



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.

LUDWIG MCINTOSH BULK HAULERS
Respondent.

**OSHRC DOCKET
NO. 92-2704**

**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 December 9, 1993. The decision of the Judge will become a final order of the Commission on January 10, 1994 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 29, 1993 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
Washington, D.C. 20036-3419

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.
Washington, D.C. 20210

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./sra
Ray H. Darling, Jr.
Executive Secretary

Date: December 9, 1993

DOCKET NO. 92-2704

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

John J. Gazzoli,Jr., Esq.
Lewis, Rice & Fingersh
611 Olive Street
St. Louis, MO 63101

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,
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v.

OSHRC Docket No.: 92-2704

LUDWIG McINTOSH BULK
HAULERS, INC.,
Respondent.

Appearances:

Christopher J. Carney, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

John J. Gazzoli, Jr., Esquire
Lewis, Rice & Fingersh
St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Ludwig-McIntosh Bulk Haulers, Inc. (Ludwig), contests a citation issued by the Secretary on August 11, 1992, alleging a willful violation of § 1910.133(a)(1). The cited standard provides:

Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Floyd Gattis on July 17, 1992.

Gattis conducted the inspection in response to a formal complaint after Kevin Bailey, a mechanic for Ludwig, sustained a serious injury when a drill bit broke and a fragment of it struck him in the right eye (Tr. 12, 111). While the parties agree generally on the facts of Bailey's accident, they vigorously dispute the events leading up to it. Witness credibility is a major issue in this case.

Ludwig hauls industrial coke for foundries (Tr. 10). Its facility in Toledo, Ohio, houses a garage, also known as the shop area, where Ludwig's vehicles are maintained and repaired (Tr. 142). Maintenance and repair of the vehicles requires a certain amount of drilling, grinding, and welding (Tr. 9-10). In addition, the coke hauled in the vehicles generates a great deal of coke dust in the atmosphere (Tr. 11). Because of the drilling, grinding, and welding activities and the amount of coke dust in the air, Ludwig has a policy requiring employees to wear safety glasses at all times while in the shop area. Ludwig posted a prominent notice reminding employees of this policy in the shop area (Exh. R-11; Tr. 94). When employees are first hired, Ludwig's manager, Kenneth Hicks, discusses safety with them, and requires them to sign a statement acknowledging that they received a pair of safety glasses (Tr. 143).

Kevin Bailey returned to work from a vacation on Tuesday, June 2, 1992 (Exh. R-4; Tr. 16, 164). It is at this point that the testimony of the various witnesses begins to diverge. Seven witnesses testified. Floyd Gattis, the compliance officer, obviously arrived on the scene after the events at issue occurred, and so his testimony does not directly establish the events at issue. The other six witnesses, all employees or former employees of Ludwig, testified with varying degrees of credibility regarding Bailey and his safety glasses. The credibility determination of the witnesses is complicated by charges and counter-charges of lying, revenge, greed, and self-interest.

The two opposing versions of what occurred leading up to the accident were set out in the testimony of Kevin Bailey and Ludwig's manager, Kenneth Hicks. Bailey, as noted, is a mechanic who was still employed with Ludwig at the time of the hearing. His version of the events at issue is as follows:

On Wednesday, June 3, 1992, (the second day of Bailey's return following his vacation) Bailey went to the office of manager Kenneth Hicks. Also present were Ludwig's

utility person, or "gopher," James Miller, and two secretaries, Tina Siadak and Pat Sutton (Tr. 16). Bailey told Hicks that his safety glasses had been missing from his toolbox when he returned from vacation. Bailey requested a new pair. Hicks replied, "We don't have any. We are waiting for them to come in from Buffalo. We get them cheaper there" (Tr. 15-16). Bailey left without obtaining a pair of safety glasses. Bailey continued to work in the shop area from that day, June 3, until the day of his accident, June 12, without wearing safety glasses (Tr. 16-17).

