UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ESPRIT CONSTRUCTORS, INC., Respondent.	:	Docket No. 96-0730
SECRETARY OF LABOR, Complainant, v. C. T. TAYLOR COMPANY, INC., Respondent.	:	Docket No. 96-0731

Appearances: Patrick L. Depace, Esq.
Office of the Solicitor of Labor
Cleveland, Ohio
For Complainant

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For Respondents

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

These consolidated cases arise under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had their joint worksite inspected by a compliance officer of the Occupational Safety and Health Administration, Esprit Constructors, Inc. (“Esprit”) and C. T. Taylor Company, Inc. (“Taylor”) ("Respondents"), were each issued one citation alleging three serious violations of the Act. Respondents timely contested. Following the filing of complaints and answers and pursuant to notices of hearing, the consolidated case came on to be heard in Cleveland, Ohio, on December 3, 4 and 5, 1996. No affected employees sought to assert party status. The parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondents do not deny that they are employers engaged in the construction industry. It is undisputed that at the time of this inspection Respondents were participating in the construction of an addition to a building in Highland, Ohio. Respondents do not deny that they use tools, equipment and supplies which have moved in interstate commerce. I find that both Respondents are engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondents are each employers within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Citation 1, Item 1.
Alleged serious violation of 1926.20(b)(4).[2]

This item of the citation alleges that;

> [t]he employer did not permit only those employees qualified by

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[1] Title 29 U.S.C. § 652(5).

[2] The cited standard, 29 CFR § 1926.20(b)(4), provides, “[t]he employer shall permit only those employees qualified by training or experience to operate equipment and machinery.”

> training or experience to operate equipment and machinery: On or about 11-24-95, employees were allowed to operate the Ingersoll Rand SD-70 roller compactor without being qualified by way of extensive knowledge, training, or experience.

It is undisputed that on or about November 25, 1995 a fatal accident occurred in Highland Heights, Ohio at a construction site. An employee of Esprit was fatally injured after being run over by a piece of heavy construction equipment identified as a roller-compactor. The roller-compactor was, at the time, being operated by Matthew Collier, Project Manager for Taylor.

Taylor was the steel erection sub-contractor on the project and had also contracted to supply laborers for other work at the site. Taylor used employees of Esprit as it usually did on other projects. (Tr. 10-11, 89-91, 151-152, 258, RX - A, RX-CC, p.5). The Esprit laborers were given their work assignments and supervised by Paul Mills, an employee of Taylor. (Tr. 277-278). The Superintendent at the site was Richard Silas, also an employee of Esprit (Tr. 88), who supervised all of the laborers on the site and regarded himself as the highest authority for Esprit on the site. (Tr. 91). Mr. Collier, as project manager for the site, had the duties of management, coordination and overseeing the project and the workforce. (Tr. 9, RX CC, pp. 25-26).

On November 25, 1995 work was being conducted by Esprit employees at ground level at a location where the steel columns and some of the beams were in place but where there were no exterior or interior walls in place. They were in the process of spreading and compacting stone. In order to accomplish this, they had to remove mud and water which had accumulated as a result of recent rain. An employee of Esprit, Mr. Don Nealy, was assigned to pump water out of various holes and depressions. In doing so, Mr. Nealy was using a sump pump owned by Taylor. Mr. Collier visited the worksite on that day, the Friday after Thanksgiving. For some time that morning Mr. Collier was accompanied by Mr. Sias. After Mr. Sias left the area to go to the construction trailer in order to answer a page, Mr. Collier got up on the roller-compactor to move it. In the process of moving the machine, Mr. Nealy was struck.

Based upon the accident and information later gathered by its Compliance Officer, OSHA alleges that Mr. Collier was not qualified to operate the roller as required by the cited standard.[3] The

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[3] The specifics surrounding the fatality were, unfortunately, focused upon by the parties in (continued...)

issue in this matter is whether Mr. Collier was, at the time he operated the roller-compactor on or about November 25, 1995, "qualified" as required by the cited standard. Because Mr. Collier was not a qualified operator of heavy equipment under Taylor's own scheme of vetting and testing equipment operators, it is held that he is not so considered for the purposes of the cited standard.

Both parties make much of the detailed testimony regarding Mr. Collier's past experiences growing up on a farm, the relationship of his experience operating farm equipment to the operation of the roller-compactor and numerous other factors which might lead to findings regarding the degree of Mr. Collier's knowledge and experience as an equipment operator. These facts are, at most, peripherally relevant and of little weight either way. I conclude that it is determinative that Taylor had instituted and maintained a system of screening and identifying those employees it regarded as qualified to operate such equipment. Taylor prepared a list of qualified operators. It made various additions, deletions and changes to the list. Mr. Collier was not on that list. Thus, by Taylor's own criteria, Mr. Collier was not qualified to operate the machine which he mounted and moved.

This is not a case in which particular operators were assigned to and operated only one piece of equipment each day. On Taylor projects it was commonplace for a number of different employees to operate various different pieces of equipment intermittently throughout the day. (Tr. 67-68). For this reason Taylor maintained a list of qualified operators. Mr. Collier was aware that there was a

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[3](...continued)
preparation for and during the course of the hearing. As the Commission noted in a very similar decision:

> Whether [the equipment operator's] failure to set the brakes during such duties was the causal agent of the death of a member of that crew need not be addressed here. A finding of noncompliance need not be predicated on the accuracy of a *post-hoc* accident analysis, and it is not necessary that an established instance of noncompliance have been the causative agent of injuries. We emphasize that our inquiry is directed to the question of whether [the equipment operator] was 'qualified' within the contemplation of 29 CFR § § 1926.20(b)(4) and 1926.32(1). [The operator's] actions during any particular operation are referenced here solely as evidence tending to show whether or not he 'successfully demonstrated his ability to solve or resolve problems' relating to the operation of the 3616D tractor.

Herbert Vollers, Inc., 4 BNA OSHC 1798, 1801, n.6 (No. 9747, 1976)(Citations omitted.)

list of qualified operators maintained by Mr. Mills and that he was not on the list. (Tr. 24). He never requested to be placed on the list. He was never tested for his competency in operating a roller-compactor (Rx. CC, p. 30). There is evidence that no supervisory or management person of either Esprit or Taylor had, prior to the day he operated the roller, ever seen Mr. Collier operate the equipment. (Tr. 23, 96, 266). Mr. Sias knew of the list. He also knew that the list identified employees Esprit considered qualified to operate heavy equipment, that those on the list were there by reason of their training, experience and job performance and that the purpose of the list of qualified operators was supposed to control who operated such equipment at the work sites. (Tr. 97-98.) The list of qualified operators was "readily available" and was generally posted at the work site. (Tr. 130-131). The list (Ex. G-3) was prepared by Mr. Mills who described as its purpose, "to notify the field personnel that the only people that should be on equipment should be [those] on this list..." (Tr. 264). He prepared the list of who was authorized to operate heavy equipment based upon his evaluation of a persons background and training and by observing their operation of the equipment. (Tr. 264-265). Mr. Mills did not know if Mr. Collier had any training on the equipment and had never observed his operation of it. Mr. Collier's name was never on the list of qualified operators. There is no doubt on the evidence on this record that under the system maintained by Taylor, Mr. Collier was not qualified to operate the roller-compactor.[4]

Respondent's argument that industry custom and practice must be considered in order to define obligations imposed by a broad, generally worded standard, while perhaps correct in the abstract, has no application under the facts in this case. It is rejected in its entirety. Whatever "qualified" might mean to a reasonable person in the general construction industry is not relevant here. Respondent's arguments now regarding industry custom and practice as well as the degree of Mr. Collier's experience and training are merely *post hoc* rationalizations.

The absence of Mr. Collier's name from the list of qualified operators is conclusive evidence that no determination that Mr. Collier was qualified to operate the equipment was ever made. By listing and identifying to everyone working on the site those employees who were qualified to operate

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[4] In addition to the well known qualified operators list, there is also a provision in both Respondents' safety programs which states: "[t]hose operating special purpose vehicles must successfully demonstrate competency in operating specific vehicles...." (GX-4, p.7).

heavy equipment, Respondents had thus also determined, or at least necessarily implied, that persons not listed were considered unqualified.[5] I thus conclude that Mr. Collier was an "unqualified individual" within the meaning of the cited standard. Mr. Collier's operation of the equipment was thus in violation of the requirements of the cited standard.

