SECRETARY OF LABOR, Complainant, v. McKIE FORD, Respondent.	OSHRC DOCKET NO. 97-0185

APPEARANCES:

For the Complainant:
Kayden B. Howard, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
John K. Nooney, Esq, Morrill, Thomas, Nooney & Braun, LLP, Rapid City, South Dakota

Before: Administrative Law Judge: Stanley M. Schwartz

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, McKie Ford (McKie), at all times relevant to this action maintained a place of business at 7 West Omaha Street, Rapid City, South Dakota, where it operated an automobile dealership. Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 10, 1996, a McKie employee was killed when his head was caught between the second floor landing and the ceiling of an unguarded vertical reciprocating conveyor (VRC) in use as a freight elevator at McKie's Rapid City work site.

In response to the subsequent fatality report, the Occupational Safety and Health Administration (OSHA) conducted an inspection of McKie's Rapid City work site on October 16, 1996. Following that inspection, McKie was issued citations alleging violations of the Act together with proposed penalties.

McKie filed a timely notice of contest to "willful" citation 2, item 1, thereby bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 20-21, 1997, a hearing was held in Rapid City, South Dakota. The parties have submitted briefs on the issues and this matter is ready for disposition.

Withdrawal of Prior Settlement Agreement

During an informal conference which followed the issuance of the citations in this matter, the parties reached a tentative settlement, in which the willful citation was reduced by OSHA to a serious violation. The agreement was reduced to writing, signed by the OSHA area director, and sent to McKie's representative (Tr. 287-92). The proposed settlement agreement was rescinded by the Secretary, however, before McKie signed it (Tr. 293).

As a threshold matter, McKie argues that the Secretary should be bound by the prior informal settlement agreement. This judge previously reserved judgment on McKie's motion for summary judgment arguing the issue.

As noted by this judge at the hearing, it is well settled that "because of the Secretary's unique role in effectuating the purposes of OSHA, [s]he has the power to withdraw from any settlement agreement prior to the entry of a final decision by the Commission." *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1187 (3rd Cir. 1980). The Act gives the Secretary, as part of her prosecutorial powers, sole discretion to determine whether the public interest is best served through settlement or through government enforcement of a citation. *Id.*

McKie's motion for summary judgment is DENIED.

Alleged Violation

Willful citation 2, item 1 alleges:

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

> (a) In the parts department, where employees were riding the vertical reciprocating conveyor which was not designed or intended to be used for routine passenger use.
>
> Feasible methods of abatement, among others, would be to post a sign on the platform which reads, "No Passengers Permitted" and develop, implement, and enforce a policy which prohibits employees, passengers, or maintenance personnel from riding the vertical reciprocating conveyor, as required by ANSI B20.1-1976, Rule 6.21.1.3.

Facts

The cited freight elevator, or VRC, was never intended for passengers (Tr. 263, 275). Norm McKie testified that he was in charge of the remodeling project that included the installation of the cited VRC (Tr. 262). The VRC is a freight elevator, and was designed to be used solely for that purpose (Tr. 263). There are no controls inside the elevator, though the controls are within reach of anyone inside the compartment (Tr. 23, 275). N. McKie had Don Biegler, the decedent, order a sign which stated that the VRC was "For Freight Only" (Tr. 264, 276).

The record shows that the use of the VRC as a passenger elevator exposes those passengers to serious hazards. CO Schmidt testified that the movement of the VRC platform and/or roof past the stationary second floor landing and/or the half gate at the first floor landing create shear points (Tr. 27-28). ASME standards, at paragraph 6.21.1(c) state that "[r]iding the conveyor shall be forbidden to all personnel. Warning signs to this effect shall be prominently posted at each point of access, in each point of operation" (Tr. 42; Exh. C-7).[1]

No warning sign was posted on the cited VRC, either at the time of the inspection, or at the time of the accident (Tr. 49, 61). N. McKie testified that he never checked to see whether the sign was installed (Tr. 271). McKie admitted that he never developed any formal rules prohibiting passenger use of the VRC, or communicated that fact to any supervisory personnel other than Don Biegler (Tr. 272, 277). Biegler was not told of a specific prohibition against riding the VRC, but told only to put up the "For Freight Only" sign (Tr. 276).

