United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BURFORD'S TREE, INC., Respondent.	OSHRC Docket No. 07-1899

APPEARANCES:

Edmund C. Baird, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; Carol A. Dedeo, Deputy Solicitor of Labor for National Operations; U.S. Department of Labor, Washington, DC
For the Complainant

J. Larry Stine, Esq., Mark A. Waschak, Esq., and Elizabeth K. Dorminey, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, P.C.; Atlanta, GA
For the Respondent

DECISION

Before: ROGERS, Chairman; and THOMPSON, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

Burford's Tree, Inc. ("BTI"), an Alabama-based company, performs utility right-of-way clearing—including mowing—for various power companies throughout the Southeast. On June 27, 2007, a BTI employee was killed when a mowing device attached to the tractor he was operating struck him after he was thrown from the tractor cab. As a result of the accident, the Occupational Safety and Health Administration ("OSHA") inspected the worksite and issued BTI a citation alleging a serious violation of section 5(a)(1) of the Occupational Safety and Health Act ("general duty clause"), 29 U.S.C. § 651-678 ("OSH Act")[1] based on the deceased

[1] Section 5(a)(1) states that each employer:

employee's failure to wear a seatbelt.[2] OSHA proposed a penalty of $7,000 for the alleged violation.

After a hearing, Administrative Law Judge Ken S. Welsch issued a decision finding that the Secretary had proven the elements of a general duty clause violation, including constructive knowledge. He vacated the citation, however, because he found BTI established that the deceased employee's failure to wear the seatbelt was the result of unpreventable employee misconduct. For the following reasons, we reverse the judge's decision and affirm the citation.

ISSUES

On review, the Secretary contends that the judge erred in finding BTI established unpreventable employee misconduct because the record shows the company failed to adequately monitor or enforce its work rules regarding the inspection of seatbelts. She further contends that these shortcomings in BTI's safety program establish constructive knowledge of the violation.[3] In response, BTI claims that it not only "had the right policies . . . and enforced those policies vigorously," but it also "took all feasible precautions 'including adequate . . . supervision of [its] supervisor."[4]

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .

29 U.S.C. § 654(a)(1).

[2] The citation also included a second item alleging a violation of 29 C.F.R. § 1910.269(b) that was withdrawn by the Secretary at the beginning of the hearing.

[3] There is no dispute that BTI lacked actual knowledge of the violative condition.

[4] BTI also maintains that the judge erred in rejecting its claim that 29 C.F.R. § 1910.178, a provision of the powered industrial truck standard, preempts the general duty clause allegation here. "[I]n order for a specific standard to preempt the general duty clause . . . the standard must be addressed to the particular hazard for which the employer has been cited under the general duty clause." *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980) (finding no preemption of general duty clause citation where standards did not address the crushing hazard at issue). Here, it is undisputed that the standard in question incorporates ANSI B56.1-1969, which does not require seatbelts. However, an October 9, 1996 memorandum to OSHA Regional Administrators states that although seatbelts are not required under ANSI B56.1-1969 as incorporated by 29 C.F.R. §1910.178, "employers are obligated to require operators of powered industrial trucks which are equipped with . . . seat belts to use the devices. OSHA should enforce the use of such devices under Section 5(a)(1) of the OSH Act." *See* Memorandum from John B. Miles, Jr., Directorate of Compliance Programs, to Regional Directors (October 9, 1996),

The issues on review are: (1) whether the Secretary established that BTI had constructive knowledge of the violative condition; and (2) whether BTI established the affirmative defense of unpreventable employee misconduct.[5]

FINDINGS OF FACT

On the day of the accident, BTI assigned a two-man crew to mow a utility right-of-way in a hilly off-road area near Wedowee, Alabama. To mow the area, the deceased employee operated a tractor with a mowing device, known as a "bush hog," attached. He was killed when the bush hog ran over him. His fellow crew member, foreman Michael Mitchell, was in a truck about a quarter mile away and did not observe the accident. Rodney Walker, a reserve deputy, arrived at the worksite within an hour of the accident. According to his undisputed testimony, the tractor had gone off a dirt road and rolled over, apparently ejecting the deceased employee from the tractor cab onto the ground. The record shows, as the judge found, that the seatbelt on the tractor had been inoperable for some time before the day of the accident. Both Walker and the OSHA compliance officer who inspected the worksite six days after the accident made this determination, which is corroborated by photographs of the seatbelt admitted into evidence.