Kenneth Hicks's version of both the date and substance of the conversation with Bailey in his office differs dramatically from that of Bailey's. Hicks testified that Bailey came to his office on June 9, not June 3, and that Bailey had his safety glasses with him at the time (Tr. 146-147): "[Bailey] and Mr. Miller came in to my office on the 9th. Kevin said he needed glasses. He had a pair in his hand. They were oily. He was rubbing them off on his shirt trying to get the oil off." Hicks said that he got up from his desk and went to the cabinet where he kept Ludwig's supply of safety glasses (Tr. 147). Seeing that he had no safety glasses on hand, Hicks sent Miller over to the Toledo Coke plant next door to see if he could get a pair. Miller reported back that none were available there. Bailey told Hicks that he would make do with his oily safety glasses until Hicks could get a new pair to him the next day (Tr. 148). The next morning, on June 10, Hicks sent Miller over to Walter Gogle's a warehouse supply store, and had him pick up two boxes of safety glasses, containing a total of twenty pairs (Tr. 149). Hicks did not give Bailey a new pair of glasses (Tr. 150).

Ludwig contends that Bailey's testimony is suspect because Bailey has filed a claim for workers' compensation, and that under the Ohio Workers' Compensation procedures, the employee can collect substantially higher benefits if the employee's injury was caused by the employer's violation of a specific standard. The Secretary argues that Hicks's testimony is suspect because it is in his self-interest to deny his responsibility for Bailey's failure to have safety glasses and incurring a \$21,000.00 penalty from OSHA. In this regard, the Secretary points out that it is curious that Hicks failed to mention his version of the conversation with Bailey during the closing conference held by Gattis. Gattis informed Hicks that Ludwig would be cited for failing to provide Bailey with safety glasses for a period of ten days.

Undoubtedly, a reasonable person in Hick's position would have disagreed with Gattis's understanding of the facts and provided Gattis with the exculpatory information known to Hicks. Hicks admits that he failed to do so, claiming that he was "nervous" during his conversation with Gattis (Tr. 156-157). Considering the seriousness of the allegation leveled against Ludwig, it appears unlikely that Hicks would not have simply told Gattis his version of the events leading up to Bailey's accident.

Since the essential point that Bailey and Hicks agree on regarding their conversation is that James Miller was present, it might be thought that Miller's testimony could shed some light on what actually occurred. Unfortunately, Miller proved himself an unreliable witness, because his testimony is inconsistent on so many points.

Exhibit C-4 is the statement that Miller gave to Gattis during his inspection. In it, Miller stated in pertinent part:

Kevin Bailey had ask [sic] Kenneth Hicks for a pair of safety glasses several days after he had returned from vacation. . . . Kenneth Hicks told Kevin Bailey that he didn't have any safety glasses to give him, he said he was waiting for New York to send him some. I, Pat Sutton, and Tina Siadak were also present when Kevin Bailey had ask [sic] Kenneth Hicks for a pair of safety glasses. Kevin Bailey then returned the shop without receiving a pair of safety glasses.

Kevin Bailey was not given a pair of safety glasses from the time he had request [sic] a pair from Kenneth Hicks to include the day of the accident June 12, 1992. I didn't see him wearing any safety glasses at anytime while working in the shop.

At the hearing, Miller said that he did not remember whether or not Bailey had any safety glasses with him the day he left Hicks's office (Tr. 43) and that he did not remember whether Bailey wore safety glasses between that time and the day of his accident (Tr. 44).

Miller also changed his story regarding the date he picked up the boxes of safety glasses from Walter Gogle. Exhibit C-5 is a copy of an invoice for an order of bolts and the order for safety glasses. The order date is given as June 10, and the invoice date is June 15. The following excerpt from Miller's testimony is representative of its tenor (Tr. 52-53):

Q: Can you tell from this document when it is that you picked up the twenty safety glasses?

A: There are two possibilities. I could have went there the same day, or I could have went there on a different day.

Q: What would that different day have been?

A: I would have to look it up in my records. I have to find out exactly when.

Q: Do you recall meeting with me last night?

A: Yes, I do.

...

Q: Do you recall what your answer was last night to that question of "when did you pick up the goggles?"

A: I thought I had gotten the glasses on the 15th.

...

Q: Wasn't your answer five times to that question "June 15 of '92"?

A: It could have been on the 15th, yes.

Q: You didn't say last night that it could have been on the 15th. You said that it definitely was on the 15th, didn't you?

The questioning of Miller continued in this same vein (Tr. 55-58).

After listening to Miller's testimony and observing his demeanor on the stand, it is concluded that Miller is not a trustworthy witness. The equivocation and inconsistency in his testimony provide no basis of credibility.

Scott Fox was a mechanic for Ludwig at the time of Bailey's accident. He was standing next to Bailey when Bailey was struck in the eye. Fox testified that Bailey was not wearing safety glasses at the time of the accident, and that he did not have safety glasses pushed up on his forehead (Tr. 83). Fox stated that although Ludwig had a safety policy requiring employees to wear safety glasses at all times in the shop area, the policy was not enforced (Tr. 84): "If you wore them, you wore them. If you didn't, you didn't. It wasn't really enforced until after the accident."

Ludwig contends that Fox is biased against Ludwig because he left the company on hostile terms, and is "bitter." After Fox gave notice to Ludwig that he was leaving for a better job, Ludwig slapped Fox with a three-day suspension stemming from Fox's alleged insubordination several months before he gave notice (Tr. 85-88). As the Secretary points

out, suspending an employee immediately after he gives notice that he is quitting indicates hostility on the part of the employer more than it does on the part of the employee. Nevertheless, the circumstances surrounding Fox's departure is another factor to consider in weighing the conflicting evidence in this case.

Tina Siadak is a secretary for Ludwig. Although she was named by Bailey and Miller as being present during Bailey's conversation with Hicks, Siadak's recollection of the conversation is vague. She is not sure that it was Kevin Bailey, but she remembers that "an employee did come in sometime during that time frame and asked for a pair of safety glasses. I cannot say it was Kevin" (Tr. 165). Siadak ran into the shop area immediately after Bailey's accident on June 12. She saw Bailey sitting on a stool holding a cloth to his eye. According to Siadak, "Mike [Pristash] was standing in front of [Bailey]. Kevin was holding his eyes and his glasses were pushed up onto the top of his forehead" (Tr. 167).

The final, and most credible, witness to be discussed is Michael Pristash. Unlike Hicks, Miller, and Siadak, Pristash no longer works at Ludwig, so that there is less likelihood his testimony is colored by the need of self-preservation. Unlike Fox, Pristash left Ludwig on amicable terms, and appeared as an unbiased, disinterested witness. Furthermore, Pristash's comportment and demeanor during his testimony encouraged the perception that he was a trustworthy, reliable witness. His testimony is given great weight.

Pristash was Ludwig's garage foreman at the time of Bailey's accident (Tr. 93). Pristash gave this account of the hours immediately before the accident (Tr. 101-102):

Kevin was under the front of the truck. Part of the job is to turn the engine slowly while the man reads his instruments on the rear. He was underneath the truck turning the crankshaft, and he says, "This stuff is falling on my face." I don't remember my exact words or exactly how I said it, but I probably said, "Why the hell don't you have your safety glasses on?" He said, "Well, I don't have any." I said, "Well, get some." He knows where they are at. They have always been available. Most generally, you would find them laying on tool boxes or stuff like that.

. . . So, he got up and got a pair of safety glasses and came back to work.

Pristash observed Bailey between that time and the time of his accident (approximately two hours). During that time, Bailey was wearing the safety glasses (Tr. 102-

103). Pristash was present when Bailey was struck in the eye with the drill bit fragment. At that time, Pristash observed that Bailey was wearing the safety glasses and that “[t]hey were up on his head” (Tr. 105).

The Secretary has charged Ludwig with a willful violation of § 1910.133(a)(1).

Under long-standing Commission precedent, to establish a willful violation, it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or condition and by a state of mind of conscious disregard or plain indifference. *Williams Enterp.*, 13 BNA OSHC [1249,] 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Also, a willful violation/charge is not justified if an employer has made a good faith effort to comply with the standard, even though the employer's efforts are not entirely effective or complete. *Id.*, 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589. See also, *R.D. Anderson Constr. Co.*, 12 BNA OSHC 1665, 1986-87 CCH OSHD ¶ 27,500, p. 35,641 (No. 81-1469, 1986)(numerous steps taken to comply with asbestos standard preclude willful finding).

