UNITED STATES OF AMERICA
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SECRETARY OF LABOR,

Complainant,

v.

WHEELING-PITTSBURGH STEEL CORPORATION,

Respondent.

UNITED STEELWORKERS OF AMERICA,

Authorized Employee Representative.

OSHRC Docket No. 91-2524

DECISION

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

BY THE COMMISSION:

Wheeling-Pittsburgh Steel Corporation ("WPS") petitions the Commission for review of Administrative Law Judge Paul L. Brady's determination that it committed repeat violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), at its Yorkville, Ohio facility by failing to comply with two of the overhead crane standards promulgated by the Occupational Safety and Health Administration ("OSHA"). The judge found violations based on WPS's failure to (1) install a cover plate on a switch box in the cab of a crane and (2) replace a metal pin normally securing a "pigtail" at the end of a magnetic cable attached to the crane's auxiliary hoist. WPS also petitions for review of the judge's assessment of a $25,000 penalty for each violation. For the reasons that follow, we affirm the judge in both respects.

I. *Alleged Repeat Violation of 29 C.F.R. § 1910.179(g)(2)(i)*

A. *Facts*

Item 1 of the citation alleged that WPS violated 29 C.F.R. § 1910.179(g)(2)(i)[1] by failing to install a cover plate on a switch box located approximately 3 feet behind the seat of a crane operator in the cab of overhead crane no. 26. With the switch box open, the electrical wiring inside was exposed. OSHA Compliance Officer Bruce R. Bigham testified that during the inspection, conducted on July 2, 1991, he observed that the crane operator "would come within three inches of the energized live electrical parts when he activated the switch on the box" and "within a foot or two as he got into his seat." William Stewart, the crane operator, testified that the electrical components in the box were energized at 250 volts, regardless of whether the switch in the breaker box was in the "on" or "off" position, and that he knew this because wires passing through that box provided electricity to another outlet into which was plugged an operating fan or heater, depending on the temperature, for the cab. Stewart testified he thought that he might receive a substantial electrical shock from the exposed wiring.

According to Stewart the box had been uncovered for the entire ten years that he had operated the crane. He testified that he brought the condition to the attention of John McKnight, the direct supervisor of cranes, and Neal Van Camp, the superintendent of the electrical department, "on several occasions over different periods of time," but he never got any response. Stewart added that "approximately every two or three months, I would mention it again." He testified that he did bring the switch plate problem to the attention of Greg Walker, superintendent of the facility, as required by the union contract, but Stewart did not file a grievance when the repair was not made. Stewart also testified that he mentioned the problem to Ed Dudzik, who was in charge of the safety committee at the union local. Dudzik acknowledged in his testimony that he had been contacted about the missing switch plate by operator Stewart, as well as by other crane operators who fill in on

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[1]Section 1910.179(g)(2)(i) provides:

> Electrical equipment shall be so located or enclosed that live parts will not be exposed to accidental contact under normal operating conditions.

overtime. Dudzik testified that he brought the matter "very many times" to the attention of "front line supervision," namely superintendent Walker, general foreman Wayne Shirley, Van Camp, and McKnight. According to Dudzik, there was no response to his numerous complaints.

Stewart also testified that he referred to the missing switch plate in his daily inspection cards, that he filled out at the beginning of each shift, but "not for ten years completely." These cards have two parts; one part goes to management, while the other part is supposed to be retained by the crane operator. Neither side produced any of the inspection cards at the hearing.

James Harris, WPS's Superintendent of Safety, testified that he reviewed the minutes of the joint union/management safety meetings as far back as 1989, but he found no reference to complaints about the missing box cover. He stated that he had never been approached by Stewart regarding the box cover prior to the inspection. Harris testified that he was in the crane cab during a prior inspection that OSHA conducted at the facility in February 1990, and he did not notice that the cover was missing. John Matysiak, WPS's manager of corporate safety, testified that he had been in the cab of the no. 26 crane approximately 10 to 20 times prior to the present inspection, both with Stewart and another crane operator. According to Matysiak, Stewart never informed him of the missing switch box cover.

B. *Judge's Decision*

The judge found that the Secretary established that WPS had knowledge of the violative condition, noting that management was "notified repeatedly of the missing breaker box cover" by the crane operators. He also determined that because the cover had been missing for at least ten years, WPS should have been aware of it with the exercise of reasonable diligence, even without the complaints of the crane operators. He affirmed the item as repeated.

C. *Discussion*

In order to establish a failure to comply with the cited standard, the Secretary must establish that (1) the standard applies, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited condition, and (4) the employer knew

or, with the exercise of reasonable diligence, could have known of the violative condition. *E.g., Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991).

WPS claims that the Secretary did not prove that the standard, which addresses only "live" parts, applies because the compliance officer did not have knowledge of electrical switches and failed to test the box with a device that would have indicated that the components in the circuit box were energized and thereby posed potential for electric shock. We conclude that such testing could have helped to establish that the box was energized. *See Otis Elevator Co.*, 16 BNA OSHC 1579, 1582, 1994 CCH OSHD ¶ 30,340, p. 41,832 (No. 91-919, 1994). However, the unrebutted testimony of long-time operator Stewart that the box was energized because it routinely powered either a fan or heater, is sufficient to establish that fact.[2] Therefore, we need not evaluate the compliance officer's knowledge of electrical switches.

WPS further claims that it had no knowledge of this alleged hazard prior to the July 1991 inspection because crane operator Stewart, who is in the best position to know about the condition of the switch box, did not notify appropriate management personnel of his concerns, nor did he proceed through the channels provided by WPS to address those concerns. This claim is without merit. Although safety superintendent Harris may not have learned of complaints through the procedures mandated in the contract, and Stewart may not have followed the exact course that Harris seemed to believe was appropriate to notify WPS of hazards, WPS did not rebut Stewart's testimony that he complained of the missing cover to supervisors Van Camp and McKnight at several different times. Nor did it rebut

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[2]We further conclude that the evidence establishes that WPS failed to comply with the terms of the standard and that employees had access to the hazardous condition. In this regard, we note Stewart's testimony that the switch box had been uncovered for the ten years he had operated the crane and the compliance officer's testimony that the unprotected switch was physically proximate to the crane operator during his normal work duties. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,424 (No. 504, 1976).

union safety committee representative Dudzik's testimony that he notified "front line" supervisors Walker, Shirley, Van Camp, and McKnight of the missing cover many times. In this regard, none of the supervisors whom Stewart and Dudzik named were called to testify.[3] Accordingly, because a supervisor's knowledge can be imputed to the employer, *e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992), and WPS does not suggest that McKnight, Van Camp, Walker and Shirley were not supervisors whose knowledge was imputable to it, we conclude that WPS had knowledge of the condition through these supervisors. The failure of the compliance officer and Harris to notice the missing switch cover during a previous inspection, and Stewart's failure to notify them of it then, do not require a different result. Generally, an employer cannot rely on the failure of OSHA to issue a citation for a particular condition during an earlier inspection as the basis for later arguing lack of knowledge of the same hazardous condition. *See Columbian Art Works, Inc.*, 10 BNA OSHC 1132, 1133, 1981 CCH OSHC ¶ 25,737, p. 32,102 (No. 78-29, 1981).

For the reasons above, we agree with the judge that WPS violated section 1910.173(g)(2)(i) by failing to install a cover plate on the switch box in the cab of the crane. Moreover, we agree with the judge that the violation was properly characterized as repeated.[4]

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[3]Alternatively, WPS could have produced the daily inspection cards for that period, as Stewart testified he routinely turned over both parts of the daily inspection cards to his foreman. Therefore, WPS's argument that Stewart was not credible because he did not introduce the cards upon which he had complained of the switch box is not persuasive as this evidence would have been accessible to either party.

[4]A violation is repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), "if, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary introduced into evidence a 1990 citation, which became a final order, for a violation of the same standard at the same facility at an exposed electrical panel on top of the bridge of a crane.

II. Alleged Repeat Violation of 29 C.F.R. § 1910.179(1)(3)(iii)

A. *Facts*

Item 2a in the citation alleged that WPS violated 29 C.F.R. § 1910.179(l)(3)(iii)[5] because the small metal pin that normally secured the heavy duty cord and plug, or "pigtail," at the end of a magnetic cable on crane no. 26's auxiliary hoist when it was not in use, had been missing for one and a half to two months before the inspection. According to crane operator Stewart, when operating the main hoist, he was "grazed in the head" several times by this 3-foot long, 10-15 pound pigtail while he was sticking his head out of the crane cab's side window to observe the hoist operation. He testified that a guard above the cab window had been installed to provide protection against the swinging hoist block, but not against the swinging pigtail. Stewart testified that the momentum generated by the main hoist causes the auxiliary hoist to swing. This testimony largely was corroborated by Compliance Officer Bigham's testimony. Stewart also testified that on three or four occasions he had brought the missing pin to the attention of superintendent Walker and crane supervisor McKnight, but the condition was not corrected until after the inspection.

Jeffrey Bookwalter, a mechanical engineer, who was admitted "as an expert and professional engineer, but not specifically relating to the field of cranes," observed the crane for approximately one hour. He testified that the guard above the window of the cab, as shown in photographic Exhibit R-17, was sufficient to protect the operator from any swinging pigtail. However, Bookwalter acknowledged that the pigtail could be caused to swing into an area where it could strike the operator:

> If you have a situation where a crane is traversing -- in this case it would be the entire bridge beam, as well as the operator's cab traversing -- and it comes to a rapid stop, then you can get a situation where the pendulum, or in this case the hook block, will swing and approach, and perhaps depending on the exact physical circumstances, cause the pigtail to come in contact with the person who would might [sic] happen to be there.

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[5]Section 1910.179(l)(3)(iii) provides:

> Repairs or replacements shall be provided promptly as needed for safe operation. . . .

B. *Judge's Decision*

The judge rejected WPS's claim that the interference with the "safe operation" of the crane resulted from unpreventable employee misconduct. He noted that the defense refers to the action of an employee, while WPS was not cited for how it operated the crane, but for failing to replace the broken pin, a condition of the crane's apparatus. The judge held that "[r]egardless of how Stewart operated the crane, the broken pin constituted a violation of § 1910.179(l)(3)(iii)." He affirmed the violation as repeated.

C. *Discussion*

The Secretary has the burden of proving that the terms of the cited standard were not met. In this case that means showing that replacement of the pin was necessary for the safe operation of the crane. The Secretary claims he has met his burden here by showing that: (1) a pin to prevent the cable from swinging had been used by the employer in the past; and (2) operation of the crane without the pin and in a manner that prevented *loads* from swinging caused the pigtail to swing at the operator's head.

We conclude that the Secretary has established a prima facie showing of a violation by proving that the standard applies, the employer failed to comply with the terms of the standard by making the repairs needed for safe operation of the crane, employees had access to the cited condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence. WPS had used a pin in the past to prevent the pigtail from swinging. Stewart testified that when he operated the crane without the pin, in a manner that prevented loads from swinging, this caused the pigtail to swing at his head. We reject WPS's argument that its employees did not have access to the hazard because it had installed a guard above the window of the crane cab. As crane operator Stewart testified, the guard above the crane window had been installed to provide protection against the swinging hoist block, not against the swinging pigtail. Moreover, Stewart testified that his head had been grazed several times by the pigtail when he was operating the main hoist. This was corroborated by the compliance officer's testimony that when he watched Stewart operate the crane, he saw the pigtail "swinging under the normal operation of the crane in such a manner that it could come in the window of the crane cab and strike the operator."

We also find that the testimony of Stewart that he was hit by the swinging pigtail, which was corroborated by the compliance officer, is more credible than the testimony of Bookwalter that the guard would have prevented such contact. When Bookwalter observed the crane, the crane was not in normal operation, and the pigtail was secured. Bookwalter testified as an engineer, not a crane expert. Furthermore, as noted above, Bookwalter admitted that during rapid deceleration the pigtail could hit the operator. Significantly, Bookwalter did not refute Stewart's testimony that manipulating the crane to prevent a main hoist load from swinging causes the pigtail to swing.

WPS claims that the pigtail will not swing unless the crane is operated improperly and that any violation here resulted from improper operation. To prove that a violative condition results from such unpreventable employee misconduct, the employer must show that it had a workrule that effectively implemented the requirements of the cited standard and that these workrules were adequately communicated and effectively enforced. *E.g. Gary Concrete Prods.*, 15 BNA OSHC at 1055, 1991 CCH OSHD at p. 39,452. WPS introduced into evidence two crane operating workrules against swinging loads and making sudden starts and stops. Stewart indicated that he was aware of those rules and followed them.[6] Indeed, it was his manipulation of the crane to prevent the load from swinging that caused the unsecured (and much less massive) pigtail to swing. However, these workrules do not adequately address the hazard at issue. *See, e.g., Regina Constr. Co.*, 15 BNA OSHC 1044, 1050, 1991 CCH OSHD ¶ 29,354, p. 39,470 (No. 87-1309, 1991). Even if those workrules were followed, they would not protect the operator from the hazard of being hit by the pigtail. Nor does the record show that they were effectively enforced. Because Stewart's operation of the crane was not a departure from a workrule, there is no basis for WPS's claim that his exposure to the swinging pigtail resulted from his failure to follow proper

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[6]WPS asserts that the evidence shows that all crane operators, including Stewart, were trained in proper crane operation procedures, including instructions not to "plug" the crane, *i.e.*, shift through the stop position when changing direction thus causing the load to swing, rather than stopping in between. Even though Stewart admitted that he sometimes plugged the crane, he explained that the way he did it was not unsafe because he "would gradually slow down the trolley," not rapidly slow it.

procedures. We therefore conclude that WPS failed to comply with section 1910.173(d)(3)(i).

For the reasons above, we agree with the judge that WPS violated section 1910.173(d)(3)(i). We also agree with the judge that the violation is properly characterized as repeated.[7]

III. *Penalties*

Section 17(a) of the Act, 29 U.S.C. § 666(a), as amended by Omnibus Budget Reconciliation Act of 1990, Pub.L.No. 101-508 § 3101 (1990), provides that an employer who repeatedly violates the Act or any standard promulgated therefrom "may be assessed a civil penalty of not more than $70,000." Although section 10(c) of the Act, 29 U.S.C. § 659(c) grants the Secretary the power to propose penalties, the Act grants the Commission the

> authority to assess all civil penalties . . . giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

Section 17(j) of the Act, 29 U.S.C. § 666(j). *See Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1994 CCH OSHD ¶ 30,363 (No. 88-1962, 1994). The gravity of the offense is generally the principle factor to be considered. *See Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

The Secretary proposed a $25,000 penalty for item 1, which concerns the switch box. The compliance officer testified that the gravity of the violation was high because any injury would be severe, and the probability of the injury was great. He testified that the gravity-based penalty as calculated under the *Field Operations Manual* ("*FOM*"), see Chapter VI, sections B.8.b. and B.14.a. (3 BNA OSHR 77:2703, 77:2705 (1994); 4 CCH ESHG ¶ 7970.150, p. 5722 (1994), ¶ 7970.205, p. 5728 (1993)) is $5,000, and that the FOM prescribes that a penalty be multiplied by five for large employers, those with over 250 employees, see Chapter VI, section B.14.b.(2) (3 BNA OSHR 77:2705 (1994); 4 CCH ESHG ¶ 7970.205, p. 5728). WPS is a large employer with 6,500 employees altogether, and 800 to

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[7]The Secretary alleges that the violation is repeated based on a citation issued to WPS on March 26, 1990 alleging a violation of the same standard cited here, which became a Commission final order. That citation concerned a swinging hoist block and slack magnet cable on crane no. 26.

850 employees at the Yorkville site. According to the compliance officer, he did not make any adjustments for good faith because the FOM does not permit it for a repeated violation. He also testified that there had been a number of previous complaints to supervisors about the condition. He followed the FOM in not making any adjustments for WPS's compliance history because it had been cited for serious, willful, or repeated violations within the past three years.

The Secretary proposed a $25,000 penalty for items 2a and 2b, as grouped in the citation. The compliance officer calculated the penalty of $25,000 for item 2a, which concerns the pigtail, in the same manner as for item 1. Item 2b was withdrawn by the Secretary at the hearing. The compliance officer, however, testified that the Secretary's withdrawal of item 2b has no bearing on the $25,000 proposed penalty because, according to the *FOM*, see Chapter VI, section B.9.c.,[8] where violations are grouped for penalty purposes, the penalty is calculated for the first instance of a violation and the other instances are either equal to or less than the first instance penalty, but only the penalty for the first instance is proposed.

In assessing a penalty of $25,000 for each violation, the judge noted the number of employees at the Yorkville plant, WPS's history of OSHA violations, and the high gravity of the repeat violations. For item 1, he found that contact with the energized parts exposed by the missing breaker box cover would likely result in death. For item 2a, he determined that being struck in the head by a swinging pigtail could result in serious injury. Even though he stated that WPS "displayed good faith in its dealings with OSHA," he made no adjustments and assessed the amounts proposed by the Secretary.

Having considered the penalty factors, we agree with the judge that the $25,000 penalty for each item is appropriate. We note WPS's large size and its record of previous violations, two of which are the violations underlying the two repeat items at issue here.

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[8]Section B.9.c. provides that "[c]ombined and grouped violations shall normally be considered as one violation for penalty purposes . . . . " 3 BNA OSHR 77:2703 (1994); 4 CCH ESHG ¶ 7970.165 (1993). Moreover, section B.9.a. states, "The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or subitem of a combined or grouped violation if it is clear which instance will have the highest penalty." 3 BNA OSHR 77:2703 (1994); 4 CCH ESHG ¶ 7970.160 (1993).

Although WPS appears to have cooperated with OSHA during this inspection, and it apparently has a low accident injury rate, its earlier failure to act on the complaints of Stewart and Dudzik suggest a lack of good faith. In addition, the gravity of the electrical violation is high because, even though the likelihood of injury might not have been great, Stewart and the overtime operators were exposed to the hazard of serious injury or death from contacting the exposed live parts, and the condition was exacerbated by the lengthy exposure of employees to the hazard. The gravity of the pigtail item is also high in that, although injuries that could result might not be as serious, the likelihood of Stewart and the overtime operators being hit by the swinging pigtail was high.

For the reasons stated above, we assess a penalty of $25,000 for the repeated violation of section 1910.179(g)(2)(i) and a penalty of $25,000 for the repeated violation of section 1910.179(l)(3)(iii).[9]

It is so ordered.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

DATED: May 26, 1994

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[9]Commissioner Foulke would note that, while he agrees with finding repeated violations of the cited standards, he takes issue with the penalty assessments. The record in this case demonstrates that the company has shown a remarkable dedication to safety and its efforts go far beyond those found in many companies. WPS's accident injury rate is less than half of the national industry average, which places the company in the unique position of being the "safest" operation in the American steel industry. He also notes that, in his decision, the administrative law judge specifically found that WPS had displayed good faith in its dealings with OSHA. Commissioner Foulke's concern here is not motivated by a reluctance to assess stiff penalties, where appropriate, but to ensure that each of the section 17(j) criteria mandated by the United States Congress are given full effect.

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SECRETARY OF LABOR, Complainant, v. WHEELING-PITTSBURGH STEEL, CORP., Respondent, UNITED STEELWORKERS OF AMERICA, DISTRICT 23, LOCAL UNION NO. 1223, Authorized Employee Representative.	:	Docket No. 91-2524

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on May 26, 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

Ray H. Darling, Jr.