BTI required foreman Mitchell to perform daily inspections of the tractor seatbelt to assess its operability and submit weekly Tractor Safety Inspection Reports ("Reports") to BTI's safety department documenting his daily inspections.[6] Mitchell, however, did not inspect the tractor's seatbelt on the day of the accident, nor had he inspected it during the preceding six-month period. Nonetheless, he submitted weekly Reports to the safety department over this six-month period indicating that he had inspected the seatbelt every day.

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http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22277.

[5] None of the four elements required to establish a general duty clause violation are in dispute on review. *See generally PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008) (noting that "[t]o establish a violation of section 5(a)(1), the Secretary must demonstrate that (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.")

[6] Although the Tractor Safety Inspection Report does not specifically include "seatbelts" on the list of items to be inspected, BTI personnel informed the OSHA compliance officer that seatbelts fell within the "accessories" category.

Monitoring compliance with BTI's safety program, including ensuring that seatbelts are operable, is also the responsibility of the company's safety department. BTI safety director Dennis Jones and his staff conduct field audits, which include determining whether personal protective equipment such as seatbelts are being worn.[7] The safety department is also responsible for reviewing weekly Reports like those submitted by Mitchell. Monitoring to ensure that seatbelts are operable is also conducted by BTI's general foremen, including James Varnon, who was responsible for supervising foreman Mitchell.

I. KNOWLEDGE

PRINCIPLES OF LAW

To establish a violation of the general duty clause violation, the Secretary must prove, in addition to the four elements not in dispute here, that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 (No. 86-360, 1992) (consolidated case); *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007). "Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003).

An employer's obligation to inspect its workplace for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Hamilton Fixture*, 16 BNA OSHC 1079, 1087 (No. 88-1720, 1993) (citation omitted), *aff'd without published opinion*, 28 F.3d 213 (6th Cir. 1994).

ANALYSIS

In finding that BTI established the affirmative defense of unpreventable employee misconduct and vacating the citation, the judge primarily relied on the field audits conducted by BTI's safety department, general foreman Varnon's worksite inspections, and BTI's requirement that foreman Mitchell perform daily inspections of the tractor's safety equipment and submit weekly Reports to BTI. Based on our review of this evidence and the remainder of the record,

[7] Although the audit forms used by the safety department do not specifically include "seatbelts" on the list of personal protective equipment to be checked, Jones specifically testified that seatbelts fell within that topic.

we discern no basis for such a finding. Instead, we find that BTI failed to exercise reasonable diligence in monitoring the operability of the tractor's seatbelt during the six months prior to the accident, which established the company's constructive knowledge of the seatbelt's inoperability over a significant period of time and, therefore, its inability to be worn.

Although foreman Mitchell was required to inspect the operability of the tractor's seatbelt on a daily basis, he admitted failing to do so for almost six months up to and including the day of the accident. He also admitted to filing weekly Reports that incorrectly indicated he had conducted these daily inspections. As the judge found, if Mitchell had inspected the seatbelt, he would have known that it was inoperable and could not have been worn by the deceased. Furthermore, neither general foreman Varnon nor safety director Jones made adequate efforts to monitor Mitchell's compliance with this daily inspection requirement or otherwise monitor the operability of the seatbelt. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993) (noting that employer must take reasonable steps to monitor compliance with safety requirements).

Varnon monitored about twenty crews of up to four men "at least twice[]a week, sometimes more[,]" over an area of Alabama that extended about 100 miles in each direction. By his own admission, his worksite inspections involved "be[ing] observant, as far as safety" and otherwise making sure the crews "[kept] their equipment up," but his time during these 30-minute visits was largely spent performing administrative tasks, such as dropping off paychecks. *Cf. N.Y. State Elec. & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000) (finding safety program adequate where, in addition to supervisory surprise audits, foreman inspected each site for safety compliance twice a day and spent thirty to forty minutes at each visit). Varnon also admitted that he could not tell if crews were wearing seatbelts when "they [were] inside that [tractor] cage and they're running." As a result, he had never observed Mitchell or the deceased employee without a seatbelt or otherwise detected an inoperable seatbelt when they were operating the tractor.

