
SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET NO. 97-0075

M & M ROAD RECYCLE, INC.,

Respondent.

APPEARANCES:

For the Complainant:

William Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Joseph Tucci, Esq., Thompson, Krilich, La Porte, Tucci & West, Tacoma, Washington

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent, M & M Road Recycle, Inc. (M & M), at all times relevant to this action maintained a place of business at U.S. Highway 20, near Ashton, Idaho, where it was engaged in road construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 17, 1996 the Occupational Safety and Health Administration (OSHA) issued citations to M & M alleging violations of the Act stemming from a June 30, 1996 accident in which an M & M employee was killed. By filing a timely notice of contest M & M brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 29, 1997, a hearing was held in Seattle, Washington. Prior to the hearing, on the motion of Respondent, Citation 1, item 1, alleging violation of 1926.20(b)(3) was dismissed as duplicative (Tr. 11-12). The parties have submitted briefs on the remaining issue and this matter is ready for disposition.

Alleged Violations

Willful Citation 1, item 2 alleges:

29 CFR 1926.601(b)(1): Motor Vehicle(s) did not have a service brake system, and emergency brake system, and a parking brake system, all in operable condition:

- (a) Highway 20 North of Ashton, Idaho - On June 30, 1996 and at times prior thereto, the Cement Spreader Truck (Vehicle Identification Number NLO-5B5C224-10114) service brakes were defective.
- (b) Highway 20 North of Ashton, Idaho - On June 30, 1996 and at times prior thereto, the Cement Spreader Truck (Vehicle Identification Number NLO-5B5C224-10114) parking brake was defective.

The cited standard provides:

All vehicles shall have a service brake system, an emergency brake system, and a parking brake system. These systems may use common components, and shall be maintained in operable condition.

Citation 1, item 2(a) - The Service Brakes

Facts

The Accident. Corporal Ismael Gonzales of the Idaho State Police (Tr. 19) testified that on June 30, 1996 he responded to a reported accident at Ashton Hill, located at mile post 369-370, U.S. Highway 20, north of Ashton, Idaho (Tr. 30). Corporal Gonzales interviewed M & M employee Sherman Jenne, who stated that he was the supervisor in charge for M & M (Tr. 27, 31; *see also*, testimony of Brent Cleves, Tr. 249). Jenne told Gonzales that M & M employee Rob DeLurme had been driving the cement spreader involved in the accident (Tr. 36-37; Exh. R-1). Jenne stated that he saw DeLurme start a **Apull@** or **Aspread@** headed down hill, but missed the mark where he was to begin spreading concrete; instead, DeLurme kept going down the hill, gaining speed (Tr. 49). A co-worker, Chuck Tyler, in his statement to the police, said that DeLurme yelled that he had no brakes (Exh. C-10). The truck left the road and rolled down a ravine approximately 5.5 miles down hill from the work site (Tr. 48; Exh. C-2 though C-9).

In his written statement to the police Jenne stated that there were problems with the spreader's brakes the day before the accident, June 29; the spreader was coming to a slow stop. Around 11:00 a.m. Jenne learned that approximately a cup of fluid had been drained from the brake system's air tanks. Jenne stated that the brakes appeared to be working after that. (Exh. C-10, p. 2 of 5).

Jenne described a later incident in which DeLurme went off the side of the road into a grassy turnout, after which DeLurme complained to Jenne that the brake pedal was making a noise. Jenne stated

that DeLurme told him that the operation of the brakes was not affected. Jenne climbed under the truck, but could not see any problem. DeLurme had no further brake problems that day; nonetheless that evening Jenne told him that if he had any problems he would Aditch@the spreader. (Exh. C-10, p. 3-4 of 5).

Jenne stated that on June 30, after the first pull, DeLurme told him that his brakes were soft. Jenne and DeLurme added brake fluid and tested the brakes by starting and stopping several times. DeLurme checked the fluid level after he completed the spread and reported he had not lost any. The accident occurred on the eighth spread. (Tr. 44, Tr. 314-17; Exh. C-10).

Compliance Officer (CO) Van Howell testified that Jenne told him that he had added four to six ounces of brake fluid to the spreaders brake fluid reservoir at approximately 5:35 or 5:45 in the morning of the 30th (Tr. 313-14, 388).

Lori Thompson, a truck driver/equipment operator for Bannock Paving, was working at the Ashton Hill site the afternoon of June 29, 1997 and saw Rob DeLurme head downhill in the cement spreader at a high rate of speed, and run off the shoulder of the road where he was able to stop in the grass and thick gravel (Tr. 100-03, 116, 118). Thompson heard Jenne joking that DeLurme had had the ride of his life (Tr. 105). Later DeLurme told her he was uncomfortable driving the truck because of the brakes (Tr. 106-07).

Gary Willmore was overseeing the Ashton Hill project for the Idaho State Highway Department on June 30, 1997 (120-25). Willmore testified that around 8:00 a.m. he witnessed an incident in which the spreader crossed in front of a semi-truck, causing the semi to veer (Tr. 125-27). The spreader was able to stop in a turnaround on the shoulder (Tr. 147). When he asked Rob DeLurme, the driver, why he didn't stop, DeLurme told him that he didn't have any brakes on the cement spreader (Tr. 128). DeLurme told Willmore that the spreader had experienced several occasions of brake failure, and that he was doing the best he could (Tr. 129). Willmore noted the incident in his daily diary (Tr. 129; Exh. C-10), and notified Brent Cleves, the superintendent of the prime contractor, Bannock Paving (Tr. 130-31, 247).

Brent Cleves testified that he told Jenne to get the spreader off the highway and fix the problem with the truck's brakes (Tr. 256). Cleves offered Jenne the assistance of Bannock's mechanic, but Jenne refused, stating that he knew what the problems were and would take care of them (Tr. 256). Jenne did not elaborate on the problems (Tr. 257). Cleves saw DeLurme and Jenne later, DeLurme under the hood, and

Jenne under the truck (Tr. 265). Cleaves watched for 30 minutes or more, and saw DeLurme starting and stopping the truck (Tr. 265-67)¹.

Corporal Gonzales determined, based on his interviews with the witnesses, that the brakes on the cement spreader had failed, causing the subsequent accident (Tr. 66). Gonzales stated that skid marks on the highway shoulder indicated that the brakes were working only intermittently, and only on the right side of the truck (Tr. 73-74, 86-87; Exh. C-2). Gonzales stated that only one 20 to 25 foot skid mark, also on the right side, was found on the paved road, north of where the spreader left the highway (Tr. 87-88).

Expert Testimony. Rodney Rooney, a diesel mechanic (151-52, 160), stated that he inspected the spreader wreckage for the Secretary (Tr. 162-63). Robert Brinton, owner of Friction Advisory Services, which specializes in the investigation of brake accidents, testified for Respondent (Tr. 403).

Rooney found that gear oil was leaking from the right, second axle driver wheel (Tr. 163, 171). Rooney stated that the wheel had been removed and a seal replaced and damaged on installation, causing the leak (Tr. 172). Rooney testified that as a result of the leak the brake shoes had become oil soaked, and that any braking effect on that wheel would have been lost (Tr. 172, 181, 204). Brinton admitted that oil found on the brake shoe on the right second axle would reduce some frictional characteristic between the shoe and the drum, causing the loss of some braking force on that wheel, and resulting in the loss of a few feet of stopability (Tr. 416, 418). Brinton testified that the oil leak would not, however affect the whole braking system, which, in his opinion, remained fully operational (Tr. 413, 416, 424, 428-29).

Rooney stated that the clearance between the brake shoes and the drums on the third axle were excessive, greater than 1/8" but less than 3/32" (Tr. 182-83). Rooney testified that because of the large gap, the brake pedal would have to be depressed further towards the floor to engage the brakes (Tr. 183, 204). Brinton stated that the clearances Rooney found between the brake shoes and drum on the third axle were normal and would not have affected the brake system's operation, except to require the operator to depress the pedal further before engaging the brakes (Tr. 414-16). Rooney agreed that the third axle brakes were operational, within the enlarged tolerances created by the gap between the brake shoes and brake drum (Tr. 220).

¹ In his written statement Sherman Jenne denied that DeLurme had pulled out in front of the truck because of brake problems (Exh. C-10, p. 5 of 5). The evidence to the contrary, however, is overwhelming.

Rooney testified that he found dirt in the brake system's master cylinder, which could cause excessive wear, and/or cause the components to stick or jam (Tr. 184-85). Brinton testified that the occurrence of rust under the master reservoir cap is common, and that neither rust, nor dirt in the master cylinder would affect the operation of the service brake system (Tr. 421-23).

Finally, Rooney testified that the air hydraulic cylinder was full of brake fluid and rust (Tr. 186). Rooney stated that the presence of fluid indicated an internal leak into that chamber, which would render the entire system inoperative (Tr. 187, 204; *See also*, testimony of Howell, Tr. 299). Brinton stated that the loss of some brake fluid into the air system would not affect the operation of the service brake system, or the ability of the vehicle to stop (Tr. 421).

Both Brinton and Rooney testified that, based on the material examined, there was no way to determine the cause of the runaway (Tr. 229, 427).

Discussion

The Violation. Based on the witnesses description of the June 30, 1996 accident, I am satisfied that on that date the brakes on Rob DeLurme's concrete spreader failed; De Lurme was unable to stop the spreader on an incline, and the spreader ran off the road.

Moreover, I find that the Secretary has also established, by a preponderance of the evidence, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD &29239, p. 39,157 (No. 87-1359, 1991). Due diligence includes the obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent their occurrence. *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD &25,129, p. 31,032 (No. 76-4627, 1981). M & M had notice that the spreader brakes were defective. Four times in the preceding two days DeLurme had experienced soft brakes or been unable to stop. Efforts were taken to fix the problem, fluid was drained from the system, brake fluid was added. Nonetheless, problems persisted. Both the Secretary's and M & M's experts agreed that, given the available evidence, they could not determine the cause of the spreader's brake failure. It is not surprising then, that Rob DeLurme and Sherm Jenne were unable to pinpoint the problem and fix it. However, given the frequency with which DeLurme experienced problems with the spreader brakes, and Jenne's inability to determine the cause of those problems, M & M should have anticipated that the problem would recur, and pulled the truck from service until the problem could be located. The Secretary has established M & M's constructive knowledge of the cited violation.

Willful Characterization. The Secretary has not shown, however, that the cited violation was willful. M & M's failure to prevent the anticipated hazard is adequate to establish constructive knowledge of the cited conditions. An employer's constructive knowledge of a hazardous condition, however, is insufficient in itself to support a finding that the violation was willful in nature. A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference. *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD &24,419 (No. 76-3743, 1980).

M & M did not disregard the problems with the spreader's brakes. Each time a problem was reported, M & M took steps to assure that the brakes were inspected. Problems found were addressed; fluid was drained from the brake system, brake fluid was added to the reservoir when it was found to be low. Start and stop tests were performed to assure that the brakes were working prior to returning the truck to service. A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD &29,080 (No. 85-319, 1990). Though M & M's efforts to locate and correct the spreader's brake problems were unsuccessful, its good faith efforts to maintain the truck preclude a finding that this violation was willful.

The cited violation will be affirmed as a **serious** violation of the Act.²

Citation 1, item 2(b) - The Parking Brake

Facts

In regard to the parking brake, Rooney testified that the lining³ had worn off of the innermost of its two brake shoes (Tr. 195). Rooney believed that the inner brake shoe and drum had not been in contact for some time, based on the presence of dirt and oil on the drum (Tr. 199). Rooney stated that some polishing on the brake drum indicated that there had been some contact between the outer brake shoe and the brake drum (Tr. 200). During his examination of the wreckage, Rooney found that the parking lever

² M & M maintains that where the Secretary fails to prove willfulness, only an other-than-serious violation may be affirmed. However, a serious violation may be found where that allegation is expressly raised by the pleadings. *Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD &29,439 (No. 87-619, 1991) Paragraph VI of the Complaint alleges in the alternative that the cited violations are **serious**. Because a fatality was involved in this case, no additional evidence concerning probable harm is necessary.

³ The brake shoes were, however, relined in March 1996 (Tr. 309, 467-70).

was fully actuated, which should have pulled the two shoes together, creating a braking action and polishing the brake drum (Tr. 201, 224). Rooney opined that the parking brake was not operational (Tr. 200-204, 224).

CO Howell testified, however, that Jenne told him they never used the hand actuated parking brake on the spreader, because they had an electronic micro-lock (Tr. 317). Brinton testified that the micro-lock is also a parking brake, though it functions differently than a mechanical parking brake (Tr. 407). The micro-lock holds the truck by ensuring that the hydraulic pressure in the service brake system is retained after the truck stops running (Tr. 407). Brinton testified that the micro-lock is actually a more effective parking brake than the mechanical brake (Tr. 407, 410).

Rooney and Brinton agreed that neither the micro-lock, nor the parking brake was an effective emergency brake, and neither would stop the truck if it were moving (Tr. 212, 408).

Rooney admitted that the micro-lock system on the spreader was fully operational and served the same purpose as the parking brake (Tr. 210).

Discussion

It is undisputed that the micro-lock system on the spreader was used as a parking brake, and that it was fully operational at the time of the inspection. This item, therefore, must be dismissed.

Penalty

A combined penalty of \$70,000.00 was proposed for the two items cited. Item 2(a) was found not to be willful, Item 2(b) was vacated. The CO testified that M & M is a small company, with less than 25 employees (Tr. 340), and has no history of similar violations (Tr. 342). Taking into consideration the relevant factors I find that a penalty of \$3,500.00 is appropriate.

ORDER

1. Citation 1, item 1, alleging violation of ' 1926.20(b)(3) is VACATED.
2. Citation 1, item 2(a), alleging violation of ' 1926.601(b)(1) is AFFIRMED as a serious violation of the Act, and a penalty of \$3,500.00 is ASSESSED.
3. Citation 1, item 2(b), alleging violation of ' 1926.601(b)(1) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: