

Secretary of Labor,
Complainant,
v.
Welltech Mid-Continent,
Respondent.

OSHRC Docket No. **97-873**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

WellTech Mid-Continent (WellTech) prepares oil well sites for drilling. Following an employee fatality at a WellTech worksite on April 10, 1997, the Occupational Safety and Health Administration (OSHA) conducted an investigation. The Secretary issued a citation to WellTech on May 27, 1997, alleging a serious violation of § 1926.602(a)(3)(i) for failing to maintain an access road in safe condition to accommodate earthmoving equipment.

WellTech acknowledges jurisdiction and coverage. A hearing was held in this matter on November 20, 1997. WellTech defends itself on two grounds. First, WellTech asserts that § 1926.602(a)(3)(i) is not applicable to the vehicle involved in the accident. Second, WellTech contends that the Secretary failed to establish that the access road was unsafe at the time of the accident. The parties each filed post-hearing briefs.

For the reasons set out below, the court finds that the Secretary failed to establish a violation of § 1926.602(a)(3)(i). The citation is vacated.

Background

On April 10, 1997, a crew from WellTech was preparing a new location for a drilling rig at the Cross Timbers lease site, located approximately 13½ miles to the west of Fairview, Oklahoma (Tr. 13, 38). WellTech was constructing an extension from an existing access road to the new drilling location (Tr. 98). The WellTech crew had been working on this project for approximately one week (Tr. 57).

The crew of seven WellTech employees was hauling rock from a quarry, known as Allied Gypsum, located south of Fairview to the Cross Timbers lease site (Tr. 10-11, 13, 34). The crew arrived at WellTech's yard at approximately 8:00 a.m. Four employees, John Farrand, Michael Farrand, Steven Meister, and Wayne Simons, operated semi-tractor rigs (identified at the hearing as "8687 Peterbuilt rigs" (Tr. 62)) with attached belly dump trailers which carried loads of rock to be used on the access road extension. Another driver was operating a semi-tractor rig with an attached low-boy trailer used to haul loaders and dozers (Tr. 10, 13). Roy Boehs was operating a grader and Lynn Dobbs was operating a bulldozer at the Cross Timbers site (Tr. 13-14, 49-51, 91-92).

In the early afternoon the crew began hauling rock from the quarry to the access road under construction. The crew dumped the rock on top of the section of new road. Dobbs then packed the rock down (Tr. 11). After dumping the load of rock the trucks would leave the construction site and return to the quarry to pick up another load of rock (Tr. 14-15). The trucks were spaced approximately 30 to 45 minutes apart from each other (Tr. 16, 63).

The Allied Gypsum quarry is located next to Highway 60, which the trucks traveled on for about two miles before turning off onto a county road with a rock surface. The trucks then turned left onto the lease, or access, road that is the subject of this proceeding (Tr. 36-37). The access road was approximately 12 feet wide over most of its length, accommodating one lane of traffic. It had a dirt and shale surface (Tr. 12, 36, 40, 52). The access road had "a couple of little curves in it," and then curved sharply to the right (Tr. 41). After passing the sharp curve, the vehicles traveled down a hill to a valley where an earthen dam was constructed and up another hill (Exhs. J-1 through J-4; Tr. 41-42, 76, 154, 244, 253-254). The earthen dam was bounded on the south by a pond and on the north by a creek. From the dam, the road climbed for approximately

½ mile to an existing well site. From that well site, the road went to the new road that WellTech was in the process of constructing (Tr. 244-245).

On April 10, 1997, the access road was muddy. It had been raining on and off during the previous week. The ground was saturated with water (Tr. 54, 174). It was sprinkling when the crew brought the first load of rock to the site on April 10, 1997 (Tr. 19). After the trucks dropped off the first load of rock it began to rain harder (Tr. 43-45). Mike Farrand went to Ray Boehs and asked him whether the crew should get another load because the weather conditions were worsening (Tr. 19). Boehs told Farrand to go to Fairview and to check with him later (Tr. 122). Boehs called WellTech supervisor Ronnie Trammel on the radio and asked him whether the crew should return for another load. Trammel said he would have to check with Dennis Dilbeck, a manager for WellTech's client who owned the lease, to see whether they should continue work. Trammel instructed Boehs to haul another load (Tr. 20, 122).

On the descent of the access road, before it reached the dam, was a terrace, "a small hump of dirt across the road" (Exhs. J-1, J-4; Tr. 28, 53-54). Dobbs had to push trucks through the water on the terrace with the bulldozer. The existing access road became slick as the rain continued (Tr. 49-58). To provide better traction, Boehs used the grader to blade over the tracks from the trucks that had used the hill (Tr. 116, 126).

John Farrand drove the last truck to descend the hill. He was on his way to the road extension and had not dumped his load of rock (Tr. 40). Just prior to Farrand's descent, Boehs bladed the road (Tr. 78, 135). After going down the grade, Farrand's tractor and belly dump trailer traveled off the road and overturned into the pond at the bottom of the slope (Tr. 61). John Farrand died as a result of the accident (Tr. 25).

Alleged Violation of § 1926.602(a)(3)(i)

The Secretary alleges a serious violation of § 1926.602(a)(3)(i), which provides:

No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade unless the access roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and materials involved.

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of the Cited Standard

WellTech argues that § 1926.602(a)(3)(i) does not apply to the cited vehicles. In her citation, the Secretary singled out the “gravel hauling, and equipment hauling tractor trailers.” No mention is made of the bulldozer and grader that WellTech employees operated at the site.

Section 1926.602 is entitled “Material handling equipment.” Section 602(a), under which the Secretary cited WellTech, is captioned “Earthmoving equipment.” Section 602(b) is captioned “Excavating and other equipment,” and section 602(c) is captioned “Lifting and hauling equipment.” Even though the Secretary emphasized the hauling functions of the trucks in the citation, she cited WellTech under the “earthmoving equipment” section.

Section 1926.602(a)(1) provides in pertinent part:

These rules apply to the following types of earthmoving equipment: scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural tractors, and similar equipment.

WellTech argues that the Peterbuilt trucks are not covered by this standard. The Secretary argues that the trucks are “off-highway trucks” within the meaning of the standard. No definition of “off-highway trucks” appears in the standard. Section 1926.601(a), which WellTech argues is the applicable standard to the Peterbuilt vehicles, provides:

Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of this section do not apply to equipment for which rules are prescribed in § 1926.602.

The Review Commission explored the somewhat confusing relationship between the coverage sections of §§ 1926.601 and 1926.602 in *Gerard Leone & Sons, Inc.*, 9 BNA OSHC 1819 (No. 76-4105, 1981). The issue was whether § 1926.601(b) applied to dump trucks not equipped with certain safety devices. The respondent argued that § 1926.601 did not apply because the dump trucks were being operated on a highway open to public traffic, and the standard is limited to vehicles being operated on off-highway jobsites. The Review Commission rejected this approach, finding that “the coverage provision at section 1926.601(a) limits the standards’ applicability by vehicle and not by location.” *Id.* at 1820. The Review Commission found “that the standard 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.” *Id.*

The Commission brought § 1926.602, the standard at issue in the instant case, into its discussion of the coverage of § 1926.601:

The first sentence of subsection 601(a) expressly applies to “those vehicles that operate off highway,” while the second sentence specifically excludes “equipment for which rules are prescribed in section 1926.602.” Section 1926.602, entitled “Material Handling Equipment,” applies to, among other things, *trucks operated exclusively off highway*. This indicates that trucks that operate exclusively off-highway are not covered by section 1926.601. It follows, therefore, that section 1926.601 applies to trucks that operate both on and off highway.

Id. (emphasis added).

WellTech’s drivers drove the Peterbuilt trucks two miles on Highway 60 on the way from the quarry to the new road site and two miles back. Michael Farrand testified that the Peterbuilt trucks “were mainly just used out in the oil fields” (Tr. 10). He referred to his truck as “an oil-field issue” (Tr. 26) and stated that “99 per cent of the time [the trucks] are used out on the dirt roads, and the lease roads.” The trucks “had been beefed up substantially for the oil field with bigger tires and that sort of thing” (Tr. 27). Farrand conceded, however, that WellTech’s drivers drove the trucks on the highway, and that there was no reason that they could not be driven on the highway (T. 27).

Compliance officer George McCown investigated the accident for OSHA. He stated that the Peterbuilt trucks “are normally used both on and off the road. You can see them on the road hauling earthen materials to a job site over a highway. . . . They make a good combination of on-road, off-road vehicles for hauling materials (Tr. 242-243).

The record establishes that the Peterbuilt trucks were not used exclusively for off-highway work. Although they were modified for oil-field work, the trucks were used on the highway. The Secretary cites several cases in which § 1926.602(a)(3) was applied to vehicles similar to Peterbuilt trucks (Secretary’s brief, p. 9). A review of these cases reveals that the applicability of the standard to the cited vehicles was not raised as an issue by the respondents.

The Secretary asserts that if the Peterbuilt trucks do not meet the requirements of “off-highway trucks,” they meet the requirements of the “and similar equipment” category tacked on to the end of the standard. The Secretary offers no reasonable explanation as to why the Peterbuilt trucks should be considered equipment similar to the earthmoving equipment specifically identified in the standard. It would be illogical for the standard to limit trucks to “off-highway” and then to allow combination “on-road, off-road” trucks to come in under the “similar equipment” umbrella.

The Secretary has failed to establish that § 1926.602(a)(3)(i) applies to the Peterbuilt trucks.

Noncompliance with § 1926.602(a)(3)(i)

Even if it were determined that the cited standard applies, the Secretary failed to establish that WellTech was in noncompliance. It is the Secretary’s burden to prove that WellTech failed to construct and maintain the access road “to accommodate safely the movement of” the Peterbuilt trucks. The record shows that the access road became muddy and slick as the rainfall increased. This alone does not establish the Secretary’s case. Any road becomes slicker when rained upon. Some evidence of the degree of slickness is necessary to prove that a hazard existed. The witnesses whose testimony tended to support the Secretary’s theory that the road was unsafe were on the whole less credible than the witnesses who considered the road to be safe.

Harold Dobbs drove the bulldozer. Dobbs testified that the road was “boggy” and that several of the trucks became stuck in the mud after they dumped their loads. Dobbs pushed the

trucks out with the bulldozer (Tr. 49-50). Dobbs described the road as being “in fairly good shape when we started” (Tr 53). Dobbs believed that the access road “was holding up good except for the terrace part” (Tr. 56). The access road “was in good repair but it was slick” (Tr. 75).

Dodds stated that he and Boehs discussed shutting down the jobsite, but he explained that the condition of the access road was not the reason for the discussion. Dobbs wanted to shut down the site because the crew was unable to do its job of preparing the new location (Tr.59):

[T]he reason we were wanting to shut down was because of the road that we were constructing was--we weren't doing any good. It was making things worse instead of better. That's why we discussed shutting down.

The road that the WellTech crew was constructing had a dirt base over which the crew was dumping rocks. The dirt was washing away in the rain. Dobbs explained (Tr. 87):

Well, when Roy [Boehs] and I discussed shutting down, it wasn't because we thought it was getting unsafe. We just thought we weren't accomplishing anything because of the rain.

Ray Boehs drove the grader the day of the accident. Boehs believed the access road was in “good, safe condition” that day (Tr. 136). He testified that he bladed the road six to eight times that day, and four or five times after 1:00 p.m. (Tr. 107-108). He observed some of the trucks getting stuck in the mud (Tr. 105). Boehs did not consider this to be dangerous; if a driver got his truck stuck Dobbs “just gave him a push with the dozer” (Tr. 130).

Boehs testified about the dam area of the road where the accident occurred. The road narrowed at that point. Boehs stated that where the road crosses over the dam, “there are no shoulders or anything on it. If a truck goes off towards the side of it, it's steep enough that it's going to turn over.” Boehs bladed this part of the road repeatedly (Tr. 118).

Steven Meister was driving one of the Peterbuilt trucks on April 10. Meister stated that “the road conditions had gotten slick” and that the trucks “could lose traction” (Tr. 142). Overall, Meister's testimony was vague and evasive. He peppered his testimony with qualifiers

such as “I believe,” “maybe,” “probably,” and “I suppose;” and he answered “I don’t know” or “I don’t recall” to a number of pertinent questions (See generally Tr. 158-160).

David White is the Oklahoma Highway Patrol Officer who was called to the accident site. The estimates of the amount of time that elapsed between Farrand’s accident and White’s arrival at the scene varied from 45 minutes to 2 hours (Tr. 189, 202-204). In that time, emergency rescue vehicles had converged at the site and Farrand’s body had been removed from the truck in the pond. The rain had increased in intensity. White conceded that the road was not in the same condition it had been at the time of the accident (Tr. 189). When White arrived at the site, he found the access road to be muddy, slick, and slippery (Tr. 184).

White made no physical examination of the road other than to look at it. He did not drive on it or perform a “coefficient of friction” test, a test that could help quantify the degree of slickness (Tr. 187). White could not state how slick the road was at the time of the accident (Tr. 188).

White estimated that John Farrand had been driving approximately 40 m.p.h. at the time his truck went off the road (Tr. 201). In his accident report, White determined the cause of the accident to be that Farrand was driving “an unsafe speed for muddy roads” (Tr. 182).

Michael Farrand was driving one of the Peterbuilt trucks the day of the accident. He was the brother of the deceased, John Farrand. Michael Farrand testified that on the afternoon of April 10, at the time he was hauling his second load, the road “was to the point where it was getting slick” (Tr. 16). Farrand stated that as he was descending the slope of the access road and then ascending it on the other side of the dam, the trailer and the back of his truck were “slipping a little bit” from side to side, and the wheels were spinning (Tr. 17). Michael Farrand’s testimony went farthest of the employee witnesses in describing the road conditions as unsafe on the day of the accident. At the time of the hearing, Michael Farrand was a plaintiff in civil litigation arising from his brother’s death.

Of the witnesses who observed the road conditions immediately before and after the accident, Dobbs and Boehs were the most credible. Unlike Michael Farrand, they had no pecuniary interest in the outcome of any proceeding related to John Farrand’s accident. And unlike the testimony of Meister, their testimony was detailed, specific, and direct. According to

their descriptions of the access road at the time of the accident, it was slick but not hazardous. Boehs was concerned about the area of the road that crossed the dam, so he bladed it several times during the afternoon. Dobbs and Boehs did not consider trucks getting stuck in the mud to be anything unusual when working on a dirt road in rainy weather.

Officer White was a credible witness but he had little to contribute to the information regarding the condition of the road at the time of the accident. He arrived at the scene after the accident and after the condition of the road was changed substantially by the arrival of the emergency vehicles and the continuing rain. White concluded that the cause of the accident was John Farrand's excessive speed on a muddy road.

Compliance officer George McCown could also offer little information regarding the road's condition. McCown disputed White's estimate of Farrand's speed at the time of the accident, but he based his opinion on photographs of the scene taken a day after the accident which, the parties agreed, did not show anything other than the layout of the area at issue (Tr. 46-47, 279). McCown could offer no quantifiable evidence of the degree of slickness of the road (Tr. 310-312).

The Secretary has failed to establish that WellTech did not maintain the access road "to accommodate safely the movement" of the Peterbuilt trucks. The citation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Item 1 of Citation No.1, alleging a serious violation of § 1926.602(a)(3)(i) is vacated and no penalty is assessed.

KEN S. WELSCH
Judge

Date: November 30, 1998