

Secretary of Labor,
Complainant,

v.

Gulf Hauling & Construction, Inc.,
Respondent.

OSHRC Docket No. **99-1193**

APPEARANCES

Kathleen G. Henderson, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Walter M. Cook, Jr., Esq.
Lyons, Pipes & Cook
Mobile, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Gulf Hauling & Construction, Inc. (Gulf Hauling), a company engaged in the business of hauling waste materials in Mobile, Alabama, received citations after an employee working at the International Paper Company (IP) plant was found lying on the waste pad in black liquor solids, a caustic material. The employee died several weeks after the accident from complications arising from the chemical burns. As a result of an inspection by the Occupational Safety and Health Administration (OSHA), Gulf Hauling was issued serious and “other” than serious citations on June 4, 1999.

The serious citation alleges that Gulf Hauling violated §5(a)(1) of the Occupational Safety and Health Act (Act) (items 1a and 1b) for failing to adequately illuminate and ensure proper drainage at the waste pad; 29 C.F.R. § 1910.132(a) (item 2) for failing to require employees to wear chemically impervious protective clothing; 29 C.F.R. § 1910.132(d)(1)(i) (item 3) for failing to identify the proper personal protective equipment for the specific job tasks in its hazard assessment; 29 C.F.R. § 1910.145(c)(3) (item 4a) for failing to have safety instruction signs at the waste pad; 29 C.F.R. §§ 1910.1200(h)(3)(ii) and 1910.1200(h)(3)(iii) (items 4b and 4c) for failing to train employees on the hazards and precautions associated with exposure to alkaline chemical

substances; and 29 C.F.R. § 1910.151(c) (item 5) for failing to provide an eye wash/shower facility at the waste pad. A total penalty of \$14,000 is proposed for the alleged serious violations.

The “other” than serious citation alleges a violation of 29 C.F.R. § 1910.147(c)(4)(i) for failing to develop a written lockout-tagout procedure for cleaning the grit basin. No penalty is proposed.

Gulf Hauling timely contested the citations and the hearing was held December 20-22, 1999, and January 19-20, 2000, in Mobile, Alabama. Jurisdiction and coverage are stipulated (Tr. 5). The parties filed post-hearing briefs.

Gulf Hauling denies the violations. It argues that compliance was impossible because IP owned and controlled the waste pad and the employee who died violated a company rule.

For the reasons stated, the violations alleging lack of a detailed hazard assessment (item 3), employee training (items 4b and 4c), and an eyewash/shower facility (item 5) are affirmed. The remaining alleged violations are vacated.

The Accident

Gulf Hauling is a family-owned business engaged in hauling dirt, debris, and materials generated from paper processing manufacturing for customers in Mobile, Alabama (Tr. 15, 38). In business since 1967, Gulf Hauling employs 50 employees. Most employees are dump truck drivers and equipment operators (Tr. 39, 42).

Gulf Hauling’s largest customer is the International Paper Company (IP), which is primarily engaged in the business of making paper and paper products (Exh. C-11, p 17-18). Pursuant to contract, Gulf Hauling transports paper processing waste from IP’s hoppers and bins to a concrete waste pad on IP’s property. The hoppers and bins are identified as the sludge hopper, ash hopper, tailings hopper and the lime bins (green liquor dregs, slaker grit, and PCC¹) (Exh. C-3; Tr. 81-83). After being dumped on the waste pad, the waste materials are later transported by Gulf Hauling to an off-site IP landfill (Exh. C-2; Tr. 43, 108, 110, 218, 248).

¹ PCC is precipitated calcium carbonate (Exh. C-3E; Tr. 94).

Gulf Hauling has hauled the waste materials at IP's plant for approximately 12 years (Tr. 80). Gulf Hauling uses three 20-yard dump trucks, two 16-yard dump trucks, three front-end loaders and a bobcat. The dump trucks remain under a specific hopper until filled and then the waste material is dumped on the waste pad (Tr. 50, 54, 273-274, 529). Front end loaders are used to push up and contain the waste material in separate piles on the waste pad (Tr. 67, 80).

IP's plant operates 24 hour a day, seven days a week. Gulf Hauling assigns six drivers to work solely at the plant (Tr. 43, 214, 633). Two drivers work the day shift (5 a.m. to 5 p.m.) and one driver works at night (5 p.m. to 5 a.m.) (Tr. 216, 302, 363, 443, 658). On average, the drivers dump approximately 4-8 loads during the day shift and 4-5 loads during the night shift (Tr. 215). Other Gulf Hauling drivers transport the waste materials from the waste pad to IP's landfill.

The concrete waste pad is flat; approximately 220 feet by 230 feet. The ash, sludge, tailings, lime and other waste from the plant are dumped on the pad in designated areas (Exh. C-5; Tr. 66-67, 81, 113, 972). The waste pad is approximately 100 yards from the mill with access by a dirt road (Tr. 269, 385, 410, 900).

In October, 1998, IP hired an environmental company to remove black liquor and clean the storage tank at Blakley Island (Exh. C-11 p. 11; Tr. 111-112, 179). Black liquor, which consists of sodium hydroxide, sodium sulfide and organic matter, is a residual product from the paper pulping process and is reused in cooking more pulp (Exh. C-11, p. 43-44). It is a corrosive and caustic material which causes skin irritations and burns if exposed (Exhs. C-3B).

After removing the black liquor from the tank, black liquor solids remained as a residue which had to be removed (Exh. C-23, pp. 39-40, 63, 82, 114, 153). Black liquor solids were described as ranging from a runny sludge to hard chunks of fiber (Exh. C-23, p. 82; Tr. 601).

On or about February 17, 1999, Gulf Hauling began hauling black liquor solids from the Blakley Island tank to IP's waste pad. By February 27, 1999, the day of the accident, 47 truck loads of black liquor solids had been dumped onto the pad (Exh. C-23, pp. 42-43, 153-156; Tr. 112-113, 180, 183). After the black liquor solids were dumped on the waste pad, they periodically were hauled from the pad.

The six Gulf Hauling drivers working full-time at IP's plant were not involved in transporting the black liquor solids to the waste pad (Tr. 773). On February 26, 1999, Gulf

Hauling employee Ray Matheny, 73 years old, began his night shift at IP's plant. Matheny, an experienced driver, had worked for Gulf Hauling for less than five months (Tr. 212, 214). That night Matheny was hauling lime to the waste pad (Tr. 229, 681, 970).

At approximately 5 a.m. the next morning, Matheny was found outside of his truck lying on the pad in approximately 6 - 12 inches of black liquor solids which had accumulated in front of the lime pile (Tr. 226-227, 229, 390, 396, 679, 685). Matheny was taken to IP's first aid station and washed with a neutralizing solution. The nurse described Matheny's skin as reddened and peeling. She observed no blistering. He was cold. Matheny told the nurse that his truck had gotten stuck in the sludge and that when he had gotten out he slipped and fell. He could not get back up (Tr. 742-744). Matheny was taken to the hospital. He died several weeks later from complications arising from the chemical burns (Tr. 29, 743, 745, 758, 895).

After receiving a complaint, OSHA Industrial Hygienist (IH) Jennifer Jackson inspected Gulf Hauling's operation at the waste pad (Tr. 755, 904). As a result of the inspection, Gulf Hauling and IP received citations.²

Discussion

Serious Citation No. 1

Item 1a and 1b - Alleged Violations of § 5(a)(1) of the Act

The citation alleges that Gulf Hauling did not maintain adequate illumination (item 1a) and proper drainage at the waste pad (item 1b).

Section 5(a)(1) of the Act provides that each employer:

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 Secretary alleges that the waste pad was not adequately illuminated and drained. The Secretary asserts that Matheny backed his truck into an accumulation of black liquor solids because of the inadequate illumination and drainage on the pad.

² The citation issued to IP was settled (Exh. R-1; Docket No. 99-1192).

The waste pad is a flat concrete surface approximately 220 feet by 230 feet. The pad is located 100 yards from the plant. A dirt road runs from the plant to one corner of the waste pad (Exh. C-6; Tr. 113, 249-250, 663). The waste materials from the plant (lime materials, sludge/tailings, and fly ash) are placed on the pad in designated areas (Exh. C-5).

To establish a violation of § 5(a)(1) of the Act, commonly referred to as the general duty clause, the Secretary must show that (1) there is an activity or condition which constituted a hazard to employees; (2) either the employer or its industry recognized the activity or condition as hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and, (4) there were feasible means to eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).

Illumination at the Waste Pad

Since the IP plant operated 24-hours a day, Gulf Hauling had one driver dumping the plant's waste material on the waste pad during the night shift. Sometime in February, 1999, IP installed a temporary light on the other side of the drainage ditch which ran along one side of the waste pad. The light was generally not on when Gulf Hauling's driver was dumping the plant's waste materials (Exhs. C-17, C-20; Tr. 134, 389, 394, 677, 689, 699, 704).

For illumination on the pad, drivers depended on lighting from the plant approximately 100 yards from the pad, the moon (if out), and the headlights/backup lights from the dump truck (Tr. 423, 677, 812). Randy Robbins, Gulf Hauling's superintendent, was aware that the drivers depended on lighting from the plant and their headlights when dumping their loads. But, he did not insist that IP turn on the temporary lighting (Tr. 207, 230). He "did not consider the lack of temporary or permanent lighting to be a hazard" because drivers did not leave their trucks on the pad (Tr. 208). Drivers Stoney Lang and Richard Derwin expressed concern to Gulf Hauling because of the illumination at the waste pad. Lang requested that lights be provided (Tr. 433-434). Driver Richard Derwin, who was assigned to operate a front end loader and pull plastic from the black liquor solids dumped on the pad during February, 1999, told Gulf Hauling that he "couldn't see the whole pad and , you know, with it being slick you really couldn't see how far you were away from the wall" (Tr. 604). Derwin testified:

Because without light, you couldn't see. I mean, there was concrete walls and a guardrail. You know, you really couldn't see enough to know how really close you was.

(Tr. 584).

However, the illumination on the pad from the plant and a truck's headlights was not shown by the Secretary to be inadequate or a recognized hazard under the conditions worked by Gulf Hauling. Driver Lang testified that with the lights from the plant, "I can see the material that's on the pad itself. I make out what the materials are without lights" (Tr. 423-424). He could identify the ash pile (Tr. 424). Derwin also acknowledged that "[w]ith the loader lights on, I could see the liquor the area where I was working with the liquor, but that was about it" (Tr. 584). Derwin stated that after one or two nights "they [IP] put a generator out there with lights on it" (Tr. 579, 612). It appears that Derwin also started working days (Tr. 622).

The concrete waste pad is large and flat. Other than dumping waste material on the pad, Gulf Hauling's drivers did not work at the pad at night. Also, no other employees worked at the waste pad at night. There is no showing that other employees or trucks were on the pad at the same time as Gulf Hauling was performing its dumping operation. Other than the waste piles towards the back of the pad, there were no objects or obstacles on the pad which impeded the driver's vision and operation of the dump truck.

Other than dumping the waste material, Gulf Hauling's drivers did not stay at the pad area. The drivers spent most of the time at the plant's hoppers and bins waiting for the trucks to fill. When on the pad, the drivers remained inside the truck. The cabs of the truck and front-end loader³ are fully enclosed and all controls to operate the truck and dump the waste are inside the cab (Tr. 239, 289, 358, 552, 559, 911). To perform the dumping operation, there was no reason for drivers to leave their trucks on the pad. Prior to Matheny's accident, there is no showing that drivers got out of their trucks at night for any reason.

Driver Marcus Albritton stated that he did not walk or get out of his truck or front-end loader on the pad (Tr. 298, 341). Driver Rodney Evans also never got out of his truck to dump material nor has he had a vehicle stuck on the waste pad (Tr. 636, 659). Evans has stood at the

³ A front-end loader, generally located at the sludge hopper, was periodically driven to the pad to move the waste material into designated piles (Tr. 80, 217-218).

front entrance to the pad, away from the waste piles (Tr. 654). Standing on the pad at the entrance was not shown to be hazardous to the drivers. The waste piles were some distance from the entrance. Driver Stoney Lang testified that he “never had the occasion to walk on the waste pad” (Tr. 416).

When black liquor solids were placed on the waste pad, the record shows that there was a containment problem. The black liquor spread on the pad and accumulated in other areas. Black liquor is a caustic and can cause serious health problems if exposed for a prolonged period (Exh. C-3B). The dumping of black liquor solids on the pad occurred only during February, 1999. Although at the time of the accident the black liquor accumulated in front of the lime pile, the Secretary fails to show that Matheny drove into the accumulation because of the lack of illumination. He may have believed that his truck would not get stuck.

In addition to not establishing an illumination hazard, the record is unclear as to the level of illumination required at the waste pad. Evans, who went to the pad looking for Matheny, described it as “still dark” (Tr. 677). From his truck, he saw Matheny’s truck but did not see Matheny lying on the pad until he heard a faint yell (Tr. 677-678).

On April 6, 1999, IH Jackson, using a Davis light meter, measured the level of illumination on the waste pad from the plant’s lights and a truck’s headlights (Exh. C-20; Tr. 806, 811). The light meter recorded an illumination level of less than 1 foot candle. With the temporary lights on across from the drainage ditch, the meter recorded an average of 16 foot candles. The readings varied from less than 1 foot candle at the entrance of the pad to more than 16 foot candles at the railing directly across from the temporary lights. IH Jackson testified that she considered the temporary lights as providing an acceptable⁴ level of illumination (Exh. C-20; Tr. 947-948).

IH Jackson is not an expert in illumination and there are no illumination standards for general industry (Tr. 935). It is noted that the construction standard, 29 C.F.R. § 1926.56(a) specifies a minimum illumination for waste areas of 3 foot candles. Instead, the Secretary relies on ANSI A11-1-1965 (R1970) and ANSI/IES-RP-7-1991 for “Industrial Lighting” as guidance (Exhs. C-21, C-22; Tr. 828). The ANSI standards are not mandatory.

⁴ Jackson would have preferred two temporary light units but would have accepted the one unit (Tr. 948).

The Secretary points to Table I, ANSI A11-1-1965 “Levels of Illumination Currently Recommended” which recommends in foot candles an amount of illumination for various industries and activities (Exh. C-21, p. 10-14). The table does not contain a recommendation for paper mills or waste pads. The Secretary instead focuses on a 20 foot candles’ recommendation for “active storage yards” and “loading/unloading platforms” (Tr. 832).

Table B2, ANSI/IES-RP-7-1991, on the other hand, recommends 5 foot candles for an “active storage yard” (Exh. C-22). Also, Table B2 recommends 0.2 foot candles for “coal storage piles and ash dumps” at electric generation stations (Exh. C-22).

At the Secretary’s request, the court personally observed the waste pad after dark on January 19, 2000, at approximately 7:00 p.m. (Tr. 992). The court was on the pad within 20 feet of the entrance. From the court’s observations, the amount of light⁵ from the plant, moon and a truck’s headlights that evening was sufficient to see across the length and width of the waste pad, distinguish and identify large obstacles on the pad, such as the truck and waste piles, make written notes on paper, read the digital dial on the light meter, and tell time from a wrist watch (Tr. 994-995).

Although considered acceptable by the Secretary, the temporary lights installed by IP across the drainage ditch from the waste pad, if on, illuminates one side of the pad and not the entire pad where most of the waste piles were located. The Secretary’s average light meter reading with the temporary lights on was 16 foot candles along the side of the pad nearest the temporary lights. No readings were taken in the area of the waste piles. Also, her readings at specific locations on the pad varied from 1 to 16 foot candles (Exh. C-20).

Item 1a is vacated.

Drainage at the Waste Pad

Drainage at the waste pad includes a drainage ditch which runs along one side. On the opposite side of the pad, there are four 6-inch drainage pipes (Exh. C-5; Tr. 124-125, 249, 663).

⁵ During the court’s visit, there were temporary construction lights on in an area behind the ditch pointed parallel to the pad which were not present during February, 1999 (Tr. 994, 997). There is no evidence that the construction lights affected the illumination on the pad.

Although flat, the waste pad is sloped to drain towards the ditch or pipes (Tr. 250). The pad's entrance was kept clear (Exh. C-5; Tr. 121-122, 301).

According to the drivers, there were occasions when the drainage pipes on one side of the pad became clogged. Gulf Hauling had complained to IP about the drainage on several occasions. Superintendent Robbins testified:

When we notice it's clogged, we call an International employee which would be right now, Carl Mueller, and tell him the drains are clogged. Then, he would call and have them unclogged. If it's not owned by Gulf Hauling, we are not to touch it (Tr. 243).

Driver Rodney Evans stated that when the drains were clogged, work on the pad is more difficult (Tr. 669). He testified that "the water would mix in with that lime, and make the lime slippery; and it would flow and it would run into the sludge. And where the angles of the pad and how the drains around it would build up to the back corner" (Tr. 671). However, even when clogged, Evans found "no difficulty in operating the vehicle on the pad because the water stayed back and to the rear, and that left enough space up front so that I could turn around to back up to the edge of where it had built up to dump my loads" (Tr. 670).

When black liquor was placed on the pad in February 1999, the record indicates that the drains clogged more frequently (Tr. 313-315, 718). In an attempt to contain the black liquor solids, Gulf Hauling placed ash approximately one foot high around the pile (Tr. 600, 669).

Driver Marcus Albritton testified that if he saw the drains clogged, he notified his Gulf Hauling supervisor to contact IP (Tr.314, 324). According to Albritton, the drains were unstopped the next day but may clog back up (Tr. 325). He stated that "[e]ven if the drains were stopped, there was no reason for anybody to drive in that material as it accumulated around the edges when the drains were clogged" (Tr. 354).

The record fails to show that the drainage created a hazard to Gulf Hauling's drivers or that Gulf Hauling had the means to abate the problem other than notifying IP. The drivers were not shown to work in areas affected by inadequate drainage. Also, the Secretary does not identify the reason for the inadequate drainage: pipes too small, thickness/consistency of the black liquor, or slope of the pad. The record is silent as to the frequency, duration, and extent of the drainage problem. It appears that once IP was informed of a problem, the drain pipes were

cleared. The accident to Matheny and the accumulation of black liquor solids in front of the lime pile was not shown to be the result of inadequate drainage or that Gulf Hauling should have known of the condition.

During her inspection, IH Jackson did not inspect drain pipes or observe the drains clogged (Tr. 955). She did not identify whether abatement required larger drain pipes, more drain pipes, drain pipes in different locations or a change in the slope of the pad. Her statement that “the water could not drain off the pad as quickly as it normally would” is ambiguous (Tr. 956). She did not identify what is normal drainage.

Even if the drainage was inadequate, there is also no showing that Gulf Hauling could install new drain pipes or change the pad’s slope. The pad was owned and controlled by IP. The record shows that when the drains were clogged, Gulf Hauling notified IP, who immediately corrected the problem. What other abatement action the Secretary expected from Gulf Hauling is unclear.

IH Jackson “understood that Gulf Hauling could deal with it in keeping the drains unclogged, that they would try to do so, and if they couldn’t, then they would notify IP and if IP could not address the drain problem, then IP would notify an outside contractor” (Tr. 941).

Item 1b is vacated.

Items 2 and 3 - Alleged Violations of § 1910.132(a) and § 1910.132(d)(1)(i)

The citation alleges (item 2) that employees working at the waste pad did not wear chemically impervious clothing, gloves, or boots to protect against contact with alkaline chemical substances such as black liquor solids. Also, the citation alleges (item 3) that personal protective equipment (PPE) required for specific jobs such as truck drivers was not identified in the hazard assessment.⁶

⁶ The Secretary has the burden of proving a violation.

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).

(continued...)

Gulf Hauling's PPE

Gulf Hauling provided drivers with PVC rain suits, rubber gloves, rubber boots, ear plugs, safety glasses, hard hats, leather steel toed boots and leather gloves (Tr. 165, 167, 255, 280, 415, 520-521, 651). Superintendent Robbins testified that not all of the PPE was worn when the driver was on the waste pad. He stated that steel toed boots, hard hats, and safety glasses were always worn, and ear plugs, if required in the area (Tr. 167). Gulf Hauling has no written instruction pertaining to the use of PPE on the waste pad and there was no requirement when to wear the rubber protective equipment. It was discretionary with the driver (Tr. 167, 252). The drivers testified that they were only told to wear the rain suit, rubber gloves and rubber boots when needed (Tr. 283, 415-416, 649).

Other than Richard Derwin, the drivers were not involved with the black liquor solids dumped on the waste pad (Tr. 781). Generally, the drivers dumped the waste material from the plant onto the pad and returned to the plant without getting out of the truck's fully-enclosed cab (Tr. 282, 298, 416-417, 560, 649). Although not all, many drivers kept their rain suits in the truck (Tr. 282, 650).

When the black liquor solids were placed on the waste pad, Richard Derwin was assigned to remove plastic sheets. Plastic sheets had been placed in the truck's bed as a liner to protect it from corroding (Tr. 561, 574, 781). To remove the plastic from the black liquor, initially Derwin walked into the black liquor and removed it by hand (Tr. 572, 615-616, 781). He described the black liquor as "gooey. It felt kind of hard and wet at the same time. It was slippery." (Tr. 573). When removing the plastic by hand, Derwin testified that he wore his rubber equipment (Tr. 523, 575). He believed the rubber equipment worn was thicker than the equipment provided when he first started to work (Tr. 571).

After two work shifts using his hands, Derwin began driving a front-end loader into the black liquor to pull out the plastic (Tr. 220, 583, 592, 616). When he started using the loader, he did not get off the loader to separate the plastic. He sometimes got off the loader at the entrance

⁶(...continued)

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

to assist the off-site truck drivers to pull the tailgate pin (Tr. 587-588, 618). Derwin described one time getting black liquor on his arm when he slipped from the loader's ladder. It burned until he had gone to first aid and rinsed it off (Tr. 593-594).

Caustic Materials

Black liquor is a processed chemical resulting from cooking pulp. It is typically in a liquid form (Exh. C-3B; Tr. 472). The pH level of black liquor is approximately 12 based on tests by IP at Blakley Island (Tr. 907-908). It is caustic⁷ and can cause skin burning (Tr. 769, 776). Black liquor solids, which is the residue, consists of black liquor and solids (Tr. 90). Lime, which Gulf Hauling regularly hauled from IP's plant to the pad, is also caustic (Exhs. C-3A, C-3C, C-3E; Tr. 772). The drivers were aware that it was caustic (Tr. 791).

IH Jackson performed no pH test on any of the waste materials on the pad, including the black liquor and lime (Tr. 907). She did not know if IP's pH test was performed with water mixed in the black liquor such as after a rain (Tr. 909). IH Jackson agrees that if water is mixed in the caustic material, the pH level may be lower (Tr. 909).

Because black liquor and lime are skin contact hazards, the Secretary asserts that the drivers need to have available while on the waste pad chemically impervious clothing or other suitable protection (Tr. 764). Such clothing does not degrade if a caustic material contacts it. It would protect the skin (Tr. 766, 789, 913, 959). Superintendent Robbins did not know if the rain suits were chemically impervious, and did not provide OSHA with literature or documentation (Tr. 166, 765, 968).

The Secretary does not require drivers to wear the chemically impervious clothing at all times on the waste pad (Tr. 767). The Secretary is satisfied if the driver has such clothing available so that if he has to walk on the pad for whatever reason, he could put it on to protect his skin (Tr. 768).

Section 1910.132(a) (item 2)

Section 1910.132(a) provides that:

⁷ An alkaline chemical is the same as a caustic chemical (Tr. 969).

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Compliance with § 1910.132(a) requires that PPE be provided when the employer has actual knowledge of a hazard requiring the use of PPE or a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the use of such equipment *Armour Food Co.*, 14 BNA OSHC 1817 (No. 86-247, 1990).

The record fails to show that the rubber protective equipment provided by Gulf Hauling was not appropriate and not worn by employees when exposed. The MSDS for black liquor requires the use of clothing made of “neoprene, nitrite rubber, polyvinyl chloride (PVC), or a material similarly resistant to black liquor” (Exh. C-3B; Tr. 914, 931). The MSDS for lime requires the wearing of neoprene gloves, safety glasses and other protective equipment, such as aprons and boots if handling large amounts, and gross contamination is possible (Exhs. C-3A, C-3C, C-3E).

There is no showing that the drivers loading the trucks at the lime bins, or Richard Derwin removing plastic from the black liquor at the waste pad, were not wearing the rubber protective equipment required by the MSDS and provided by Gulf Hauling. Compliance with the MSDS complies with the PPE requirements of § 1910.132(a) (Tr. 915, 963). IH Jackson understood that the rain suits used by the drivers were PVC (Tr. 911).

There is no dispute that Matheny, when he came in contact with the black liquor, did not have on rubber protective equipment (Tr. 919). IH Jackson, however, did not know if his rubber suit and gloves were in the truck (Tr. 962). She observed a rubber suit in one truck but did not know if it belonged to Matheny (Tr. 962).

Also, Matheny’s getting out of the truck on the pad was not foreseeable by Gulf Hauling. If the truck was stuck or had malfunctioned, there is no evidence that Gulf Hauling knew or

should have known with reasonable diligence. The record fails to show that drivers previously had walked on the pad in the areas of the waste piles or that there were prior incidents of a truck being unable to drive off the pad because of malfunction or getting stuck.

Item 2 is vacated.

Section 1910.132(d)(1)(i) (item 3)

Section 1910.132(d)(1)(i) provides that the employer shall:

Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.

In order to determine the appropriate PPE, § 1910.132(d) requires an employer to assess the work place for present or likely to be present hazards. The hazard assessment is to identify the specific job task hazards which may require appropriate PPE to be worn (Tr. 959).

There is no record that Gulf Hauling performed a hazard assessment of the lime bins and waste pad. Gulf Hauling's written safety policy includes a hazard communication program and a personal protective equipment (PPE) program (Exh. C-18). However, the programs are generic and do not specifically relate to the waste pad or bins (Tr. 764). The PPE assessment does not reference the job tasks performed at the IP plant, the caustic materials to which the drivers may be exposed, the skin contact hazards associated with the materials, and the types and circumstances when PPE should be worn. Superintendent Robbins was not aware of any hazard assessment made at the waste pad (Tr. 173). He also stated that he did not inform the drivers that black liquor was caustic and could burn their skin (Tr. 187).

Some of the waste materials (lime products and black liquor) were caustic and posed health hazards to employees from exposure (Exhs. C-3A, C-3B, C-3C, C-3E). In loading the lime from the bins, drivers used a front-end loader and occasionally shovels to capture any overflow and keep the lime in the pit area (Tr. 83- 86, 275, 285, 535-536, 634).

Drivers were provided rain suits and rubber gloves and basically told to "wear it when needed." There was no explanation (Tr. 283, 415-416, 520-521, 649). Although the appropriate PPE may have been worn, Gulf Hauling is not relieved from its responsibility to perform a hazard assessment. There was no hazard assessment. Richard Derwin, who removed the plastic

from the black liquor, did not know the meaning of caustic (Tr. 562). When he asked Gulf Hauling, all he could remember being told was that a caustic “could eat the bed of the truck” (Tr. 562).

Item 3 is affirmed.

Items 4a, 4b, and 4c - Alleged Violations of
§§ 1910.145(c)(3), 1910.1200(h)(3)(ii) and 1910.1200(h)(3)(iii)

The citation alleges that there were no safety instruction signs posted at the waste pad informing employees to avoid skin contact with caustic materials (item 4a). Also, the citation alleges that employees were not trained as to the physical and health hazards of caustic materials (item 4b) and as to precautions to avoid exposure to such materials (item 4c).

Gulf Hauling’s drivers were loading and hauling lime waste regularly from bins at the IP plant to the waste pad (Tr. 534-535, 634). Once black liquor was placed on the waste pad, Gulf Hauling assigned one driver, Richard Derwin, to remove the plastic and keep the black liquor contained (Tr. 185, 220-221). There is no dispute that black liquor and lime are caustic materials which if contacted expose employees to certain physical and health risks (Exhs. C-3B, C-3A, C-3C, C-3E; Tr. 87, 105).

Item 4a- Safety Instruction Signs

Section 1910.145(c)(3) provides that:

Safety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures

There is no dispute that signs were not posted at the waste pad identifying the materials dumped on the pad, the potential hazards posed, or the precautions to prevent exposure and emergency procedures (Tr. 234). The dump trucks or other vehicles driving on the pad also did not contain written instructions (Tr. 234).

The record, however, does not establish that the standard requires posted safety instruction signs at the waste pad. The standard allows the employer to post “where there is a need.” It is a broadly worded requirement. It does not identify the criteria to use.

`[A] broad regulation must be interpreted in the light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993).

Gulf Hauling did not own or control the waste pad. There is no showing that Gulf Hauling had the authority to erect a sign at the pad. The pad and waste material belonged to IP and Gulf Hauling was contracted to dump the waste on the pad.

Also, under the circumstances of this case, there is no showing that a safety instruction sign was needed. Other than the black liquor which was on the pad for less than one month, Gulf Hauling's drivers did not exit their vehicles while on the pad. The drivers remained inside the fully enclosed cabs. They did not walk on the pad in the areas of the waste piles. No employees were assigned to work at the pad. Derwin pulled plastic by hand from the black liquor for two days. Otherwise, he also remained inside the loader's cab. Item 4c is vacated.

Item 4b - Training on Health Hazards

Section 1910.1200(h)(3)(ii) provides that the training include "[t]he physical and health hazards of the chemicals in the work area."

Gulf Hauling's written safety program provides general instructions but fails to identify the health hazards associated with exposure to lime and black liquor (Exh. C-18).

Driver Rodney Evans testified that there were safety meetings at the waste pad "probably once a month" (Tr. 733). Driver Stoney Lang stated that safety meetings were occasionally held "probably every two weeks maybe" (Tr. 440). The meetings were for the drivers on duty at the time (Tr. 441). The record is silent as to what was discussed during the meetings.

In describing new driver training, superintendent Robbins testified that he talks to the new driver and reviews his experience. He then has the new driver ride with him while he shows him each part of the job. Afterwards, the new driver spends a week with another driver learning the job (Tr. 240-241).

During his description of the training, Robbins failed to indicate that the physical and health hazards associated with lime or black liquor were discussed (Tr. 240-241). Robbins had

not even seen the MSDS for black liquor prior to Matheny's accident (Tr. 174). He also did not know that burns to the skin could cause death (Tr. 178).

Driver Marcus Albritton testified that he had not been told about hazards associated with lime and was told merely to stay away from the black liquor (Tr. 278, 308). Albritton knew that if he got a little lime on him, it would burn (Tr. 284). Similarly, driver Stoney Lang was instructed by Robbins to basically, "just stay out of it." (Tr. 409). He was told that there was some potential danger with the sludge, tailings and lime and that "if it gets on the skin, it may burn" (Tr. 410).

The record shows that Gulf Hauling failed to provide training to its drivers on the health hazards associated with caustics, lime and black liquor. The drivers were told not to touch it. Such instruction, although proper is inadequate training. It fails to advise the employee of the health effects. Although kept by IP, Gulf Hauling, did not have copies of the MSDSs (Tr. 174). Driver Richard Derwin, who worked in the black liquor did not know what a caustic was (Tr. 562).

Item 4b is affirmed.

Item 4c - Training on Precautions

Section 1910.1200(h)(3)(iii) provides that the training include:

The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

Superintendent Robbins testified that there were no written instruction pertaining to the use of PPE for the waste pad (Tr. 167). He described his instruction as:

our general rule was you never get in it, and there is no reason for us to work in it. We had always told our drivers from day one, driver/operators. Do not get out of your equipment, your truck or equipment for any reason on the pad.

