UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036–3419

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SECRETARY OF LABOR, Complainant, v. COUNTY CONCRETE CORPORATION, Respondent.	OSHRC Docket No. 93-1201

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The only issue in this case is whether 29 C.F.R. § 1926.600, governing "equipment," applies to Respondent County Concrete Corporation's ("County") concrete-mixing truck. The Occupational Safety and Health Administration ("OSHA") conducted an inspection of County's worksite on October 2, 1992 after a County concrete-mixing truck, unoccupied at the time, rolled backward down a ramp and struck two employees, one of them fatally. County was cited for a number of violations, all of which were settled except for an alleged

serious violation of 29 C.F.R. § 1926.600(a)(3)(ii).[1] Administrative Law Judge Irving Sommer affirmed the violation and assessed a penalty of $4000.

County argues that its concrete-mixing truck is governed exclusively by section 1926.601, titled "Motor vehicles." Since no provision of section 1926.601 requires employers to use chocks, County reasons, its failure to use them -- both in this case and on a regular basis -- does not violate the Act. County further contends that section 1926.600, under which it was cited, does not apply to its truck. We find that nothing in Subpart O[2] precludes the simultaneous applicability of both sections 1926.600 and 1926.601 to concrete-mixing trucks.[3] We therefore affirm the violation and penalty.[4]

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[1]That standard provides:

§ 1926.600 Equipment.

(a) *General requirements.*

. . . .

(3) (i) . . . .

(ii) Whenever the equipment is parked, the parking brake shall be set. Equipment parked on inclines shall have the wheels chocked and the parking brake set.

It is disputed whether the driver in fact set the parking brake. However, the Secretary bases his case solely on County's failure to use chocks as required by the standard.

[2]Subpart O, captioned "Motor Vehicles, Mechanized Equipment, and Marine Operations," consists of one general section covering "equipment," as well as a variety of five specific sections covering "motor vehicles," "material handling equipment," "pile driving equipment," "site-clearing" equipment, and "marine operations and equipment."

[3]On the contrary, certain portions of Subpart O on their face demand simultaneous applicability. For instance, section 1926.600(a)(3)(i), in the generic "Equipment" section, directs that "[b]ulldozer and scraper blades . . . shall be either fully lowered or blocked when being repaired or when not in use." Yet bulldozers are specifically listed among the specific types of "earthmoving equipment" covered under section 1926.602, captioned "Material handling equipment."

[4]County also contends in its petition for discretionary review that the truck was not "parked," that the standard is unconstitutionally vague, that the driver did set the parking brake, and that even if he did not, his failure to do so was an isolated occurrence and the result of unpreventable employee misconduct. Our direction for review specified only the

(continued...)

County is correct that no provision in section 1926.601, the more specific of the two sections as far as motor vehicles are concerned, addresses the use of chocks or, indeed, any parking precautions. County asserts that it is a well-settled principle of statutory construction that the requirements of a more specific regulation control over the requirements of a more general regulation where there is a conflict between the two, citing *In re Davidson*, 120 Bankr. 777 (D.N.J. 1990). We certainly recognize that principle, and have therefore carefully considered that same principle as embodied in 29 C.F.R. § 1910.5[5] governing the applicability of standards under the Act. However, the principle does not support County's interpretation. What County appears to overlook is that when, as here, a section is silent on a particular hazard, there is no conflict with another section that contains a standard that speaks to that hazard. *See Quinlan t/a Quinlan Enterps.*, 15 BNA OSHC 1780, 1991-93 CCH OSHD ¶ 29,765 (No. 91-2131, 1992) (section containing standards specially promulgated for steel erection industry did not address guarding of

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[4](...continued)
issue of whether the provisions of the standard applied to the concrete-mixer. The Commission has discretion to limit the scope of its review, and ordinarily does not decide issues that are not directed for review. In this case, the only objection that County raised to the judge's decision which merits review is the one we directed. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992) (consolidated) and cases and Commission rules cited.

[5]That standard provides in pertinent part:

> **§ 1910.5 Applicability of standards.**
>
> . . . .
>
> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .
>
> (2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies.

temporary floors, and thus did not preclude application of section containing general guarding standards, including a provision specifically applicable to situation).

Even if section 1926.601 could be construed, through its listing of required parts, equipment, and accessories, to address parking hazards or the provision of chocks as standard safety devices, it would not necessarily automatically apply to the exclusion of section 1926.600. General standards remain applicable where they "provide meaningful protection to employees beyond the protection afforded" by specific standards. *See Quinlan* 15 BNA OSHC at 1782, 1991-93 CCH OSHD at p. 40,485, citing *Bratton Corp.*, 14 BNA OSHC 1893, 1987-90 CCH OSHD ¶ 29,152 (No. 83-132, 1990). *See also Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1234 (3d Cir. 1980) (general industry standards apply if there is no specific construction, maritime and longshoring, or agricultural standard governing the hazardous condition). As we read section 1926.601, it affords no protection whatsoever against the hazard of runaway equipment and is therefore incapable of preempting the clear directive of section 1926.600 to use chocks on inclines.[6]

In summary, we find that the chocking requirement applies to County's concrete mixers and that its failure to equip its trucks with chocks and instruct its drivers in their use resulted in a serious violation of the standard.

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[6]We note in passing that County's contention that it had no reason to know that it was supposed to use chocks for its concrete mixers is severely undermined by former section 1926.700(d)(8), in the Subpart Q Concrete standards, that until June 1988 provided: "When discharging on a slope, the wheels of ready-mix trucks shall be blocked and the brakes set to prevent movement." Even assuming, as County argues, that industry custom and practice has not reflected the regular use of chocks, such industry-wide failure would provide no defense for County here.

ORDER

Neither party disputed the appropriateness of the $4000 penalty the judge assessed. Accordingly, we affirm the serious violation and, based on the statutory criteria in 29 U.S.C. § 666(j), assess a total penalty of $4000.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: August 9, 1994

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-1201
COUNTY CONCRETE CORP.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on August 9, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

August 9, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-1201

NOTICE IS GIVEN TO THE FOLLOWING:

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Respondent.

OSHRC DOCKET
NO. 93-1201

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 30, 1994. The decision of the Judge will become a final order of the Commission on August 1, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 20, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 30, 1994

Ray H. Darling, Jr.
Executive Secretary

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DOCKET NO. 93-1201

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SECRETARY OF LABOR, Complainant, v. COUNTY CONCRETE CORPORATION, Respondent.	:	Docket No. 93-1201

Appearances:

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For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (``the Act''), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Respondent is a corporation which was engaged in concrete delivery and related activities. On or about October 2, 1992, the worksite at Northfield Estates, Lot #1.54, Blk. #13304, Northfield Drive, Wantage, New Jersey was inspected by an OSHA compliance officer. Subsequently, on March 30, 1993, the company received a serious citation resulting from this inspection. Respondent filed a timely notice of contest to the citation and penalties. A hearing was held on November 29, 1993, in New York, New York. Both parties were represented at the hearing and both parties have filed post-hearing briefs. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

Secretary's testimony

At the hearing on November 29, 1993, the compliance officer, Gary Jensen, testified that he had begun his investigation of the reported accident at the Respondent's worksite by getting updated by the New Jersey State Police concerning their findings regarding the accident. Mr. Jensen related that he had talked to two New Jersey State Police Officers, Trooper Jacobs and Trooper Gillette. Trooper Jacobs told the compliance officer that a concrete mixing truck owned by County Concrete Corporation had pulled up onto a ramp, that the driver of the truck had gotten out of the vehicle, and the vehicle had rolled backwards striking two men, resulting in the death of one of them, and then continued to roll across the excavation to the southernmost edge before stopping. Trooper Gillette, who was doing the inspection of the truck's brakes, indicated to the compliance officer that he had found no defects in the brake system of the vehicle and concluded that the parking brake had not been set (transcript, p. 62-64, Secretary's brief, p. 4). The compliance officer's testimony was also supported by photographic evidence (exhibits C-1- C-13).

The compliance officer also met with Respondent's representative, Mr. Napierski, to determine the company's parking policy for its truck drivers. Mr. Napierski told Mr. Jensen that the company's truck drivers were instructed to leave their trucks running in neutral, to apply the maxi air brake, and to make sure that the vehicle was not rolling prior to getting out of the truck. Mr. Jensen also met with County Concrete's supervisor and dispatcher, Mr. Space, who concurred with Mr. Napierski regarding the company's parking procedure. Both men also indicated to the compliance officer that chocks were not provided nor used by County Concrete personnel as part of their parking procedure on an incline (transcript, p. 39-43).

The Secretary's case was further illuminated by the testimony of New Jersey State Trooper Jacobs at the hearing. Trooper Jacobs testified that the State Police did not classify the accident as a motor vehicle accident as the concrete truck was being used as equipment at the time of the accident. The State Trooper defined the term ``parked'' as any vehicle which is stopped and left abandoned by an individual. In the police investigation report, the accident was described as a ``subject who was struck by an unattended cement truck while being used as a machine''(exhibit C-1, transcript, p. 51-53, 60-78, Secretary's brief, p. 4-8).

Respondent's testimony

Respondent acknowledges that an accident occurred at its worksite. However, County Concrete asserts that since motor vehicles, such as the truck here in question, appear to be covered by 29 C.F.R. section 1926.601, the Secretary is in error by citing Respondent for a violation of 29 C.F.R. section 1926.600(a)(3)(ii), which pertains to ``equipment'' and not a ``motor vehicle''. Further, even if Respondent had been cited under the applicable standard (1926.601), Respondent still is not guilty of any violation as that standard does not even mention the necessity to use chocks as a safety device (transcript, p. 85-91, Respondent's brief, p. 4-8).

Respondent also submits that the Respondent's cement truck was not ``parked'' on the incline as that term is intended in the citation. Rather, the truck was never left unattended as the truck driver, Mr. Hotalen, left the engine running to dispense cement when he exited the truck cab and was standing right next to the truck when it began to roll backwards (transcript, p. 65-69, Respondent's brief, p. 5-9).

Further, Respondent argues that the standard that the Secretary has cited it of violating is unconstitutionally vague. In the instant case, there is no indication that the standard is meant to apply to motor vehicles. In addition, the Secretary has offered no evidence of the custom and practice of the concrete industry regarding the use of chocks on trucks (Respondent's brief, p. 7-9).

The Respondent asserts that the driver of the truck in question set the parking brake. However, if the parking brake was found not to be set by the driver, it was an isolated occurrence. This brief violation of the standard was caused by an employee not following an adequate work rule which had been effectively communicated to the employees and uniformly enforced (transcript, p. 62-64, Respondent's brief, p. 8-9).

DISCUSSION

Alleged serious violation of 29 C.F.R. section 1926.600(a)(3)(ii)

Serious Citation 1, item 1 alleges:

> Equipment parked on an incline did not have the wheels chocked and the parking brake set.

A.

The primary question to consider here is whether or not the Respondent violated the particular standard for which it was cited. In this instance, County Concrete Corporation is accused of violating section 1926.600(a)(3), alleging that equipment parked on an incline did not have the wheels chocked and the parking brake set.

The Secretary asserts that the Respondent has been properly cited as charged as the truck was being utilized as ``equipment'' to pour ready-mix concrete. The Respondent counters that it was cited incorrectly as the truck is not ``equipment'' but a ``motor vehicle'', governed by section 1926.601.

In determining whether or not a particular standard applies the Commission looks primarily to the text and structure of the statute or regulations whose applicability is questioned. See Secretary of Labor v. Kiewit Western Company, 16 BNA OSHC 1689 (No. 91-2578, 1994).

In this case, it is evident from reading the wording of section 1926.600(a)(3) that there is no language in the standard which disallows a ``motor vehicle'' from being described or utilized as ``equipment'' as covered in this standard. Specifically, the concrete truck in question here was being utilized at various locations at this worksite to pour ready-mix concrete. Consequently, its functional use was as a piece of ``equipment''. The standard cited applies generally to the securing of any type of self-propelled equipment. Consequently, I find that the Respondent was clearly cited under the proper standard in this matter and that the standard is not unconstitutionally vague.

B.

The Respondent asserts that the truck in question was not ``parked'' as that term is used in the cited standard. The Secretary counters that the truck was definitely ``parked'' as that term is normally understood.

The term ``parked'' is defined in Webster's Third New International Dictionary (p. 1642, 1986) as to bring (something) to a stop and keep standing for a time in a certain location. In this matter, since the standard does not elaborate any exotic definition for the term ``parked'', I understand the term to be used as commonly understood and utilized.