May 26, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2524

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
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OSHRC DOCKET
NO. 91-2524

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 March 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 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 March 24, 1993 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:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. 3/8/93

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2524

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SECRETARY OF LABOR, Complainant, v. WHEELING-PITTSBURGH STEEL CORP., Respondent, UNITED STEELWORKERS OF AMERICA, INC., Authorized Employee Representative.	OSHRC Docket No. 91-2524

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Pittsburgh, Pennsylvania
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Wheeling-Pittsburgh Steel Corporation (Wheeling) contests a citation issued to it on August 29, 1991. The citation resulted from an inspection of Wheeling's Yorkville, Ohio, plant on July 2, 1991, by the Occupational Safety and Health Administration (OSHA). In

the citation, the Secretary alleges that Wheeling was in violation of two provisions of the standard covering overhead and gantry cranes under the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the citation alleges a repeat violation of § 1910.179(g)(2)(i) for failure to locate or enclose live parts of electrical equipment so that they would not be exposed to accidental contact under normal operating conditions. Item 2 alleges a repeat violation of § 1910.179(l)(3)(iii) for failure to provide repair or replacements promptly as needed for safe operation.[1]

The two items each relate to an overhead crane with dual hoist control located in the cold strip area of the Yorkville plant (Tr. 9, 20). The crane is referred to as #26 crane (Tr. 8).

OSHA safety specialist Bruce Bigham conducted the inspection and recommended the issuance of the citation that gave rise to the instant case.

Item 1: Alleged Violation Of § 1910.179(g)(2)(i)

The Secretary alleges that Wheeling committed a repeat violation of § 1910.179(g)(2)(i), which provides:

> Electrical equipment shall be so located or enclosed that live parts will not be exposed to accidental contact under normal operating conditions.

The breaker box in the #26 crane cab, directly behind the operator's station, did not have a cover (Exh. C-1; Tr. 23). The electrical components in the breaker box had a voltage of 250 volts (Tr. 27). Another electrical switch and outlet ran off the breaker box and controlled the operation of a fan and heater within the cab of the crane (Tr. 30). The fan was operating at the time of the inspection (Tr. 71-72).

Under normal operating conditions, the crane operator would come within 3 to 6 inches of the energized electrical parts (Tr. 31-32, 220). The electrical components within the breaker box were continually energized, even when the switch on the breaker box was in the "Off" position (Tr. 29-30). When the breaker switch was in the "Off" position, the

[1] The Secretary withdrew item 2b at the hearing (Tr. 257), leaving item 2a, relating to #26 crane's magnet cable, as the only alleged violation of § 1910.179(l)(3)(iii).

fan and heater still operated off of the other electrical switch that ran through the breaker box (Tr. 31). Bigham explained that the breaker switch posed a greater hazard in the "Off" position than it did in the "On" position (Tr. 230):

> I would consider it more hazardous if the switch was in the "Off" position because if it was in the "On" position, the flow of electricity would be going to the appliance and would, in effect, be a ground.
>
> In the "Off" position, if someone should contact both terminals, they would then become the completion of the circuit; their body would become the completion of the circuit and receive the full voltage of electricity.

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). The Secretary has established the first three elements of proof. The #26 crane operators were exposed to contact with energized parts of the breaker box. Did the Secretary prove that Wheeling knew of the violative condition?

William Stewart was one of the operators of the #26 crane (Tr.8). He had operated the crane for 10 years at the time of the hearing (Tr. 9). Stewart testified that the breaker box's cover had been missing "ever since I've been in the crane" (Tr. 32). Stewart reported the missing cover on several different occasions to John McKnight, the supervisor of crane maintenance, and Neil VanCamp, the supervisor of the electrical department (Tr. 33-34). Stewart reported the continuing violation to these supervisors "approximately every two or three months," but they never responded to his complaints (Tr. 34).

Eventually, Stewart complained of the condition to Ed Dudzik, the safety committeeman for Yorkville's Local 1223 of the USW (Tr. 34). Dudzik corroborated Stewart's testimony. He also received complaints regarding the missing cover from two other crane operators, Messrs. Tuckosh and Kafauna (Tr. 144). Dudzik notified various management officials of the missing breaker box cover, including McKnight and VanCamp, as well as Wayne Shirley, Wheeling's general foreman of the cold strip department (Tr. 145). Dudzik brought up the operators' complaints at formal and informal meetings with Wheeling

management personnel. Dudzik described Wheeling's attitude towards the complaints: "Generally, I was told, 'Well, I haven't got time to get up there,' or 'Well, we're going to look into it,' or they would come up with, 'Well, we're planning on doing this or that to repair to the situation,' and nothing ever came about it" (Tr. 147).

