Secretary of Labor,

Complainant,

v.

Anderson Columbia Co., Inc.,

Respondent.

OSHRC Docket No. **01-2210**

Appearances:

Millard P. Darden, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Michael G. Pendergast, Esq., Eric J. Holshouser, Esq., Coffman, Coleman, Andrews & Grogan, Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Anderson Columbia Co., Inc. (Anderson), is a highway paving contractor. In August 2001, Anderson was installing a sewer line along the side of U. S. Highway 41 near White Springs, Florida. On August 7, 2001, one of Anderson's employees was fatally injured when he fell from the back of a moving pickup truck while placing traffic warning signs.

On August 13, 2001, Occupational Safety and Health Administration (OSHA) compliance officer Daniel DeHart conducted an investigation of the accident. As a result of the investigation, the Secretary issued two citations to Anderson on November 29, 2001, alleging violations of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of citation no. 1 alleges that Anderson committed a serious violation of § 1926.601(b)(7) for failing to secure tools and materials when transported in the same compartment as employees. The serious citation proposes a penalty of $7,000.

Item 1a of citation no. 2 alleges that Anderson committed a willful violation of § 1926.601(b)(8) for failing to have adequate seating for the number of employees transported in the back of a pickup truck. Item 1b of citation no. 2 alleges a willful violation of § 1926.601(b)(9) for failing to install seat belts in the back of a pickup truck. In the alternative to items 1a and 1b, the Secretary alleges a willful violation of § 5(a)(1) of the Act for permitting employees to ride in the back of the pickup truck. The willful citation proposes a penalty of $70,000.

A hearing in this matter was held in Jacksonville, Florida, on August 27, 2002. Anderson stipulated to jurisdiction and coverage (Tr. 4-5). The parties have filed post-hearing briefs.

Anderson denies that it violated the cited standards and asserts that the § 1926.601 standard is limited to vehicles that operate within an off-highway jobsite that is not open to the public.

For the reasons discussed, item 1 of citation no. 1 is affirmed, items 1a and 1b of citation no. 2 are vacated, and the alternative violation of § 5(a)(1) is affirmed as serious.

Background

Anderson is primarily a highway paving contractor, but approximately 20% of its business consists of utility installation (Tr. 251). Anderson employs approximately 800 employees (Tr. 87). Its business office is located in Lake City, Florida (Tr. 68).

In August 2001, Anderson was engaged in a six-month project installing a sewer pipeline parallel to U. S. Highway 41 near White Springs, Florida (Tr. 51). Anderson laid the sewer line 5 to 8 feet from the highway pavement, in between the edge of the pavement and a ditch that paralleled the highway (Tr. 41-44). At the time of the accident, Anderson had laid the main pipe, but Anderson's five-man crew was installing air release valves and making connections (Tr. 55).

Glenn Baker was Anderson's foreman on the project (Tr. 25). He assigned Anderson employees Miles Gathright and Ken Lewis to place traffic warning signs in the area where the other crew members were working next to U. S. Highway 41 (Tr. 29-31). The signs measured 68 inches wide by 92 inches long (Tr. 135-136). Gathright drove Anderson's Nissan mini-pickup truck. The truck's bed was 55 inches wide and 74½ inches long (Tr. 136). Because the signs were both longer and wider than the truck bed, they could not lie flat in it.

Gathright drove at speeds between 10 and 20 miles per hour, and Lewis, who sat in the truck bed, placed one sign every 500 feet, for a total of 3 signs placed over a distance of 1500 feet (Tr. 29, 74). Gathright drove the truck partly on the grassy shoulder and partly on the paved shoulder of the road when he and Lewis were placing signs (Tr. 256-257).

The Nissan truck was equipped with two seats and two seatbelts in the cab of the truck (Tr. 97-98). Lewis generally rode in the back of the truck when he and Gathright were placing signs. Because there were no seats in the truck bed, Lewis would sit on an ice cooler in the right rear corner

of the truck bed. With the tailgate up, he would hold onto one side rail of the truck with one hand and onto the signs with his other hand (Tr. 34, 78, 254).

On August 7, 2001, Gathright and Lewis were placing signs that read "Utility Construction Ahead" alongside U. S. Highway 41. Highway 41 was open to public traffic (Tr. 58, 96).