Don Biegler was riding the VRC with management's knowledge at the time he was killed (Tr. 17). Lee Fried, McKie's parts department manager, told CO Schmidt that Biegler rode the VRC on a daily basis (Tr. 18, 30). At the hearing, Fried testified that he knew that Biegler and other McKie employees rode the VRC, and felt it was fine. Fried had ridden the VRC himself (Tr. 155-59). Fried testified that he was in charge of enforcing safety and health in the parts area, but stated that there were no written safety rules (Tr. 157). Fried believed that common sense was the most important safety rule and relied on his employees' judgment in matters of safety (Tr. 157-58).

Bill Stevenson, a ten year McKie employee, testified that it was common to see employees riding on the VRC (Tr. 113-15). Biegler, who had bad knees, always rode the VRC, and used it approximately 20 times a day (Tr. 115). Stevenson testified that he was present when another employee, Keith Smith, caught his hand in between the roof of the elevator and the second floor platform, on September 29, 1989

[1] See also, ANSI standards B20.1-1976 ¶ 6.21.1.3 "The conveyor shall not be used to carry an operator, passengers, or maintenance personnel (Tr. 46; Exh. C-7).

(Tr. 117). Stevenson testified that he was waiting at the first floor landing when K. Smith began yelling for him to raise the elevator. Stevenson hit the up button, which allowed K. Smith to pull out his hand. Stevenson then drove K. Smith to the hospital to have his hand stitched (Tr. 117-19; Exh. C-8). Stevenson testified that Bill Smith, the parts department manager, was in the parts room at the time of the incident, and so was aware of K. Smith's accident (Tr. 198). Stevenson recognized that the VRC was dangerous, but "not to the point where, you know, I thought it would harm me" (Tr. 123). Stevenson stated that he had not read McKie's employee handbook and so was unaware of any safety rules (Tr. 127).

Bill Smith was McKie's parts department manager at the time of K. Smith's accident (Tr. 209, 220, 222). Though he was named on the injury report as the supervisor who received notice of the injury, B. Smith could not remember the details of the September 1989 incident, and stated that he never knew how K. Smith was injured (Tr. 222-23). B. Smith testified that he knew the VRC was a freight elevator only, and was not designed to carry passengers (Tr. 213). B. Smith stated that he knew that the VRC was not safe, and that you "had to pretty much stay awake if you were going to be riding it, because of all the open areas and the things that passed by when it was going up and down" (Tr. 214). Nonetheless, all the parts employees rode the VRC; B. Smith stated that someone would ride on it every day (Tr. 213). B. Smith stated that McKie provided no safety training, outside of some CPR classes (Tr. 212, 224). He was aware of only one safety rule, requiring that seat belts be used in company vehicles (Tr. 215). B. Smith was named loss control coordinator during his tenure as parts department manager, and given responsibility for completing worker compensation and medical forms, and for making any changes necessary to ensure the safety of the employees in his department (Tr. 220-21). No additional training was given him to accompany his new title (Tr. 224).

Dennis Erdman, a ten year McKie employee (Tr. 91), stated that everyone rode the VRC; he rode the VRC himself until Keith Smith got his hand caught between the second floor landing and the roof of the elevator (Tr. 95, 98-100). Erdman testified that he wasn't concerned that he might be injured, he just "[didn't] like seeing blood and any of that kind of stuff" (Tr. 101). Erdman told CO Schmidt that it was "just a personal thing. I don't like pain and injury." Erdman was never told that it was against company rules to ride the VRC, or supplied with any work safety rules of any kind (Tr. 93-94).

Sharon Geyer, a former McKie employee, testified that when she worked as a shipping and receiving clerk at McKie, she believed the VRC was intended to carry passengers, and rode it four to five times a day for the four years she worked there (Tr. 133-34). She sometimes rode the VRC with Don Biegler, but did recognize that it was unsafe to ride the VRC with both Mr. Biegler and the parts cart (Tr. 137).

Rick Shinabarger, a former McKie employee testified that he remembered an incident in which molding tipped out and was bent as it caught on the second floor landing as the VRC was going up (Tr. 237). Shinabarger stated that an accordion wooden gate, which was originally installed on the VRC compartment, was broken in the same manner (Tr. 238). Shinabarger further testified that McKie owners Steve Kalkman and Mark McKie were aware that employees rode the VRC (Tr. 231). Shinabarger stated that both Kalkman and McKie were present during the 1994 inventory, during which Don Biegler used the freight elevator (Tr. 232-35).

