
SECRETARY OF LABOR,

Complainant,

v.

O'BRIEN CONCRETE PUMPING, INC.,

Respondent.

OSHRC Docket No. 98-0471

DECISION

Before: ROGERS, Chairman; and VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

O'Brien Concrete Pumping, Inc. ("O'Brien") was issued a serious citation following an inspection conducted in response to a fatal accident. O'Brien specializes in providing concrete to construction locations that are inaccessible to traditional concrete mixing trucks. Concrete is placed inside a large hopper located at the rear of each of the concrete pump trucks used by O'Brien and mixed by rotating steel auger blades located inside the hopper. A pump then draws the concrete into a long retractable tube known as an "extension boom", which is used to direct the concrete to the area in which it is to be poured. After pouring concrete at a construction site in Erie, Colorado, Kevin Dillon, a concrete pump truck operator for O'Brien, was asphyxiated when he was crushed by the rotating auger blades located inside the hopper of his truck.¹

In the citation, the Secretary alleged three serious violations of standards related to training, machine guarding, and lockout/tagout. A penalty of \$3,500 was proposed for each violation. Judge Sidney Goldstein vacated the training and lockout/tagout violations, but affirmed the machine guarding violation, assessing the proposed penalty. At issue before the Commission is whether the judge erred in his disposition of the training and machine

¹ There were no witnesses to the incident and it is not clear exactly how Dillon came in contact with the auger blades.

guarding violations.²

TRAINING VIOLATION

The Secretary has alleged that O'Brien violated 29 C.F.R. § 1926.21(b)(2) by failing to train its employees on specific procedures regarding the safe operation and cleaning of the concrete pump truck hoppers.³ After a pour, the truck operators are responsible for cleaning residual concrete from the pump's boom, hopper, and auger blades. The first step of the cleaning process involves using a cylindrical rubber sponge to flush concrete out of the extension boom. The truck operators then rinse the inside of the hopper, including the auger blades, with water supplied by an on-board water tank and hose. In order to effectively rinse the auger blades, the truck operators rotate the blades at various intervals during this process.⁴

To facilitate the cleaning process, O'Brien removed the manufacturer-installed bolts which secure a hinged metal grate over the hopper opening. This allows the 155-pound grate

² The alleged lockout/tagout violation was not petitioned or directed for review and is not before the Commission.

³ The cited provision requires as follows:

§ 1926.21 Safety training and education.

(a) *General requirements.*

....

(b) *Employer responsibility.*

....

(b)(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

⁴ Because the auger blades and the water hose operate on the same power system, running the blades at the same time as the hose reduces the water pressure to a mere trickle, making it virtually impossible to effectively rinse the blades at the same time that they are being repositioned.

to be lifted by the truck operators so that the auger blades can be effectively rinsed, the hopper can be completely flushed out, and if necessary, any hardened concrete can be "chipped" out of the hopper with an appropriate tool. Truck operators also raise the hopper grate to retrieve the rubber sponge used to flush the boom, which often becomes trapped inside the hopper, as well as foreign objects, such as chunks of asphalt or tree roots, which occasionally fall into the hopper.

During the inspection, compliance officers Stephen Yellstrom and Katy Buchanan interviewed ten O'Brien employees, all of whom had experience as truck operators. Based primarily upon the information gathered during these interviews, the Secretary argued that O'Brien had failed to adequately train its employees on safe hopper cleaning procedures, specifically the hazards associated with running the auger blades with the hopper grate raised. O'Brien responded that the requisite training had, in fact, been provided pursuant to its safety program, which included on-the-job training and monthly safety meetings. The judge agreed with O'Brien and vacated the violation. Relying primarily upon the testimony of Leon Hake, O'Brien's regional manager responsible for safety and training, the judge concluded that "all new hires were instructed in the safe operation of the cement pumps." The judge also observed that "[s]o far as appears in the [interview] notes, not a single employee expressed dissatisfaction with his training with regard to safety."⁵ We find that a training violation exists and reverse the judge's decision.

⁵ The record contains the written notes taken by one, and in some cases both, of the compliance officers during the employee interviews, as well as an interview summary compiled by compliance officer Yellstrom highlighting individual employee responses to four key issues in the case. In vacating the training violation, the judge expressly stated that he placed "more reliance on the written [interview] notes taken almost immediately after the accident than upon the compliance officer's recollection of the information supplied in conversations with the employees." O'Brien argues that this finding constitutes a rejection of Yellstrom's interview summary even though the judge never expressly refers to the document in his decision. However, any alleged inconsistencies which may exist between these documents do not appear to alter the conclusions which can be drawn from the employees' responses as initially documented in the compliance officers' written notes.

DISCUSSION

To prove a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020, 1995-97 CCH OSHD ¶ 31,422, p. 44,416 (No. 94-200, 1997), *aff'd without published opinion*, 158 F.3d 583 [18 BNA OSHC 1513] (5th Cir. 1998); *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619, 1991-93 CCH OSHD ¶ 29,681, p. 40,243 (No. 89-2019, 1992). An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them," and modeled on the applicable OSHA requirements. *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7, 1993-95 CCH OSHD ¶ 30,231, p. 41,621 nn. 6 & 7 (No. 90-1106, 1993).

We find that O'Brien's training efforts were incomplete with regard to instructing employees about the requirements of OSHA's regulations with regard to guarding the hopper's point of operation, i.e. the rotating auger blades, at all times the truck operators had access to the "danger zone" created by the rotating blades.⁶ Although virtually all of the

⁶ Section 1926.300(b)(4)(ii), a violation of which is also alleged here, requires as follows:

§ 1926.300 General requirements.

(a) *Condition of tools.*

....

(b) *Guarding.*

....

(b)(4) *Point of operation guarding.*

....

(b)(4)(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to

(continued...)

interviewed employees stated that O'Brien provided them with on-the-job training, their training did not apparently include specific instruction on OSHA's point of operation guarding requirements. On the contrary, according to the responses of a majority of the interviewed employees, O'Brien failed to provide employees with uniform hopper cleaning instructions, leaving each truck operator to simply develop his own cleaning method based upon the procedure he had been taught by a fellow operator. The parties agree that the truck operators would raise the hopper grate and also periodically run the auger blades in order to adequately clean the hopper. Although O'Brien's safety manual, a copy of which was distributed to each employee, generally warned that contact with the rotating blades could cause serious injury, employees were not specifically instructed that the applicable OSHA regulation required the rotating blades to remain guarded by the hopper grate at all times.⁷

⁶(...continued)

prevent the operator from having any part of his body in the danger zone during the operating cycle.

⁷ Commissioner Visscher agrees in finding a violation of § 1926.21(b)(2) because the "applicable regulation" in this case, § 1926.300(b)(4)(ii), specifically requires that the auger be covered whenever it is operated, and the employer could not identify any evidence that instructions were given to its employees that track this requirement. He would also emphasize that this training standard does not require that an employer instruct its employees in the specific language of the OSHA standards, but only that its training track the requirements of the applicable standards. In his view, the decision in this case is consistent with previous decisions that have found that § 1926.21(b)(2) was not violated where the "applicable regulation" is less specific in its scope and requirements than is the one at issue here, and there was evidence that the employer's training generally tracked the requirements of the standard, even though the training may not have been completely documented. *See, e.g., El Paso Crane*, 16 BNA OSHC at 1426, 1993 CCH OSHD at pp. 41,621-22 ("[a]n employer's instructions are not necessarily deficient just because they allow the employees discretion as to how to proceed, particularly where the working circumstances are such that no one form of protection is capable of being used every time."). *See also Archer-Western Contrac., Inc.*, 15 BNA OSHC 1013, 1020, 1991 CCH OSHD ¶ 29,317, p. 39,381 (No. 87-1067, 1991), *aff'd without published opinion*, 978 F.2d 744 [15 BNA OSHC 1953] (D.C. Cir. 1992) (training found adequate under § 1926.21(b)(2) where employees properly
(continued...)

O'Brien also conducted monthly safety meetings and had a representative from concrete pump truck manufacturer Putzmeister train employees on pump operation at an annual two-day program, but the record fails to establish that these training sessions provided any specific instructions related to guarding the auger blades or even cleaning the hopper. Four of the ten interviewed employees reported that only general safety matters were discussed at these training sessions. According to the testimony of regional manager Hake, the two topics he consistently covered at safety meetings were the use of extension booms around high tension wires and driving accidents.⁸ This training fails to satisfy the specific requirements of § 1926.21(b)(2). *See Superior Custom Cabinet*, 18 BNA OSHC at 1020-21, 1995-97 CCH OSHD at p. 44,416-17 (violation of § 1926.21(b)(2) affirmed where employer provided only general instructions regarding fall hazards and failed to model the instructions on the applicable guardrail standards).

Supplying employees with the company's safety manual, as well as Putzmeister's Operating Instructions for the concrete pump trucks, Putzmeister's Safety Booklet, and the American Concrete Pumping Association's (ACPA) Safety Manual, also failed to meet the requirements of the cited standard.⁹ Both the Operating Instructions and the Safety Booklet

⁷(...continued)

performed crane rigging and signaling after some instruction in safety meetings); *H.C. Nutting Co. v. OSHRC*, 615 F.2d 1360 [8 BNA OSHC 1241, 1241-42] (6th Cir. 1980) (unpublished) (section 1926.21(b)(2) "does not outline any particular requirements for a safety program" but does require "that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations.").

⁸ Hake also testified that he shared information with employees at safety meetings about industry accidents, specifically one involving an employee who fell into a hopper. While this information may have alerted employees to the hazards presented by unguarded rotating auger blades, it failed to address the point of operation guarding requirements themselves.

⁹ Copies of the Putzmeister Operating Instructions were also placed in the concrete pump trucks.

specifically prohibit the operation of the auger blades with the hopper grate raised, and the former expressly warns that the hopper grate should remain secured during cleaning. The ACPA's Safety Manual states that operators should never put their hands or other body parts into the hopper when the hydraulic system is operational and should remove the hopper grate only if the system is properly locked out.¹⁰ Although O'Brien required its employees to affirm that they had read and understood these manuals by signing an acknowledgment form attesting to that fact, four of the ten interviewed employees, including an operations manager, were unaware of Putzmeister's requirements for safe operation and cleaning, and one of the employees admitted that he had "probably never read" any of the manuals.

Even if we were to assume that these materials adequately conveyed the requirements of the standard, the fact remains that five of the ten employees interviewed by the compliance officers expressly stated that O'Brien had never instructed them not to run the auger blades with the hopper grate raised.¹¹ See *L & M Lignos Enterp.*, 17 BNA OSHC 1066, 1067, 1993-95 CCH OSHD ¶ 30,675, p. 42,570 (No. 92-1746, 1995) (violation of § 1926.21(b)(2) affirmed where employees received written instruction requiring the use of fall protection at heights over ten feet but no explanation of the hazards that would require the use of such fall protection). Although O'Brien regional manager Hake initially claimed that employees had been trained not to run the auger blades with the hopper grate raised, he was unable to identify on cross-examination how or when employees had been instructed about this safety rule. Six of the interviewed employees, including the operations manager,

¹⁰ O'Brien also made available to employees training videos developed by the ACPA which, according to regional manager Hake, contained the same type of information found in the ACPA's Safety Manual. Although the videos were apparently shown at safety meetings, it is not evident whether they actually addressed the point of operation guarding requirements or the hazards associated with running the auger blades with the grate raised.

¹¹ Only one of the interviewed employees claimed that O'Brien had a policy against running the auger blades while the hopper grate was raised and he admitted to violating that policy in order to facilitate the cleaning process.

admitted that they left the hopper grate raised while repositioning the auger blades during the hopper cleaning process.

Finally, we note that the fact that none of the interviewed employees expressed dissatisfaction with the training they received from O'Brien is not dispositive. What matters is the content of this training, and whether it specifically addressed both the hazards associated with their work and the applicable OSHA standards. *See El Paso Crane*, 16 BNA OSHC at 1425 nn.6 & 7, 1993-95 CCH OSHD at p. 41,621 nn. 6 & 7. Not only is it questionable to find significance in what the employees did *not* say, but the sufficiency of an employer's training should not be measured solely by its employees' subjective assessment or, as in this case, the lack of such an assessment. Had O'Brien's employees actually expressed an opinion on the adequacy of their training, it would not have ended the inquiry into whether a violation existed. Their failure to express such an opinion certainly does not resolve this question. *See, e.g., Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878, 881 (4th Cir. 1982) ("The particular views of workmen are not necessarily, and often times are not, the best determination as to what is safe and what is unsafe. Convenience rather than safety considerations often dictates a worker's perspective."). Accordingly, we find that the training O'Brien provided its employees was inadequate to satisfy the requirements of § 1926.21(b)(2).

