UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. VENANGO ENVIRONMENTAL, INC., Respondent.	Docket No. 98-0408

APPEARANCES: Maureen A. Russo, Esq.
Donald K. Neely, Esq.
Office of the Solicitor of Labor
For Complainant

Patrick Lewis, Esq.
Cleveland, Ohio
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a Compliance Officer (CO) of the Occupational Safety and Health Administration (OSHA) on September16, 1997, Venango Environmental, Inc. ("Respondent") was issued two citations on February 23, 1998. Respondent timely contested the citations.

Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Pittsburgh, Pennsylvania. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges, and Respondent does not deny, that it is an employer engaged in public utility construction. It is undisputed that at the time of this inspection, Respondent was building and/or repairing a waste treatment facility in Beaver Falls, Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

On or about September 5, 1997 one of Respondent's foremen operating a Case Model W24B articulating front end loader died as a result of injuries sustained when the machine overturned during work operations. OSHA investigated the accident on September 16, 1997.

Inspections of the front end loader as established by the evidence presented at the hearing demonstrated that the hydraulic line from the left rear brake was connected to the master cylinder. Other brake lines intended to be similarly connected were not. (JX - 1, Tr. 6-7). A number of employees had complained to management about the abnormal operation of the brakes prior to the date of the accident however, the machine had not been tagged out of operation. (Tr. 3)

Of the two citations issued to Respondent, Citation 1 settled at the hearing and thus is not in issue. (Tr. 6).[2]

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[1] Title 29 U.S.C. § 652(5).

[2] Under the terms of the settlement, Citation 1, Items 1a, 1b and 1c are affirmed. A total civil penalty of $2,625 is assessed. Citation 1, Item 2 is affirmed as a serious violation. A civil penalty (continued...)

As to Citation No. 2, to prove a violation, the Secretary must demonstrate by a preponderance of the evidence that (1) the cited standard applies, (2) the employer did not comply with the terms of the standard, (3) employees were exposed or had access to the hazard created by the non-compliance, and (4) the employer knew, or, with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989). The Secretary's failure to carry the burden of proof as to any one element of an alleged violation requires vacating that item.

Citation 2, Item 1a - 1926.602(a)(4).

Item 1a of Citation 2 alleged that;

> ...the brakes on the Case Model W24B front end loader, Serial number 9109287, were deficient in that the brake line to the left front was cut and crimped, the line to the left rear was present but disconnected and the right rear was missing entirely. The brakes were not capable of stopping and holding the front end loader.

The cited standard, 29 C.F.R. § 1926.602(a)(4), states, **in its entirety**;

> *Brakes*. . All earthmoving equipment mentioned in this 1926.602(a) shall have a service braking system capable of stopping and holding the equipment fully loaded, **as specified in Society of Automotive Engineers SAE- J237, Loader Dozer-1971, J236, Graders-1971, and J319b, Scrapers-1971.** Brake systems for self-propelled rubber-tired off-highway equipment manufactured after January 1, 1972 **shall meet the applicable minimum performance criteria set forth in the following Society of Automotive Engineers Recommended Practices:**
>
> **Self-Propelled Scrapers..... SAE J319b-1971.**
> **Self-Propelled Graders..... SAE J236-1971.**
> **Trucks and Wagons..... SAE J166-1971.**
> **Front End Loaders and Dozers.. SAE J237-1971.**

(Emphasis added.)

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[2](...continued)
of $3,675 ($4,900 as proposed reduced by 25%) is assessed.

The evidence demonstrates that the brakes were in such poor condition that stopping the machine when loaded required putting it into reverse gear and or lowering the bucket and scraping it along the ground. Some of the hydraulic brake lines were missing or crimped or cut. Everyone who drove or observed the machine in use recognized the faults with the brakes. At least one expert who examined the machine reached the conclusion that the loader was not capable of stopping and holding a load.