Since Taylor had supervisory control over Mr. Collier, Taylor and Esprit had control over working conditions at the site in general and Esprit had control over its own employees at the site, both Respondents are responsible under the Act. Under the Act employees are considered to be exposed wherever, within reasonable predictability, they were within the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.,* 504 F. 2d 1255, 1263 (4th Cir. 1974), *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 14909 (No. 3042, 1976); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). See also, *Jefferson Smurfit Corp*., 15 BNA OSHC 1419, 1421 (No.89-0553, 1992). Given the dangers of an unqualified operator running a piece of heavy machinery, I find that there was exposure of employees of both Respondents in that each had employees at the site who could have been or were in the vicinity of the roller-compactor when operated by Mr. Collier. Indeed, Mr. Collier himself was exposed to hazards by his own operation of the roller-compactor.

I also find that both Respondents knew or should have known of the violative condition. As a Taylor supervisory employee, Mr. Collier's unqualified operation of the roller-compactor is imputed to Taylor. Mr. Silas credibly testified that he was unaware that Mr. Collier intended to operate the roller-compactor on the day of the incident. (Tr. 133-134). Nonetheless, Mr. Silas was fully aware that he had shown Mr. Collier how the machine operated; that it was normal procedure for equipment to be operated by a number of different employees depending upon which employee was available; that time was of the essence that day; and that he was leaving the area to answer a page while Mr. Collier was remaining behind. Respondent's policy of equipment being operated by a number of

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[5] Respondent's contentions as to the applicability of the Commission decision in *Herbert Vollers, Inc.,* 4 BNA OSHC 1798 (No. 9747, 1976), and that the term "qualified" can be defined only under 1926.20(b)(4) and not under 1926.32(m), are both rejected in light of the determination above. Similarly, the opinions of the experts offered by both parties are of virtually no probative weight because Taylor itself had made the determination that Mr. Collier was not qualified to operate heavy equipment.

different people at different times, coupled with the maintenance of a list of qualified operators put all supervisory personnel on notice that operation of equipment by any person other than the listed qualified operators was unauthorized. Both Respondents knew or reasonably should have known that operation of the roller-compactor by a person other than a qualified operator was taking place.

Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.,* 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied,* 639 F.2d 772 (3d Cir. 1980). It is reasonable to infer that equipment weighing several tons moving about a construction site with numerous people on the ground in the vicinity clearly poses the likelihood of serious harm or death.

Respondent Esprit maintains that it has established the "multi-employer work site defense" by demonstrating each of its elements, *i.e.,* that (1) it did not create the hazardous condition, (2) did not control the violative condition such that it could have realistically abated the condition, and (3) took reasonable alternative steps to protect its employees. *Anning-Johnson Co.,* 4 BNA OSHC 1193, 1198 (No. 3694, 1976). The argument is rejected.

While Esprit may not have had control over Mr. Collier as he was an employee of Taylor, it has failed to show by a preponderance of the evidence that it took reasonable alternative steps to protect its workers. In this regard, Esprit relies solely on the fact that most of its workers had undergone the OSHA 10-hour course. Esprit did not show that every employee on the site at the time took the course nor that the course was a reasonable alternative. In addition, the claim by both Respondents that it could prevail by showing that the victim of the accident violated known company rules is rejected. The violations alleged in items 1 and 2 refer to the conduct of Mr. Collier.

For the above reasons, I find that Respondents violated the cited standard as alleged in Citation 1, Item 1 and that the violation was serious. Item 1 is thus AFFIRMED.

Citation 1, Item 2.
Alleged serious violation of 29 CFR § 1926.95(a).[6]

The citation alleges;

> Appropriate personal protection was not used by employees in all operations where there was exposure to hazardous conditions: Although the Ingersoll Rand roller compactor, model #SD-70 and serial number 5206-S, was equipped with beat belts, employees did not use the seat belts.

The alleged violation arises out of the undisputed fact that neither Mr. Collier nor at least two others who operated the roller-compactor used the seat belt while operating the equipment. (Tr, 19, 187, 212). Other employees indicated that they did not always have the seat belt on when operating the same equipment. One stated that he did not use the belt primarily when operating in reverse because doing so required him to be in a standing position in order to obtain an effective view. (Tr, 186, 206). One operator, Mr. Cooper, essentially conceded that he understood that the seat belt was supposed to be worn but that under the circumstances at that site, "pretty flat" terrain and with the operators "jumping from one machine to the roller," the seat belt was not used. (Tr. 215). Mr. Cooper also indicated that he had not operated that particular roller in a standing position. (*Id.*) Several employees opined that the site in general was so level as not to present a roll-over hazard for the roller compactor. (Tr. 189-190) or that the even if the roller went into one of the depressions surrounding the columns, the depth would not be sufficient to tip the roller over (Tr. 117, 193). Based upon the above testimony, I find that, as a matter of fact, that operators of the roller-compactor did not consistently use the seat belt. I further find that they were permitted to exercise

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[6] The standard cited, 29 CFR § 1926.95(a), states:

> (a) "Application." Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

their discretion in its use, and did not use it in three circumstances; when they felt too busy to do so, when moving in reverse so they could drive in a standing position for a better view or when they felt that the ground was level enough as to preclude a tipping hazard.

The cited construction industry standard originated with the general industry standard at 29 CFR § 1910.132(a) which is identical and under which the Commission has held that seat belt are "personal protective equipment." *Ed Cheff Logging*, 9 BNA OSHC 1883, 1888 (No. 77-2778, 1981). The standard thus applies.

Under this broadly worded standard, the Secretary must show by a preponderance of the reliable evidence that there were "hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered" so as to trigger the requirement to use personal protective equipment. The Commission has stated;

> the test for determining whether a hazard exists requiring personal protective equipment....is whether the employer had actual notice of a need for protective equipment or whether a reasonable person familiar with the particular industry would recognize such a hazard.

Con-Agra Flour Milling Co., 16 BNA OSHC 1137, 1140 (No. 88-1250, 1993)("*Con Agra*") (Citations omitted.) The "hazard" must be shown by the Secretary to be more than merely speculative, but must be one based on "foreseeability" and must be a "condition[s] *likely* to lead to injury." *Con Agra,* 16 BNA at 1141. (Citations omitted.) In this case, I find that the Secretary has shown by a preponderance of the reliable evidence of record that Respondents were under actual notice that the seat belt was required be worn by the operator of the roller-compactor at all times while operating the machine.[7]

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[7] Since the evidence shows that Respondents were on actual notice that seat belts were required to be used by operators of the roller-compactor at all times, issues regarding the industry recognition of a hazard requiring roller-compactor operators to use seat belts and questions of the likelihood of tipping or roll over of the machine are moot.

It is noted, however, that were such issues resolved herein, the testimony offered by William Bunner as an expert would be considered to be of little moment. There is no question that his education and experience qualify him as an expert. Nonetheless, several factors, taken together, mitigate against assigning any significant persuasive weight to his opinions. Mr. Bunner's business interests as safety director and manager of litigation for another employer recently found to be in violation of the same standard provides a strong basis for a possible bias. In addition, Mr. Brunner's

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As evidence that Respondents were actually aware that seat belt use was required at all times on the roller-compactor, the Secretary relies on the Construction Industry Manufacturers Association manual for rollers (GX-7), The Construction Equipment Operation & Maintenance Manual prepared by the manufacturer of the roller-compactor, Ingersoll-Rand (GX-6), a warning decal on the roller-compactor (GX-5), materials supplied to Respondents' employees who attended an OSHA "10 Hour Course" (RX-M) and Taylor's own Safety and Health Program (GX-4). These materials demonstrate that Respondents had actual notice that the seat belt was required to be used at all times by the roller-compactor operator. The two equipment manuals, one prepared by the equipment manufacturers trade association and one by the manufacturer of this specific machine, unequivocally state that the seat belt is required to be used at all times when operating this roller-compactor.[8] The warning decal relied upon by the Secretary is, on this evidentiary record, of little probative weight. The most that can be said of the evidence of record is that the decal affixed to the roller-compactor apparently provided a similar warning. Exhibits showing the decal (GX-5, RX-B), and the testimony as to its contents (Tr. 334) are less than clear as to whether the decal specifically states that the seat belt is to be used at all times or are references to the dangers of using the machine on or near inclines. Similarly, relying on materials given to Respondents' employees who attended a basic 10-hour OSHA course as having provided actual notice of the requirement to use the roller-compactor's seat belt at all times is of relatively little probative value. Although most Esprit employees have apparently attended the 10-hour course,[9] and "safety around construction vehicles" was discussed during the

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[7] (. . . continued) opinion that the use of the seat belt on the roller-compactor was not required except on an incline is rejected. He provided no basis for that opinion other than his own experience and that conclusion is directly contradicted by reliable and highly probative industry evidence in this case. (GX-6 and 7).

[8] "Always use seat belts if your machine is equipped with a ROPS [rollover protection structure]." (GX-7). "When using a compactor with ROPS, seat belts and other OSHA required safety equipment must be worn." (GX- 6). It is undisputed that the machine involved in this case was equipped with ROPS.

[9] Respondents have been especially diligent in having employees attend an "OSHA 10-hour" course as well as a supervisors refresher course. See, Tr. 416.

course,[10] even a preliminary perusal of the course "manual" cited by the Secretary (RX-M) demonstrates that is a mass of material far too large and complex to consider as giving effective notice of specific hazards to its recipients. (See, Tr. 418, ll. 6-10). At best, the manual could be regarded as a reference tool for the participants in the course. Most important as evidence that Taylor actually knew that the roller-compactor seat belt was required to be worn by its operator at all times is Respondent's own Safety and Health Program (GX-4). Even though the written program is far reaching and complex, it carries much more evidentiary weight on this issue than does the 10-hour OSHA course manual because the program is unique to Taylor and Esprit, is designed specifically as information for Taylor's and Esprit's employees and is written in a far more easily understood fashion,[11] Moreover, the safety program, in addition to general admonition that seat belts are to be worn "when driving/traveling on company business" (GX-4, p.7), contains highly specific requirements that seat belts are required to be used "on ALL mobile equipment...includ[ing] dump trucks, graders, dozers, earth movers, etc." (GX-4, p.5, ¶ k)(Emphasis in original). In addition, Respondent's own safety program's "Job Safety & Health Checklist For Construction" which is "...intended to identify the common hazards in the industry" (GX-4, p.40) notes very specifically that seat belts are to be worn on all equipment on which rollover protection is installed. (GX-4, p.43). The sum of the evidence is that Respondents had actual notice that seat belt use by operators of the roller-compactor was required at all times the machine was in operation.

Given the fact that several people who operated the roller-compactor were either management level officials or did so in an open, notorious and repeated manner in the presence of management or, at least, where they could have easily been observed by supervisors and superiors, I find that both employers knew or had a reasonable basis to know that operators of the roller-compactor were running the equipment without using the seat belt.

That employees were exposed to the hazard arising from non-compliance is not disputed.

Failure to use a seat belt on the roller-compactor is a serious violation. Even on relatively level terrain, sudden stops or changes in speed or direction create the possibility that an operator

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[10] Tr 418.

[11] Although the program, GX-4, is identified as Taylor's program, the record shows that it was equally applicable to Esprit. (Tr. 267).

would be thrown from the machine. An equipment operator thrown to the ground forcefully and suddenly at a busy construction site would be at considerable peril even if only dazed or disoriented but not severely injured by the fall itself. Such an event would create a substantial probability that death or serious injury could result.

The affirmative defenses raised are rejected for the reasons discussed in regard to Item 1, *infra.*[12]

For the above reasons, I find that both Respondents violated the cited standard as alleged in Citation 1, Item 2 and that the violation was serious. Item 2 is thus AFFIRMED.

Citation 1, Item 3.
1926.404(f)(7)(iv)(C).[13]

The citation alleges:

> Exposed noncurrent-carrying metal parts of cord and plug-connected equipment which could become energized were not grounded when the equipment was one of the types listed in 29 CFR

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[12] In this regard, Respondents' comment when discussing penalties that the use of the safety belt would have created a "greater hazard" (Resp. Brief, p. 30) is a "throw away." The defense is not raised in Respondents' answers nor developed at the hearing or in the post-hearing brief.

[13] The cited standard, 29 CFR § 1926.404(f)(7)(iv)(C), provides:

> (f) *Grounding*. Paragraphs (f)(1) through (f)(11) of this section contain grounding requirements for systems, circuits, and equipment.
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> * * *
>
> (7) *Supports, enclosures, and equipment to be grounded* -
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> * * *
>
> (iv) *Equipment connected by cord and plug*. Under any of the conditions described in paragraphs (f)(7)(iv)(A) through (f)(7)(iv)(C) of this section, exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded:
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> * * *
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> (C) If the equipment is one of the types listed in paragraphs(f)(7)(iv)(C)(1) through (f)(7)(iv)(C)(5) of this section. However, even though the equipment may be one of these types, it need not be grounded if it is exempted by paragraph (f)(7)(iv)(C)(6).

> 1926.404(f)(7)(iv)(C)(1) through (C)(5): The Tsurumi model #LB-400 submersible sump pump, serial number B-684246, was not grounded by virtue of having its ground prong missing.

The cited standard applies to the types of electrical equipment described in 29 CFR 1926.404(f)(7)(C)(1) through (c)(5).[14]

The facts surrounding this alleged violation are not in dispute. The sump pump being used was a cord and plug connected piece of equipment being used in a wet location. It was not supplied with an isolation transformer nor was it double insulated. It was required to be properly grounded which it was not. It was, however, protected by a ground fault interrupter.

The Secretary concedes that the hazard which the standard is intended to eliminate is that of electrical shock. The Compliance Officer admitted that the use of a ground fault interrupter circuit ("GFIC") circuit provided the same shock protection as would proper grounding. (Tr. 358).

On this evidence, the standard is found to be applicable, the violative or non-complying condition has been established, and at least one employee (Nealy) was exposed. Given the Compliance Officer's testimony as to the lack of shock hazard by using a GFIC and the lack of a showing of any other serious hazard arising as a result of the removal of the "third prong" on a plug[15],

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[14] Title 29 CFR § § 1926.404(f)(7)(C)(1) through (C)(5) provide:

> {1} Hand held motor-operated tools;
> {2} Cord- and plug-connected equipment used in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or boilers;
> {3} Portable and mobile X-ray and associated equipment;
> {4} Tools likely to be used in wet and/or conductive locations;
> {5} Portable hand lamps.

The exemption, 1926.404(f)(7)(iv)(C){6}, states:

> {6} Tools likely to be used in wet and/or conductive locations need not be grounded if supplied through an isolating transformer with an ungrounded secondary of not over 50 volts. Listed or labeled portable tools and appliances protected by a system of double insulation, or its equivalent, need not be grounded. If such a system is employed, the equipment shall be distinctively marked to indicate that the tool or appliance utilizes a system of double insulation.

[15] The Compliance Officer's testimony that "the tendency many times on construction sites is to disconnect the ground fault protection..." (Tr. 342) is, at best, speculative in regard to the work

(continued...)

this alleged violation has not been shown to be reasonably likely to result in death or serious injury. It is thus properly classified as other-than-serious.

For the above reasons, I find that Respondents violated the cited standard as alleged in Citation 1, Item 3 and that the violation was other-than-serious. Item 3, as so modified, is thus AFFIRMED.

PENALTIES

The Commission has often held that in determining appropriate penalties for violations, "due consideration" must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include; the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." *J.A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) The Secretary is under an obligation to present evidence for the record as to the penalty factors and explain how she arrived at the penalty proposed. The Administrative Law Judge should set forth the weight assigned to each of the four factors. *Valdek Corp.* 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995).

Respondents argue that only one penalty for each violation is appropriate because Taylor and Esprit were operating as an integrated operation. This argument does not withstand scrutiny. First, Respondents raise the argument for the first time in the post-hearing brief. It was not identified prior to the hearing in their pre-hearing statement of issues. The issue was not identified during the hearing thus was not tried by consent. Moreover, Taylor and Esprit are, by their own design separate legal entities with separate employees. They are individual employers. Each agreed in its separate answer to the Secretary's complaints that it was an employer. Finally, there is no bar to citing and penalizing more than one employer for a single violation. It is a practice long ago approved by the commission. *Anning-Johnson, Co.*, 4 BNA OSHC 1193 (No. 3694, 1976); *Grossman Steel & Alum. Corp.,* 4

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[15](...continued)
site cited here. Another witness' statement regarding a possible spark hazard is pure speculation and unrelated to any demonstrated conditions.

BNA OSHC 1185 (No. 12775, 1976) (Consolidated cases.).

The Secretary's explanation of how the amount of the penalties proposed were arrived at is short and conclusory. (Tr 345-347). The Secretary's post hearing briefs elaborate somewhat. (Sec. brief, Pp. 45-47).

Respondent Taylor employs approximately ten to twenty employees while Esprit employs approximately 90 employees.

As to Item 1, the gravity is considerably lower than the Secretary claims. The claim that "an employee died as a result of the violation" (*Id.,* at p. 45) is without foundation in the record in this case. Having a unqualified operator running a piece of heavy equipment on a busy construction site could reasonably be expected to result in death or serious injury in the general sense. It has not been shown to have been the proximate cause of death on this record. There is precious little other evidence as to the number or frequency of employee exposure. Indeed, the scant evidence is that Mr. Collier operated the roller-compactor for only a short period of time during which the number of employees in the vicinity or zone of danger is unknown on this record. Thus, it is reasonable to find that the "gravity" is moderate because while the consequences would be severe, the extent and duration of employee exposure is not shown to be notable.

The evidence regarding the gravity of Item 2, is also rather minimal. There is no evidence that the failure of the roller-compactor operator to use the seat belt poses a significant risk to anyone other than the operator. While the result of an operator being tossed or thrown from the machine is serious as to the operator, the frequency or duration of the risk is not addressed by evidence on this record. Thus, the gravity of this violation is, on this record, considerably less than that claimed by the Secretary.

Item 3, which has been found to be an other-than-serious violation does not warrant the imposition of any monetary penalty. Gravity is virtually nil in that the hazard was effectively eliminated by another means (GFIC). Here, gravity is clearly the primary element.

With the Compliance Officer conceding that the good faith element requires "some subjective judgment," (Tr. 344), the Secretary relies solely on his statement that "no answers were forthcoming except through [counsel]" (*Id.*) for affording neither Respondent any "credit" for good faith. This admittedly subjective judgment seems rather harsh. Requesting a compliance officer to direct

requests to counsel is not, by itself, indicative of a lack of good faith. There is no evidence that Respondents delayed or in any way restricted or impeded the investigation. The Compliance Officer in fact indicated that some of the Complainant's evidence was supplied by Respondent's counsel. In addition, Respondents' efforts and expenditures in employee training and identifying potential hazards at its work locations is indicative of efforts at compliance with the Act. Accordingly, I find that the Secretary did not show that Respondents have exhibited a lack of or limited good faith.

History is another matter. It is undenied on this record that both Respondents have a history of prior serious violations under the Act. The fact that Respondents had "gone to trial" on prior citations is irrelevant to their good faith.

Under the above circumstances and considering that the range of penalties which can be assessed for a serious violation of the Act is up to $7,000, I find the following penalties to be appropriate:

Respondent Esprit Constructors, Inc. (No. 96-0730)

Item 1: $ 1000

Item 2: $ 500

Item 3: $ 0

Respondent C.T. Taylor, Inc. (No. 96-0731)

Item 1: $ 1500

Item 2: $ 750

Item 3: $ 0

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

Conclusions of law applicable to both Docket Nos. 96-0730 and 96-0731:

1. Respondents were, at all times pertinent hereto, employers within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondents were in violation of section 5(a)(2) of the Act in that they failed to comply with the standards as alleged in Citation 1, Items 1, 2 and 3.

4. The violations of the standards cited in Items 1 and 2 were serious.

5. The violations of the standard cited in Item 3 was other-than-serious.

Conclusion of law applicable to Docket No. 96-0730:

6. Penalties of $1000, $500 and $0 are appropriate, respectively, for the violations of the of the standards cited in Items 1, 2 and 3.

Conclusions of law applicable to Docket No. 96-0731:

7. Penalties of $1500, $750 and $0 are appropriate, respectively, for the violations of the of the standards cited in Items 1, 2 and 3.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

Docket No. 96-0730

1. Items 1 and 2 of Citation No. 1 are AFFIRMED as SERIOUS violations of the Act. Penalties of $ 1000 and $ 500, respectively, are assessed.

2. Item 3 of Citation No. 1 is AFFIRMED as an OTHER-THAN-SERIOUS violation of the Act. A penalty of $ 0 is assessed.

Docket No. 96-0731

1. Items 1 and 2 of Citation No. 1 are AFFIRMED as SERIOUS violations of the Act. Penalties of $ 1500 and $ 750, respectively, are assessed.

2. Item 3 of Citation No. 1 is AFFIRMED as an OTHER-THAN-SERIOUS violation of the Act. A penalty of $ 0 is assessed.

Michael H. Schoenfeld,
Judge, OSHRC

Dated:

Washington, D.C.