GUARDING VIOLATION

The Secretary has alleged that O'Brien violated § 1926.300(b)(4)(ii) by failing to properly guard the hopper's rotating auger blades. O'Brien argues that this standard, which appears under Subpart I, titled "Tools – Hand and Power", is not applicable to the hopper, which O'Brien claims is an integral part of the concrete pump truck and cannot be operated independently.¹² Noting that the Commission's administrative law judges "have been faced

¹² In support of its argument, O'Brien relies on *Mid-States Constr. Co., Inc.*, 6 BNA OSHC (continued...)

with this argument in previous cases," the judge relied upon three unreviewed judges' decisions to support his conclusion that § 1926.300(b)(4)(ii) was applicable to the hopper. He then affirmed the violation based on the fact that "the evidence discloses that the auger was operated with its moving parts unguarded." We affirm the judge's decision.

DISCUSSION

O'Brien's argument that § 1926.300(b)(4)(ii) is inapplicable to the hopper is not supported by the wording of the standard. Although entitled "Tools - Hand and Power", it is apparent that the standards under Subpart I address a wide-range of tools and machinery. *See Daniel Constr.*, 10 BNA OSHC 1549, 1555, 1982 CCH OSHD ¶ 26,027, p. 32,675 (No. 16265, 1982) (application of § 1926.300(b) not limited to hand-held tools where requirements of Subpart I address other types of tools). For instance, § 1926.300(b)(4), whose language was incorporated verbatim from general industry standard § 1910.212(a)(3), covers point of operation guarding for various types of "machines" including, but not limited to, shears, power presses, and milling machines. *See* 44 Fed. Reg. 8577, 8617 (February 9, 1979) (identifying general industry standards which are applicable to construction work). *See also Ladish Co.*, 10 BNA OSHC 1235, 1237, 1982 CCH OSHD ¶ 25,820, p. 32,281 (No. 78-1384, 1981) (guarding requirements of § 1910.212(a) applicable to moving parts of

¹²(...continued)

1301, 1302-03, 1977-78 CCH OSHD ¶ 22,486, p. 27,112 (No. 10932, 1978), a Commission decision in which the Secretary conceded for unspecified reasons that § 1926.300(b)(2), which sets forth guarding requirements similar to those of the cited standard, was not applicable to an unguarded starter pulley for the motor of a wheel mounted cement mixer. Even though the two-member Commission disagreed over the disposition of two of the three violations at issue, including the alleged guarding violation, they agreed to affirm the judge's decision, but accorded their decision the precedential value of an unreviewed judge's decision. *Mid-States*, 6 BNA OSHC at 1301-02, 1977-78 CCH OSHD at p. 27,110-11. Such decisions are not binding precedent on the Commission. *See Leone Construction Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSH ¶ 20,387 (No. 4090, 1976).

all types of industrial machinery unless a more specific guarding standard applies).

As depicted in the product manuals supplied by manufacturer Putzmeister, the concrete pump appears to be one piece of equipment which is simply "truck-mounted". In addition, we note that Putzmeister refers to its product as a "machine", not a truck or vehicle. As such, the hopper can reasonably be characterized as a component of a truck-mounted machine whose rotating auger blades serve as a point of operation. *See Allis Chalmers Corp.*, 4 BNA OSHC 1876, 1877, 1976-77 CCH OSHD ¶ 21,341, p. 25,629 (No. 8274, 1976) (unguarded rotating parts, nip points, and points of operation created by rotating rear wheels of assembled tractors cited under general industry machine guarding standard § 1910.212(a)(1) but vacated where tractors were result of manufacturing process, not used as part of the manufacturing process). As O'Brien has noted, Subpart Q specifically addresses conditions arising in concrete and masonry construction operations. However, there is no specific section under that subpart which applies to machine guarding. In fact, § 1926.700(a) expressly provides that in addition to the requirements contained under Subpart Q, "other relevant provisions in parts 1910 and 1926 apply to concrete and masonry construction operations." Therefore, we find that the guarding requirements of Subpart I are applicable here.