The standard promulgated and cited by the Secretary is clear and completely unambiguous. A violation of § 1926.602(a)(4) requires showing not only that the brake system on a covered machine renders the machine incapable of "stopping and holding the equipment fully loaded," but also that "stopping and holding" must be "as specified in" particular materials published by the Society of Automotive Engineers ("SAE"). The cited standard also requires that machines manufactured after January 1, 1972, apparently including the one in issue here, have brake systems which "shall meet the applicable minimum performance criteria set forth in the Society of Automotive Engineers Recommenced Practices" which are listed in the standard.

Years ago, in establishing the standard, the Secretary chose to incorporate definitions and tests established by the SAE. Now, in seeking to enforce the standard, she cannot simply ignore them. There is no need to engage in a full-blown pilpul to ascertain what is required by the standard. The unequivocal language of the OSHA standard mandates the use of SAE definitions or specifications as the criteria for "stopping and holding the equipment fully loaded." In the absence of any evidence on this record establishing what the SAE criteria are, there is no way to objectively and fairly determine whether there was non-compliance.

While it might be reasonable to assume that the condition of the brakes, which required a shift into reverse or lowering the bucket, or both, in order to stop, would most likely fail to meet any reasonable safety criteria, the Secretary cannot blithely ignore the standard as she herself wrote it. She cannot simply write out one of the criteria in the standard.[3] This is especially so in light of the

[3] OSHA is apparently deliberately attempting to write out of the standard any reference to the SAE materials. The SAE criteria are conveniently omitted from quotations of the standard appearing in the Secretary's citation, complaint and even in her pre-trial statement and post-hearing brief.

Secretary's published interpretation letter of August 29, 1986, *Clarification of service braking system requirements for rubber-tire off-highway equipment*, which requires considerations of an SAE standard.

There is no evidence whatsoever on this record that the condition of the brakes was such that the cited machine lacked a "service braking system capable of stopping and holding the equipment fully loaded, **as specified in Society of Automotive Engineers SAE- J237, Loader Dozer-1971, J236, Graders-1971, and J319b, Scrapers-. 1971**" The Secretary has failed to prove an essential element of the alleged violation. This item is accordingly VACATED.[4]

Citation 2, Item 1b - 19126.20(b)(3)

This item of Citation 2 alleged that;

> [T]he Case Model W234B, Serial number 9109287 front end loader with deficient brakes was not tagged, locked or removed from service. Operating equipment with deficient brakes can lead to severe or fatal injury.

The cited standard states;

> (b)(3) The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.

There is no dispute that the front end loader was not tagged or locked out of service or that it was available for use and was, in fact used, while the brakes were inoperable. However, the clear and specific terms of the cited standard require tagging out, locking out or removing from service equipment that is shown to be "not in compliance with any applicable requirement of this part." The

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[4] Judges Blythe and Sparks appear to have held otherwise in *Central Plains Contracting Co.*, No. 80-7081 (August 19, 1981), 1981 OSAHRC Lexis 159 (Judge Blythe); *The Great Lakes Construction Co.*, No. 85-0597 (April 15, 1986), 1986 OSAHRC Lexis 141, (Judge Sparks). With all due respect to these judges, I am of the opinion that the standard clearly requires comparison of the braking ability with the SAE standards. I also note that neither Judges' decision was reviewed by the Commission. Thus, they have no precedential value. *Leone Const.*, 3 BNA OSHC 1979 (No. 4090, 1976).

Secretary has failed to show that the front end loader was not in compliance with another applicable requirement imposed by Part 1926.