The Secretary has established that Wheeling had knowledge of the violative condition. Not only were management personnel notified repeatedly of the missing breaker box cover, the cover had been missing for at least ten years. Even without the complaints of the crane operators, Wheeling should have been aware of the missing cover through the exercise of reasonable diligence. Wheeling was in violation of § 1910.179(g)(2)(i).

The Secretary alleged the violation as a repeat. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Wheeling was previously cited on March 26, 1990, for the violation of § 1910.179(g)(2)(i) because of the exposed electrical panel on the bridge of the #36 crane (Exh. C-5). The violation was affirmed and became a final order of the Review Commission on April 4, 1991 (Tr. 236-237). The present violation is therefore properly classified as a repeat violation.

Item 2a: Alleged Violation of § 1910.179(l)(3)(iii)

The Secretary alleged that Wheeling committed a repeat violation of § 1910/179(l)(3)(iii), which provides in pertinent part:

> Repairs or replacements shall be provided promptly as needed for safe operation.

The #26 crane has a dual hoist control. The main hoist has a 25-ton lifting capacity and the auxiliary hoist has a 10-ton lifting capacity (Tr. 9). Attached to the auxiliary hoist is a 40 to 50 foot long magnet cable (Tr. 35-36). At the end of the magnet cable is a heavy-duty female plug and cord, referred to as a "pigtail," that connects the auxiliary hoist block to a large magnet with a male plug connection. The pigtail is approximately 3 feet long and weighs between 10 and 15 pounds (Exh. C-2, Tr. 44-47, 57).

When operating the main hoist of the #26 crane, the auxiliary hoist is raised to the limit switch, adjacent to the operator's position in the crane cab (Tr. 515-519). Until approximately a month and a half before Bigham's inspection, the pigtail was secured through the auxiliary hook with a pin and chain when not in use. This prevented the pigtail from swinging freely when the main hoist was operating. Because of the momentum, the auxiliary hoist has a tendency to swing while the main hoist is in use. The pin that secured the pigtail broke off approximately a month and a half before the inspection (Tr. 52-58). The pin was not replaced, and Stewart was hit in the head by the swinging pigtail on several occasions while operating the main hoist (Tr. 47-48).

Stewart notified both McKnight and Greg Walker, the cold strip's superintendent, of the broken pin. They took no action to correct the violative condition (Tr. 58-59).

Wheeling argues that any violation of the cited standard was the result of unpreventable employee misconduct on the part of Stewart. "In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." *H. B. Zachry Company*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980).

Wheeling's reliance on this defense is misplaced. The defense refers to the *action* of an employee. Wheeling contends that Stewart was operating the crane in an unsafe manner, which caused the pigtail to swing and strike him in the head. But Wheeling is not cited for the manner in which the #26 crane was operated. The company was cited for failing to correct a condition of the crane's apparatus. Had the pin been repaired or replaced, the pigtail could have been secured to prevent it from striking the crane operator. Regardless of how Stewart operated the crane, the broken pin constituted a violation of § 1910.179(l)(3)(iii).

This violation was also cited as a repeat. Wheeling had been previously cited for the violation of this standard on March 26, 1990 (Exh. C-7). It became a final order of the Review Commission on April 4, 1991 (Tr. 237, 243). Wheeling's violation of § 1910.179(l)(3)(iii) in the present case is a repeat violation.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

There were approximately 850 employees at Wheeling's Yorkville plant (Tr. 260). Wheeling displayed good faith in its dealings with OSHA. Wheeling has a history of OSHA violations. The gravity of the repeat violations is high. Contact with the energized 250V parts exposed by the missing cover on the breaker box would likely result in death (Tr. 231). Being struck in the head by the swinging pigtail could result in a serious injury (Tr. 98). Accordingly, a penalty of $25,000.00 will be assessed for each of the cited items.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

(1) That item 1 of the citation, alleging a violation of § 1910.179(g)(2)(i), is affirmed, and a penalty of $25,000.00 is assessed; and

(2) That item 2a of the citation, alleging a violation of § 1910.179(l)(3)(iii), is affirmed, and a penalty of $25,000.00 is assessed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: February 22, 1993