The monitoring conducted by safety director Jones was equally lacking. Jones and his one field inspector were responsible for approximately 900 employees across five states. With as many as "three or four hundred" crews in the field on any given day, safety director Jones "had no idea" how often a particular crew was audited by BTI's safety department. Either Jones or the field inspector performed an audit "[i]n each general location" only once a week, but Jones

did not know the last time his department had audited Mitchell's crew in the field. *Cf. Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182-83 (Nos. 00-1268, 2003) (consolidated) (finding safety program adequate where supervisors visited each work site at least once a day and safety manager visited ten to fifteen sites a week). Moreover, these audits were cursory at best, involving only a brief walk-around inspection of the tractors from several feet away.

Jones's audits of Mitchell's weekly Reports were similarly limited. Jones only investigated problems when they were noted and Mitchell's incorrect Reports never mentioned any such issues. *See Hamilton Fixture*, 16 BNA OSHC at 1094 (finding that unsubstantiated "checklist inspections" show lack of reasonable diligence). Consequently, neither Mitchell's alleged inspection of the seatbelt nor his Reports confirming the operability of the seatbelt received any oversight. *See L.E. Myers Co.*, 16 BNA OSHC at 1042 (No. 90-945, 1993) (finding safety program inadequate, in part, because company safety officials failed to monitor supervisor's adherence to safety rules during "the month or more" he was assigned to cited worksite). In sum, of the three BTI employees charged with monitoring the operability of seatbelts, Mitchell never checked the tractor's seatbelt over the course of six months, Varnon was unable to determine whether seatbelts were operable because he was unable to see into the cab of the tractor during his worksite visits, and Jones had no recollection of when a safety audit of Mitchell's crew was last performed.

Finally, the judge relied upon BTI's claim that its employees knew they were subject to discipline for work rule violations and could shut down an operation "if [they] perceive[d] a safety violation." An employer cannot, however, "shift [responsibility to comply with 5(a)(1)] to employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe." *Armstrong Cork Co.*, 8 BNA OSHC at 1074. And BTI cannot fulfill its duty of rendering its workplace free of the hazard solely by relying on its employees to report that seatbelt equipment was inoperable.

For these reasons, we conclude that the Secretary established that BTI had constructive knowledge of the cited condition.[8]

[8] In his decision, the judge found that the Secretary had established knowledge of the violation by imputing the constructive knowledge of foreman Mitchell. Given our conclusion that BTI's failure to monitor the operability of seatbelt equipment supports a finding of constructive

II. UNPREVENTABLE EMPLOYEE MISCONDUCT

To establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that "(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered." *Danis Shook Joint Venture XXV*, 19 BNA OSHC at 1502. The Commission has considered these same factors in evaluating both an employer's constructive knowledge and the merits of an employer's unpreventable conduct affirmative defense. *Id.* at 1503 (finding that employer's affirmative defense of unpreventable employee misconduct failed "for largely the same reasons upon which [the Commission] base[d] [its] finding of constructive knowledge of the violation at issue"; the employer failed to establish and adequately communicate a work rule that was designed to prevent the hazard).

As we have found, the record shows that BTI failed to adequately monitor compliance with its requirement that the operability of seatbelts be inspected on a daily basis. These findings also establish that BTI failed to prove the violation was the result of unpreventable employee misconduct. *Id.* Accordingly, we affirm the citation.

III. CHARACTERIZATION AND PENALTY

The seriousness of the affirmed violation is evident given the deceased employee's accident. *See, e.g., Sweetman Const. Co.*, 3 BNA OSHC 2056, 2058 (No. 3750, 1976) (finding serious violation where an employee was thrown from a cab and killed while operating earth moving equipment in uneven terrain without a seatbelt). Moreover, BTI has not challenged the serious characterization of this violation. *See KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming judge's serious characterization where parties did not dispute issue on review).

With regard to penalty, the Secretary contends that the maximum penalty of $7,000 for a serious violation is appropriate "in light of the hazard resulting in a fatality in this case, and [because BTI] did not challenge the amount of the penalty before the ALJ." 29 U.S.C. § 666(b). Although BTI challenged the reasonableness of this penalty in its answer, it has not raised the

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knowledge of the deceased employee's failure to use the seatbelt, we need not reach this argument.

issue at any other stage of the proceedings.[9] *KS Energy Servs. Inc.*, 22 BNA OSHC at 1268 n.11.

