Secretary of Labor,
Complainant,

v. OSHRC Docket No. **00-1825**

George J. Igel & Co., Inc., **EZ**
Respondent.

Appearances:

Patrick L. Depace, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Douglas L. Suter, Esquire
Isaac, Brant, Ledman & Testor
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

George J. Igel & Co., Inc., is engaged in the business of construction site development. On August 24, 2000, respondent was engaged in construction work at a jobsite in Columbus, Ohio. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite on August 24, 2000. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the citation and proposed penalties.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.102(a)(2) as follows:

> Eye and face equipment required by this part did not meet the requirements specified in the American National Standards Institute Z87.1-1968, Practice for Occupational and Educational Eye and Face Protection.
>
> On the site, dirt and gravel was blow [sic] from around the back up alarm with a high pressure hose without approved safety glasses.

Citation No. 1, item 2, alleges a serious violation of 29 C.F.R. § 1926.302(b)(4) as follows:

> Compressed air, not reduced to less than 30 p.s.i., was used for cleaning purposes:

> On the site, dirt and gravel were removed from the back-up alarm with a [sic] air pressure hose with 160 pounds per square inch.

Citation No. 1, item 3, alleges a serious violation of 29 C.F.R. § 1926.601(b)(10) as follows:

> Trucks with dump bodies were not equipped with positive means of support, permanently attached, and capable of being locked in position to prevent accidental lowering of the body:
>
> On the site, work was performed with the truck bed up without locking the equipment to prevent the bed from lowering.

A hearing was held pursuant to the E-Z trial procedures in Columbus, Ohio, on January 17, 2001. At the conclusion of the hearing, a bench decision was issued vacating Citation No. 1, item 1, and affirming Citation No. 1, items 2 and 3. A penalty of $300 was assessed for item 2 and a penalty of $2,000 was assessed for item 3.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is vacated.

2. Citation No. 1, item 2, is affirmed as a serious violation and a penalty of $300 is assessed.

3. Citation No. 1, item 3, is affirmed as a serious violation and a penalty of $2,000 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: February 8, 2001

(On the record.)

JUDGE SIMKO: Back on the record. It s 3:15 in the afternoon. I have reviewed all the exhibits both sides have submitted today. I took copious notes during the hearing, and I have reviewed those notes and the testimony and all the evidence that s been presented today.

At this time, I m going to enter a decision on the record. It ll be followed, after I receive the transcript, with the portions of the transcript in this decision attached thereto, and I will add additional language and some discussion in the decision which will follow in writing. What I m going to give you today is pretty much the guts of the decision, however.

Going straight to the citation, which was issued as the result of an inspection that took place at Respondent s work site on August 24, 2000 at 1668 West McKinley Avenue in Columbus, Ohio, three items were issued in this citation.

The first one alleged the violation of 29 C.F.R. 1926.102 (a) (2). It alleges that eye and face equipment required by this part did not meet the requirement specified in the American National Standards Institute Z87.1 (1968) Practice for Occupational and Educational Eye and Face Protection, specifically on the site. Dirt and gravel was blown from around the backup alarm with a high

pressure hose without approved safety glasses.

The four elements which we referred to earlier in this case will apply to all of these violations, specifically whether the standard applies, whether the terms of the standard have been violated, whether employees were exposed, and whether there was knowledge. If that is proved, then we go to the next element., and that is the employee misconduct defense.

Here, the employee was not wearing safety glasses. Everyone admits that. He was wearing his regular prescription eyeglasses. These were not safety glasses in accordance with the ANSI standard. The terms of the standard were not complied with. The employee was exposed to the hazard of flying rock and debris in the area.

The element which we reach next is the element of knowledge, and I find that there was no knowledge on the part of the Employer on this site, either actual or constructive, and that s because the mechanic arrived on this jobsite, although he had been called out here by the superintendent, he arrived on the jobsite while the superintendent and the Safety Director were meeting with the Compliance Officer. They had no knowledge of his presence when he arrived on the site.

This is a matter of personal protective equipment which the Company does require and appears to enforce. The

employee was not wearing it, and this Employer, being at least 300 yards away, did not know and could not have known of the requirement of the fact that this employee was not wearing the personal protective equipment. So due to lack of knowledge, I am vacating this item and assessing no penalty.

With regard to Item Number 2, this alleges that compressed air which was not reduced to 30 pounds per square inch or psi was used for cleaning purposes in violation of 29 C.F.R. 1926.302(b)(4). Specifically on the site, dirt and gravel were removed from the backup alarm with an air pressure hose with 160 pounds per square inch. There appears to be no dispute as to the specific facts alleged herein that this hose did contain 160 pounds per square inch of pressure. The Respondent argues that he did not know that there was a construction standard that applied. There was a general industry standard that applies, however, and here we find that there truly was a construction standard that did apply.

Even if there were not a construction standard that applied, the general industry standards do apply whether or not corresponding construction standards to all industry. So you might want to look at that in the future for any other standards that might apply to your operation.

There was the knowledge required in this case is

knowledge of the condition, not the existence of a law or standard. As they said in the old days, ignorance of the law is no excuse. Well, ignorance of the existence of a standard here is no excuse either. But it s the knowledge of the condition that we re talking about.

Here, the Respondent, management knew that 160 pounds per square inch was being used for cleaning purposes. There s been nothing to contradict that, and it was not reduced to 30 pounds per square inch. After the inspection, Respondent acted in good faith and got the appropriate wands and nozzles to step this down and make this -these cleaning nozzles comply with the standard. This goes to the good faith of this Respondent, and I think the Respondent did act in very good faith in making these corrections. I do find that a violation of the standard occurred. The employee was exposed to this. The standard requirements were not complied with, and it was applicable. I also find the requisite knowledge of this condition.

However, I do believe that the penalty, given the good faith on the part of this Company, its good safety program, good safety record and the interest of the safety of its employees should be reduced and will be reduced to a total of $300 for that item.

Now, we go to --that amount is assessed -- Item 3.

This is the item that both sides seemed to focus most on. The Citation Item 3 of Citation Number 1 alleges violation of 29 C.F.R. 1926.601(b) (10) in that trucks with dump bodies were not equipped with positive means of support permanently attached and capable of being locked in position to prevent accidental lowering of the body. Specifically on the site, work was performed with the truck bed up without locking the equipment to prevent the bed from lowering.

The first element of the Secretary s burden is the applicability of the standard. Clearly, the standard does apply. This is a truck with a dump body. It s used in construction. The next element is whether there was compliance with the terms of the standard, and I find that there was not a positive means of support permanently attached to this truck body which was capable of locking in position to prevent accidental lowering of the body. We reach next the question of exposure. There is some difference of opinion in this testimony that I must resolve. The Compliance Officer testified that he observed Mr. Testa reaching in to pull muck and dirt and mud from the area of the backup alarm. Mr. Testa testified that he only used the wand to blow it out. He did not reach in there.

However, Mr. Testa did testify that he came, if I

accept the totality of his testimony, that he came within six inches of a crush point. Exposure is not just being actually exposed. It s having access to a hazard and to a zone of danger. Mr. Testa clearly was within the zone of danger not only being able to be crushed by the truck body coming down and crushing him between the bed and the frame, but also just the bed of the truck coming down could strike an individual who is six inches from a crush point or even up to three feet from the backup alarm itself.

So. I find that the credibility rests with the Compliance Officer. However, even if I find that Mr. Testa s testimony is credible, which I do not totally discredit, I find that he is within the zone of danger. And therefore, has access to the hazard and therefore is exposed.

The final area that I have to deal with in the Secretary s case-in-chief is knowledge on the part of the Employer. For the first item, there was no knowledge because Mr. Testa arrived on the site without the knowledge of the management, and management was nowhere near the area. It involved using personal protective equipment, something that was in the control of the employee. Here, we re talking about knowledge of condition, which is a bit different. The condition is the condition of this truck not being equipped with a positive means of

support permanently attached. The testimony was that this was a condition that existed for possibly two weeks without correction.

The superintendent called for a mechanic to come out to this jobsite. He knew that the mechanic was going to be coming out here to work on a problem with one of its trucks. The driver was charged by the Respondent with the responsibility to check the safety of the truck. He knew that the lock bar was off for two weeks. He also testified that a night mechanic took this lock bar off. The night mechanic, according to the testimony of Mr. Igel, has responsibility which is delegated by the Respondent to inspect the equipment daily on a nightly basis. The Respondent had a program for inspections by the driver and the night mechanics, but obviously, did not have a program for those mechanics or drivers to report the deficiencies to management in an effective manner. This was came through from the testimony of Mr. Igel and Mr. Culver.

Now, management has an ongoing responsibility to inspect equipment for deficiencies. They cannot relegate this responsibility or delegate this responsibility to drivers and mechanics without some mechanism for reporting this to management. It could have known of the existence of the hazard with the exercise of reasonable diligence,

and therefore, had requisite knowledge of the violative condition.
The Employer has the responsibility to discover violations on its jobsite and has an ongoing responsibility to locate these conditions whenever possible. And here it was possible, and in fact, it was known to the driver, and it was known, apparently, to the night mechanics, but there was no mechanism to get this corrected.
I find that the Secretary has carried his burden on his case-in-chief, and now, we turn to the unpreventable employee misconduct defense. The threshold question that I have before me is one of applicability of this defense. Does the standard require a positive employee action. An example of that is an employee must wear hi~ personal protect~Lve and eye equipment or tie off 1o a beam, or does it require Employer action such as erecting guardrails. This affirmative defense is geared primarily towards violations over which employees have individual control. Arguably, this is one that falls within, and I would find and do find, that this falls within the area of Employer action rather than the individual employee action.
Even if this does fall within the area of where employee action would come into play, there are four elements that the Respondent must reach to prove his defense. One is whether the Employer has established work

rules designed to prevent the violation.
The Employer has shown that he has general safety work rules, and that he enforced those work rules. He has to have work rules. It has to be communicated to the employees, and he has to enforce these work rules. I believe that he had established work rules designed to prevent the violation, that these work rules were communicated in general to the employees, and that he did enforce work rules by disciplinary action, progressive disciplinary action through warnings, through written reprimands, and also through firing.
The final element is whether the Employer has taken the steps to discover the violations. And this is where we run into a problem. If this -if I find this employee misconduct even applies, which I do not, I do find that the lock bar was removed and not replaced for a period of two weeks, and the Employer did not take the steps and discover those violations. There s no requirement by the Respondent for employees to report this particular type of violation, and therefore, the employee misconduct defense must fail.
I affirm the violation as alleged in Item 3. However, once again, due to the good faith of this Employer and the exemplary safety record of this Employer, I am reducing the proposed penalty and assessing a penalty of $2,000.
Okay. Is there anything further today.?