Both parties introduced testimony at the hearing and touched on this issue in their post-hearing briefs. A review of the complete case record in this case as well as the common usage of the term ``parked'' leads to the inescapable conclusion that County Concrete's truck was ``parked'' on the incline at the time of the accident, which precipitated the inspection.

C.

Respondent argues that it is not industry custom to use chocks with cement trucks. The Secretary asserts that the Respondent is mistaken as the industry and the truck manufacturer recommend the use of chocks for concrete trucks parked on an incline.

Respondent supported its assertion by introducing testimony of its Vice President, Mr. Napierski, at the hearing (transcript, p. 85-92). Mr. Napierski testified that in the eight years that he had worked for County Concrete that he had never seen any of the company's ready- mix cement trucks equipped with chocks. In addition, he noted that since the company had received the citation, he had personally checked with four other concrete companies of comparable size and found that not one of these companies used chocks with their trucks either. Mr. Napierski also testified that he previously had been a New Jersey State Trooper for a number of years. In his opinion, the cement truck in question should be governed by standards as a ``motor vehicle'' and not as ``equipment''.

The Secretary introduced into evidence at the hearing the National Safety Council Data Sheet for Ready-Mixed Concrete Trucks (exhibit C-12). This exhibit in pertinent part advises that concrete trucks should be equipped with wheel chocks and

never left in a position to roll free. The exhibit further recommends the use of an emergency brake and chocking of the truck's wheels when parking on a slope (exhibit C-12, transcript, p. 45-49, Secretary's brief, p. 5-8). In addition, the Secretary introduced into evidence the Operator's Handbook issued by Mack Truck for the model and series utilized by Respondent at this jobsite (exhibit C-13). The manual advises that when parking the truck on a grade that chocks should be used under the rear wheels or the truck's front wheels should be turned to the curb (exhibit C-13, transcript, p. 49-51, Secretary's brief, p. 5-8).

Weighing the arguments of both parties regarding this issue, I find that a preponderance of the evidence supports a conclusion that Respondent should have instructed its employees to utilize chocks with its cement trucks when parked on an incline, in conformance with the standard and in accordance with industry recommendations.

D.

Respondent maintains that the truck driver, Mr. Hotalen, set the parking brake on the date of the accident. However, if the parking brake was found not to be set by the driver, it was an isolated occurrence. The Secretary argues that the evidence strongly indicates that Respondent's truck driver did not engage the parking brake on the day in question. Further, Respondent's own Vice President, Mr. Napierski, testified that the company's truck drivers were not provided with chocks, nor instructed to use chocks when parked on an incline.

A preponderance of the evidence presented indicates that Respondent's truck driver, Mr. Hotalen, did not use the parking brake and did not use chocks when parked on an incline on the day of the accident in violation of the standard. The

Secretary does not disagree with Respondent's position that there is evidence that the truck driver's failure to use the parking brake was an isolated instance as Respondent's employees were generally trained to utilize the parking brake. However, the Secretary maintains that with respect to the failure to use chocks that Respondent knew or should have known of the cited condition as it was Respondent's policy not to require the use of chocks nor to make them available to its truck drivers, in violation of the cited standard.

CONCLUSION

Despite Respondent's protestations to the contrary, the facts in this case indicate that County Concrete Corporation was in violation of 29 C.F.R. section 1926.600(a)(3)(ii). Clearly, a truck operated by one of its employees was being used as jobsite equipment to pour ready-mix concrete. It is quite evident that the wheels of Respondent's truck were not chocked and Respondent's operator did not utilize the truck's emergency brake when he parked the truck on the ramp. See Secretary of Labor v. Brickfield Builders, Inc., 15 BNA OSHC 1941 (No. 90-3222, 1992); Secretary of Labor v. Concrete Construction Company, 4 BNA OSHC 1828 (Nos. 5692 & 7329, 1976).

Therefore, taking into consideration all the record evidence and credible testimony presented regarding this citation, I find that the Secretary has established a violation of the standard by a preponderance of the evidence presented. The evidence further reflects that the Respondent knew or should have known of the hazard to its employees. The violation was obvious and discernible by mere observation. A review of all the relevant factors, the hearing transcript, and the original case record fully establishes that a penalty of $4000 is appropriate for this citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. section 1926.600(a)(3)(ii), is affirmed and a penalty of $4,000 is assessed.

IRVING SOMMER
Judge, OSHRC

DATED: JUN 29 1994
Washington, D.C.