(Tr. 986)

Such training is inadequate. It fails to advise employees on the precautions to prevent exposure such as the appropriate PPE and the first aid necessary, if exposed. An instruction to

stay away from a hazardous material is incomplete. Gulf Hauling's drivers were directly involved in loading lime into the trucks and once black liquor was delivered to the waste, one employee remained on the pad to remove plastic. In performing these jobs, drivers need to be instructed in the appropriate PPE to use to prevent skin exposure and the first aid requirements. An instruction to wear the rubber suit "when needed," gives no guidance and fails to address the loading at the lime bins (Tr. 252, 415, 649).

Driver Rodney Evans acknowledges that he was told not to get out of truck (Tr. 715). However, he also testified that he was not instructed what to do if the truck got stuck or malfunctioned while on the pad (Tr. 659).

Other drivers testified to the lack of instructions (Tr. 283, 438-439). Driver Albritton did not receive any training as to the precautions to take if exposed to black liquor (Tr. 307). Albritton testified that he had not been instructed to stay in the truck or loader while on the pad⁸ (Tr. 346). Item 4c is affirmed.

Item 5 - Alleged Violation of § 1910.151(c)

The citation alleges that employees at the waste pad did not have access to an eye wash/shower unit. Section 1910.151(c) provides that:

Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The MSDS for black liquor and slaker grits (lime) directs that if contacted in the eyes "speed is essential, flush thoroughly with running water for 15 minutes including under the eyelids" (Exhs. C-3B, C-3C). If there is skin contact, the instruction is to wash affected area immediately with water for 15 minutes. The MSDS for black liquor also specifies that "emergency eyewash stations should be readily accessible in areas where exposure to black liquor is possible" (Exh. C-3B). The MSDSs for lime materials, such as green liquor dregs and

⁸ On cross-examination, he claimed that he was instructed to stay with the truck (Tr. 354, 360).

PCC, require that if there is eye contact “flush thoroughly with running water for 15 minutes including under the eyelids” (Exhs. C-3A, C-3E).

In analyzing the requirements of § 1910.151(c), the Review Commission states that:

whether an employer has complied with its obligation to provide “suitable facilities” within the meaning of section 1910.151(c) depends on the “totality” of the relevant “circumstances” including the nature, strength and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities.

Atlantic Battery Company, Inc., 16 BNA OSHC 2131, 2167-2168 (No. 90-1747, 1994).

Gulf Hauling acknowledges that there was no eye wash/shower facility located at the waste pad area (Tr. 122). The nearest wash facilities were 100 yards from the pad at the plant (Tr. 123). The plant has a shower at the fly ash silo and one next to the water evaporator (Tr. 410, 412, 414). Also, there is a bathroom at the plant for drivers (Tr. 444-445).

Superintendent Robbins testified that a water spigot at the waste pad was not in operation at the time of the accident (Tr. 122, 412). The spigot had not functioned for at least a year “if not longer” (Tr. 899). Robbins stated “somebody in the mill busted the lines and they did not-- they failed to hook them back up for us” (Tr. 211). Robbins agreed that “it was a hazard if there was no source of uncontaminated water provided in the waste pad area” (Tr. 211). He stated that “any of that stuff is going to burn you, tingle your skin; wash it off as soon as you can” (Tr. 212). He had previously contacted some of the lime materials on his skin (Tr. 212).

Gulf Hauling’s drivers do not work on the pad and everything is done from inside the cab of the truck (Tr. 154, 156). The record does not show that drivers, during their normal or expected duties of hauling waste, were exposed to the waste materials on the waste pad. The drivers remained in their trucks or front-end loader and performed all their operations from inside fully enclosed cabs. While in the cab, drivers are not exposed to splashing or potential contact with the waste material.

However, at least one driver, Richard Derwin, during deliveries of black liquor, worked on the waste pad. Richard Derwin’s job involved removing plastic from the black liquor (Tr. 560-561, 572). Initially, Derwin retrieved the pieces of plastic by hand. Derwin testified that it

would splash “when I would pull the plastic” (Tr. 575, 615). Derwin stated that his eyes were covered and it never got on his skin (Tr. 575). However, when he was mixing in ash with the black liquor, Derwin slipped from a ladder and black liquor got on his arm which burned “a little bit” (Tr. 593-594). He had to go to the plant’s bathroom to rinse it off and then to the first aid office (Tr. 594).

Derwin’s work with the black liquor required a source of water for flushing the eyes or skin at the waste pad. Access to sources of water at the plant were not suitable. To get to the plant from the pad “an employee [has to] walk down this dirt road from the waste pad to the IP mill” (Tr. 899). “There are little dips, potholes and things of that nature” in the dirt road (Tr. 901). The MSDS for black liquor clearly states that if contacted “speed is essential” in washing off the material. Matheny had to be taken 100 yards to the plant’s first aid office before he could be rinsed off.

Item 5 is affirmed.

Serious Classification for Citation No. 1

The violations in items 3, 4b, 4c, and 5 are cited as serious. In determining whether a violation is serious, § 17(k) of the Act requires a showing that there is a substantial probability of death or serious physical harm from the condition and the employer knew or should have known with an exercise of reasonable diligence of the presence of the violation. “The issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur.” *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989). An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during their scheduled work. *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221 (No. 86-758, 1991).

Items 4a, 4b, and 5 are properly classified as serious. Gulf Hauling failed to train employees in the hazards and precautions associated with lime and black liquor and failed to provide a source of water at the pad for quick flushing. The employees were exposed to possible serious physical harm. Gulf Hauling knew or should have known of the hazards.

