BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CENTRAL TRANSPORT, INC.

RESPONDENT.

DOCKET NO. OSHANC 2005-4502
OSHA INSPECTION NO. 308655307
CSHO ID NO. B5670

ORDER

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 14th day of August, 2007 in the Board Room, Main Floor, N. C. Medical Society Building, 222 North Person Street, Raleigh, North Carolina by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Ralf Haskell, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Peter J. McGrath, Jr., Moore & Van Allen PLLC, Charlotte, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Complainant prove by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of N.C.G.S. 95-129(1), the general duty clause, by failing to furnish to each of his employees conditions of employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm by not requiring its employees to wear seatbelts while operating forklifts?

2. Did Complainant prove by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.178(k)(1) by not having wheel chocks placed under the rear wheels of highway trucks to prevent the truck from rolling while they were boarded with powered industrial trucks in that trucks were dropped at its facility for employees to load/unload freight without chocking the rear wheels?

STATUTES AND REGULATIONS AT ISSUE

1. N.C.G.S. 95-129(1) states:

> Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees[.]

2. N.C. Gen. Stat. § 95-138(a) in pertinent part provides:

. . . the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, shall have the authority to assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order adopted under this Article, as follows:

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> (2) A penalty of up to seven thousand dollars ($7,000) shall be assessed for each serious violation.

(Emphasis added).

3. N.C. Gen. Stat. § 95-138(b) provides:

> (b) The Commissioner shall adopt uniform standards that the Commissioner, the Commission, and the hearing examiner shall apply when determining appropriateness of the penalty. The following factors shall be used in determining whether a penalty is appropriate:
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> (1) Size of the business of the employer being charged.
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> (2) The gravity of the violation.
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> (3) The good faith of the employer.
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> (4) The record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.
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> The report of the hearing examiner and the report, decision, or determination of the Commission on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

4. 29 CFR 1910.178(k)(1) states:

> The brakes of highway trucks shall be set and wheel chocks placed under the rear wheels to prevent the trucks from rolling while they are boarded with powered industrial trucks.

5. 29 CFR 1910.178(a)(4) states:

> Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

6. CPL 2-1.28 (Compliance Assistance for the Powered Industrial Truck Operator Training Standards) provides:

> Seat belts in forklift trucks are a component part of an operator restraint system that is designed to reduce the incidence and severity of injuries to the operator in the event of a tipover accident. Forklift trucks are particularly susceptible to tipovers. Failure to wear the seat belt that is provided in the forklift increases the risk of injury to the operator in the event of such an accident. Section 1910.178 does not currently contain requirements for the use of operator restraint systems. However, Section 5(a)(1) (substantially identical to N.C. Gen. Stat. 95-129(1)) of the OSH Act requires employers to protect employees from serious and recognized hazards. Recognition of the hazard of forklift tipover and the need for operators to use an operator restraint system is evidenced by certain requirements in the more current version of ANSI B56.1 consensus standard for powered industrial trucks, and ASME B56.1-2000 - Safety Standard for Low Lift and High Lift Trucks. In addition, seat belts have been supplied by many manufacturers of counterbalanced, center control, high lift trucks that have a sit-down nonelevating operator position. OSHA's enforcement policy on the use of seat belts on powered industrial trucks is that employers are obligated to require operators of powered industrial trucks that are equipped with operator restraint devices, including seat belts, to use the devices. CSHOs will enforce the use of such devices under Section 5(a)(1) of the OSH Act in accordance with the October 9, 1996 Seat Belt Enforcement Memorandum.

7. N.C.G.S. 150B-2(8a)c states:

> "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
>
> c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

Having reviewed and considered the record and the briefs of the parties and the arguments of the parties, the North Carolina Occupational Safety and Health Review Commission hereby AFFIRMS the decision of the Hearing Examiner with respect to the violations and the designations but increases the penalties and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The Respondent, Central Transport, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On February 9 and 10, 2005, Compliance Safety Officer (CSO) Cohen Elgin conducted an occupational safety and health complaint inspection of Respondent, Central Transport, Inc's (Central), truck terminal (distribution center warehouse) located at 601 Johnson Road in Charlotte, North Carolina.