After considering the penalty factors set forth under § 17(j) of the OSH Act, we find that a penalty of $7,000 is appropriate here. *See* 29 U.S.C. § 666(j) (penalty factors include employer's business size, prior violative history, good faith and the gravity of the violation).

CONCLUSIONS OF LAW

We conclude that the Secretary met her burden of showing BTI had constructive knowledge of the violation. We also conclude that the judge erred in finding BTI established the affirmative defense of unpreventable employee misconduct.

ORDER

We affirm Citation 1, Item 1 as a serious violation and assess a penalty of $7,000.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Horace A. Thompson III
Commissioner

Dated: January 8, 2010

[9] On review, BTI did not dispute the lack of credit for good faith. But had it done so, Commissioner Thompson notes that he would have considered giving such credit. Although not required by 29 C.F.R. § 1910.178, BTI spent a considerable amount of money - $9,000 to $10,000 for each tractor - to install a rollover protection system ("ROPS") on its tractors, which is designed to protect the operator in the event that the equipment tips or flips over. Additionally, BTI has a safety manual and work rules that address the inspection and use of seatbelts, performs surprise safety audits, provides safety training sessions and maintains a supply of spare seatbelts for its tractors. *See Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991) (giving good faith credit where employer took some measures to implement a safety program). While BTI's efforts failed in some respects, in Commissioner Thompson's view, these steps illustrate "its commitment to assuring safe and healthful working conditions." *See Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001) (noting that the Commission has given consideration to an employer's commitment to assuring safe and healthful working conditions when evaluating a good faith credit).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Burford's Tree, Inc., Respondent.	OSHRC Docket No. **07-1899**

Appearances:

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For Complainant

J. Larry Stine, Esquire, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Burford's Tree, Inc. (BTI) performs utility, right-a-way mowing, clearing, and tree trimming throughout the southeastern United States. On June 27, 2007, while mowing a right-a-way in a forest area near Wedowee, Alabama, the BTI tractor operator was fatally injured when the tractor rolled over and went into a ravine. As a result of an inspection by Occupational Safety and Health Administration (OSHA) compliance officer James Cooley, BTI received a serious citation on November 2, 2007. BTI timely contested the citation.

The serious citation alleges BTI violated § 5(a)(1) of the Occupational Safety and Health Act (Act) (item 1) for the tractor operator's failure to wear the seat belt and 29 C.F.R. § 1910.269(b) (item 2) for not rendering medical services in a timely manner. The citation proposes a penalty of $7,000.00 and $5,000, respectively.

The hearing in this case was held in Anniston, Alabama, on May 20, 2008. The parties stipulated jurisdiction and coverage (Tr. 7). The Secretary withdrew item 2, alleged violation of

Section 1910.269(b); leaving the alleged violation of § 5(a)(1) of the Act remaining in dispute (Tr. 5). The parties filed post hearing briefs.

BTI denies the alleged violation and asserts § 5(a)(1), the general duty clause, is not appropriate because the *Powered industrial trucks* standard at 29 C.F.R. § 1910.178 is applicable. If § 5(a)(1) is found applicable, BTI asserts the record fails to impute knowledge of the operator's failure to use a seat belt. Also, BTI claims unpreventable employee misconduct.

For the reasons discussed, § 5(a)(1) of the Act is applicable but a violation is not found based on unpreventable employee misconduct. The alleged violation of § 5(a)(1) is vacated and no penalty is assessed.

The Accident

BTI is a large utility contractor which performs utility, right-a-way mowing, clearing, and tree trimming in Alabama, Georgia, North Carolina, South Carolina, and Louisiana. BTI's office is located in Anniston, Alabama. Mike Burford is president and owner. BTI employs approximately 900 employees (Tr. 41, 102, 116-117, 122-123).

BTI's corporate structure consists of the director of operations Tommie Gardner, and safety officer Dennis Jones, state supervisors and general foremen who oversee the crews, coordinators who assign the crews, and foremen who direct the crews. The state supervisors and general foremen are paid a salary. The coordinators and foremen, like the crew members, are paid hourly (Tr. 102-103, 126).

BTI has as many as 250 crews working at any time. General foremen are responsible for overseeing 8 to 15 crews, depending on the type of work. There are approximately 35 mowing crews, consisting of two to four employees including the foreman (Tr. 103, 116, 122-123).