The Secretary's post-hearing brief, on page 7, states summarily that "[t]he front end loader was not in compliance with Part 1926 of the Regulations." There is no narrative explanation of the Secretary's theory or rationale nor is there any overt statement as to what regulation within Part 1926 the Secretary is relying on as the necessary predicate for this alleged violation. The Secretary then provides 29 transcript references in support of her proposition. Twenty-eight of these references are to broad or general testimony that the loader had inoperable, ineffective or bad brakes, and there is only one reference to another regulation, 1926.602(a)(4). (Tr. 139, lines 3-5). Given the context of the case and the single transcript reference to another regulation, it would appear that the Secretary is attempting to argue that since the loader violated 1926.602(a)(4), it had to be tagged out, locked out or removed from service pursuant to 1926.20(b)(3). However, in view of my previous conclusion that a violation of 1026.602(a)(4) has not been shown, there is no predicate for the alleged violation of 1926.30(b)(3). In the absence of a showing that the loader violated another requirement within Part 1926, the failure to tag out, lock out or remove the front end loader from service does not amount to a violation of 1926.20(b)(3). The Secretary has failed to establish the alleged violation. Accordingly, this item is VACATED.

Citation 1, Item 1c - Section 5(a)(1).

Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), provides;

> Each employer --
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The citation alleges, that "[a]t the Beaver Falls....Project, the steering on the Case, Model W24B, Serial number 9109287 was deficient."

To establish a violation of § 5(a)(1) of the Act, the Secretary must prove that (1) a condition or activity in the employer's workplace presented a hazard to its employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm , and (4) feasible means existed to eliminate

or materially reduce the hazard. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1963 (No. 84-546, 1991).

Apparently relying on Item 1a for finding against Respondent due to the inoperable brakes on the loader, this item alleges a violation of § 5(a)(1) of the Act specifically and only for the hazard generated by the loader's deficient steering. Based upon employee testimony, there is no doubt that the loader steering was not operating properly. Employee after employee testified that it was very difficult to steer the loader (*e.g.*, Tr. 23, 29). Engineer Baumann, appearing as an expert witness, opined that the steering was defective. (Tr. 119-120). Engineer Kassakert, also an expert witness, considered the steering defect to be of such magnitude that the operator of the loader could not steer the machine. (Tr. 239-240)[5]. Based upon such evidence, I find that the defective steering on the loader created a hazard to employees. It is also reasonable to infer that defective steering on such a machine operating on a construction site gives rise to the possibility of serious injury or death, and I so find. That the employer had actual knowledge of the hazardous condition is clear from the fact that Mr. Ernest Klein operated the defective machine and acknowledged the existence of the steering problem to others (Tr. 55, 72, 90). In addition, the Secretary established that a feasible means of abatement existed, repair or replacement of the hydraulic pump or valves supplying pressure to the steering mechanism, through the direct testimony of the two experts as well as inferences drawn from their testimony. (Tr. 113, 236-37).

This record demonstrates all of the elements of the alleged violation of § 5(a)(1) of the Act. , Item 1c of Citation 1 is therefore AFFIRMED.

Citation 2, Item 2a - 1910.20(b)(4).[6]

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[5] The Secretary's post-hearing brief incorrectly identifies page 155 of the transcript as the source of this testimony. In fact, the testimony appears at pages 239 - 240 of the transcript. Perhaps more importantly, the Secretary's brief misquotes this testimony. The brief quotes the witness as concluding "[t]his hazard is likely to cause death or serious physical harm." The witness said no such thing. The sentence was apparently added by counsel. This is but one of numerous significant errors in the Secretary's brief.

[6] The citation which initially alleged a violation of the standard at 1910.20(b)(4), was amended (continued...)

The citation alleges that;

> Laborers and Carpenters were permitted and encouraged to operate the Case, Model W24B, Serial number 9109287 front end loader and they were unqualified by training or experience to operate this machine.

The cited standard requires that "the employer shall permit only those employees qualified by training or experience to operate equipment and machinery."

As noted on page 11 of the Secretary's post-hearing brief, numerous employees testified without contradiction that they had operated the machine with little or no training or experience. Several of these informal operators were, in fact, urged to do so. (*e.g.*, Tr. 90). Allowing such employees to operate heavy equipment like the loader constitutes a violation of this standard. This item is consequently AFFIRMED.

Citation 2, Item 2b - 29 C.F.R. § 1926.21(b)(2).

The cited standard requires that;

> each employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness on injury.