Item 3 is properly classified as “other” than serious. Although the hazard assessment did not identify the PPE requirements, there is no showing that employees failed to wear appropriate PPE in situations reasonably anticipated to cause exposure. The Secretary has not shown any employees exposed without appropriate PPE.

Penalty Consideration for Citation No. 1

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Gulf Hauling is a medium-sized employer with approximately 50 employees (Tr. 42, 846). Six Gulf Hauling employees worked at IP’s plant hauling waste material to the waste pad (Tr. 43). Gulf Hauling is not entitled to credit for history because it has received a serious citation within the previous three years (Tr. 847). There is no evidence that Gulf Hauling was uncooperative during the inspection.

No penalty is assessed for violation of § 1910.132(d)(1)(i) (item 3) because it is re-classified as “other” than serious.

A grouped penalty of \$1,800 is reasonable for violations of § 1910.1200(h)(3)(ii) (item 4b) and § 1910.1200(h)(3)(iii) (item 4c). Other than instructing employees to remain inside the truck while on the pad, there is no showing that employees received training as to the nature of the health hazards associated with caustic material or precautions to take to reduce exposure. Six employees did not receive the training.

A penalty of \$2,800 is reasonable for violation of § 1910.151(c) (item 5). There was no source of water for employees working at the pad. One employee was required to retrieve plastic from the black liquor on the waste pad.

Other Than Serious Citation No 2

Item 1 - Alleged Violation of § 1910.147(c)(4)(i)

The citation alleges that Gulf Hauling did not have written lockout-tagout procedures for cleaning the grit basin. Section 1910.147(c)(4)(i) provides:

Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The grit basin is a hole approximately 10 feet deep (Tr. 453). A conveyor runs over the grit basin which carries grit, wood debris and sand to the basin. The basin is cleaned out once a week by Gulf Hauling (Tr. 235). The motors that run the conveyor need to be locked out in order to avoid continued dumping of grit into the basin (Tr. 349). On a bobcat, an employee moves the material to a corner. A backhoe outside the basin pulls the material out and puts it into a dump truck (Tr. 551).

According to driver Marcus Albritton, before cleaning the basin, “you have to just go lock out on IP’s lockout” (Tr. 347, 350). Superintendent Robbins described the process of cleaning the grit basin as “when it’s time to do it, to dip it, the mill superintendent checks it, and then my men go with him to sign off and put our locks on that box” (Tr. 237).

Driver Stoney Lang testified that:

the first thing I would do is when I would get there, the wood yard operator would go down to the canal, shut his equipment down, which what they call the pumps. He shut it down, he would bring that key and put it in this lockout box, the tagout box, and put his lock on it. Then an employee from the -- a laboratory technician will come down and they would probe this hole for gas or whatever. She would fill out her sheet, should place it on the tagout board. Myself and the operator of the backhoe, we would sign this sheet and then we start performing our jobs (Tr. 551).

Lang further stated that “We put lock to. That is to make sure that nobody can take that key and start this equipment while in the area” (Tr. 453). I “want everybody to know that I am in the hole” (Tr. 453).

The parties agree that IP had a written lockout procedure. According to IH Jackson, Gulf Hauling, however, did not have a copy of IP’s written lockout procedure and did not have a procedure of its own (Tr. 794). She was told that Gulf Hauling’s employees followed IP’s written procedure (Tr. 793). Her understanding was that IP puts the locks on the equipment and

they take the keys from the locks and put them in a lock box. Gulf Hauling also puts a lock on the lock box (Tr. 796). She classified the violation as “other” than serious because Gulf Hauling failed to have a written copy of IP’s procedure (Tr. 903, 993-934).

Gulf Hauling agrees that a lockout/tagout program is needed for the grit basin. It also acknowledges that it did not have its own written lockout procedure. Gulf Hauling maintains that it follows the written procedure of IP, which is hung on the board in the office about 25 feet from the basin (Tr. 236-237, 352). The grit basin is supervised by IP (Tr. 352-353, 379).

The Secretary accepts that IP’s written lockout procedure for the grit basin was adequate. Also, there is no showing that Gulf Hauling’s employees failed to follow the procedure. Employees knew where IP’s written procedure was posted on a board in the office within 25 feet of the grit basin area (Tr. 237, 352).

The standard requires that a lockout procedure be “developed, documented and utilized.” Such a written procedure was in place at the grit basin. The basin and property belonged to IP. Gulf Hauling’s employees were aware and knew the procedure. The standard does not require that Gulf Hauling maintain a copy of the procedure as long as a procedure is “developed, documented and utilized.” Such a procedure was present in this case.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Serious Citation No 1

1. Item 1a, alleged violation of § 5(a)(1) of the Act, is vacated.
2. Item 1b, alleged violation of § 5(a)(1) of the Act, is vacated.
3. Item 2, alleged violation of § 1910.132(a), is vacated.

4. Item 3, alleged violation of § 1910.132(d)(1)(i), is affirmed as other than serious and no penalty is assessed.

5. Item 4a, alleged violation of § 1910.145(c)(3), is vacated.

6. Item 4b, alleged violation of § 1910.1200(h)(3)(ii), and item 4c, alleged violation of § 1910.1200(h)(3)(iii), are affirmed as serious and a grouped penalty of \$1,800 is assessed.

7. Item 5, alleged violation of § 1910.151(c), is affirmed as serious and penalty of \$2,800 is assessed.

Other Than Serious Citation No. 2

1. Item 1, alleged violation of § 1910.147(c)(4)(i), is vacated.

KEN S. WELSCH
Judge

Date: September 7, 2000