On June 27, 2007, a BTI crew consisting of foreman Michael Mitchell and tractor operator Ernie Turley, was mowing a right-of-way for the Alabama Power Company in a forest area near Wedowee, Alabama (Tr. 43, 70, 112, 150). Turley, who had been employed for six months, was driving a New Holland tractor. The tractor was towing a bush hog, which is a device capable of mowing brushes and small trees. The area of the right-a-way was cut through a forest which was hilly with steep inclines. The location was five miles from the nearest paved road. The tractor's cab was equipped with a rollover protective system (ROPS) which is a steel and wire mesh cage designed to protect an employee in a rollover accident (Exhs. C-4, C-6, C-7; Tr. 30-31, 42, 51-53).

At 12:30 p.m., foreman Mitchell was in his truck doing paper work. Turley was operating the tractor, a quarter of a mile away. Because he had not seen Turley for a while, Mitchell drove to the mowing area and saw him lying at the bottom of the ravine, 20 feet from the tractor. For reasons unknown, the tractor had gone off the right-a-way, rolled over at least once, and went into a ravine, approximately 150 feet from the right-a-way. The door to the tractor's cab was open. No one saw the accident. Mitchell called 911 and attempted to assist Turley who was conscious and talking. When the county sheriff and reserve deputy Rodney Walker arrived at the site, a helicopter was called to airlift Turley to the hospital. Turley went into shock and died apparently from being struck in the back by the bush hog (Exh. C-5; Tr. 10-13, 19-20, 32, 34-35, 43-47).

In examining the tractor, deputy Walker testified the cab was not damaged but there was a small bend in the top of the open door. Upon checking the seat belt, he said that he could not clip the belt into the receiver. The receiver was partially full of dirt and debris. Based on his observations and inability to clip the seat belt, Walker testified the seat belt had not been used in "quite some time" (Tr. 15-16, 20-21).

OSHA compliance officer Cooley and another OSHA inspector initiated an inspection into the accident on July 3, 2007 (Tr. 40). Upon examining the seat belt, Cooley testified he also could not fasten it. He said the buckle portion of the seat belt was not bent or disfigured. He concluded the seat belt had not been fastened and did not fail during the accident. He did not observe any dirt and debris in the seat belt (Exhs. C-2, C-8, C-9; Tr. 55-56, 96-97).

Based on OSHA's inspection, BTI received the serious citation on November 2, 2007, for the operator's failure to wear the seat belt.

Discussion

Item 1 - Alleged Violation of § 5(a)(1) of the Act

The citation alleges that BTI's operator failed to use the seat belt while operating the tractor. Section 5(a)(1) of the Act provides:

Each employer -

> shall furnish to each of his employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

BTI disputes the application of § 5(a)(1) and whether the Secretary has established BTI's knowledge of the Turley's failure to use the seat belt.

Application of § 5(a)(1)

BTI argues 29 C.F.R. § 910.178, *Powered industrial trucks*, standards preempt the application of § 5(a)(1) of the Act. Tractors such as involved in Turley's accident are specifically covered by § 1910.178(a)(1). Under § 1910.178(a)(2) which incorporates ANSI Standard B56.1-1969, the Secretary stipulates seat belts are not required (Tr. 194). Therefore, BTI asserts that Section 5(a)(1) cannot be applicable.

A citation alleging a violation of § 5(a)(1) is not appropriate when a specific OSHA standard applies to the practice, condition or hazard. Section1910.5(c) which governs the applicability of standards provides, in part, that

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Section 1910.5(c)(2) provides, in part, that

> ...any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies.[1]

"A citation under § 5(a)(1) will not be vacated where the hazards presented is not entirely covered by any single standard . . . or where a specific standard does not address the particular hazard for which the employer has been cited." *Ted Wilkerson, Inc.,* 9 BNA OSHC 2012 (No 13390, 1981). A general standard is not preempted by a specific standard unless both address the same particular hazard. *Williams Enterprise of Ga., Inc.,* 832 F2d 567, 570 (llth Cir, 1987).

BTI's preemption argument is rejected. The 1969 ANSI standards are silent on the subject of seat belts. It does not mention seat belts. There is no standard that requires or rejects the use of

[1]Also, it is noted § 1910.5(f) provides that "An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard."

seat belts on powered industrial trucks. Therefore, since no specific standard protects against the hazard associated with the lack of seat belts, § 5(a)(1) is not precluded from application.[2]

Section 5(a)(1) Violation

To establish a violation of this provision, the Secretary must show that (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees. (2) either the employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993). Additionally, because a § 5(a)(1) violation is classified as a "serious" violation under §17(k) of the Act, [3] the Secretary must show that the employer knew or should have known with the exercise of reasonable diligence of the presence of the violative condition.