Dec-Tam Corporation, slip op. at 6-7 (No. 88-523, 1993).

The Secretary predicates his allegation of a willful violation on Ludwig's failure to provide Bailey with safety glasses for a period of ten days after he requested them. But the record fails to establish that Bailey was deprived of his safety glasses. The Secretary did not prove by a preponderance of the evidence that Bailey requested a pair of safety glasses on June 3, and that Ludwig failed to provide him with the safety glasses. Although Ludwig did not prove that it did provide Bailey with the safety glasses, the Secretary has the burden of proof in establishing the violation.

The Secretary's evidence for willfulness is based on the testimony of Bailey and Fox. But their testimony, while consistent, was not so convincing as to overcome the testimony of Siadak and Pristash. Both witnesses stated that they saw Bailey immediately after the accident with his safety glasses pushed up on his forehead. The Secretary has not established that it was more likely than not that Bailey did not have safety glasses available

at the time of his accident. The Secretary has failed to prove that Ludwig committed a willful violation of the cited standard.

In the alternative, the Secretary alleged that Ludwig committed a serious violation of § 1920.133(a)(1). To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

The Secretary has established a serious violation. Section 1910.133(a)(1) applies to Ludwig's shop area. The fact that Bailey was struck in the eye demonstrates that he was not wearing the protective eye equipment at the time of the accident, establishing both that the terms of the standard were not met and that an employee had access to the violative condition. Pristash, as foreman of the shop area, had knowledge that Bailey was not wearing the safety glasses properly, and his knowledge is imputed to Ludwig.

Ludwig raises the defense of unpreventable employee misconduct. "In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." *H. B. Zachry Company*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980). Ludwig had an effectively communicated work rule requiring the wearing of safety glasses in the shop area. A sign proclaiming the policy was prominently displayed. Employees were provided with safety glasses and trained in their use upon being hired at Ludwig. Each of the employee witnesses testified to being aware of the policy.

Enforcement of the work rule is another matter, however. Fox testified that the requirement to wear safety glasses was not really enforced. Even discounting Fox's testimony as that of a disgruntled employee, there was other evidence of lax enforcement. Bailey, testifying against his own interests, confirmed that he sometimes pushed his glasses up on his forehead (Tr. 192): "When I wasn't working directly on something, I would put

them up, because after a while, they start getting scratchy, and it gets hard to see, and you start sweating, and they fog up. I will put them up."

The most dispositive evidence on this question came from Pristash. As foreman of the shop area, it was his responsibility to ensure that all of the shop employees wore their safety glasses (Tr. 94). But, Pristash conceded, "It wasn't the highest priority in my agenda" (Tr. 108). Pristash agreed that Ludwig's enforcement policy changed after Bailey's accident (Tr. 95): "I would say that probably we paid more attention to it and enforced it stronger, yes" (Tr. 95). Pristash was present with Bailey on the afternoon of the accident. He did not tell Bailey to put on safety glasses until Bailey complained about getting coke dust in his eyes. Later, Pristash was present when Bailey was apparently wearing the safety glasses pushed up on his forehead. Even though drilling was being done, Pristash did not tell Bailey to wear the safety glasses over his eyes.

Despite the existence of an effectively communicated work rule requiring employees to wear safety glasses in the shop area, enforcement of the rule was lax enough for an obvious violation of the rule to occur in the presence of the shop foreman without drawing a warning or disciplinary action. Ludwig's unpreventable employee misconduct defense must fail. Ludwig was in serious violation of § 1910.133(a)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Upon consideration of the relevant factor, it is determined that a penalty of \$5,000.00 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:

That the citation for the violation of § 1910.133(a)(1) is affirmed as serious, and a penalty of \$5,000.00 is assessed.

/s/ Paul L. Brady _____

PAUL L. BRADY

Judge

Date: November 24, 1993