Steve Kalkman, McKie's chief financial officer and part owner (Tr. 18), testified that he had never seen the VRC in operation prior to the accident, and did not know employees were riding it (Tr. 325-27). Though he was in the parts department on a weekly basis he was not generally in the area of the freight elevator (326). Kalkman testified that he did not work with Shinabarger during the 1994 inventory, and produced Shinabarger's inventory sheets. The sheets were initialed by R.R., a parts manager from another store (Tr. 336). Kalkman testified that prior to the accident, he had no opinion as to the safety of riding the VRC, but believed it was a generally known, though unwritten, rule of the shop and a common sense safety rule that personnel were not to ride the VRC (Tr. 347). Kalkman stated that Lee Fried should have had enough sense to know that people should not be riding the freight elevator (Tr. 348).

Norm McKie testified that Kalkman was responsible for development of McKie's safety program, and for review of injury and illness records (Tr. 258-599). However, Kalkman stated that he was unaware of K. Smith's 1989 injury, though the worker's compensation paperwork admittedly came through his office (Tr. 327, 338). Kalkman stated that McKie had no procedures for following up on employee injuries reported to workers compensation or to OSHA (Tr. 358-59).

In 1993 McKie reported 113 workdays lost due to injury; in 1994, 340 workdays were lost; in 1996, 40 lost workday were reported as a result of 29 separate injuries (Tr. 359-60; Exh. C-10). McKie has approximately 140 employees, 15 of whom are office workers (Tr. 361-62).

Kalkman testified that McKie instituted a program around 1994 to reduce its worker compensation claims, which consisted of instituting CPR training and sponsoring a demonstration in the use of fire extinguishers (Tr. 339-40). Kalkman stated that the main emphasis of the program was to make management more aware of safety issues (Tr. 340). Kalkman did not know whether McKie had a hazardous communication program (Tr. 357), and did not know what a lockout/tagout program was (Tr. 354).

McKie admits that Mark McKie had seen Don Biegler riding the VRC during an inventory, and so was aware of the practice (Tr. 343-44; Exh. C-11).

Discussion

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

Neither the violative conditions, nor the proposed abatement measures set forth in the citation are disputed. The cited conditions were in plain view and were known to McKie management. McKie maintains that no violation has been established, however, because Complainant has not shown that the cited conditions posed a recognized hazard. McKie argues that none of its personnel recognized that riding the VRC was hazardous until after Don Biegler's death.

This judge cannot agree. The record establishes that the cited VRC posed a recognized hazard. ASME standards specifically state that riding the conveyor shall be forbidden to all personnel, and require that warning signs to this effect be prominently posted at each point of access. Though the cited ASME standards are not specific to the automobile repair industry, a finding of industry recognition does not require a specific showing as to the safety practices in a narrowly defined industry. In *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317 (5th Cir. 1984), the Court found that "where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question." *Id*. at 321; *See also*; *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991).[Advisory (ANSI) standards may establish industry recognition]. The cited ASME standards establish the common knowledge of safety experts familiar with the activity in question, *i.e.* the use of conveyors and related equipment in a broad band of industries. The ASME standards committee for the B20 standards included safety representatives not just from the conveyor manufacturing industry, but from a wide range of industries utilizing conveyors and related equipment, including 3M Corp., I. duPont de Nemours & Co., Inc., and General Motors Corp. (Exh. C-7). In the absence of evidence to the contrary, such broad based industry standards establish that the hazard was recognized. McKie's substitution of the subjective knowledge of its admittedly untrained personnel for the judgment of safety experts familiar with the cited equipment is unpersuasive.

Moreover, the cited hazard was open and obvious, and was recognized by McKie personnel. Norm McKie knew that the VRC was not intended for passengers. Steve Kalkman, the McKie management

official with responsibility for safety, stated that the parts manager should have had enough common sense to know that people should not be riding the freight elevator. Bill Smith and Bill Stevenson admitted knowing that it was hazardous to ride the VRC, though they felt that they could avoid being injured. Dennis Erdman did not ride the VRC because he didn't like the idea of being injured. McKie's contention that the cited hazard was not obvious to the layman is not supported by the facts.

