



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
COLOR IMAGE, INC.
Respondent.

OSHR DOCKET
NO. 96-1080

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 22, 1996. The decision of the Judge will become a final order of the Commission on December 23, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before December 12, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: November 22, 1996

DOCKET NO. 96-1080

NOTICE IS GIVEN TO THE FOLLOWING:

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Nancy J. Spies
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SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 96-1080
	:	
COLOR IMAGE, INC.,	:	
Respondent.	:	E-Z

Appearances:

Dorian West, Esquire
 Office of the Solicitor
 U. S. Department of Labor
 For Complainant

J. Larry Stine, Esquire
 Wimberly and Lawson
 Atlanta, Georgia
 For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Color Image, Inc., contests a citation alleging a serious violation of § 1910.178(l) for failure to train an employee in the safe operation of a forklift. The Secretary issued the citation on July 16, 1996, based on an investigation conducted by Occupational Safety and Health Administration (OSHA) compliance officer William Harrington. Harrington inspected Color Image's warehouse following an accident on April 12, 1996, in which an employee named Phan was killed while operating the company's forklift. A hearing was held in this case on October 7, 1996. This case was designated for E-Z Trial on August 29, 1996, pursuant to Commission Rules 200-211.

Background

Color Image manufactures toner for the printing and computer industries at its facilities in Norcross, Georgia (Tr. 29, 37). Color Image employs approximately 80 employees (Tr. 37). Four employees worked in Color Image's warehouse on a regular basis. Thai Nzuyen was the shipping and receiving supervisor in the warehouse (Tr. 9). One forklift was used in the warehouse. Each of the four warehouse employees operated the forklift at various times (Tr. 30). Phan operated the forklift "once in awhile" (Tr. 19).

Nzuyen (who, like Phan, was Vietnamese) had worked at Color Image for two years at the time of the hearing (Tr. 9). He had a total of seven years experience in operating forklifts (Tr. 27). While at Color Image, Nzuyen viewed a 12-minute videotape on the operation of forklifts provided by the company (Tr. 18, 27, 31-32). The videotape was in English (Tr. 33).¹

Phan began working at Color Image six weeks to two months before his fatal accident (Tr. 11, 32-34). Nzuyen understood that Phan had some experience operating forklifts when Phan started working at Color Image (Tr. 23, 33). Nzuyen stated that Phan was familiar with the operation of forklifts in which the operator sits down and operates the forklift with a steering wheel. The forklift used by Color Image is one in which the operator stands up and operates the forklift with a handle (Exh. C-2; Tr. 23, 33; 43).

Nzuyen showed Phan how to operate the company's forklift. He testified, "I just showed him the basics, like the gas pedal, the steering wheel and how to operate it pretty much" (Tr. 21). Nzuyen also went over certain safety procedures (Tr. 14-15). Nzuyen testified consistently that the entire training session lasted 10 minutes (Tr. 20-24).

Color Image had no written safety program or written rules regarding the operation of the forklift. Nzuyen did not use the forklift's owner's manual or a checklist when instructing Phan in the operation of the forklift. Phan did not view the videotape on the safe operation of forklifts. Nzuyen did not test Phan after the 10-minute instruction session. The session consisted only of Nzuyen speaking to Phan in Vietnamese (Phan spoke little English) for 10 minutes (Tr. 10-23).

Nzuyen testified that he observed Phan operating the forklift in an unsafe manner "two or three times" after Nzuyen instructed him in the use of the forklift (Tr. 18). Nzuyen stated, "It seems that he was safe but occasionally, two or three times, as I said before, that I saw him make a couple of mistakes and I stopped him to straighten him out" (Tr. 26-27).

¹ While Nzuyen speaks and understands English, it is his second language. At the hearing, two interpreters, Thomas Phan and Chicu Phung assisted in the questioning of Nzuyen (Tr. 7-8). At times Nzuyen's testimony was somewhat confusing (for example, regarding how long Phan had been with Color Image at the time of his accident). However, his testimony was clear and consistent regarding the issue presented in this case, *i.e.*, the type of training Color Image provided to Phan.

The Standard

The Secretary alleges that Color Image committed a serious violation of § 1910.178(l), which provides:

Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.

The Secretary has the burden of proving his case by a preponderance of the evidence.

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 standards (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).

The only element of the Secretary's burden of proof that Color Image disputes is the second (the employer's noncompliance with the standard's terms). It is undisputed that § 1910.178(l) applies to the forklift in question, that Phan had access to the forklift in question, and that Color Image, through its supervisor, Nzuyen, knew the extent of the training provided to Phan. The only issue to be determined is whether Nzuyen's training of Phan was sufficient to meet the requirement of § 1910.178(l) that operators be trained "in the safe operation of powered industrial trucks."

The Secretary argues that Color Image failed to meet this standard. It had no written rules and no structured training program. Nzuyen did not use a checklist, the owner's manual, the videotape, or any other kind of documents or aids in his training of Phan. He did not test Phan on what he had told him or require any demonstration of Phan's forklift operating skills. The training was, as the Secretary's counsel characterized it, an "off-the-cuff type of instruction" (Tr. 54).

Color Image counters that standard does not require a written safety program or the use of videotapes, owner's manuals, checklists or any other kind of aid. Nor does the standard require that the training session last a specific length of time. Color Image contends that the Secretary is basing the citation solely on the amount of time spent on Phan's training without regard to the content of the training.

Color Image is correct in pointing out that § 1910.178(l) does not impose stringent requirements for the safety training of forklift operators. However, if the standard is to have any meaning at all, it must impose some minimal requirement on employers to train their employees. Color Image failed to meet that minimal requirement.

The record establishes that Phan may have had some experience in operating a forklift (or at the least that he said he had), but it was a different kind of forklift than the one used at Color Image (Tr. 23). Compliance officer Harrington testified that the two types of forklifts “are like a day and night difference because of the fact that you have a steering wheel; and on this one, you have a handle. The other one uses a gas pedal, and it’s just completely different to operate, and you don’t learn how to run it in ten minutes” (Tr. 43).

Color Image cites a 1975 case, *John W. McGrath Corporation*, 3 BNA OSHC 1092, (No. 6019, 1975), in support of its argument that its training of Phan was sufficient to meet the requirements of § 1910.178(l). In that case, Administrative Law Judge Chodes stated (1975 WL 4744, p. 4):

In light of the fact that the respondent’s operators are qualified and experienced, it would appear that the method utilized by the respondent to assure safety, namely, safety meetings with feedback to the employees, and observation by supervisory personnel with appropriate reprimand and corrective instruction, meets the requirements of the standard. Under the circumstances existing in the instant case, a formal training program for operators is not required.

The difference between *McGrath* and the present case is that in *McGrath*, the employer’s operators were “qualified and experienced.” Earlier in his decision, Judge Chodes detailed the employer’s methods for hiring operators (*Id.*):

All drivers were furnished to the respondent from a list of experienced drivers under an agreement with the International Longshoremen’s Association. Each driver is identified with a Seniority Identification Card indicating that the possessor is a qualified driver. Moreover, the drivers assigned to the respondent are known to respondent’s supervisors as qualified drivers. Significantly, the compliance officer who conducted the inspection of the respondent’s worksite did not inquire of the drivers or anyone else regarding their training or experience.

In the present case, Color Image had no reason to assume that Phan was a trained operator of forklifts. After being hired, Phan reported to Nzuyen. Phan indicated to Nzuyen that he was

familiar with a type of forklift different from that used by Color Image. Nzuyen did not know whether Phan was actually trained in the operation of any type of forklift or whether he had any type of safety instructions on the machine (Tr. 23, 33). *McGrath* stands for the proposition that no formal training program is required when an employer's operators are known to be qualified and experienced. Such was not the case here. Nzuyen showed Phan how to operate a potentially dangerous piece of equipment in 10 minutes. He made no evaluation of Phan's operating skills. He observed Phan operating the forklift in an unsafe manner several times in the six weeks Phan worked at Color Image. Ten minutes of oral demonstration was simply not enough to train someone on how to operate a forklift and to cover basic safety procedures. Nor did the on-the-job reprimands for specific unsafe activities cure the defective training. Harrington testified that safety training could not be given in only 10 minutes (Tr. 44). Color Image violated § 1910.178(l) by failing to train Phan in the safe operation of its forklift.

The Secretary asserts that the violation is serious. Section 17(k) of the Act states that a violation is serious if it creates "a substantial probability that death or serious physical harm could result." Failure to train employees in the safe operation of forklifts creates a substantial probability of death or serious physical harm. The violation is serious.

PENALTY DETERMINATION

Section 17(j) of the Act, requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, good faith and prior history of violations. The gravity of the violation is the most significant factor to be considered when assessing the penalty.

Color Image employs approximately 80 employees (Tr. 37). It has no history of previous violations (Tr. 50). No evidence of bad faith was presented at the hearing.

The gravity of the violation is high. Unsafe operation of a forklift can endanger the lives of the operator and of other employees working near the forklift. A penalty of \$2,500.00 is assessed.

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 that:

Item 1 of Citation No. 1, alleging a violation of § 1910.178(l), is affirmed and a penalty of \$2,500.00 is assessed.



NANCY J. SPIES
Judge

Date: November 13, 1996.