BTI does not dispute that the failure to use a seat belt is a hazard and it recognizes that the lack of seat belts can cause serious injury or harm. The wearing of seat belts would abate the hazard. Other than claiming lack of knowledge, BTI does not dispute the elements in establishing a violation of Section 5(a)(1).[4] There is no dispute the tractor was equipped with a seat belt and the seat belt was not worn by Turley. The operator's manual for the New Holland tractor involved in the accident at issue specifically states:

> **Always** use the seat belt when the roll bar is raised. Seat belts save lives when they are used. Do **not** use the seat belt when the roll bar is lowered. (Exh. C-10, p.2).
>
> Warning: Always use the seat belt with a safety cab or ROPS frame installed. Do not use a seat belt if the tractor is not equipped with a safety cab or ROPS. (Exh. C-10, p.4).

The tractor at issue was equipped with an elaborate ROPS purchased by BTI for $10,000 (Tr. 109-110). ROPS is designed to keep the operator within the ROPS. If the seat belt is not worn

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[2]The Secretary has long made it known that § 5(a)(1) would be cited for the failure to use seat belts on powered industrial trucks. See *Standard Interpretation* notice, May 22, 1998 (Exh. C-18).

[3]*Plum Creek Lumber Company*, 8 BNA OSHC 2185 (No. 78-1485, 1980) (an other than serious classification can not be applied to a violation of § 5(a)(1) of the Act).

[4]Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

there is a danger of the operator being thrown clear of the ROPS (Exh. C-10; Tr. 60). Warning signs on the tractor's door instructs operators to read and understand the manual before using the tractor (Exhs. C-11, C-12). Also, BTI agrees its policy is that seat belts should always be used. In its Tailgate Safety Program, it provides that:

> **Seat Belts:** -shall be worn whenever a piece of company equipment is in use.(Exh. C-15).

Thus, a violation of § 5(a)(1) is established if knowledge of the violative condition is imputed to BTI.

BTI's Knowledge

In order to establish an employer's knowledge of a violation, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). In essence, the employer's knowledge must be shown to be either actual knowledge or constructive knowledge.

It is undisputed that BTI's general foreman, James Varnon, did not have actual or constructive knowledge of Turley's failure to use a seat belt or that the seat belt was inoperable. Varnon who oversaw approximately 20 crews including foreman Mitchell's crew, testified he never observed Turley or Mitchell operating a tractor without a seat belt. Also, the daily equipment inspection reports prepared by Mitchell did not indicate a problem with the seat belt (Tr. 156, 160, 164).

Foreman Mitchell who supervised Turley admitted that he did not check the functionality of the seat belt on the day of the accident (Tr. 70-71). BTI does not dispute that the seat belt was inoperable. According to his statement, Mitchell had never checked the seat belt in the tractor although it was part of his job as foreman (Exh. C-17). If he had checked it, he would have known it was inoperable and could not have been used. Mitchell's constructive knowledge of Turley's failure to use the seat belt is established by Mitchell's failure to inspect the seat belt.

BTI disputes whether Mitchell's constructive knowledge as foreman can be imputed to BTI. BTI notes that Mitchell was paid on an hourly basis and operated more as "co-worker than a supervisor" (Tr. 86, 103).

The record in this case shows that Mitchell meets the criteria as a supervisor whose knowledge can be imputed. The substance of the delegation of authority, not the title of the

employee, is controlling in determining whether an employee is a supervisor. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1577, 1583 (No. 91-2626, 1992) (a leadman's knowledge imputable to an employer despite his status as bargaining unit employee). An employee such as Mitchell who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *A.P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman). The Commission has noted that the power to hire and fire employees is not controlling in determining supervisory status. It is sufficient to establish supervisory status by showing the foreman's duties included supervising the activities of his crew, taking the necessary steps to complete the job assignments, and ensuring the work was done in a safe manner. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

Mitchell's position as foreman qualifies him as a supervisor for the purpose of imputing knowledge to BTI. He was placed by BTI in charge of the worksite. He supervised Turley's activities in accomplishing the job and was responsible for Turley's safety. In his interview statement, Mitchell describes his duties as "To bush hog power lines in safe manner. Oversee paperwork and crew members' safety." (Exh. C-17). He also states he has the power to hire and fire an employee on his crew and is required to inspect the tractors in accordance with a checklist he is given by BTI. BTI concedes that each foreman is responsible for his crew's safety and conduct daily safety briefings before starting the job (Tr. 105-106). Thus, Mitchell exercised sufficient control over the worksite as foreman to be considered a supervisor and his constructive knowledge regarding Turley's failure to use the seat belt is imputed to BTI.