6. As a result of this inspection on February 18, 2005, Complainant issued two citations to Central alleging three violations:

> 1. Citation Number One, Item 1, was issued for a serious violation of N.C.G.S. § 95-129(1), the General Duty Clause, in that forklift operators at Central's terminal were not wearing seatbelts while operating Toyota forklifts.
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> 2. Citation Number One, Item 2, was issued for a serious violation of 1910.178(k)(1) for failure of Central to chock the wheels of trailers which were being loaded/unloaded at the facility.
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> 3. Citation Number Two was issued for a non-serious violation of 1910.141(d)(2)(iv) for Central's failure to provide in four employee restrooms hand towels or other drying device for employees to dry their hands.

7. By letter dated March 28, 2005 and filed with the Review Commission on April 1, 2005, Central served its Notice Of Contest upon Complainant, contesting Items 1 and 2 of Citation Number One. Central did not contest Citation Number Two.

8. Central's Statement of Position was filed with the Review Commission on May 3, 2005 accompanied by a letter dated April 28, 2005, setting forth its defenses.

9. This matter was heard by the Honorable Richard Koch, Hearing Examiner, on November 16, 2005, February 2 and 3, 2006, and March 1, 2006.

10. At the hearings Complainant presented two witnesses, CSO Cohen Elgin and Gary Burkholder, who was tendered and accepted as an expert witness in forklift operation, training and safety (T I, Hearing dated November 16, 2005, pp. 37-38). Central presented two witnesses, Randy Miller, Terminal Manager, and Tara Murphy, who is the current company safety director.

11. On May 25, 2006, after the hearings had been concluded, Complainant filed a Motion to Amend to allege a hazard for Citation 1, Item 1, the General Duty Clause violation for not wearing seat belts.

12. On December 29, 2006, Hearing Examiner Koch issued his order which was filed with the Review Commission on January 4, 2007. In his order, Hearing Examiner Koch granted the Complainant's Motion to Amend and affirmed the amended serious violation of the General Duty Clause violation for failure to wear seat belts with a penalty of $2,450.00. Hearing Examiner Koch also affirmed the serious violation 29 CFR 1910.178(k)(1) for not having wheel chocks placed under the rear wheels of highway trucks with a penalty of $2,450.00. Although not contested, Hearing Examiner Koch also affirmed the nonserious violation of 29 CFR 1910.141(d)(2)(iv).

13. Complainant filed its Petition for Review with the Review Commission on February 6, 2007.

14. On February 13, 2007, Chairman Keller granted Complainant's Petition for Review.

15. The parties filed their briefs and the appeal was heard at the August 14, 2007 Quarterly meeting of the Review Commission.

16. The Commission adopts the Hearing Examiner's findings of fact numbered 1 through 98.

17. The Respondent has no policy requiring the driver of the forklifts to make sure that the wheels of the trailers are chocked prior to the forklifts entering them but instead relied on the truck drivers to ensure that the wheels were chocked with 4 x 4 pieces of lumber. (TIII, Hearing dated February 3, 2006, p 18).

18. Central had no regular wheel chocks on site and 4 x 4 pieces of lumber were used as wheel chocks rather than regular wheel chocks because the regular wheel chocks tend to get stolen. (T IV, Hearing dated March 1, 2006, p 31).

19. Wheel Chocks are devices usually made of rubber or aluminum that are shaped so that they fit the contour of the wheel on one side and have a 90 degree angle on the other side which may or may not have a cleat that fits into the pavement. 4 x 4 pieces of lumber are not acceptable to use as wheel chocks. (T I, Hearing dated November 16, 2005, pp. 83-84).

20. The compliance officer observed eight trailers parked at the loading dock without wheel chocks. (T III, Hearing dated February 3, 2006, p 19).

21. The compliance officer observed forklifts loading and unloading while going on and off of the trailers at Central Transport. (T II, Hearing dated February 2, 2006, p 53; T III, Hearing dated February 3, 2006, p 67).

22. None of the trailers at Respondent's worksite were chocked with wheel chocks that qualified as appropriate wheel chocks under 29 CFR 1910.178(k)(1), the standard requiring wheel chocks. (T I, Hearing dated November 16, 2005, p 84; T IV, Hearing dated March 1, 2006, p 31).

23. North Carolina OSH Compliance Officers may cite for a wheel chock violation if the spring-loaded brake system has not been properly maintained. (T III, Hearing dated February 3, 2006, p 25).

24. Respondent did not have a comprehensive written inspection program for their spring brake system and was not entitled to the exception to the required wheel chocking. (T III, Hearing dated February 3, 2006, p 24-26).

25. The Respondent did not always use wheel chocks on trucks that have spring brakes. (T IV, Hearing dated March 1, 2006, p 33).

26. Tara Murphy, the corporate safety director for Central Transport stated and the Commission finds as a fact:

> We do not prohibit the use of the seat belt if that's what the employee believes is in their best interest. . . . the general recommendation is for the operator to be able to remove himself from the high-low (forklift), to jump off of it.

(T IV, Hearing dated March 1, 2006, p 25).

27. On March 16, 2005 at one of Respondent's South Carolina facilities, a forklift driver was killed when a trailer without wheel chocks pulled away from the loading dock while a forklift was exiting the trailer. The driver was not wearing a seat belt and was crushed when he tried to jump from the forklift. (Complainant's exhibit No. 36; T II, Hearing dated February 2, 2006, pp. 86-106).

28. Respondent did not have any wheel chocks for their trailers at the South Carolina facility and were cited for a willful serious violation of 29 CFR 1910.178(k)(1) and fined 35,000.00 by the South Carolina OSH. (Complainant's exhibit No. 36; T II, Hearing dated February 2, 2006, pp. 90-91, 104-106).

29. Respondent was also cited for a serious violation of the General Duty Clause for the failure to require the forklift drivers to wear seat belts. (Complainant's exhibit No. 36; T II, Hearing dated February 2, 2006, pp. 89-90).

30. Respondent failed to show up for the hearing in South Carolina and a default judgment was entered against them upholding the two citation items plus one additional citation and ordering Respondent to pay a penalty of $41,750.00. (Complainant's exhibit No. 37; T II, Hearing dated February 2, 2006, pp. 91-94).

31. Respondent only used Toyota forklifts at its Charlotte facility. (T III, Hearing dated February 3, 2006, p 128).

32. The manual for the Toyota Forklifts used at Respondent's Charlotte facility had numerous warnings about the use of seat belts and the hazards of tip-over as follows:

> On page 9:
>
> Operator Restraints. Restraints *must* be used to reduce the possibility of injury from overturns or other accidents.
>
> On page 15:
>
> Rail or highway docks have drop-offs many of which are not guarded. Watch rear wheel steering near edges, back away, don't go forward. Stay with truck if it falls.
>
> On page 23:
>
> Lift trucks can tip over when empty. Slow down for turns, steer smoothly and slowly. *Always* fasten the seat belt and stay with the truck if it tips. (Emphasis added).
>
> On pages 37 and 39:
>
> A specially designed operator seat and seat belts are provided for your safety. Get in the habit of using the seat belt whenever you sit on the truck.
>
> On page 38:
>
> WARNING. Buckle up. Your seats and seat belt can reduce the risk of serious injury or death in the case of a truck tip-over. Your chances for avoiding serious injury or death in a tip-over are better if you stay with the truck in the operator's compartment.
>
> On page 38 and 40:
>
> WARNING. Always wear your seat belt when driving the truck. The truck can tip over if operated improperly. To protect operator from risk of serious injury or death in the event of tip-over, it is best to be held securely in the seat. The seat and seat belt will help keep you safely within the truck and operator's compartment. In the event of a tip-over, don't jump. Grip the steering wheel, brace your feet, lean away from the direction of the tip-over and stay with the truck.

(T II, Hearing dated February 2, 2006, pp. 140- 51) (Complainant's Exhibit #11, pp 9, 15, 23, 37, 38-40).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.

2. The Commission has jurisdiction of this cause and the parties are properly before this Commission.

3. The Complainant has proven by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of N.C.G.S. 95-129(1), the general duty clause, by failing to furnish to each of his employees conditions of employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm by not requiring its employees to wear seatbelts while operating forklifts.

4. The Complainant has proven by the greater weight of the evidence and by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.178(k)(1) by not having wheel chocks placed under the rear wheels of highway trucks to prevent the truck from rolling while they were boarded with powered industrial trucks in that trucks were dropped at its facility for employees to load/unload freight without chocking the rear wheels.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Commission "the Commission shall schedule the matter for hearing, on the record, (emphasis added) except that the Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba James Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove a serious violation of an OSH standard the Commisioner of Labor must prove by a preponderance of the evidence and by substantial evidence the following:

1. A hazard covered by the cited standard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident could be death or serious physical injury and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Ansco & Assocs., 114 N.C. App. at 717, 443 S.E.2d at 92 (1994); Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

In order to establish a violation of the general duty clause the Commissioner of Labor has the burden of proving by a preponderance of the evidence and by substantial evidence the following:

1. The employer failed to keep its workplace free of a hazard;

2. employees were exposed to the hazard;

3. the hazard was recognized;

4. the hazard created the possibility of an accident;

5. the substantial probability of an accident could be death or serious physical injury and

6. there were feasible measures that can be taken to materially reduce the likelihood of death or serious physical harm resulting to employees from the hazard.

Brooks v. Rebarco, Inc., 3 NCOSHD 1, 91 N.C. App. 459 (1988); Brooks v. McWhirter Grading Co., INC., 2 OSHANC 115, 303 N.C. 573 (Supreme Court 1981). In addition, G.S. 95-127(18) which gives the definition of a serious violation requires an element of employer knowledge: " A 'serious ' violation shall be deemed to exist in a place of employment . . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation." If the state proves that the hazard was recognized, then the scienter requirement of N.C.G.S.95-127(18) is satisfied.

Respondent asserts that the Complaint failed to prove by a preponderance of the evidence that Respondent violated the General Duty Clause by failing to require its forklift operators to use seatbelts because the Hearing Examiner stated in his opinion that "there is evidence to support a decision either way". His argument is that since there is evidence to support a decision either way then the evidence is "equipoise" and not a preponderance either way. The complete sentence from which the Hearing Examiner's statement about the evidence reads: "While there is evidence to support a decision either way, I believe the evidence presented by the complainant was more compelling." (Emphasis added). Hearing Examiner Order, dated Dec. 29, 2006, p. 24. The rest of the paragraph from which the Hearing Examiner's statement was taken states:

> The original research into this issue supports the safety value of seatbelts in these circumstances. The respondent has had prior employee accidents where injury was caused due to tip over or drop off. The respondent did not counter this evidence with organized studies or research. Rather, their evidence was personal experience, statistical or anecdotal. Even the American Trucking Association supported the ANSI standards. To me it is common sensical that, in the event of tipover or dropoff, staying within the guard compartment and holding on is much more likely to reduce injury than trying to jump out. Moreover, within the split second it takes to tip over or drop off, once the condition is recognized by the driver, he very likely has no time to jump clear before impact. The factual circumstances in other cases bear this out.

Hearing Examiner Order, dated Dec. 29, 2006, p. 24. Also, in finding of fact numbered 96, the Hearing Examiner found the following:

> 96. The undersigned finds the testimony of the complainant's witness and the complainant's exhibits to be more credible and compelling.

Hearing Examiner Order, dated Dec. 29, 2006, p. 23. Respondent's challenge to the decision on the burden of proof clearly has no merit. Although the Hearing Examiner found evidence either way, he did not give much credibility to the Respondent's evidence and clearly found that the preponderance of the evidence supported the Commissioner of Labor's position that the Respondent violated the General Duty Clause by failing to require its forklift operators to use seatbelts.

Further, the Respondent states that the use of the General Duty Clause to enforce seat belt use on forklifts is improper rule making and invalid under the Administrative Procedure Act. The Respondent's argument is that the Commissioner of Labor is attempting to enforce as a rule its internal policy requiring seatbelt use by setting it forth in a compliance directive, CPL2-1.28A, without propagating the rule in accordance with Article II.A of the Administrative Procedure Act. The Administrative Procedure Act sets forth in N.C. Gen. Stat. § 150B-2(8a)c the following exception to rulemaking:

> c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

The North Carolina Court of Appeals has applied this exception to rulemaking in the OSH law context to the statements contained in the North Carolina Operations Manual on citing employers on multiemployer worksites and found that these statements were just interpretive statements and not rules subject to rule making requirements. In Commissioner v. Weekly Homes, L.P.. d/b/a David Weekly Homes, 169 N.C. App. 17 (2005), *cert. denied*, 359 N.C. 629 (2005) the court stated:

> The Operations Manual is a nonbinding statement which interprets, inter alia, the rule requiring inspections. In requiring an employer to inspect the worksite regularly, the Operations Manual merely guides the inspectors regarding who can be cited for a violation. Furthermore, the multi-employer policy as stated in the Operations Manual does not impose sanctions for failure to comply. Sanctions are imposed for violation of the rule, i.e., failure to inspect, not for violation of the policy which only describes who can be cited. Therefore, the multi-employer policy, an interpretive statement established in the Operations Manual, falls within the exception created by N.C. Gen. Stat. § 150B-(8a)(c) and does not have to be promulgated as a rule.

Commissioner v. Weekly Homes, L.P.. d/b/a David Weekly Homes, 169 N.C. App. 17, at 25-26 (2005), *cert. denied*, 359 N.C. 629 (2005).

A Compliance Directive is a document produced by the federal Occupational Safety and Health Division to assist its compliance officers in the interpretation of an OSHA statute or regulation. (T II, Hearing dated February 2, 2006, pp. 154-155) CPL2-1.28A is a compliance directive issued to assist federal compliance officers in the enforcement of the Powered Industrial Truck Operator Training Standards as is evident from it title: "Compliance Assistance for the Powered Industrial Truck Operator Training Standards". North Carolina adopted CPL2-1.28A on September 18, 2001 as part of its Field Information System. (Complainant's exhibit No. 19; T II, Hearing dated February 2, 2006, pp. 164-165) In adopting CPL2-1.28A North Carolina made the following changes to adjust the language to North Carolina law:

> References to the Field Information Reference Manual (FIRM) and Regional Administrator or other federal personnel will mean the North Carolina Operations Manual and the appropriate OSH Division management person (District Supervisor, Bureau Chief, or Assistant Director), respectively. Reference to (5)(a)(1) will mean North Carolina General Statute 95-129(1), commonly referred to as the "general duty clause.">
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> (Complainant's exhibit No. 19; T II, Hearing dated February 2, 2006, pp. 164-165).
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> Paragraph IX C. of CPL2-1.28A, titled "General Inspection Guidelines" provides:
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>> Seatbelts on forklift trucks are a component part of the operator restraint system that is designed to reduce the incidents and severity of injuries to the operator in the event of a tip-over accident. Forklift trucks are particularly susceptible to tip-overs. Failure to wear the seat belt that is provided in the forklift increases the risk of injury to the operator in the event of such an accident. Section 1910.178 does not currently contain requirements for the use of operator restraint systems. However, Section 5(a) (1) of the OSHA Act requires employers to protect employees from recognized hazards. Recognition of the hazard of forklift tip-over and the need for operators to use an operator restraint system is evidenced by certain requirements in the more current version of ANSI B56.1 consensus standard for powered industrial trucks and ASME B56.1-2000 safety standard for low-lift trucks. In addition, seatbelts have been supplied by many manufacturers of the counterbalanced, center control and high-lift trucks that have a sit-down, non-elevating operator position. OSHA'S enforcement policy on the use of seatbelts on powered industrial trucks is that employers are obligated to require operators of powered industrial trucks that are equipped with operator restraint devices including seatbelts to use the devices. OSHA will enforce the use of such devices under Section 5(a)-1 of the OSHA Act in accordance with the October 9, 1996, seatbelt enforcement memorandum.
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> (Complainant's exhibit No. 18, p 4; T II, Hearing dated February 2, 2006, pp. 156-157).
>
> It is clear that the compliance directive set out above is an interpretive statement that interprets the meaning of a statute, N.C.G.S. 95-129(1) as it applies to the use of seat belts on forklifts. No penalty attaches to a violation of the CPL, the penalty attaches to the violation of N.C.G.S. 95-129(1), the general duty clause as interpreted by the CPL. CPL2-1.28A falls within the exception created by N.C. Gen. Stat. § 150B-(8a)(c) and does not have to be promulgated as a rule.
>
> Respondent asserts that the Complainant failed to prove that the Respondent violated the wheel chock standard, 29 CFR 1910.178(k)(1), because there was no evidence and no finding of fact that any forklifts entered the trailers when the wheels were not chocked while the compliance officer was at the worksite. This is an argument that the Commissioner of Labor has failed to prove by a preponderance of the evidence that the hazard of unchocked trailers existed at the worksite. There may not have been any finding of fact but there was sufficient evidence that the forklifts boarded the trailers while the compliance officer was on the site and that the compliance officer observed them doing so. Also, Gary Lynn Burkholder who was accepted by the Hearing Officer as an expert witness in forklift operation, training and safety gave uncontroverted testimony that 4x4's are not acceptable to use as wheel chocks. The only device behind a wheel that was in sight at the Central Transport facility was a 4x4 that was underneath one rear wheel of a truck. In addition, Tara Murphy, the corporate safety director testified that they only used 4x4's because the regular ones get stolen. (T IV, Hearing dated March 1, 2006, p 31). This is an admission by the Respondent that it did not chock the wheels with a wheel chock that meets the standards requirements. The testimony that the Compliance Officer observed the forklifts boarding the trailers combined with the testimony of Tara Murphy that they only used 4 x4's as wheel chocks and the uncontested testimony of Mr. Burkholder, Complainant's expert, that 4 x4's are not acceptable wheel chocks, more than meets the Complainant's burden of proving by a preponderance of the evidence that the Respondent failed to chock the rear wheels while the trucks were boarded with powered industrial trucks. In addition Central Transport did not have a comprehensive written inspection program for their spring brake system and was not entitled to the spring brake exception to the use of wheel chocks. (T III, Hearing dated February 3, 2006, p 26). Tara Murphy, the corporate safety director admitted that they did not always use wheel chocks on trucks that have spring brakes. (T IV, Hearing dated March 1, 2006, p 33). This is an admission that they violated the wheel chocking standard. The Review Commission has made additional findings of fact numbered 17 through 25 above to cure any alleged defect in the findings of fact with respect to the chocking of the wheels. See, N.C. Gen. Stat. 95-135(i), (Upon review of the report and determination by the hearing examiner the Commission may adopt, modify or vacate the report of the hearing examiner and notify the interested parties. The report of the hearing examiner, and the report, decision, or determination of the Commission upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record.)
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> Pursuant to N.C. Gen. Stat. § 95-138(a), the Review Commission has the following authority in assessing penalties:
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>> . . . the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, shall have the authority to assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order adopted under this Article, as follows:
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>> (2) A penalty of up to seven thousand dollars ($7,000) shall be assessed for each serious violation.
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> N.C. Gen. Stat. § 95-138(a)(2) (Emphasis added). In addition in determining the appropriateness of the penalty, the Commission is required to apply the 4 statutory criteria of N.C.G.S. 95-138(b), the size of the business, the gravity of the violation, the good faith of the employer and the record of previous violations. After examining the facts of this case with respect to those 4 statutory criteria the full Commission has determined that a penalty of $7,000.00, the maximum allowed under the statute should be assessed for each of the two serious violations.
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> The Commission has not taken this action lightly and it is only in light of the egregious actions of the Respondent in ignoring the overwhelming evidence that the wearing of seat belts while operating forklifts reduced injuries and saved lives in the event of a tipover or running off the dock accident. Respondent only used Toyota forklifts at its Charlotte facility and the Toyota manual for the Toyota forklifts set out in detail that an operator restraint system that included seat belts were provided for the safety of the driver and contained numerable warnings about the use of seat belts and staying with the forklift in the event of a tipover:
>
>> On page 9:
>>
>> Operator Restraints. Restraints *must* be used to reduce the possibility of injury from overturns or other accidents.
>>
>> On page 15:
>>
>> Rail or highway docks have drop-offs many of which are not guarded. Watch rear wheel steering near edges, back away, don't go forward. Stay with truck if it falls.
>>
>> On page 23:
>>
>> Lift trucks can tip over when empty. Slow down for turns, steer smoothly and slowly. *Always* fasten the seat belt and stay with the truck if it tips. (Emphasis added).
>>
>> On pages 37 and 39:
>>
>> A specially designed operator seat and seat belts are provided for your safety. Get in the habit of using the seat belt whenever you sit on the truck.
>>
>> On page 38:
>>
>> WARNING. Buckle up. Your seats and seat belt can reduce the risk of serious injury or death in the case of a truck tip-over. Your chances for avoiding serious injury or death in a tip-over are better if you stay with the truck in the operator's compartment.
>>
>> On page 38 and 40:
>>
>> WARNING. Always wear your seat belt when driving the truck. The truck can tip over if operated improperly. To protect operator from risk of serious injury or death in the event of tip-over, it is best to be held securely in the seat. The seat and seat belt will help keep you safely within the truck and operator's compartment. In the event of a tip-over, don't jump. Grip the steering wheel, brace your feet, lean away from the direction of the tip-over and stay with the truck.
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> (T II, Hearing dated February 2, 2006, pp. 140- 51) (Complainant's Exhibit #11, pp 9, 15, 23, 37, 38-40). These same type warnings are also included in the operator's manuals for Clark and Hyster forklift. (T II, Hearing dated February 2, 2006, pp. 152-153) (Complainant's Exhibit #16 and #17). Even though the manuals instructed that a copy of the Toyota manual should be kept in the pocket on the back side of the driver's seat, none of the Toyota forklifts were provided with a Toyota manual for their forklift and there were none on site at the time of the inspection. Instead, when the employees were "trained" to drive the forklifts, they were provided with a "manual" produced by the Respondent. Although it contained directions to stay with the truck in the event of a tip-over, conspicuously absent is any mention of seatbelts and how they save lives and there is no warning that seat belts are required to be worn by the operator of the forklift. The substitution of the Respondent's forklift operator's manual for the Toyota manual and the conscious leaving out of any requirement about wearing seat belts shows not just an indifference to employee safety but an intentional total disregard for employee safety. Respondent took no action to require the use of seat belts as part of the operator restraint system in the face of overwhelming evidence that seat belt use by forklift drivers saved lives. Compliance directives issued by the Department of Labor, standards issued by the American Society of Mechanical Engineers (AMSE), the North Carolina Trucking Association of which Respondent is a member and the Industrial Truck Association all recognize the hazard of forklift tip-over and falling off dock and all recognize that seat belt use will reduce serious injuries and prevent deaths. (T II, Hearing dated February 2, 2006, pp. 122-130). All respondent could come up with to justify not requiring seat belt use was supposed anecdotal evidence. Respondent continued to allow its forklift operators to drive the forklifts without using seatbelts even after a driver was killed at one of its South Carolina facilities when he drove off of the back of a trailer and was crushed when the driver of the truck pulled the trailer away from the dock. If he had been wearing a seat belt, he might be alive today. In the face of all of this evidence Tara Murphy, the corporate safety director for Central Transport stated:
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>> We do not prohibit the use of the seat belt if that's what the employee believes is in their best interest. . . . the general recommendation is for the operator to be able to remove himself from the high-low (forklift), to jump off of it.
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> (T IV, Hearing dated March 1, 2006, p 25). This contumacy by the Respondent shows an intentional and complete disregard for the safety and health of its employees.
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> Likewise, the Respondent showed an intentional and complete disregard for the safety and health of its employees by their failure to provide acceptable wheel chocks and by their failure to have a policy in force requiring the forklift drivers to check to make sure that the wheels were properly chocked before they drove on to the trailers. First of all they only provided 4x4's instead of wheel chocks that met the requirements of the wheel chocking standard, 29 CFR 1910.178(k)(1). 4x4's do not fit the contour of the wheel and will not prevent a trailer from rolling sufficiently to meet the requirements of the standard. The excuse for failure to provide the proper wheel chocks was that they get stolen. Respondent was cited by the state of North Carolina for the serious seat belt violation under the General Duty Clause and for the serious wheel chock violation on February 18, 2005. Approximately one month later, on March 16, 2005 at one of Respondent's South Carolina facilities, a forklift driver was killed when a trailer without wheel chocks pulled away from the loading dock while a forklift was exiting the trailer. The driver was not wearing a seat belt and was crushed when he tried to jump from the forklift. (Complainant's exhibit No. 36; T II, Hearing dated February 2, 2006, pp. 86-106). Respondent did not have any wheel chocks for their trailers at the South Carolina facility and was cited for a willful serious violation of 29 CFR 1910.178(k)(1) and fined $35,000.00. (Complainant's exhibit No. 36; T II, Hearing dated February 2, 2006, pp. 104-106). Respondent was also cited for a serious violation of the General Duty Clause for the failure to require the forklift drivers to wear seat belts. Respondent failed to show up for the hearing in South Carolina and a default judgment was entered against them upholding the two citation items plus one additional citation and ordering Respondent to pay a penalty of $41,750.00. (Complainant's exhibit No. 37; T II, Hearing dated February 2, 2006, pp. 91-94). Respondent had approximately one month's notice that OSH regulations required forklift drivers to wear seat belts and that the wheels of the trailers were required to be chocked and if they had heeded that notice and required either that seat belts be worn or that the wheels be chocked, the South Carolina forklift driver might be alive today.
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> The facts of this case warrant a willful serious citation for both the General Duty Clause violation for the failure to require seat belt use and for the failure to provide wheel chocks acceptable under the standard. No precedent could be found for increasing the designation of the two citations to willful serious. However, state law and legal precedent do allow the Commission to increase the penalty as assessed by the Labor Commissioner and the federal courts and the North Carolina Review Commission have held that an increase in the penalty by the Review Commission did not violate due process and chill the right of the employer to contest because there was always the right of appeal of the Review Commission's decision to the appellate branch.. N.C. Gen. Stat. § 95-138(a), McWhirter Grading Co., Inc., 2 NCOSHD 98, at 105, (RC 1978), reversed on other grounds, 2 NCOSHD 115 (NCSC 1981), 303 N.C. 573 (1981). California Stevedore and Ballast Company, 1974-1975 OSHD ¶ 19,671, p 23,464, 517 F.2d 986 (1975). If the Review Commission had found legal precedent to change the designation of the two citations to willful serious, it would have assessed the maximum penalty allowed by law for willful citations. After reviewing the four statutory criteria of N.C.G.S. 95-138(b), the size of the business, the gravity of the violation, the good faith of the employer or lack thereof and the record of previous violations, the Review Commission assesses a penalty of $7,000.00, the maximum penalty allowed by law for each of the two serious citations for a total of $14,000.00. Hopefully the Respondent will heed the message that goes with a severe penalty and will follow the overwhelming evidence in the trucking industry and safety community that seat belts use on forklifts and wheel chocks underneath trailer wheels save lives.
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> **ORDER**
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> For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's April 28, 2006 Order in this cause is, **AFFIRMED** with respect to the designation of the violations and the Respondent is found to have committed a serious violation of N.C.G.S. 95-129(1), the general duty clause by not requiring its employees to wear seatbelts while operating forklifts and a serious violation of 29 CFR 1910.178(k)(1) by not having wheel chocks placed under the rear wheels of highway trucks while they were boarded with powered industrial trucks. With respect to the penalty assessment the Review Commission assesses a penalty of $7,000.00 for each of the two violations and the Respondent is **ORDERED** to pay the combined penalty of $14,000.00 within 30 days of the date of this order.
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> This the 27th day of November, 2007.
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> ______________________________
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> OSCAR A. KELLER, JR., CHAIRMAN
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> ______________________________
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> RICHARD G. PEARSON, MEMBER
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> ______________________________
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> JANICE SMITH GERALD, MEMBER