Finally, the evidence establishes that both employees and parts had become caught in the VRC's shear points, providing McKie with notice of the shear point hazard. McKie argues that management was unaware of the prior injury, and thus had no notice of the cited hazard. McKie's poor reporting and follow-up procedures, however, do not excuse its failure to perceive the obvious hazard. Rather they are evidence of that indifference to employee safety which led the Secretary to characterize this violation as "willful."

Willfulness

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. *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980). McKie clearly demonstrated such indifference. Despite high incidences of injury, McKie had no procedures for reviewing injury reports or for following up on injuries to identify safety hazards in its work place. McKie had a safety program consisting of a single sheet of general work rules (Exh. C-5). However, employees, including the parts department manager, received no safety training and were unfamiliar with the rules in place. Steve Kalkman, who was ostensibly responsible for McKie's safety program, was ignorant of the requirements of the Act. It is clear from the testimony that for almost 10 years no one at McKie acknowledged or addressed the obvious hazard posed by the VRC because no one at McKie was concerned about workplace safety.

McKie relies on *St. Joe Minerals,* 647 F.2d 846 (8th Cir. 1981), in which the Court vacated the Commission's finding of willfulness, in a case involving a malfunctioning freight elevator. Respondent in that case bypassed an interlock device, and assigned an employee to manually operate the elevator and its doors until repairs could be effectuated. The court found that Respondent's alternative procedures did not eliminate the recognized hazard posed by the absence of the interlock devices, but concluded that the 24 hour delay in removing the bypass did not, in itself, show an indifference to the safety of the workplace. *Id.* McKie cites *St. Joe Minerals* for the proposition that the mere passage of time is insufficient to support a finding of willfulness.

The facts in the case at bar are clearly distinguishable from those found in *St. Joe Minerals.* In that case, the employer made an effort, albeit an unsuccessful one, to protect its employees from the hazards of the unguarded freight elevator. That it was aware of the safety hazard, and took steps to safeguard its employees, mitigated its failure to repair the interlock guard within 24 hours. Here, McKie management claims to have been oblivious to an open and obvious hazard for almost 10 years, despite damage to parts and injury to employees caused by McKie's failure to guard the cited freight elevator.

McKie's continued failure to appreciate the cited hazard can only be attributed to plain indifference. The violation is properly classified as willful.

Penalty

The Secretary proposed a penalty of $56,000.00 for the contested willful citation 2, item 1. In assessing penalties, the Commission gives due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *See;* §17(j) of the Act. These factors are not necessarily accorded equal weight. Generally gravity is the principal factor in assessing a penalty. *Trinity Indus. Inc.*, 15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury will result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶29,964, p. 41,033 (No. 87-2059, 1993).

There is no question that in this case the gravity of the violation is high, because of the frequent exposure of the parts department employees over a 10 year period. The CO allowed a 10% reduction for size, and an additional 10% reduction based on the absence of any prior violations.

The record clearly establishes that Respondent's behavior constituted more than mere carelessness or lack of diligence; but rose to a level of plain indifference, as outlined above. At the same time, I believe, based on my observation of Respondent's management employees at the hearing, that McKie genuinely regrets and grieves over the loss of Mr. Biegler, a long time employee and colleague. A willfulness finding does not automatically indicate an evil or malicious intent on Respondent's part, and such a finding is expressly not made in this case. One would hope that the tragic accident combined with the finding of a willful violation will serve as a wake up call to the dealership with respect to employee safety in its parts and service departments. Balancing the mitigating factors against the gravity of the violation, and keeping in mind that at one time Respondent had a signed offer which reduced the characterization of the violation as well as the penalty to within the parameters of a serious citation, I find that a penalty of $20,000 should

be assessed in this case. I have noted the Secretary's concern that McKie not be rewarded for its lax attitude toward employee safety by a reduction in the penalty (Secretary's brief, p. 19). No such interpretation of the penalty reduction is intended, or should be inferred from my assessment of a $20,000.00 penalty. Rather I have attempted to weigh the factors contained in the record and to assess an appropriate amount, *de novo*, in accordance with those factors as required by the Act.

ORDER

1. Willful citation 2, item 1, alleging violation of §5(a)(1) is AFFIRMED, and a penalty of $20,000.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: