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SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent, and UAW LOCAL 974, Authorized Employee Representative.	OSHRC Docket No. 93-373

DECISION

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

BY THE COMMISSION:

This case arises out of an accident at the East Peoria, Illinois facility of Caterpillar, Inc. ("Caterpillar") involving repair of the Erie 6000, a 6,000 ton forging press. The equipment used for the repair procedure included a gear pulling device consisting of four steel studs, each weighing 35 to 40 pounds and measuring 42 inches in length and 1¾ inches in diameter. The accident occurred when a stud fragment was propelled 121 feet and hit an employee in the head causing serious injury. Following the accident, the Secretary

conducted an inspection and issued a citation alleging that Caterpillar willfully violated section 5(a)(1), 29 U.S.C. § 654(a)(1), the "general duty clause," of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), and proposed a penalty of $49,000.[1] Administrative Law Judge Nancy J. Spies affirmed the citation and assessed a penalty of $30,000. At issue on review is whether the judge properly classified the violation as willful and assessed an appropriate penalty. We agree with Judge Spies that Caterpillar's violation of section 5(a)(1) was willful, and we adopt the factual findings and legal conclusions contained in her decision, attached hereto. We do not, however, adopt her penalty assessment. Rather, we conclude that a penalty of $49,000 is appropriate based on the statutory factors.

Caterpillar's challenges Judge Spies' willfulness finding primarily by arguing that she created a "new theory of evidence" called "institutional memory." While the record evidence amply establishes the pervasive and continuing nature of the stud flying hazard and management knowledge of its extent in 1989,[2] Caterpillar claims that its knowledge of the hazard ended with the departure of supervisor Parker and superintendent Seeyle, and its assignment of the 1992 pull procedure to new supervisors unfamiliar with the extent of the hazard. Our review of long-standing legal precedent reveals that this argument is clearly erroneous.

In accord with well settled principles of agency law, the Commission has held that a supervisor's knowledge of hazardous conditions is imputable to his employer. *Tampa*

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[1]The Secretary alleged an alternative violation of 29 C.F.R. § 1910.212(a)(1), a machine guarding standard, which the judge found inapplicable to the facts of the case. The Secretary has not sought review of this finding, and we do not address it.

[2]Caterpillar's counsel admitted in his opening remarks at the hearing that the hub pulling technique "is common in Caterpillar's maintenance operations" and "is a technique that the evidence will show is commonly used and followed by maintenance mechanics everywhere."

Shipyards, Inc., 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101-02, (No. 86-360, 1992) (consolidated). "'Knowledge' by a corporate entity is necessarily a fiction; the corporation can only be said to 'know' information by imputing to it the knowledge of natural persons who serve as its agents." *Central Soya de Puerto Rico, Inc. v. Secretary,* 653 F.2d 38, 39 (1st Cir. 1981). *See also Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970) ("knowledge of officers and key employees of a corporation, obtained while acting in the course of their employment and within the scope of their authority, is imputed to the corporation itself"). It is also well settled that knowledge, once properly imputed from agent to principal, is conclusive upon the principal despite the agent's subsequent departure. *Mechanics Bank of Alexandria v. Seton*, 26 U.S. 299 (1828) (notice to agent constitutes notice to principal, and change in agent requires no new notice); *Acme*, 422 F.2d at 1398 ("knowledge by a corporation, obtained by and through its officers and key employees, of facts of continuing importance to the business of the corporation, even after the termination of services of that officer or employee, is conclusive upon the corporation"); Restatement (Second) of Agency § 275 cmt. e, § 278 cmt. b (1957).

The rationale for this rule is well exemplified in this case. Caterpillar attempts to evade responsibility for its violative conduct by pointing to the ignorance of its new supervisory personnel. This ignorance, however, derives solely from Caterpillar's failure to convey to these supervisors relevant and available information it possessed and which, under the Act, it was responsible for disseminating to those entrusted with the health and safety of its employees.[3] Accordingly, we conclude that Caterpillar's heightened awareness of the

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[3]*See, e.g., V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p. 42,110 (No. 91-1167, 1994) (despite employees' option to refrain from engaging in unsafe work, violation found willful as Act precludes employer from shifting to employees its responsibility to provide safe working conditions); *Pride Oil Well Serv.*,

(continued...)

stud pulling hazard, established by imputing to it the knowledge of former supervisor Parker and former superintendent Seeyle, remains with the corporation and was not affected by any turnover in personnel.

Armed with this knowledge of the hazard and extensive corporate resources, including on-site engineers whose expertise was utilized to effectively evaluate and abate the hazard only after the accident, Caterpillar took no action at a managerial level to develop any abatement procedures. Instead, it delegated "carte blanche" authority to Williams, a non-management employee whose prior safety concerns it had rebuffed.[4] In so doing, Caterpillar demonstrated plain indifference to employee safety. *See Tampa Shipyards,* 15 BNA OSHC at 1540-41, 1991-93 CCH OSHD at p. 40,103 (employer's failure to develop and implement procedures to prevent known hazard constitutes willful violation). *See also Mineral Indus.*

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[3](...continued)
15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87,692, 1992) ("[a]n employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures"); *Potlatch Corp.,* 7 BNA OSHC 1061, 1064, 1979 CCH OSHD ¶ 23,294, p. 28,172 (No. 16183, 1979) (although "supervisors are key personnel, . . . they are normally not the policy makers of a corporation, and . . . adherence to safety standards by a corporation should [not] depend on localized administration by less than high echelon officials").

[4] Although Caterpillar's reliance on Williams may seem reasonable, Commission precedent permits an employer to rely on the judgment of "highly experienced and trained employees" (*Connecticut Light & Pwr. Co.*, 13 BNA OSHC 2214, 2219, 1987-90 CCH OSHD ¶ 28,508, p. 37,794 (No. 85-1118, 1989)) only when the effectiveness of the safety procedure in question is well established by the employer or the applicable trade or industry. *See, e.g., Cerro Metal Prods.,* 12 BNA OSHC 1821, 1825, 1986-87 CCH OSHD ¶ 27,579, p. 35,832 (No. 78-5159, 1986) (employer took all requisite steps to abate known hazard by relying on employee with good safety record to comply with established, enforced and effectively communicated work rule). Moreover, in this case Caterpillar ignored Williams' 1989 request that Caterpillar's engineers be asked to assist in addressing the hazard.

& Heavy Constr. Group, Brown & Root, Inc. v. OSHRC, 639 F.2d 1289, 1295 (5th Cir. 1981) (employer's failure to establish workrules or provide employee training regarding safe operation of equipment constitutes willfulness).

Finally, we also conclude that a willfulness finding is not obviated by Caterpillar's installation of the tape barrier and warning signs for the 1992 pull. *See Tampa Shipyards,* 15 BNA OSHC at 1541, 1991-93 CCH OSHD at p. 40,104 (willfulness not justified where employer makes objectively reasonable, though unsuccessful, effort to comply with Act's requirements). On the night of July 15, the tape was located forty to sixty feet out from the Erie 6000. This was barely the distance that a stud was known to have previously flown, stopping only upon hitting a metal cabinet where it left a three-inch dent. The record does not reveal who positioned the tape, but Williams noticed that it was inadequate when he arrived at work on July 16, and doubled its distance from the machine. Even if some form of tape barrier would have been a reasonable means of protecting employees, the barrier on the night of July 15 clearly was not. Moreover, in view of what the judge described as the unpredictability of the hazard, the tape barrier was hardly an objectively reasonable means of abatement, especially where employees involved in the hub-pulling procedure were located within it. To provide reasonable protection from such a hazard, an employer might abate at the point of creation, a suggestion made by Williams and rejected by Caterpillar until after the accident.[5] Accordingly, we conclude that Caterpillar is not spared from a

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[5]Contrary to the implication of our dissenting colleague, we do not disregard the abatement efforts made since 1989 in response to William's concerns, nor do we rely on Caterpillar's failure to adopt each of Williams' recommendations as evidence of plain indifference. Rather, we rely on the consistent failure of those above Williams to respond to the hazard, which took the form of both a failure to take more than perfunctory affirmative action and a failure to provide for the institutional procedures needed to alert subsequent generations of management to the need for such action. Caterpillar's plain indifference is exemplified by its obviously deficient placement of the tape barrier on July 15. Indeed, at its best, Caterpillar's response to the hazard constituted

(continued...)

willfulness finding by employing abatement procedures that were patently inadequate. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993) ("an employer is not necessarily spared from a finding of willfulness by taking *any* measure, regardless [of] how minimal, to enhance employee safety") (emphasis in original); *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1611-1612, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No. 87-2007, 1992) (employer need not act in "utter disregard" of employee safety to establish willfulness); *Calang Corp.*, 14 BNA OSHC 1789, 1792-93, 1987-90 CCH OSHD ¶ 29,080, p. 38,872 (No. 85-0319, 1990) (employer's effort to reduce possibility of cave-in by lowering water table does not preclude finding of willfulness where it failed to slope trench in accordance with applicable standard).

We agree with Judge Spies' findings as to three of the statutory penalty factors. The gravity of the violation is high and Caterpillar is a large employer with a history of only one serious violation within the seven year period preceding the accident. We find, however, that Caterpillar is entitled to no credit for good faith where the violation was willful and abatement was prompted by the accident, rather than Caterpillar's prior knowledge of the hazard. *See Valdak Corp.*, 17 BNA OSHC 1135, 1139, 1993-95 CCH OSHD ¶ 30,759, p. 42,743 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

We weigh the statutory factors in light of the maximum penalty for a willful violation of $70,000. Section 17(a), 29 U.S.C. § 666(a), *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990). Accordingly, in view of the high gravity of Caterpillar's violation, which is the weightiest of the four penalty factors, Caterpillar's large size, and lack of good faith, a substantial penalty is warranted. Crediting Caterpillar only for its generally positive history of previous violations, we conclude that the proposed

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[5](...continued)
nothing more than vaguely "attending" to it, as described by the dissent, rather than reasonable precaution. In our view, this falls far short of the objectively reasonable efforts required under the Act.

penalty of $49,000 is appropriate.

Accordingly, for the reasons stated above, we adopt the judge's factual findings and legal conclusions that Caterpillar committed a willful violation of section 5(a)(1) of the Act. We assess a penalty of $49,000.

Stuart E. Weisberg
Chairman

Daniel Guttman
Commissioner

Dated: September 4, 1996

MONTOYA, Commissioner, dissenting:

For the reasons stated below, I have concluded that this violation of OSH Act section 5(a)(1), the "general duty clause," cannot properly be characterized as willful.

Quoting from *Asbestos Textile Co.,* 12 BNA OSHC 1062, 1063, 1983-84 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-3831, 1984), *Williams Enterp., Inc.,* 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987) identifies a willful violation as one committed "with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety." *Williams* goes on to require a showing that the employer has displayed "a heightened awareness -- of the illegality of the conduct or conditions" as well as a "conscious disregard or plain indifference" to employee safety. *Id.* at 1256-57, 1886-87 CCH OSHD at p. 36,589.

Given the frequency with which the problem of breaking studs had presented itself, Caterpillar cannot be heard to complain that it did not have a heightened awareness of this hazardous condition. However, Caterpillar has demonstrated a history of attending to the hazard of breaking studs that negates the assertion that it displayed conscious disregard or plain indifference to employee safety. As the judge's decision discloses, and as the majority concedes, Caterpillar had tried a number of methods suggested by lead mechanic Williams to abate the hazard of breaking studs, including tapering the studs and attaching cables to the studs. When these methods proved unworkable, Caterpillar settled on the practice of blocking off the work area with red warning tape and caution signs. While Caterpillar did not accept all of Williams' abatement recommendations prior to this accident, this hardly establishes conscious disregard or plain indifference to employee safety. Nor does the fact that Caterpillar's chosen method of abatement, red warning tape and caution signs, ultimately proved to be ineffective. *See United States Steel Corporation,* 12 BNA OSHC 1692, 1704, 1986-87 CCH OSHD ¶ 27,517, p. 35,675 (No.79-1998, 1986) (violations of OSH Act section 5(a)(1) not properly cited as willful where the company's managers had developed a strategy

for dealing with the hazard, thereby negating Secretary's argument that the company had intentionally disregarded the requirements of the Act); *Mobil Oil Corporation*, 11 BNA OSHC 1700, 1700-01, 1983-84 CCH OSHD ¶ 26,699, p. 34,124 (No. 79-4802, 1983) ("[w]here the record reveals that the employer who knew of the hazardous condition took some precautions, even though not entirely effective or complete precautions, to protect the employees, the employer's conduct lacks the element of intentional disregard or plain indifference characterizing willful conduct." *Cf. Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987) ("a good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness"), and *Williams,* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591 ("the test of an employer's good faith for these purposes is an objective one - whether the employer's belief concerning a factual matter or concerning the interpretation of the standard was reasonable under the circumstances").

As I have not found this violation of the general duty clause to be willful, I need not address penalty issues. However, I would urge that Caterpillar's multiple efforts to abate this hazard prior to the accident be considered as evidence of good faith on the company's part, just as the judge gave good faith for Caterpillar's subsequent abatement and cooperation with the accident investigation.

Dated September 4, 1996

Velma Montoya
Commissioner

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-373
CATERPILLAR, INC.,	:	
Respondent,	:	
and	:	
UAW LOCAL 974,	:	
Authorized Employee Representative.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on August 4, 1996. **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

Date: September 4, 1996

Ray H. Darling, Jr.
Executive Secretary

93-373

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SECRETARY OF LABOR
Complainant,
v.

CATERPILLAR, INC.,
Respondent,

LOCAL 974, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Authorized Employee Representative.

OSHRC DOCKET NO. 93-0373

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 August 23, 1994. The decision of the Judge will become a final order of the Commission on September 22, 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 September 12, 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:

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DOCKET NO. 93-0373

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. 8KH

Date: August 23, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0373

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SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent, and LOCAL 974, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), Authorized Employee Representative.	OSHRC Docket No. 93-373

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For Authorized Employee Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Caterpillar, Inc. (Caterpillar) contests a citation issued by the Secretary on January 13, 1993. The citation alleges that a maintenance procedure used at Caterpillar's

East Peoria, Illinois, manufacturing facility resulted in a willful violation of, alternatively, either § 1910.212(a)(1) or § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act). The citation followed an inspection conducted by the Occupational Safety and Health Administration (OSHA) of an industrial accident which occurred on July 16, 1992. The authorized employee representative elected party status and participated in the case.

Nonapplicability of § 1920.212(a)(1)

A citation under § 5(a)(1) is appropriate only if no specific standard applies. *Marquette Cement Mfg. Co.*, 568 F.2d 902 (2nd Cir. 1977). If the standard at § 1920.212(a)(1)[1] covers the particular hazard for which Caterpillar has been cited, the standard preempts the general duty clause. *See Armstrong Cork Co.*, 8 BNA OSHC 1070, 1980 CCH OSHD ¶ 24,273 (No. 76-2777, 1980). Section 1910.212(a) applies to "nearly an infinite variety of machines which might pose hazards" and generally protects the operator from dangers associated with the point of operation. *Diebold, Inc.*, 585 F.2d 1327, 1336 (6th Cir. 1978). While the type of machine covered by the standard varies widely, the basic targeted hazard does not. A machine's function and the manner in which it is operated create the hazard anticipated by the standard. *See Jefferson Smurfit Corp.*, 15 BNA 1419, 1421, 1992 CCH OSHD ¶ 29,551 at p. 39,953 (No. 89-553, 1991). Thus, the examples set forth in the standard ("such as . . . points of operation, nip points, rotating parts, flying chips and sparks") specifically relate to the process which occurs when machines are used for their intended purposes. Even assuming that the gear pulling device assembled by Caterpillar is a "machine" within the meaning of § 1926.212(a)(1), the particular hazard addressed by the standard is not present. The standard is not directed to a hazard created

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[1] § 1910.212(a)(1) provides:

> *(a) Machine guarding--(1) Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

because a machine unintentionally breaks. Since the standard does not apply, the case must be decided under the general duty clause, which the Secretary pled in the alternative.

General Duty Clause

The general duty clause, § 5 (a)(1), requires that employers furnish employees a place of employment free from recognized hazards which can cause serious injury or death. The Secretary alleges that from July 14 through July 16, 1992:

> [Caterpillar's] employees were exposed to the hazard of being struck by broken parts thrown through the air during maintenance procedures. The equipment, including the studs . . . did not have a safety factor of four-to-one [2] and the equipment was neither guarded nor retained.

Background

Caterpillar is a major manufacturer of tracked earthmoving equipment. The machinery's track links are forged in presses. These presses are periodically serviced or repaired. In July 1992, a bearing on the hub of the Erie 6000, a 6,000 ton forging press, failed and the hub had to be removed so that new bearings could be inserted (Tr. 31, 35). This procedure was not routine maintenance but was considered a "major tear down" (Tr. 39-40). A major tear down involves more than one craft, and, in the case of removing the hub on the Erie press, would take two weeks. The maintenance procedure was scheduled for July 15, 1992, during a planned production shutdown. The pull was to be made during alternating 12-hour shifts (Tr. 30, 40).

Two meetings were held to plan the operation. Present at the meeting were Ronald Williams, the day shift's lead repairman (a non-managerial position), and his supervisor of 3 months, James Rhodes. Earlier Williams had detailed discussions with his previous supervisor about his safety concerns for the Erie pull and his suggestions to lessen the perceived danger. For the July 1992 meeting, however, he suggested only that warning signs be posted and the area be cordoned off. Rhodes agreed (Tr. 41-42, 179).

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[2] The "four-to-one" factor was not explained during the hearing or in counsel's argument and is deemed abandoned.

In order to access the bearings of the Erie 6000, the crew had to pull the hub from the shaft. The hub measured 6 feet in diameter and weighed 7,600 pounds. The hub is held in place on the crank shaft with a shrink ring. Removal of a shrink ring theoretically should have permitted the hub to slide off the crank shaft (Tr. 34-35). In practice, this often did not happen. Even with the shrink ring removed, the clearance between the hub and the crank shaft was a few 1000ths of an inch. If the hub was misaligned even the slightest degree, the phenomenon of "galling" could cause intense friction between the steel of the hub and the crank shaft, making removal of the hub exceedingly difficult (Tr. 93, 130).

To remove the hub Williams and two co-workers assembled a gear pulling device (gear puller). The gear puller was similar to those commonly used by maintenance personnel on other large pulling projects (Tr. 94). The gear puller consisted of four steel studs, each weighing 35 to 40 pounds and measuring 48 inches in length and 1¾ inches in diameter; a steel spanner bar, measuring 6 inches by 6 inches in diameter and 58 inches in length; and two smaller steel cross pieces, each 12 inches long (Exh. C-5; Tr. 13, 39, 58).

The studs were screwed into the face of the hub, two on each side. The smaller pieces of steel fitted over the paired studs and the steel bar spanned the area across the face of the crank shaft between the paired studs (Exh. C-2; Tr. 39). Using two large 200-ton hydraulic jacks, each capable of exerting 10,000 pounds of pressure per square inch (psi) as leverage, an outward pressure was placed against the hub. Because of the size and weight of the jacks and the gear puller, they were hoisted in place and held by a crane (Exh. C-1; Tr. 33, 89).

As happened in the past with this type of assembled gear puller, when a high degree of pressure was placed on the steel spanner bar, uneven pressure could be transmitted from the bar to the studs causing them to bend or break. If broken, stud fragments often flew through the air for substantial distances (Exh. C-2; Tr. 43).

The pull was begun during the night shift on July 15, 1992. That crew was unsuccessful in removing the hub, quitting after a stud fragment snapped and flew 25 feet (Tr. 143-144). The fragment hit near the cross-aisle where power trucks were driven (Tr. 151). The occurrence was witnessed by the night shift maintenance supervisor, Dick Hill. Hill told day shift supervisor Rhodes that the stud broke (Tr. 142-143, 186). Williams, who was the worker in charge of the pull, was not advised (Tr. 131).

When Williams began preparing for the pull, he noticed that the area in front of the Erie 6000 was not "taped off." He and Rhodes taped off an additional area 90 to 100 feet in front of the press (Tr. 82). Williams did not anticipate that a stud would fly further than that distance. Williams then warned employees Bonner and Dennis Dunn, who were performing unrelated work, that the hub pulling operation was about to begin. The men moved out of the way (Tr. 84).

The crew began the pulling procedure. When the pressure on the fixture reached 6,500 psi, one of the studs broke and the fragment, which weighed over 9 pounds, flew 121 feet through the air. It struck Dennis Dunn in the back of the head, seriously injuring him. He remained in a coma for 30 days (Tr. 23-24).

DISCUSSION

If the Secretary is to prove a violation of section 5(a)(1), he must show:

> (1) that a condition or activity in the employer's workplace presented a hazard to employees, (2) that the cited employer or the employer's industry recognized the hazard, (3) that the hazard was likely to cause death or serious physical harm, and (4) that feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1997-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

Coleco Industries, Inc., 14 OSHC 1961, 1963, 1991 CCH OSHD ¶ 29,200 (No. 84-546, 1991).

The hazard presented is that by the nature of the process, when stud fragments break during the hub pull, they are propelled with force in unpredictable ways.[3] Caterpillar's employees were subjected to this hazard.

It is stipulated that the hazard would likely cause death or serious physical harm (Tr. 21). There were physical and economically feasible means to abate the hazard. In fact, after the accident, Caterpillar's engineers designed a new gear puller assembly which equalized the pressure on the steel spanner bar to substantially lessen the possibility that the

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[3] To the Secretary, the hazard is the fact that studs flew in the workplace. Caterpillar defines the hazard as flying studs being propelled beyond a cordoned off "safe area" of 90 to 100 feet. Although the parties would describe the hazard differently, it was the unpredictability of the studs' flight which created the danger and which should have been addressed for purposes of lessening or eliminating the hazard.

studs would break (Exh.C-4). Even without the new design, additional precautions, such as use of a furnace curtain, could have prevented the uncontrolled propulsion of the stud fragments into the work area.

Employer Knowledge

The focus of Caterpillar's argument is that the Secretary failed to prove the second element of a § 5(a)(1) violation, *i.e.* that the hazard was recognized. This may be established by proof that an employer had knowledge that the condition was hazardous. Generally, a supervisor's knowledge may be imputed to the employer. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992); *Tampa Shipyards, Inc.*, 1987-90 CCH OSHD ¶ 28,063 (Nos. 86-360 and 86-469, 1987).

Because of Caterpillar's previous experiences with gear pullers, detailed below, its supervisors were unavoidably aware that, when broken, studs ricocheted through the workplace with dangerous force. They were also aware that studs broke at various pressures and flew at various velocities in various directions.[4]

March/April 1989 pull. In March and April 1989, Williams' crew pulled the hub on the Erie 6000 press to remove the brake wheel (Tr. 44). During the process one of the studs broke and a fragment flew 60 feet in the air. The fragment was stopped because it hit a heavy gauge sheet metal cabinet. The force of the impact indented the cabinet three inches (Tr. 45-46). Machine operators were working 25 to 30 feet from the cabinet (Tr. 53).

Both maintenance foreman Clay Parker (Williams' supervisor at the time) and shop superintendent Darrell Seeyle were aware of the incident. Parker was with the crew. Seeyle was walking down the aisle as Williams attempted to warn him out of the way. Seeyle proceeded and was within 20 feet of the cabinet when the stud hit. He simply smiled and continued walking (Tr. 47-48). Later that day someone painted a bulls-eye on the cabinet. The bulls-eye remained on the cabinet for a long time (Tr. 48).

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[4] For example, in 1992 the stud broke when the psi reached 6,500; in 1989 studs broke periodically until the hub was finally removed at 9,500 psi. The hydraulic jacks provided up to 10,000 psi. The force with which a stud fragment was propelled may have been related to the pressure on the stud before it broke. In any event, many variables came into play during the procedure.

July 1989 pull. Three months later in July 1989, the crew removed the hub from the other side of the Erie 6000 press. Ronald Williams was again leadman. Eight to ten studs broke and flew during this procedure. One of the studs flew 35 to 40 feet to the south and hit 12 to 16 inches from where Dennis Dunn, who was later to be injured in the 1992 incident, was operating the crane. Another employee was standing nearby and talking to Dunn when the stud hit. The stud left a ½-inch dent in the metal of the crane (Tr. 51).

The 1991 pull. During 1991 the hub of the Erie 6000 was removed without incident. Galling did not occur, and there were no broken studs (Tr. 92).

Pulls on other equipment. Williams was familiar with seven or eight major tear down procedures on the Erie 6000 or on a similar National 4000 press before July 1992 (Tr. 42-43). Studs broke on each tear down, except that of the 1991 Erie 6000 (Tr. 43). In the tear down procedures that Williams was personally involved with, some thirty studs broke, usually traveling around 25 to 30 feet before they stopped or hit something (Tr. 43).

Williams' suggestions to lessen or eliminate the hazard.

Even if Williams' new supervisor, Jim Rhodes, did not know that the precautions suggested by Williams in 1992 were insufficient to protect against the hazard, others did. Other supervisory personnel, especially Parker, were aware that Williams had repeatedly requested, and repeatedly been denied, more comprehensive safety protection.

As Caterpillar emphasized, Williams was a qualified, conscientious worker. After the stud almost hit his superintendent in March or April, 1989, he spoke to his immediate supervisor Parker. Williams was "afraid [a stud fragment] would hit someone" (Tr. 52). Williams suggested hanging tubs in front of the press with a furnace belt, the so-called "furnace curtain."

> I suggested, you know, that we needed to do something to stop the studs from flying and we talked about putting tubs in front of it and using [a] furnace belt to hang it from the studs (Tr. 53).

Furnace belts were kept in the warehouse a couple of hundred yards away. Parker rejected use of these belts because he considered it too expensive and time consuming (Tr. 53-54).[5]

Williams next raised the issue of the flying studs during the July 1989 pull, which was also marked by galling. He suggested that the studs could be redesigned so that they would taper at the end. Thus, if the studs broke, they would break at their weakest point, the tapered end. Parker allowed eight tapered studs to be made for the July 1989 pull. When these tapered studs broke, as Williams predicted, they broke at the tapered end and remained in the hub rather than flying through the air. However, these studs had to be drilled out of the hub, which took about 1 hour. Parker considered this time, and the time necessary to make the studs, to be too costly. He would not permit further tapered studs to be made (Exh. C-3; Tr. 59-61). At some point during this pull, Williams was allowed to try attaching cables to the studs. When the studs broke, they whipped uncontrollably. The idea was quickly abandoned.

Shortly after Parker rejected use of the tapered studs, Williams again spoke to Parker about the danger of flying studs. He often requested that Caterpillar's engineers be brought in to assess the problem (Tr. 62). Parker usually replied, "I'll check into it" (Tr. 63). It is unknown whether Parker consulted with the engineering department, but it had no input into the situation until after the accident.

Also in July 1989 Williams discussed the breaking studs with fellow employee, John Bonner. Williams wanted to have a device built or bought (Tr.62). He and Bonner suggested an "H-beam fixture," something that could be put between the studs to hold them straighter and not allow as much deflection (Tr. 65). The two men discussed the suggestion with Walley Finley, a mechanical technician who was a member of management, and with their supervisor Parker. Finley thought it was a good idea. However, nothing resulted from the discussion (Tr. 67).

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[5] After the July 1992 accident, this "furnace curtain" was utilized for a pull on a smaller press. It took about an hour to install it. This does not imply that Parker knew that it would only take an hour to install the curtain. It does show, however, the practicality of Williams' suggestion and an apparent reluctance on Parker's part to try to solve the problem.

Then Williams was "just grasping for things to do" and sketched another idea which he believed might work. The sketch depicted a "bridge affair" of several pieces of plate welded together with bracing. Although Williams had some background in engineering from the Navy, he knew that the engineering department would have to be involved with any assembly based on his design (Tr. 67-68). He showed the sketch to Parker, who simply looked at the sketch and handed it back to Williams. Nothing came of the suggestion (Tr. 68). Throughout the July 1989 pull, Williams had ongoing discussions with Parker and with Walley Finley "about every day, [e]very time we broke a stud" (Tr. 55).

Proof of knowledge is not, as Caterpillar would have it, limited to the mental understanding of the specific supervisor in charge of the work area in which a violation is alleged. Simply because a supervisor, such as Parker, is transferred or promoted, does not diminish his knowledge of the hazard. His knowledge may still be imputed to the company.

Nor was Parker the only supervisor with knowledge of the hazard. Superintendent Seeyle was almost hit by the stud fragment. Mechanical technician Finley was involved in repeated discussions regarding the hazard and proposed methods for controlling it. Mechanical technician Wayne Bryant, aware of the problem with the flying studs, tried unsuccessfully to obtain advice on removing the hub from its manufacturer, the Erie Press Company. When Bryant was rebuffed, he sought no further (Tr. 104-105). Even Rhodes, who had been Williams' supervisor for 3 or 4 months, and Richard Hill, the night shift maintenance supervisor, were fully aware that when the studs broke, they were erratically propelled into the work area.

A reasonable person having such knowledge would take appropriate precautions. Taping off an area was insufficient. It was insufficient, not only in hindsight, but because Caterpillar had no real basis for determining how large the danger zone should have been. Its "trial and error" approach proved predictably unsuccessful. Although Caterpillar had engineers available within the company, they performed no studies of how, why, or within what parameters studs would break. Likewise, Parker and others knew that employees were

at risk even inside of the taped-off area (for example, Dunn was nearly hit while he operated the crane in 1989).[6]

Having established that Caterpillar had the requisite knowledge of the hazardous nature of the condition, the Secretary has established each of the elements of the § 5(a)(1) violation.

Willful violation

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.g., Williams Enterprises, Inc.,* 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *Id.*

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990).

Caterpillar contends that it did not have a "conscious disregard or plain indifference" to the hazard because it could not have known that the means of abatement chosen by Williams in 1992 were insufficient. Caterpillar emphasizes that it reasonably relied on its skilled tradesman, Williams, to advise his then current supervisor of appropriate safety procedures.

Williams was highly regarded for his expertise. As Rhodes stated:

> Q. You referred to Ron [Williams] as a lead mechanic. Is that a recognized job classification at your plant?
>
> A. No. sir. I referred to him as that because when it comes to presses, he's probably one of the premier mechanics in the world as far as knowledge goes on those types of machines. (Tr. 188)

This knowledgeable employee had made effective suggestions and repeated requests to control the hazard, although not to his new supervisor in 1992. That Williams considered the situation to be dangerous is without doubt. He "was afraid [the stud] would hit

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[6] Even if the crane was hit when cables were tied to the studs, there were enough variables in the procedure to put all employees in the area at risk.

somebody" and he "didn't want to see anybody get hurt" (Tr. 52, 55). Yet, except for taping the area and one attempt to tie cables to the studs, which required no real effort or expense on Caterpillar's part, none of Williams' suggestions and requests were pursued.

Caterpillar would place much responsibility on Williams. However, Williams had no authority to implement his own safety suggestions or even to assure that they were seriously considered. Williams had no continuing duty to suggest abatement measures that were repeatedly rejected by his superiors. How often must an employee be turned down before he considers his recommendations to be futile? As Williams explained:

> Q. . . . go back to that prepulling meeting before the July 1992 pull . . . Why during that meeting did you not raise those issues [of abatement] at that point?
>
> A. You just get tired of asking the same things and you don't get no reply.

Williams' responsibility to make safety suggestions to each new supervisor would exist only if the company had no institutional memory. However Caterpillar conveys information to succeeding supervisors, the company has the responsibility to do so in the safety arena. An employer's memory does not become a blank slate with every supervisory change. Caterpillars' supervisors considered the breaking studs of such little concern that they did not include a notation of it in the pull information which Rhodes reviewed as the new supervisor in charge of the operation (Tr. 184-185).

Further, Caterpillar's claim that it taped an area larger than studs were known to fly, is not accurate. The night shift taped an area approximately 50 feet from the sides of the machine.[7] A stud was known to fly as far as 60 feet, only stopping upon meeting an obstacle. As the day shift found, nothing had been taped off in front of the machine. This "taping off" procedure appeared lackadaisical, as if it didn't really matter to Caterpillar.

Caterpillar limited its efforts to reduce the hazard because it was indifferent to the safety of the pulling procedure. It is significant that Williams kept seeking assistance from

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[7] Based upon his reconstruction of events, night shift supervisor Hill determined that the taped-off area extended approximately twice the distance from where the stud landed, or 50 feet, at the time the night shift performed its work in July 1992 (Tr. 143-144).

his superiors, while those with responsibility over the procedure never initiated any actions. Caterpillar was aware of the magnitude of the hazard. When Caterpillar proceeded with the July 1992 pull utilizing only warning tape and signs, it showed "plain indifference" to the safety of employees working inside and outside of the taped area. The Secretary has established that the violation of § 5(a)(1) was willful.

Penalty

Under 11(j) of the Act, the Commission must give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993).

These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-691, 1992). Gravity includes the severity of a possible injury and the probability of an accident. *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2199, 1991-93 CCH OSHD ¶ 29,945, p. 40,939 (No. 90-329, 1993). The number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that injury would result are considerations in arriving at the gravity of the violation. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1991-93 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993).

The gravity of the willful violation is high. Employees engaged in the hub pull, including the crane operator, those positioning the assembly, and those performing unrelated work in adjacent areas, were directly exposed to the hazard. Although this constituted a limited number of employees, the exposure was heightened because the hazard could occur at any time during the two-week, double shift time frame anticipated to complete the job. The fact that large metal fragments were sporadically propelled through the workplace created a high potential for injury. The ineffective precautions taken against this known hazard are also assessed as a negative factor in the penalty determination.

Caterpillar is a large international manufacturing corporation. It employs 5,000 workers at the East Peoria establishment alone (Tr. 136).

Good faith considerations include Caterpillar's cooperation with the accident investigation and its immediate abatement. However, as evidenced by the willful characterization of the violation, abatement was prompted by an accident, not by its prior knowledge of the hazard.

A computer printout of Caterpillar's past history of OSHA violation at its Peoria facility shows only one serious violation within the previous seven year period (Exh. C-6). OSHA conducted inspections during this time that resulted in either no violation or in nonserious violations. Given the size of the facility, this past history is considered in a positive light. The history indicates that Caterpillar is not a company that has factored in OSH Act penalties as a "cost of doing business."

The statute provides that not more than $70,000 nor less than $5,000 shall be assessed for each willful violation. The Secretary did not provide specifics as to the manner in which he arrived at his proposed penalty. However, considering the employer's large size, the high gravity of the violation, Caterpillar's past history and other factors previously discussed, a penalty of $30,000 is assessed for the willful violation of the general duty clause.

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 on the foregoing decision, it is ORDERED that the willful violation of § 5(a)(1) is affirmed and a penalty of $30,000 is assessed.

NANCY J. SPIES
Judge

Date: August 8, 1994