Gathright and Lewis placed three warning signs 500 feet apart next to the southbound lane of U. S. Highway 41. Then they began placing three signs next to the northbound lane. After placing the second sign, they traveled 10 to 15 miles per hour towards the location where they were going to place the third sign. After traveling approximately 388 feet from the second sign, Lewis fell from the truck bed, sustaining serious head injuries. He died from his injuries on August 11, 2001 (Tr. 28, 78-79, 253-254).

OSHA compliance officer Daniel DeHart conducted an investigation of the accident beginning on August 12, 2001 (Tr. 67). As a result of his investigation, the Secretary issued the citations that resulted in the instant case.

CITATION NO. 1

The Secretary has the burden of proving her 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 standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of § 1926.601 standards

Anderson argues that item 1 of citation no. 1 and items 1a and 1b of citation no. 2 are not applicable to the Nissan pickup truck at issue. Anderson cites § 1926.601(a), the coverage section, which provides:

> Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of this section do not apply to equipment for which rules are prescribed in § 1926.602.

The Review Commission addressed § 1926.601(a) in *Gerard Leone & Sons, Inc.*, 9 BNA OSHC 1819 (No. 76-4105, 1981). The issue was whether § 1926.601(b) applied to dump trucks not

equipped with certain safety devices. The respondent argued that § 1926.601 did not apply because the dump trucks were being operated on a highway open to public traffic, and the standard is limited to vehicles being operated on off-highway jobsites. The Review Commission rejected this approach, finding that "the coverage provision at section 1926.601(a) limits the standards' applicability by vehicle and not by location." *Id.* at 1820. The Review Commission found "that the standard applies to trucks that operate off highway even if they do not operate exclusively off highway, regardless of where they are generally operated or where they are operated at a particular time." *Id.*

The Commission also brought § 1926.602 into its discussion of the coverage of § 1926.601:

> The first sentence of subsection 601(a) expressly applies to "those vehicles that operate off highway," while the second sentence specifically excludes "equipment for which rules are prescribed in section 1926.602." Section 1926.602, entitled "Material Handling Equipment," applies to, among other things, *trucks operated exclusively off highway*. This indicates that trucks that operate exclusively off-highway are not covered by section 1926.601. It follows, therefore, that section 1926.601 applies to trucks that operate both on and off highway.

Id. (emphasis added).

The Secretary argues that since Anderson operated the Nissan pickup on off-highway sites, as well as on the highway, the cited sections of § 1926.601 apply. Anderson counters that the Secretary has failed to submit any evidence that the pickup truck was ever operated off-highway. Under *Leone*, it is immaterial whether Anderson uses the pickup truck at off-highway locations:

> In view of our holding that section 1926.601 applies to trucks that can operate both on and off highway regardless of their actual or general use or location where they are located at any particular time, Gerard Leone's argument that the record contains no evidence that the cited truck was ever used off-highway becomes inapposite.

Id. at 1821.

In his dissent, Chairman Barnako pointed out the obvious flaws in the Commission's reasoning:

> The standards at issue in this case are expressly limited in application by subsection 601(a) to motor vehicles "that operate within an off-highway jobsite, not open to public traffic." Therefore, the cited standards apply only if it can be established that the vehicle is being operated in an off-highway jobsite.

> My colleagues conclude that section 601 applies to vehicles which *can* operate in off-highway jobsites, regardless of whether they operate at such a site at any particular time. Not only is such an interpretation contrary to the clear wording of subsection 601(a) but by focusing on the type of vehicle in question rather than the location the vehicle is actually used, my colleagues ignore the fact that material handling equipment governed by section 602, to which the cited standards do not apply, is expressly defined in terms of vehicle type. Furthermore, the term "that operate" in subsection 601(a) implies a test based on location of the vehicle; this term does not appear in subsection 602(a).

Id. at 1821-1822 (emphasis in original, footnote omitted).

Although the court agrees with Chairman Barnako's analysis of § 1926.601(a), he is bound to follow Commission precedent. Based upon *Leone*, it is determined that the § 1926.601 standards apply to the Nissan pickup truck because the truck can operate both on and off the highway.

Item 1: Alleged Serious Violation of § 1926.601(b)(7)

The Secretary alleges that Anderson committed a serious violation of § 1926.601(b)(7), which provides:

> Tools and material shall be secured to prevent movement when transported in the same compartment with employees.

It is undisputed that Lewis was riding in the same compartment (the bed of the truck) as the traffic signs. The signs were not secured to prevent movement.

