Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-0882**
	:	
Brungart Equipment Company, Inc.,	:	**EZ**
Respondent.	:	

Appearances:

Carla Gunnin, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

John J. Coleman, III, Esquire
Jenelle R. Evans, Esquire
Balch & Bingham, L.L.P.
Birmingham, Alabama
For Respondent

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

DECISION AND ORDER

Brungart Equipment Company, Inc. (Brungart), is a corporation engaged in the rental, sale, and repair of forklifts. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's facility in Mobile, Alabama, from February 6, 1998, through May 8, 1998. As a result of this inspection, respondent was issued two citations. Respondent filed a timely notice contesting these citations and the proposed penalty. A hearing was held pursuant to the EZ trial procedures in Mobile, Alabama, on November 6, 1998. For the reasons that follow, Citation No. 1, item 1, alleging a violation of 29 C.F.R. § 1910.178(q)(7) is vacated, and no penalty is assessed. Citation No. 2, item 1, alleging a violation of 29 C.F.R. § 1910.178(a)(6) is affirmed. No penalty was proposed for that item, and none is assessed.

Background

On January 21, 1998, respondent's employee was repairing and inspecting a forklift. The forklift turned over while the employee was operating it during a routine maintenance check. The employee was injured. As a result of this incident and subsequent complaint, OSHA began its inspection and investigation on February 6, 1998.

Stipulation of Facts

At the hearing, the parties read into the record a Joint Stipulation of Facts as follows:

1. Jimmy Rogers, who worked with Rodney Lynch on the forklift in issue on January 21, 1998, had more experience than Rodney Lynch. Rodney Lynch had completed training, but was still classified as an apprentice. Jimmy Rogers was not Rodney Lynch's supervisor.

2. The accident precipitating the complaint that precipitated the inspection occurred January 21st, 1998.

3. Brungart did not own or lease the forklift in issue. Brungart only does repairs. Brungart, at all relevant times, had a rule providing that workers doing forklift check drives during repairs must not raise the forks more than 12 inches off the ground while the forklift is moving. Rodney Lynch was aware of this rule at all relevant times and was well trained for what he was doing.

   On January 21st, 1998, while doing a check drive during repairs of the E40B Hyster forklift in question, Rodney Lynch raised the forks to the maximum 187-inch height while the truck was moving and carrying a load.

4. The truck tipped when, while the truck was moving, he raised off his seat causing the emergency brake to catch, and the truck lurched forward. Mr. Lynch admits raising off the seat, but denies the truck was moving. All parties to this action, however, conclude from the circumstances that the truck was being driven, was moving, and tipped when the emergency brake was triggered. The weight load on the forks was certified as within the truck's capacity. The weight of the battery was within manufacturer's specifications. There was just under a two-inch clearance on each side of the battery.

5. After the January 21, 1998, accident, Brungart placed a 2 x 4 in the battery compartment. Nothing was available from the manufacturer or on the market that would prevent the battery from moving forward under these circumstances.

   When Brungart received the forklift that tipped from its customer, Morton Industries, for the purpose of doing repairs, the forklift did not have a restraining device on the battery.

6. The Secretary cannot prove, and indeed will not attempt to prove, that the movement of the battery caused the accident in this instance.

7. At all times relevant to this proceeding Jimmy Rogers, Kenny Alford and Dale Pitts were able to read the data plate on the forklift in issue, that is, the subject of the data plate citation. And further, that all three stated that they were able to read it because they were used to seeing it.

Discussion

The Secretary has the burden of proving the 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).

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

Citation No. 1, Item 1
Alleged Serious Violation of 29 C.F.R. § 1910.178(q)(7)

The Secretary in Citation No. 1, item 1, alleges that:

Industrial trucks were not examined before being placed in service:

An inspection was not made of the Hyster Model E40B electric forklift prior to it [*sic*] being operated on or about January 21, 1998. The battery was not secured inside the battery compartment with shims or a battery restraint device to prevent the battery from moving.

The threshold issue that must be resolved is the applicability of the standard. Section 1910.178(q) reads, in part, as follows:

> *(q) Maintenance of industrial trucks.* (1) Any power-operated industrial truck not in safe operating condition shall be removed from service. All repairs shall be made by authorized personnel.
>
> > (7) Industrial trucks shall be examined before being placed in service, and shall not be placed in service if the examination shows any condition adversely affecting the safety of the vehicle. Such examination shall be made at least daily.

Subsection 1910.178(q)(7) must be read as part of § 1910.178(q). Subsection (q)(1) requires unsafe forklifts to be removed from service and that repairs be made by authorized persons. Subsection (q)(7) requires that forklifts be examined before they are placed in service. Clearly, this forklift had been removed from service for repairs. The owner sent the industrial truck to the respondent to perform the necessary repairs. On January 21, 1998, as part of this repair work, respondent's employee was checking the forklift drive. At that time, the forklift or industrial truck had not been placed back into service, but rather was still out of service being repaired. Respondent was, in fact, examining the forklift prior to returning it to its owner.

Operating the forklift as part of the repair work does not equate to placing the industrial truck in service. Checking the forklift drive is an integral part of repairing the unit while it is out of service. The standard does not envision that the forklift is in service during the period of time that it is being repaired after being removed from service for that repair. No evidence was presented by the Secretary that respondent or any other employer used this forklift for its ordinary use. It was operated only as part of the repair work performed by respondent's employees after it was removed from service and before it was placed back in service. While 29 C.F.R. § 1910.178 is applicable to respondent's operations, § 1910.178(q)(7) does not apply to this working condition. Since the standard is inapplicable, no other elements of the Secretary's burden or respondent's defenses need be discussed. The alleged violation of 29 C.F.R. § 1910.178(q)(7) is vacated.

Citation No. 2, Item 1
Alleged "Other" Violation of 29 C.F.R. § 1910.178(a)(6)

The Secretary in Citation No. 2, item 1, alleges that:

> Nameplates or markings for powered industrial trucks were not in place or maintained in a legible condition:
>
> > Hyster forklift Model E40B, Serial #B108V07058 - The nameplate was not legible.

The Secretary's compliance officer testified that during his inspection, he observed the nameplate on the Hyster forklift at respondent's facility. He stated that he could not read the information on the plate. He wiped the plate with a rag and still could not read it. The employee injured on January 21, 1998, told him that he also could not read the information on the nameplate. The compliance officer has over twenty-two years' experience inspecting powered industrial trucks like this forklift. The parties stipulated that some employees said they could read the data plate. Those employees, however, could read the plate because they were used to seeing it. Having observed the testimony and demeanor of the compliance officer, I find his testimony regarding the legibility of this nameplate to be credible and convincing. I find that this nameplate was not maintained by respondent in a legible condition.

Section 1910.178(a)(6) requires:

> (6) The user shall see that all nameplates and markings are in place and are maintained in a legible condition.

This standard is applicable to the working conditions in respondent's facility. Here the respondent was the user of this forklift while it was in his shop for repairs. As discussed above, the respondent did not comply with the requirements of the standard that the nameplate be legible. Respondent's employees worked on and with this forklift in this condition, and respondent's management knew this condition existed.

The compliance officer classified this violation as an "other" violation since some information relating to the weight classification was stenciled on the lift mast. He testified that a legible nameplate would have provided even more information. Respondent violated 29 C.F.R. § 1910.178(a)(6). This violation is classified as "other."

Penalty

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the inspection, Brungart employed twenty-four employees in its Mobile, Alabama, repair facility. Some information required on the nameplate was found on the lift mast. Respondent knew of the violative condition. Upon due consideration of these factors, it is determined that a penalty of $.00, as proposed by the Secretary for Citation No. 2, item 1, is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is vacated and no penalty is hereby assessed.

2. Citation No. 2, item 1, is affirmed, no penalty was proposed, and none is hereby assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: November 30, 1998