The citation alleges that Respondent;

> did not train employees in the recognition and avoidance of unsafe conditions as evidenced by permitting and encouraging untrained and inexperienced employees to operate the ... front end loader which had faulty brakes and steering. Absence of, or insufficient training could lead to severe injury or death.

The basis of this item is the OSHA CO's conclusion that;

> that the employees were not instructed in the recognitions and avoidance of unsafe conditions, vis-a-vis they were instructed, they

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[6](...continued)
to identify the standard at 1926.20(b)(4). The amendment was granted inasmuch as it did not prejudice Respondent.

> were permitted and encouraged to operate an unsafe front end loader and a lot of other construction equipment that was on the site.[7]

(Tr. 149). This is the only argument in support of Item 2b made by the Secretary in her post-hearing brief . (Sec. Brief, p. 12). In sum, it is the Secretary's theory that the same activity, that is, allowing or encouraging untrained or under-trained employees to operate the front end loader, is both a violation in and of itself (Item 2a) and the sole evidence of another violation (Item 2b). Without any further rationale, Items 2a and 2b are redundant in that the same activity gave rise to both charges and both are abated by the same action. Moreover, there is positive evidence that at least some safety training or meetings took place. The record includes testimony from six employees regarding safety meetings, five stated that the meetings were weekly.[8]

For the above reasons, I conclude that the Secretary has failed to show by a preponderance of the reliable evidence on this record that Respondent violated the standard at 29 C.F.R. § 1926.21(b)(2). Accordingly, Item 2b is VACATED.

Willful

Having affirmed the violations as alleged in Citation 2, Items 1c and 2a, I turn to whether the violations were willful.

A willful violation of the Act is one committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade,Inc*., 13 BNA 0SHC 1019 (1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that

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[7] The "lot" of other equipment described by the Compliance Officer consisted of one crane and one "bobcat." (Tr. 149). The Secretary points to no evidence that these pieces of equipment were owned or controlled by Respondent or that they were operated by Respondent's employees.

[8] The CO expressed dissatisfaction with the nature and content of Respondent's safety meetings. He did not consider such shortcomings as evidence of this alleged violation, but, rather, relied upon it when asked about his basis for concluding that Item 2b was willful. (Tr. 149). The CO's second-hand descriptions of the regular safety meetings was somewhat inconsistent with the testimony of employees who attended those meetings. (Tr. 18, 45, 58 and 81.) The CO's testimony about the meetings was also less than illuminating, and, in the absence of more detailed evidence, does not fulfill the Secretary's burden of showing them to be so inadequate as to violate the requirements of 1926.21(b)(2).

can be considered a conscious disregard or plain indifference to the standard, *General Motors Corp., Electro-Motive Div*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated); *Williams Enterprises, Inc.*, 13 BNA 0SHC at 1256-57. The term "willful" describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.*, 595 F.2d 309, 318-319 (5th Cir. 1979); *Ensign - Bickford Co. v. 0OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983).

The degree of disregard for employee safety by Mr. Ernest Klein goes far beyond mere "intentional." This record is replete with evidence of Mr Klein's awareness of the defects in the loader, its use by inexperienced employees and the very danger to which such use gave rise. Warned of the dangers of using the loader in its poor condition, Mr. Klein not only allowed its use, he also directed employees to use the machine and used it himself. One employee aptly depicted Mr. Klein's state of mind in testifying that;

> [It] seemed like Ernie really didn't care about it, you know, about the brakes. He just kind of blew you off. You know, just get the job done....

(Tr. 20).

The Commission has held that a finding of willfulness is not justified where an employer has made a good faith effort to comply with the Act's requirements, even if the employer's efforts are not entirely effective or complete. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2139 (No. 90-1747, 1994). However, such is not the case here. Respondent's efforts to repair were incomplete, ineffective and bordered on the disingenuous. Under the applicable Commission standard, Respondent's repair activity was not made in good faith because its efforts were not reasonable under the circumstances. *Id.* Likewise, given the degree of problems with the loader, Respondent's repair activity was not reasonable. Klein knew the defects existed after the supposed repair. While several brake hydraulic lines were crimped or cut, replacement of only one was even attempted, and Klein was even informed that the "repairs" were incomplete. (Tr. 202-03). It is therefore concluded that Respondent's repair attempts were not reasonable under the circumstances and thus cannot rise to the level of a good faith, though ineffective, attempt to comply with the requirements of the Act.

Finally, Ernest Klein's refusal to testify raises the inference that his testimony would be damaging to his case. At the hearing, after being sworn in as a witness, Mr. Klein declined to give

any testimony on the grounds that his answers might tend to incriminate him and thus invoked his right under the Fifth Amendment. Invocation of one's right not to give self incriminating testimony in proceedings before the Commission does not preclude drawing adverse inferences based on the refusal to testify. *Woolston Construction Co., Inc.*, 15 BNA OSHC 1114, 1121 (No. 88-1877, 1991), *aff'd*, CA DC 91-1413, May 22, 1992, 15 BNA OSHC 1634. Such an inference is warranted in this case because it would be highly consistent with the other evidence of record and with Mr. Klein's demonstrated antipathy towards employee safety.

For the foregoing reasons, I conclude that the violations of 29 C.F.R. 1926.20(b)(4) and § 5(a)(1) of the Act, 29 U.S.C. 654(a)(1) are willful.

Penalty Assessment

The Commission has often held that in determining appropriate penalties for violations, including those classified as willful, "due consideration" must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." An administrative law judge is required "to state an adequate factual basis for his assessment of a penalty." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). For the following reasons I find that a penalty of $25,000 for each of the two willful violations is appropriate in this case.

The applicable penalty for a willful violation is an amount not to exceed $70,000 for each violation. Act, § 17(a), 29 U.S.C. 666(a), as amended. Respondent's size is small, with some 32 employees at the time of the violations and the company apparently has a clear record of any prior violations. The gravity of the violations is not very high in that relatively few employees were exposed to the hazards and employee exposure was for rather short period time. However, the violative conditions had a high degree of likelihood of causing serious injury or death if an accident did occur. Further, Respondent's lack of good faith is evident and is far and away the most salient feature of any penalty consideration. It is clear that Respondent's willful actions exposed employees to serious physical harm or death. It is also clear that if there were degrees of willfulness, this would be of the

highest order because true scienter is shown on this record. Quite blatantly, Respondent knowingly and intentionally put its employees in harms' way.

Based on the above, a civil penalty in the amount of $50,000 is assessed.[9]

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(1) of the Act and of section 5(a)(2) of the Act as alleged in Citation 2, Items 1c and 2a.

4. Each of the violations of the Act found above was willful.

5. Respondent was not in violation of section 5(a)(2) of the Act as alleged in Citation 2, Items 1a, 1b, and 2b.

6. A total civil penalty of $50,000 is appropriate for the willful violations of the Act.

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[9] Respondent's accountant testified regarding the financial condition of the company with Respondent maintaining that if the penalty as proposed were assessed Respondent would be unable to meet its financial obligations and unable to continue operations. While some dispute between the Secretary and Respondent exists as to the actuarial import of some of the accounting factors testified to by the accountant, the parties agree and understand that the financial condition of the employer is not one of the four factors the Commission is required to consider in arriving at an appropriate penalty.

ORDER

1. Items 1c and 2a of Citation 2 are AFFIRMED as willful violations of the Act.

2. Items 1a, 1b and 2b of Citation 2 are VACATED.

3. A civil penalty of $50,000 is assessed for the willful violations.

4. Under the terms of the settlement, Citation 1, Items 1a, 1b and 1c are AFFIRMED as serious violations of the Act.. A civil penalty of $2,625 is assessed for the serious violations. Under the terms of the settlement, Citation 1, Item 2 is AFFIRMED as a serious violation of the Act. A civil penalty of $3,675 is assessed for the serious violation.

Michael H. Schoenfeld
Judge, OSHRC

Washington, D.C.

Dated: