Secretary’s proposed penalty is appropriate and will be assessed.

**Alleged Violation of §1926.151(a)(3)**

Serious citation 1, item 2 alleges:

29 CFR 1926.151(a)(3): Smoking was not prohibited at or in the vicinity of operations which constituted a fire hazard:

A) Harmon Power Substation: Employees were permitted to smoke at a no smoking area located in the battery area.

The cited standard provides:

Smoking shall be prohibited at or in the vicinity of operations which constitute a fire hazard, and shall be conspicuously posted: “No Smoking or Open Flame.”

**Facts**

Cruz testified that when he went into the substation he found cigarette butts on the floor of the battery compartment area (Tr. 66, 70-71; Exh. G-2s, G-2t). Cruz asked Richard Nemerosky, BCC’s safety director, for a list of BCC employees on the Harmon site who were smokers (Tr. 74). BCC had 11 employees with access to the Harmon site who were smokers (Tr. 75-76; Exh. G-5).

During cross-examination, Cruz admitted that he was unable to ascertain whether any BCC employees had been smoking in the battery area; all the BCC employees interviewed denied smoking in the area (Tr. 181-82, 186, 372). Cruz testified that employees of the Guam Power Authority and the Navy also had access to the battery area prior to May 2, 1996 (Tr. 182).

Cruz testified that there was a “no smoking” sign posted in the area (Tr. 66-69; Exh. G-2r).

**Discussion**

In her brief, the Secretary correctly notes that “the record does not reflect that the battery area was a fire hazardous area. . . .” The Secretary relies on the posting of the ‘No Smoking’ sign to establish the applicability of the cited standard (Complainant’s post-hearing brief, p. 19, fn. 9).

Even assuming, arguendo, that the ‘No Smoking’ sign in the battery area establishes a fire hazard, the record fails to establish a violation of the cited standard. First, The ‘No Smoking’ sign indicates that smoking *was* prohibited in the battery area. The record is mute on BCC’s efforts to discover any violations of the apparent no smoking policy and/or to discipline employees found violating said policy. Finally, the Secretary failed to prove that any BCC’s employees did violate the no smoking policy.

This judge cannot conclude that BCC failed to prohibit smoking in the battery area, or to exercise due diligence in enforcing the policy. The Secretary failed to prove, by a preponderance of the evidence, that BCC violated the cited standard. Citation 1, item 2 is vacated.

**Alleged Violation of §1926.416(a)(3)**

Serious citation 1, item 3 alleges:

29 CFR 1926.416(a)(3): Before work began, the employer did not ascertain by inquiry, direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, was so located that the performance of the work could bring a person, tool, or machine into physical or electrical contact with an energized electric power circuit.

A) Harmon Power substation: Employer did not provide a written hazard analysis for clean-up crew entering the substation with a boon (sic) truck to pick up debris from the roofing project.

**Alleged Violation of §1926.600(a)(6)**

Willful citation 2, item 1 alleges:

29 CFR 1926.600(a)(6): All equipment covered by this subpart did not comply with the requirements of 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters in that equipment was operated where part of the equipment was within 10 feet of electrical distribution or transmission lines rated 50kv or below that had not been de-energized and visibly grounded, nor had insulating barriers not a part of, or an attachment to the equipment been erected to prevent physical contact with the lines.

A) Harmon Power Substation switch gear project: Isuzu flat bed truck with hydraulic boom, license #8940 TLP, came into contact with a 34.5 kv electrical distribution bus bars which had not been de-energized and visibly grounded; nor were insulated barriers provided; exposing employees to electrocution.

### Facts

Ernie Sanchez testified that prior to leaving for the Harmon substation on May 2, 1996, he and Santiago met at BCC's City Bank work site to discuss the day's work (Tr. 551, 581). Sanchez testified that he told Santiago that they were going to be picking up debris at the substation (Tr. 581). Sanchez stated that he told Santiago they were going into a "critical area," and that they would, therefore, not be using the boom (Tr. 582). Sanchez did not specifically tell Santiago that the lines were energized, Sanchez believed Santiago knew the lines were energized, that it was just "common sense" (Tr. 561-62).

Sanchez called Bayani Brozo, an electrical supervisor working at the substation, to tell him that they were bringing the boom truck into the area (Tr. 624). Sanchez testified that he and Santiago then proceeded to the substation, where they met Arturo Collera (Tr. 582-83). Sanchez stated that the three men proceeded to load the truck, by hand, with debris (Tr. 584). Sanchez testified that he left the substation when the truck was fully loaded and ready to go (Tr. 584-86). Sanchez stated that he told Santiago that he was to take the debris to the yard, drop it, and then go pick up concrete for the City Bank project (Tr. 584-85, 600).

Brozo maintains a log as part of his regular business at the Harmon substation (Tr. 626). The names of BCC employees, and the times they entered and left the substation are listed (Tr. 626-27). Brozo testified that the May 2, 1996 log accurately reflected all the people who were at the substation on that day (Tr. 628-29, Exh. G-9o). E. Sanchez is not listed in the May 2, 1996 log; Brozo testified that only Santiago and Collera loaded the truck (Tr. 634; Exh. G-9o).

Arturo Collera testified that he knew the bus bars were energized; Bayani Brozo, his supervisor on April 30, and May 1, 1996, had told him so (Tr. 468-69, 501). Collera stated that he heard Sanchez, his supervisor on May 2, tell Santiago not to use the boom for the day's clean up operations (Tr. 467, 503). Collera stated that he, Santiago and Sanchez initially loaded the back of the truck by hand (Tr. 477). After Sanchez left, he and Santiago used the boom to load some additional materials, which were too heavy to lift (Tr. 477, 507-08, 594).

Sanchez testified that he instructed Santiago to load only debris, and did not know Santiago would pick up the other materials, *i.e.* the tar buckets and a basket (Tr. 594-98). Sanchez later added that he specifically told Santiago before he left that he was finished loading and not to load anything more (Tr. 600). Sanchez testified that Santiago had never before disobeyed orders (Tr. 571, 600).

Jose Aguillar testified that he had been told that the bus bars were energized at a regular BCC safety meeting (Tr. 513). Aguillar testified that he arrived at the Harmon substation at about 8:30-8:45 a.m. on

May 2, 1998; Aguillar stated that he did not see Sanchez (Tr. 517, 519, 530). Aguillar testified that he spoke to Santiago outside the gate; Santiago asked him to return to the City Bank site to ask Sanchez for additional help (Tr. 518-20). Aguillar returned to the site at 9:15 a.m., after the truck was completely loaded (Tr. 482, 520, 532).

Collera testified that after they finished loading he went to get a drink of water; when he returned the outriggers were already up; he stated that he did not notice that the boom was still extended (Tr. 489-90). Aguillar helped Collera close the side panels; he did not notice that the boom was extended either (Tr. 522). Santiago, Collera and Aguillar got in the truck (Tr. 490).

Bayani Brozo testified that, although he was working 10-15 feet from the boom truck, he was not supervising the clean up crew, and did not provide them with any instruction (Tr. 489, 631-32). Brozo testified that he did not see Collera or Santiago using the boom (Tr. 630-32). Brozo stated that he was busy, and was not paying attention to the laborers (Tr. 631). Brozo did turn when he heard the truck start; as he saw the truck near the bus bar he shouted (Tr. 633).

BCC stipulates that the hydraulic boom of the subject truck contacted the energized 35.5 kV. bus bar (Tr. 116; Exh. G-17).

Beth DeGuzman, a safety officer for BCC (Tr. 711), testified that BCC had line guards, which it had used on other projects, but not at the Harmon substation (Tr. 717). Rene Bautista, BCC's project engineer, testified that BCC had no authority to de-energize the bus bars (Tr. 638). According to BCC's construction contract, the substation's operator, the U.S. Navy, would de-energize the bus bars when BCC was moving equipment in the area (Tr. 122-24, 126, 377-79). BCC was to submit a shut down request whenever they anticipated working in the area (Tr. 125-27, 638, 663-64; Exh. 13a, b and c).

Beth DeGuzman testified that BCC's safety policy required supervisory personnel to notify a safety officer when heavy equipment was being used at the Harmon substation (Tr. 719, 725; Exh. G-19). DeGuzman stated that BCC's safety department was unaware that the boom truck was going into the area on May 2; BCC did not request that the bus bars be de-energized (Tr. 126, 380). DeGuzman testified that had she been notified that Sanchez was sending a boom truck into the area, she would have stopped it (Tr. 721). Sanchez admitted that he did not contact his safety officer; he did not believe there was a problem passing beneath the power lines (Tr. 559, 564). Sanchez estimated the height of the bus bars at 16 feet; he testified that he measured the truck from the ground to the boom at seven feet (Tr. 554, 557-58). Sanchez testified that he had driven his truck underneath the power lines without incident (Tr. 553). GPA and Navy vehicles drove back and forth under the energized lines (Tr. 577).

During his investigation, Cruz measured the height of the bus bars at the Harmon station at 16 feet (Tr. 61). The distance between the bus bars and the knuckle of the boom, the highest point on the vehicle, was 62 inches (Tr. 54, 61).

**Serious citation 1, item 3, §1926.416(a)(3)**

*Discussion*

The cited standard provides:

Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. . . . The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

Leonard Limtiaco, OSHA's director of enforcement and investigation for the Pacific territories, admitted that the cited standard does not require a written hazard analysis (Tr. 440), nonetheless, the Secretary maintains that the clean up crew was not briefed on the hazards associated with working under the bus bars before beginning the clean-up project on May 2, 1996. This judge agrees.

The cited standard specifically requires the employer to advise employees of the location of energized power circuits, the hazards involved, and the protective measures to be taken where that employer has determined that the work to be performed may bring persons or machinery into contact with such circuits. Supervisory personnel Sanchez and Brozo knew that the bus bar in the substation was energized, but did not specifically apprise the clean up crew of the danger associated with using the boom truck in the area, of the possibility of the boom contacting the bar, or of the danger of electrocution. Brozo provided no supervision, and did not speak to the clean up crew. Sanchez believed that the hazards at the substation were obvious, just "common sense." At best, Collera and Aguillar had been told, under other circumstances, that the bus bars were energized. Sanchez may have told Santiago that the substation was a "critical area," and that he would not be using the boom. Such instruction does not meet the requirements of the cited standard.