Turning to the merits of the violation, O'Brien does not dispute that the bolts which secure the grate over the hopper opening were removed, thereby allowing employees to raise the grate. It is also undisputed that the point of operation was not guarded at all times that the auger was operated. Section 1926.300(b)(4)(ii) specifically requires that a point of operation guard "be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle". Where the removal of the bolts allowed employees to raise the grate while the auger blades were rotating, a practice in which they admittedly engaged during the hopper cleaning process, O'Brien has failed to

adequately protect its employees from this point of operation.¹³ Accordingly, we find a violation of § 1926.300(b)(4)(ii).

PENALTIES

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, "due consideration" must be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations. Gravity is typically the most important factor in determining an appropriate penalty and depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993).

Neither party has addressed the issue of penalties in their briefs before the Commission. The Secretary has proposed a penalty of \$3,500 each for the training violation and the machine guarding violation, having given reductions for O'Brien's size and lack of prior history. For the machine guarding violation, the judge assessed the proposed amount of \$3,500, noting that "[t]here appears to be no quarrel with the penalty." We find this amount to be appropriate under the penalty criteria of § 17(j) and affirm the penalty as assessed.

However, we find that a reduction in the penalty proposed for the training violation is appropriate under the circumstances. Even though O'Brien's training program failed to specifically address the need to keep the hopper grate lowered whenever the auger blades were running, its program did include on-the-job training and the distribution of the manuals

¹³ In addition to this routine cleaning, employees occasionally raise the grate to chip out hardened concrete or remove foreign objects that fall into the hopper. There is nothing in the record, however, to suggest that the auger blades are actually operated on such occasions. Compliance officer Yellstrom suggested that placing an interlock device on the hopper grate would have automatically disabled the auger blades whenever employees had to raise the grate.

published by Putzmeister and the ACPA. O'Brien also provided employees with general instructions as to the hazards associated with the operation of the concrete pump truck, including those posed by the rotating auger blades. Therefore, giving good faith credit for the training O'Brien did provide to its employees, we assess a penalty in the amount of \$1,750.¹⁴

¹⁴ Commissioner Weisberg disagrees with his colleagues' decision to *significantly* lower the penalty for the training violation ostensibly on the grounds that O'Brien has made some effort, albeit incomplete, to provide training to its employees. Initially, he notes that under § 17(j) of the Act, the gravity of the violation is generally the most important factor in determining the appropriate penalty. Commissioner Weisberg views the gravity of the training violation as high in that it posed serious hazards to O'Brien's employees, with a high probability of injury as demonstrated by the fatal accident. He notes that there were serious deficiencies in the employer's training program including, most notably, its total failure to train and instruct its employees on the specific hazards associated with cleaning the hopper, *a process which must be done regularly after each concrete pour*. O'Brien's safety manual, a copy of which was provided to each employee, makes no reference to procedures for safely cleaning the hopper or to any safety rule prohibiting employees from running the auger blades while the hopper grate is raised. Commissioner Weisberg believes that while the employer had safety meetings with its employees on the use of extension booms around high tension wires and driving accidents, and supplied its employees with safety manuals published by Putzmeister and the ACPA, such efforts in the context of a training program with serious deficiencies clearly do not warrant *50 percent off* the penalty assessed for the high gravity training violation resulting from its failure to provide any specific hopper cleaning instructions to its employees.

ORDER

We reverse the judge's decision to vacate the alleged violation of § 1926.21(b)(2) and assess a penalty of \$1,750 (Serious Citation 1, Item 1). We affirm the judge's decision finding a violation of § 1926.300(b)(4)(ii) and assess a penalty of \$3,500 (Serious Citation 1, Item 2).

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Dated: February 16, 2000

SECRETARY OF LABOR,
Complainant,

v.

O'BRIEN CONCRETE PUMPING, INC.,
Respondent.