Anderson argues that § 1926.601(b)(7) does not apply because the signs were not being "transported" in the same compartment with Lewis. Anderson arrived at this novel conclusion by consulting *Webster's New Collegiate Dictionary* (1981), in which "transport" is defined as "to transfer or convey from one place to another." Anderson contends that the truck "was not being used to transport employees and materials to or from the worksite, but was in the process of a job function requiring minimal travel at a very slow speed within the work area" (Anderson's brief, p. 10). As Anderson itself cites the definition, "to or from the worksite" is not a limitation placed on the meaning of "transport." The definition cited plainly states "from one place to another." Gathright drove Lewis and the signs from one place to another as Lewis set up the signs; Lewis was transported along with the signs between stops. In applying a standard, its wording must be interpreted in a

reasonable manner consistent with a common sense understanding. *Globe Industries*, 10 BNA OSHC 1596 (No. 77-4313, 1982).

Anderson violated § 1926.601(b)(7). The Secretary classified the violation as serious. Under § 17(k) of the Act, a violation is serious if it creates a substantial probability of death or serious physical harm. The Secretary has established a serious violation.

Citation No. 2

Items 1a and 1b: Alleged Willful Violations of §§ 1926.601(b)(8) and (9)

The Secretary alleges that Anderson committed willful violations of §§ 1926.601(b)(8) and (9), which provide:

> (8) Vehicles used to transport employees shall have seats firmly secured and adequate for the number of employees to be carried.
>
> (9) Seat belts and anchorages meeting the requirements of 49 C.F.R. part 571 (Department of Motor Vehicle Safety Standards) shall be installed in all motor vehicles.

It is undisputed that the Nissan pickup truck was equipped with at least two seats and seat belts as required by §§ 1926.601(b)(8) and (9). These standards address the installation of safety equipment in vehicles used to transport employees. They do not require employees to actually use the seats and seat belts.

The Secretary attempts to expand the scope of the cited standards to require installation of seats and seat belts in the beds of trucks if employees ride there. This interpretation is rejected. Nothing in the plain language of the standards supports such a reading.

Anderson's truck was in compliance with §§ 1926.601(b)(8) and (9). Items 1a and 1b are vacated.

Alternative Alleged Violation of § 5(a)(1)

In the alternative, the Secretary alleges that Anderson committed a willful violation of the general duty clause, § 5(a)(1), by allowing an employee to ride in the bed of a pickup truck without a seat belt.

In order to establish a violation of the general duty clause:

> [T]he Secretary must show that (1) a workplace condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious

> physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it.

Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996).

The Secretary argues that it has established the four elements of § 5(a)(1) violation by showing that (1) Lewis died as a result of being thrown from the bed of a moving truck while not wearing a seat belt; (2) Anderson's safety manual, which requires employees to wear safety belts while riding in company vehicles, demonstrates that the company recognized the hazard; (3) the hazard of being thrown from the bed of a truck is likely to cause death or serious physical injury; and (4) the truck was already equipped with seat belts so that a feasible means of abatement existed.

Anderson counters that (1) it does not recognize that riding in the bed of a truck at speeds of 10 to 15 mph is hazardous; (2) the highway construction industry does not recognize riding in the bed of a truck as a hazardous activity; (3) having employees ride in the cab of the truck would increase, not decrease, their risk of harm because it would prolong their exposure to traffic when they get out to place the traffic devices;[1] and (4) alternatives are not feasible because of the increased exposure to traffic and because placing traffic devices from a moving vehicle in a seated, belted position is not ergonomically possible.

Did a Hazard Exist?

> [W]hen citing a violation of the general duty clause, the Secretary must establish that the cited condition actually poses a hazard to employees. . . . [T]he general duty clause, while intended to protect employees from hazards that have yet to be addressed by standards, is not intended to replace standards as an enforcement mechanism.

Waldon Healthcare Center, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

In support of its contention that there was no hazard in allowing an employee to ride in the back of a truck, Anderson called Richard Cabrera as a witness. Cabrera is a project manager for Zook Moore & Associates, a "transportation and engineering litigation support firm" (Tr. 143). Cabrera holds a B.S. in Civil Engineering and an M.A. in Business Administration. He worked for

[1] Although Anderson argues that requiring an employee to sit in the cab of a truck and to wear a seat belt increases his exposure to the hazard of being struck by traffic when he gets out to place the traffic devices, Anderson did not properly assert the affirmative defense of greater hazard.

the Florida Department of Transportation for over 20 years (Exh. R-2; Tr. 144). He was qualified by the court as an expert witness in highway construction safety and maintenance of traffic (Tr. 179).

Cabrera testified that Anderson followed standard industry practice in allowing an employee to ride in the back of a moving truck (Tr. 199). Cabrera's conclusion, however, is based on information that is inapposite to the specific facts of this case. For example, Cabrera based his testimony regarding industry practice on two letters sent in 1993 (Exhs. R-4 and R-4). David Rush, a safety engineer whom Cabrera spoke with, sent a letter to C. V. Varga, "the head of a safety department for the Virginia Department of Transportation" (Tr. 186). In the letter, Rush asks Varga to confirm his understanding that it is permissible for employees to ride in the backs of trucks while placing or removing traffic devices (Exh. R-3):

> An employee may ride in the back of a vehicle to place or pick up channeling devices so long as it did not travel greater than five miles per hour and was followed by a truck mounted crash cushion to provide protection to the installation/removal operation for roadways of speeds of 45 mph or greater.

Varga responded to Rush's letter confirming Rush's understanding (Exh. R-4).

Almost none of the conditions posited in Rush's question existed at the time of Lewis's accident. Lewis was not placing channeling devices, the truck was moving at a speed of 10 to 20 miles per hour, and the truck was not followed by a truck mounted crash cushion. Rush's and Vargas's letters lend more credence to the Secretary's position. The inference is that it is impermissible for an employee to ride in the back of a truck when the truck's speed exceeds 5 mph.

Cabrera also referred to a study published in April 2001 by the National Institute of Occupational Safety and Health (NIOSH). The study, which covered a period from 1992 to 1998, reported on a total of 850 fatalities related to roadside construction zones. Cabrera noted that the activity that resulted in the third highest number of fatalities was setting up or removing traffic devices. Cabrera stated, "I felt it was odd that an activity which generally can be accomplished in 30 to 45 minutes and consequently is a relatively small amount of the overall time that construction activity is ongoing, a minuscule amount of time would have such a high rate of fatalities, that it would be in the top three of worker fatalities" (Tr. 200). Cabrera assumed that the fatalities occurred when vehicles struck employees as they placed or removed traffic devices. But Cabrera

acknowledged that he did not know how many of the fatalities resulted from employees falling from the backs of trucks as they were engaged in this activity (Tr. 210-211).

Anderson's Exhibit R-1 indicates that falls from truck beds were responsible for a number of the fatalities reported in the NIOSH study. In disputing the Secretary's argument that Anderson willfully violated the § 1926.601 standards, Anderson's attorney confronted compliance officer DeHart with search results from OSHA's website showing that other companies had not been cited for willful violations under similar circumstances. The document contains details of nine separate investigations between September 1996 and July 2001. In every instance, an employee was fatally injured when he or she fell or was thrown while riding in the back of a truck. In each case, the fatality resulted from severe head injuries (Tr. 100-109).

The underlying information on which Cabrera relied in reaching his conclusion that riding in the backs of trucks was not hazardous actually tends to establish the extreme risk of doing so. Cabrera's testimony was further weakened by his inclusion of cones and other traffic channeling devices in his discussion of the hazards of riding in a truck bed. Lewis's assignment on the day in question was to set up six traffic signs. The Secretary's citation refers only to traffic signs. Yet Cabrera continually discussed cones and other devices which would have altered the conditions under which Lewis and Gathright were working (Tr. 203-204). For example, Cabrera related an extended hypothetical positing an employee who would place approximately 300 cones in approximately 30 minutes while riding in a truck traveling at a speed of 5 mph (Tr. 204-205). Again, this set of circumstances simply does not apply to the instant case, and Cabrera's analysis is of little help in deciding the issue at hand.

The Secretary regards the fact of Lewis's death as proof that riding in a truck bed is a hazardous activity. It is well-established that "it is the hazard, not the specific incident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard." *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970 (No. 78-4555, 1982), *aff'd.* 729 F.2d 317 (5th Cir. 1984). However, an accident may convincingly demonstrate that a condition presents a hazard to employees. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991). In the instant case, it is determined that the accident and the record of other fatalities demonstrate that riding in a truck bed is a hazardous condition.

Did Anderson or Its Industry Recognize the Hazard?

Anderson's safety manual states (Exh. C-5, p. 31):

> All drivers and occupants of Company vehicles are required to wear seat belts or restraints at all times when vehicles are in operation.

and (Exh. C-5, p. 40):

> Accidents have happened as a result of employees riding in unsafe positions on or in Company vehicles. Therefore, passengers are generally restricted to riding on seats provided for them. These seats shall be locked down and safety belts provided for each seat which a passenger will occupy (over the road vehicles). There will be no riding on any off highway equipment, *e.g.*, dozers, loaders, graders, scrapers, in back of pickup trucks, etc.

It is apparent from the specificity of these rules that Anderson recognized that riding in the back of a truck without a seat belt is a hazardous activity.

Was the Hazard Likely to Cause Serious Physical Harm?

Not only was the hazard likely to cause serious physical harm, the most likely outcome of the hazard was death. Falling or being thrown from a moving truck, even at minimal speeds, appears to often result in massive head injuries.

Did a Feasible Means of Abatement Exist?

The most obvious feasible means of abatement was to forbid employees to ride in the beds of trucks. Instead, the employee gets in and out of the truck cab to place the signs. That is, in fact, the policy Anderson implemented following Lewis's accident (Tr. 48-49). Cabrera argued against the feasibility of this method of abatement by adding complications not found in the instant case (Tr. 202-203):

> I have not done any time motion studies to address the issue, but I can just logically approach the question, and I would easily say to the scenario that I had mentioned before, you're placing devices at five to six second intervals from a moving vehicle at five miles per hour. If you're in a seated belted position, first of all, from an ergonomics, I don't believe that it would be feasible to place those devices.

It is significant that Cabrera performed no time motion studies. Anderson did not dwell on how much time it took for employees to place six signs. Anderson did not argue that the extra time that it takes for an employee to unbuckle his seat belt, open the cab door, climb out, and then reverse

the process after he had placed a sign would be burdensome to its crew. Anderson got bogged down in hypotheticals concerning the placement of hundreds of cones but never addressed the ease with which the specific situation could be remedied. Anderson foreman Baker testified that on occasion his crew moved the traffic signs three to four times in a day, and sometimes the signs would not be moved all day (Tr. 30). When asked how much time it would add to the process for an employee to ride belted in the cab, Cabrera answered, "[I]t might take an extra 30 seconds or a minute; maybe a little bit longer" (Tr. 218). Given that placing the signs was an infrequent activity, the extra time it would take to require employees to ride in the cab would be minimal. This is a feasible abatement.

The Secretary has established a violation of § 5(a)(1).

Willfulness Classification

The Secretary alleges that the violation is willful.

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶ 30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n. 3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd.* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L. R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd. on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A. E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

The Secretary bases her charge of willfulness solely on the fact that Anderson's safety manual stated that employees should wear seat belts while riding in vehicles, and that they should not ride in the backs of pickup trucks. This argument is rejected.

The rules cited by the Secretary from the safety manual are general rules that do not address the specific operation of placing traffic signs and other devices. Allowing employees to ride in the back of a truck while placing traffic devices appears to be industry practice. Neither the OSHA standards nor Florida state law prohibits adults from riding in the bed of a pickup truck (Tr. 247).

The Secretary has failed to demonstrate that Anderson acted willfully. The violation is classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Anderson employed approximately 800 employees. The Secretary had cited Anderson in the previous 3 years. Anderson demonstrated good faith; it had what DeHart characterized as a good written safety program (Tr. 87-88).

The gravity of the violations is high. The serious violation of § 1926.601(b)(7) (item 1 of citation no. 1), for failure to secure tools and materials in the truck bed, may have contributed to Lewis's death. The only theory proposed for Lewis's fall from the truck, subscribed to by both the Secretary and Anderson, is that a strong gust of wind caught one of the signs that Lewis was holding onto, and that it acted as a sail in pulling him from the truck (Tr. 93-94, 254). Had the signs been secured, they would not have blown out of the truck.

The gravity of serious violation of § 5(a)(1) (alternative item of citation no. 2) has already been discussed. When an employee falls from a moving truck, the result is most likely to be death from massive head injuries. It is determined that the appropriate penalty for each item is $7,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that :

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.601(b)(7), is affirmed and a penalty of $7,000.00 is assessed;

2. Items 1a and 1b of citation no. 2, alleging willful violations of §§ 1926.601(b)(8) and (9), are vacated and no penalty is assessed; and

3. The alternative item of citation no. 2, alleging a willful violation of § 5(a)(1), is affirmed as serious and a penalty of $7,000.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: January 20, 2003