Sanchez' testimony that he accompanied Santiago to the site after instructing him not to use the boom, closely supervised the entire operation, specifically instructed Santiago that the task was finished, and that he was not to pick up the tar buckets and baskets, is inconsistent with other evidence presented at the hearing and with subsequent events, and so is not credited. While Arturo Collera's testimony confirmed that of Sanchez, the company log shows only Santiago and Collera on the site. Brozo, who was working 10 to 15 feet from the boom truck, testified that the log accurately reflected the personnel on site.

Jose Aguillar, who met Santiago outside the gate before Santiago started work, testified that Santiago sent him off looking for Sanchez to ask for additional men. Further, Sanchez' testimony that Santiago, who had never before been known to disobey orders, continued to work, loading materials he had been specifically instructed not to load after being told that his job was finished, seems unlikely. I find that the weight of the evidence does not reasonably support Sanchez' version of events.

The violation has been established.

**Penalty**

A penalty of \$5,000.00 is proposed for this item. For the reasons discussed above, the penalty is deemed appropriate and will be assessed.

**Willful Citation 2, item 1, 1926.600(a)(6)**

The cited standard provides:

All equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

Section 1926.550(a)(15) states:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.

\* \* \*

(iii) In transit with no load and boom lowered, the equipment clearance shall be a minimum of 4 feet for voltages less than 50 kV., . . . .

**Applicability.** As a threshold matter BCC argues that the cited standard is not applicable. Respondent maintains that its boom truck is a truck crane covered by **Subpart N-Cranes, Derricks, Hoists, Elevators, and Conveyors.** It argues that §1926.600(a)(6), found under **Subpart O-Motor Vehicles, Mechanized Equipment, and Marine Operation**, was incorrectly cited. This judge disagrees.

The cited boom truck is clearly a motorized vehicle subject to the provisions of §1926.600(a)(6). That the crane mounted on the flat bed of the truck may have also been subject to design, inspection and

maintenance requirements contained in Subpart N does not exempt the truck from coverage under Subpart O.<sup>1</sup> BCC's argument is without merit. The cited standard is applicable.

**Knowledge.** BCC concedes that the standard was violated, but states that it was without knowledge, in that it did not, nor with the exercise of reasonable diligence, could it have known that Santiago had left the boom in a raised position in time to prevent the misconduct (Respondent's post-hearing brief, p. 17-18, fn.9).

Reasonable diligence includes adequate supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1991-93 CCH OSHD ¶29,344 (No. 86-1087, 1991). The record establishes, and this judge has already found, that BCC failed to train or ensure that Santiago was adequately experienced to operate the subject boom truck, and that there was no direct supervision and inadequate hazard information provided to the crew involved in the clean up operation. BCC failed to exercise due diligence; knowledge of the violative conditions is, therefore, imputed to it.

The cited violation is established.

Willful

BCC maintains that the cited violations were not "willful" in nature.

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980).

The record does not establish the necessary disregard for the Act, or indifference to employee safety. While Sanchez may have disregarded BCC's own internal policies in assigning the boom truck for use within the substation without alerting safety personnel, OSHA regulations do not prohibit such use, so long as minimum clearances are maintained between the equipment and the energized lines: for lines rated 50 kV. or below, 10 feet, or 4 feet when the equipment is in transit with no load and boom lowered. Sanchez believed that there was no danger in driving the boom truck under the energized bus bar, there was more than the OSHA required 4 feet of clearance available. That BCC had more stringent internal rules

---

<sup>1</sup> In any event, §1926.550(a)(15) falls under Subpart N and so is specifically applicable to truck cranes.

governing equipment operation in the substation is to be commended; not used against it as the basis for a “willful” characterization.

BCC’s inadequate supervision of the cleanup crew on May 2, 1996, though adequate to support a finding of constructive knowledge, does not in itself establish that BCC was indifferent to employee safety.

The violation will be affirmed as a “serious” violation of the Act.<sup>2</sup>

Penalty

A penalty of \$70,000.00 is proposed for this item. Because this item is found not to be “willful,” and for the reasons set forth above, a penalty of \$7,000.00 is deemed appropriate.

**ORDER**

1. Serious citation 1, item 1, alleging violation of §1926.20(b)(4) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.151(a)(3) is VACATED.
3. Serious Citation 1, item 3, alleging violation of §1926.416(a)(3) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
4. Citation 2, item 1, alleging violation of §1926.600(a)(6) is AFFIRMED as a “serious” violation, and a penalty of \$7,000.00 is ASSESSED.

---

Benjamin R. Loye  
Judge, OSHRC

Dated:

---

<sup>2</sup> In the Complaint, Citation 2 is alleged, in the alternative, as a serious violation. *See; Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD ¶29,439 (No. 87-619, 1991).