
SECRETARY OF LABOR,
Complainant,
v.
MOBILE PREMIX CONCRETE, INC.,
Respondent.

OSHRC Docket No. 95-1192

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

On December 12, 1994, a Mobile Premix Concrete, Inc. ("Mobile Premix") employee died when he was buried in a sand hopper at the company's Quivas concrete batch facility in Denver, Colorado. The following day, OSHA initiated an inspection that resulted in the issuance of three citations to Mobile Premix. Two of the three citations were settled by the parties. The remaining citation alleged violations of the confined space standard, including 29 C.F.R. §§ 1910.146(c)(2), (c)(3), and (c)(4).¹ Administrative Law Judge Sidney J.

¹That standard provides:

§1910.146 Permit-required confined spaces.

....

(c) *General requirements.*

....

(2) If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

NOTE: A sign reading DANGER -- PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER or using other similar language would satisfy the requirement for a sign.

(continued...)

Goldstein affirmed all three items as serious, and assessed a penalty of \$7,000 for each item. For the reasons that follow, we affirm the judge and his penalty assessment.

I. Facts

The confined space citation was based on several sand and gravel hoppers at Mobile Premix's concrete batch facility. The bodies of the hoppers are below ground level, with three vertical walls and one sloped wall. The tops of the hoppers are at ground level, and are partially covered by steel "grizzly bars," designed to prevent equipment from slipping into the hoppers. Each hopper is 6 feet 8 inches deep. Material (sand or gravel) is dispensed through a flat gate at the bottom. The gates operate automatically to feed the material onto an underground conveyor belt.

Workers operating loaders push material into the hoppers, creating mounds of material that pile up above the tops of the hoppers. When the gate at the bottom of a hopper is closed, the pile is stable. However, when a gate is opened, the material begins flowing, creating a "live" pile. A live pile presents an engulfment hazard, as an employee standing on a live pile may be sucked into the hopper and engulfed by sand. During cold weather, an additional hazard is present. When moisture in the sand freezes, a crust on the surface of the sand is created. As material drops into the hopper and through the hopper's gate, the top surface of the sand remains frozen in place, creating the appearance that the sand pile is stable and solid. This phenomenon is referred to as "bridging." In 1973, Mobile Premix employee Ed

¹(...continued)

(3) If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraphs (c)(1), (c)(2), (c)(6), and (c)(8) of this section.

(4) If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

Duran was partially engulfed when he stepped onto a bridged sand pile and fell through. Another employee was similarly engulfed in 1974. Safety Director Paul Kirk, who had worked for Mobile Premix for 10 years, testified that he was not aware of these accidents until after the December 1994 fatal engulfment.

Employees occasionally ascend the piles to paint or hang signs on the walls that separate the mounds of sand or to adjust sprinkler heads used to moisten the piles. Employees may also approach the grizzly bars to dislodge trapped material. Mobile Premix had an unwritten safety policy that required employees to “lock out” piles before stepping onto them. The control room was to be notified through an intercom, located near the hoppers. The control room operator would then close the gate and tag the control to prevent inadvertent operation. Employees could also stop the conveyor belt by pulling the electrical interruption line, a safety device running the length of the belt. Employees were warned to stay off live piles by senior employees, although not by management. For example, when training employees, Ed Duran discussed his 1973 partial engulfment to illustrate the dangers of bridging.

Employees also enter the hoppers to perform maintenance after the hoppers have been drained of material. A small quantity of material always adheres to the sides of the hoppers. Employees use this material to climb up the sloped side of the hopper. When the material has been scraped from the walls of the hopper, some employees use a ladder to exit the hopper.

There were no witnesses to the engulfment that killed employee Tony Ehret. Mobile Premix employee Chad Hill testified that on the day of the accident, he was sent to check on a hopper gate that would not close. From the tunnel under the hopper, he saw a grizzly bar sticking through the gate. He went outside to see if he could remove the bar from the top of the pile. There Hill observed foot prints going up to the sand pile, but no returning footprints. He concluded that employee Ehret was in the sand pile. The initial report of the accident taken by OSHA records Mobile Premix’s description of the accident as follows:

It is believed that employee Tony Ehret hooked a “grizzly” (steel bars above underground sand conveyor system) with the loader he was running, tried to

straighten [sic] steel bars and was sucked through the bars and buried under the sand. He was dug out by the Denver fire Department at approximately 4:17 p.m.²

II. Whether the Judge Erred in Classifying the Sand and Gravel Hoppers as Permit-required Confined Spaces?

The standard applies if the space at issue can be considered a confined space under the standard. 29 C.F.R. § 1910.146(b) defines a confined space as one that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous employee occupancy.

A confined space is considered a “permit-required” confined space if it has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- (2) Contains a material that has the potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) Contains any other recognized serious safety or health hazard.

29 C.F.R. § 1910.146(b).

A. Are the Hoppers Confined Spaces?

The judge found that the hoppers clearly were “confined spaces.” Both parties agree that the sand and gravel hoppers are large enough that an employee can enter and perform assigned work, and that they are not designed for continuous employee occupancy. However, the parties dispute whether the hoppers have limited or restricted means for exit within the

²Compliance Officer Stephen Yellstrom testified that this report was taken from Mobile Premix Safety Director Kirk. Kirk testified that he was unsure if he made the call. The record indicates that Safety Director Kirk either made the call himself, or directed an employee to make the call.

meaning of section 1910.146(b). Although both parties present compelling arguments concerning an employee's ability to exit a hopper when it is empty, on the record here, we need not resolve this issue.³

We hold that when the hoppers contain material and the gates are open (the piles are "live") the hoppers do have a limited or restricted means of exit. If an employee was inside a hopper when the pile was live, that person would be unable to gain footing, creating a limited or restricted means of exit. Although there were no witnesses to the fatal engulfment of Tony Ehret, the record shows that the gate of the hopper was open when employee Chad Hill deduced that Ehret was engulfed by the sand in the hopper. Safety Director Kirk confirmed that an employee would have difficulty exiting the hopper if a pile were live. Accordingly, we hold that the hopper is a confined space within the meaning of the standard.

B. Are the Hoppers Permit-Required Confined Spaces?

We have held that the sand and gravel hoppers here are confined spaces. The hoppers can be considered "permit-required" confined spaces if they "contain[] a material that has the potential for engulfing an entrant." 29 C.F.R. § 1910.146(b). The standard defines engulfment as "the surrounding and effective capture of a person by a liquid or finely divided (flowable) solid substance that can be aspirated to cause death by filling or plugging the

³The Secretary notes that in the definition of a confined space, the standard lists hoppers as an example of an area that may have a limited means of entry or exit ("tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry"). The Secretary also argues that the types of equipment used by Mobile Premix employees when entering or exiting the hoppers provide further evidence that the hoppers are confined spaces. The Secretary points to Mobile Premix's confined space program, which identifies as confined spaces "[a]ny work area that exhibits a slow exit or slow egress due to planned delay such as automatic closure doors or restricted space or ladder ways or restricted space within a travel way."

Mobile Premix Safety Director Paul Kirk examined the nearly empty hoppers, and concluded that they were not confined spaces because the hoppers were open at the top, were approximately six feet deep, and had a compacted material slope that provided a ramp that employees could use to exit the hopper. As a result, Kirk concluded that the relatively shallow hoppers could be easily exited.

respiratory system or that can exert enough force on the body to cause death by strangulation, constriction, or crushing.” 29 C.F.R. § 1910.146(b). As demonstrated by the fatal engulfment of Tony Ehret, the sand contained within the hoppers can unquestionably be aspirated to cause death.⁴ Therefore, the sand and gravel hoppers are permit-required confined spaces within the meaning of the standard.

Having found that the sand and gravel hoppers at Mobile Premix’s Quivas concrete batch facility are confined spaces and permit-required confined spaces as defined in 29 C.F.R. § 1910.146(b), we conclude that the judge did not err in holding that 29 C.F.R. §§ 1910.146(c)(2), (c)(3), and (c)(4) were applicable to the cited conditions.

III. Whether the Judge Erred in Failing to Classify the Violations as Willful.

A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), is one committed with an “intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *L.E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41,123, 41,132 (quoting *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). “It is differentiated from other types of violations by a ‘heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.’” *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is

⁴Mobile Premix argues that there is no potential for engulfment, as employees only enter the hoppers when they are empty. However, the record establishes that employees perform assigned duties on the piles when the hopper gates are closed, and that employees perform assigned duties near live piles. As Mobile Premix reported to OSHA, the company believed that Tony Ehret attempted to straighten a grizzly bar and was sucked through the bars and buried under the sand. Therefore, we find that employees have access to the hazardous condition that exists when a hopper contains material and the gate is open.

an objective one, that is, “whether the employer’s belief concerning the factual matters in question was reasonable under all of the circumstances.” *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, pp. 41,261, 41,281 (No. 88-572, 1993).

The judge found that “[f]rom the facts in this case, I cannot conclude that the Respondent intended to violate the three items as alleged in the citation. Nor did it know that it was in violation of the regulations. Its safety director did not believe that the hoppers fell within the intention of the regulation. Thus, the Respondent did not willfully disregard or exhibit plain indifference to the regulations. Its employees felt secure with respect to its safety program, and the union representative was pleased with the company’s safety policy.” We agree with the judge, and hold that the violations were not willful.

Mobile Premix Safety Director Kirk examined the hoppers as required by the standard and concluded that they were not confined spaces. In addition, Jeffery Stienert, a loss control consultant from Business Insurance Company, agreed during a safety inspection that the hoppers were not confined spaces. Although Safety Director Kirk was aware of the hazards presented by live piles, both the Secretary and Mobile Premix evaluated the hoppers to determine if they were confined spaces when the hoppers were nearly empty. When the hoppers are evaluated only in this condition it is difficult to determine if the hoppers are confined spaces and thus could be permit-required confined spaces. Although Safety Director Kirk’s judgment may have been misplaced, the record does not suggest that Mobile Premix intentionally circumvented the standard or acted with plain indifference to employee safety.

The Secretary argues that a Mine Safety and Health Act (“MSHA”) citation received by Mobile Premix three months before the fatal accident put Mobile Premix on notice that the hoppers were in fact confined spaces. The MSHA citation relied on by the Secretary concerned a screen deck separator, and was not a confined space citation.⁵ Mobile Premix

⁵The cited provision provides:

(continued...)

Safety Director Kirk testified that crushed rock is fed into the screen deck separator from a belt that enters into the top of the screen deck. He explained that “[a]t various stages in the screen deck there are screens that are horizontal . . . and off each of these screens you screen off a certain size product, and that product, then, is conveyed onto an omni crusher.” The screen deck separator is basically enclosed, with a large discharge point at the base. The chute of the screen deck is 16 feet long and 6 feet wide. Although the MSHA citation does address the possibility of engulfment, the cited condition involves planned entry into the screen deck separator to clean material from the sides. The screen deck separator is not similar to the hoppers at issue here. Therefore, the MSHA citation would not necessarily put Mobile Premix on notice that the sand and gravel hoppers were permit-required confined spaces.

IV. Penalty

A. Whether the Judge Erred by Failing to Group the Violations for Penalty Purposes?

Mobile Premix argues that because all of the alleged violations stemmed from the company’s decision not to classify the hoppers as permit-required confined spaces, the judge erred in failing to group the violations of 29 C.F.R. §§ 1910.146(c)(2), (c)(3), and (c)(4). We find this argument unpersuasive. To accept this argument would suggest that whenever an employer makes one decision that results in noncompliance with more than one standard the resulting citations must be grouped for penalty purposes. The Commission does have wide discretion in the assessment of penalties for overlapping violations, but “there is no

⁵(...continued)

30 C.F.R. §56.16002 Bins, hoppers, silos, tanks, and surge piles.

(a)Bins, hoppers, silos, tanks and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be -

(1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials.

unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item.” *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981). This is particularly true where, as here, each of the cited violations requires a separate abatement by Mobile Premix. We therefore find that the judge did not err in failing to group the violations of 29 C.F.R. §§ 1910.146(c)(2), (c)(3), and (c)(4).

B. Penalty Assessment

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations. The judge found that while Mobile Premix’s conduct was not willful, the violations were serious. The judge then assessed a penalty of \$7,000 for each violation, for a total of \$21,000.

Mobile Premix employs approximately 180 employees, 50 of whom worked at the Quivas facility. Mobile Premix Safety Director Paul Kirk testified that Mobile Premix had not received any citations in at least ten years. Mobile Premix cooperated with the Secretary’s inspection, and abated the condition following the inspection. Although testimony by Mobile Premix employees indicated that the company had a positive attitude toward safety, the Secretary elicited testimony that Mobile Premix’s existing confined space program was not adequately enforced. Only one of the Mobile Premix employees who testified remembered obtaining a permit before entering a confined space. The gravity of the violation was high, as evidenced by the death of Mobile Premix employee Ehret. *See A.P. O’Horo Company, Inc.*, 14 BNA OSHC 2004, 2013, 1991-93 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991). After considering all these factors, and giving substantial weight to the gravity of the violation, we affirm the judge’s assessment of \$7,000 for each violation. Accordingly, we:

1) Affirm the violation of 29 C.F.R. § 1910.146(c)(2) as serious, and assess a penalty of \$7,000.

2) Affirm the violation of 29 C.F.R. § 1910.146(c)(3) as serious, and assess a penalty of \$7,000.

3) Affirm the violation of 29 C.F.R. § 1910.146(c)(4) as serious, and assess a penalty of \$7,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: September 19, 1997