OSHRC DOCKET
NO. 98-0471

APPEARANCES:

Kayden B. Howard, Esq., Office of the Solicitor, U.S. Department of Labor,
Kansas City, Missouri

Robert R. Miller, Esq., Stettner, Miller and Cohn, Denver, Colorado

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor against O'Brien Concrete Pumping, Inc. to affirm three items of a citation issued to the company by the Occupational Safety and Health Administration for the alleged violations of safety regulations relating to recognizing and avoiding unsafe conditions, guarding machines and locking out and tagging out equipment. The Respondent disagreed with the citation and filed a notice of contest. After a complaint and answer were filed with this Commission,

a hearing was held in Denver, Colorado.

Item 1 of the citation alleged that:

The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

a) Employees were not trained on specific procedures regarding the safe operation and cleaning of the pump truck hoppers.

in violation of the regulation found at 29 C.F.R. §1926.21(b)(2) which is shown below:

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Item 2 of the citation alleged that:

The point of operation of machines whose operation exposes an employee to injury, was not guarded:

a) Employees were exposed to the hazard of rotating blades from the pump truck hopper augers in that the hopper grates (guards) were not securely fastened to the hopper and were frequently raised during cleaning in the field.

in violation of the regulation at 29 C.F.R. §1926.300(b)(4)(ii) which reads:

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of

applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Item 3 of the citation states that:

Employees were permitted to perform maintenance or repair activity on equipment (such as compressors, mixers, screens, or pumps used for concrete and masonry construction activities) where the inadvertent operation of the equipment could occur and cause injury without all potentially hazardous energy sources being locked out and tagged:

a) Employees were permitted to perform pump truck hopper maintenance such as cleaning, foreign object removal and lubrication without first locking out and tagging out the hopper auger, and thus, were subjected to the unexpected activation of the rotating auger blades.

in violation of the regulation found at 29 C.F.R. §1926.702(j)(1) which reads as follows:

(j) *Lockout/Tagout Procedures.* (1) No employee shall be permitted to perform maintenance or repair activity on equipment (such as compressors, mixers, screens or pumps used for concrete and masonry construction activities) where the inadvertent operation of the equipment could occur and cause injury, unless all potentially hazardous energy sources have been locked out and tagged.

The record discloses that the Respondent specialized in placing concrete in areas that an ordinary concrete truck cannot reach. As stated in the introduction to the Complainant's brief, on January 21, 1998, Kevin Dillon fell into or was pulled into a hopper attached to one of the company's concrete pumping trucks. A rotating auger inside the hopper crushed Dillon's chest, asphyxiating him.

Two compliance officers interviewed a number of Respondent's employees. A management representative informed the lead investigator that although there was no specific method to clean the hopper, a hazard could occur if the hopper grate were raised while the hopper was activated. Instructions accompanying the truck caution that no work should be performed without a closed tightly screwed agitator grid. The Respondent removed fixed bolts when a truck was received. According to one officer eight of nine employees interviewed stated that they were not told to run the auger with the grate up. There was also no lock-out tag-out procedure.

Upon more detailed examination the lead compliance officer testified that the rotating auger would be a hazard if the grate were up. However, there was no example of an auger starting without purposely turning it on. There was no residual power in the hydraulic system related to the auger. It was company policy not to run the agitator when the grate was up. He did not know if the pump was manufactured with a lock-out tag-out device.

Information obtained by the other compliance officer also confirmed that the Respondent had no lock-out tag-out program or specific instructions regarding the grate when the agitator was on or off. Each operator had his own method concerning the cleanup of the auger.

A number of employees were questioned regarding their training. Notes taken at the conversations indicated that the operators were trained in the work assigned to them. Thus, William Booker had training with a previous employer and a month's on-the-job training with the Respondent; Charles Lamb attended a concrete pumping school for six months plus three months on-the-job training with various operators who watched him; Jeff Hook went out with trainers for two or three weeks and was shown how to do the work; Brett Avenriep also had on-the-job training, attended

safety meetings and was given a safety manual; Mike Channess had the job training and he accompanied other operators who gave him instructions; Randy Rumpza had three months on-the-job training; Ron Templeton operated pumpers since 1974 and because of this experience did not need additional training; Marvin Lake had two years' experience as a pumper operator and was given one week on-the-job training; Tim Carpenter was already an experienced operator when he started with the company and yet was given additional on-the-job training.

Mr. Leon T. Hake, Respondent's regional manager, is in charge of the company's safety program. He has thirty years' experience in the concrete mixing field and is on the safety committee of the Colorado Contractors and Colorado Redi-Mix Associations. He made sure that all new hires had safety training. In addition they were furnished with Putzmeister's truck instructions which were located in the truck at all times. The company also conducted monthly safety meetings, and employees viewed safety videos. The victim was an experienced operator. A truck auger cannot be operated accidentally, and he never saw anyone operate the auger with the grate up. If this was done, it was in violation of company safety rules.

Mr. Gary Zilk confirmed Mr. Hake's version of safety training. He added that he gave at least one month on-the-job training to all new employees. Concrete pump truck manufacturers also gave safety talks to operators. Copies of the American Concrete Pumping Association manual and the Respondent's safety program were issued to all employees.

Item 1 of the citation lists a violation of the regulation found at 29 C.F.R. §1926.21(b)(2) in that Respondent's employees were not trained on specific procedures regarding the safe operation and cleaning of the pump truck hoppers. The Complainant asserts that the citation was in order because there should have been

specialized training not to run the agitator while cleaning was performed with the grate up. One of the officers understood that Respondent did not train its employees regarding safe cleaning procedures.

This information is in contrast with testimony of Respondent's regional chief who was responsible for safety and who testified that all new hires were instructed in the safe operation of the cement pumps.

With this diversity of opinion I refer to the compliance officer's notes taken at the time of the interview. As recounted heretofore, all employees interviewed discussed the nature of their training. So far as appears in the notes, not a single employee expressed dissatisfaction with his training with regard to safety.

I place more reliance on the written notes taken almost immediately after the accident than upon the compliance officer's recollection of the information supplied in conversations with the employees. The Complainant has not established that the Respondent failed to train its employees regarding the safe operation and cleaning of the pump truck hoppers. Item 1 of the citation is therefore VACATED.

As noted, item 2 of the citation requires an employer to guard the point of operation of machines whose operation exposes an employee to injury. The Respondent urges that this item should be vacated because (1) the standard deals with hand and power tools only and should not apply to a ten wheeled concrete pump truck and (2) the point of operation was guarded by a grate.

Commission Administrative Law Judges have been faced with this argument in previous cases. As pointed out by the Secretary, ALJ's have affirmed violation of this standard involving a cement mixer and a concrete pumping engine. Later cases include *Secretary of Labor v. Heimerman Masonry, Inc.*, OSHRC 82-1090, 11 OSHC 1717, where the Commission let stand an affirmance of a violation of 29 C.F.R. S-

1926.300(b) involving a mortar mixer; *Secretary of Labor v. Cuthers Corporation, d/b/a Woodland Construction*, OSHRC 87-1941, 13 OSHC 1906, in which case a violation of the same standard was affirmed involving a cement finishing machine; and *Secretary of Labor v. P & M Masonry, Inc.*, OSHRC 90-1869, 15 OSHC 1245, wherein it was held that the failure to guard rotating blades on a muller mixer used to mix mortar was a violation of the standard in issue.

Thus, since the evidence discloses that the auger was operated with its moving parts unguarded, this item of the citation is AFFIRMED.

Item 3 of the citation charges that the Respondent violated the regulation found at 29 C.F.R. §1926.702(j)(i). That regulation requires lock-out tag-out procedure on equipment where the inadvertent operation of the equipment could occur and cause injury unless all potentially hazardous energy sources have been locked and tagged.

The Complainant's position is that there could be stored energy which could cause an unexpected start of equipment. The Respondent replies that the auger could not start by itself, and that the compliance officer could offer no example where an auger could start up without purposely turning it on.

Since the Complainant has not established that the auger could be unintentionally operational, this item of the citation is VACATED.

In sum, item 1 of the citation is VACATED; item 2 of the citation is AFFIRMED; and item 3 of the citation is VACATED.

There appears to be no quarrel with the penalty for item 2, and a \$3,500.00 penalty is assessed.

Sidney J. Goldstein
Judge, OSHRC

Dated: December 15, 1998