BTI's reliance on the Fifth Circuit decision[5] in *W.G. Yates & Sons Construction Co., Hvy. Div. v. OSHRC*, 459 F3d 604, 608-609 (5th Cir. 2006), *on remand*, 22 BNA OSHC 1196 (No. 03-2162, 2008) is misplaced because Mitchell was not the exposed employee and the citation does not allege as the basis Mitchell's malfeasance. The citation in issue involves the operator's failure to use the seat belt and not the foreman's exposure to an unsafe condition or his failure to inspect the seat belt. The *W.G. Yates* case and other cases cited by BTI involve the issue of whether a "supervisor's knowledge of his own malfeasance is imputable to the employer where the

[5]This case arises in the Fifth Circuit. The Commission is bound to follow the law of the circuit to which a case would likely be appealed. *Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104 n.7 (No. 00-1077, 2003).

employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." The Fifth Circuit declined to impute such knowledge.

Mitchell's presence on the worksite and his failure to inspect the seat belt is sufficient to establish Mitchell's constructive knowledge of Turley's failure to use the seat belt and such construction knowledge is imputed to BTI. Mitchell as foreman was placed in a position by BTI of ensuring the employee safety.

Unpreventable Employee Misconduct

BTI asserts unpreventable employee misconduct as to Turley for failing to use the seat belt. In order to establish the affirmative defense of unpreventable employee misconduct, BTI must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated the rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

1. Safety Rule

BTI has a written safety manual (Exhs. R-3). BTI's company policy requires seat belts to be worn whenever its vehicles or pieces of equipment including tractors equipped with seat belts are operated by employees (Tr. 176, 180). Seat belts must be worn when they are provided (Tr. 112-113, 130).

OSHA acknowledges that BTI has a specific work rule requiring the use of seat belts (Tr. 91-92).

2. Communication

BTI's safety training starts when a prospective employee fills out an application and is informed about the company's safety polices and personal protective equipment (PPE) requirements (Exh. R-2; Tr. 111). Employees are instructed that they are not to operate equipment if it is nonfunctional which includes inoperable seat belts (Tr. 189).

Foreman Mitchell was trained and instructed in the company's seat belt policy and that each piece of equipment should be inspected daily and removed from service if any parts were not in working order (Exh. C-17; Tr. 132-133, 153). Employees including Turley attend weekly safety programs and each foreman conducts a daily safety briefing (Tr. 105). To ensure effective communication regarding safety issues, the safety meetings are documented on the employees'

weekly time sheets (Tr. 105). Employees also receive "tailgate safetygrams" with their paychecks which they must sign and return (Exh. R-5; Tr. 131-132).

Safety officer Jones conducts full day safety training sessions which Mitchell attended, where seat belts and other safety issues were discussed (Tr. 132-133, 153). Turley was scheduled to attend one such session, but failed to do so because he brought his children and thought the class would only last an hour (Tr. 141). Turley left and did not return (Tr. 55, 141). Although Turley failed to attend the formal 8-hour safety course, he did attend a weekly safety training sessions including a session on April 14, 2007 that focused on seat belts. Turley and Mitchell signed the acknowledgment showing that they attended the training session (Exh. C-15, Tr. 64-65).

OSHA concedes that BTI has communicated its work rule regarding seat belts to employees (Tr. 91-92).

3. Monitoring

BTI's safety department, headed by Jones, has field safety officers who train employees, enforce safety rules and check equipment (Tr. 104-105). Jones and his staff conduct regular surprise safety audits in the field (Tr. 137). A company mechanic testified the company maintains a stock of spare seat belts which he has replaced in the field (Tr. 158-159).

James Varnon, general foreman to whom Mitchell reported, also conducted safety inspections when he visited the crews he oversaw in the field (Tr. 158). According to Varnon, he visited each crew "at least twice a week, sometimes more" (Tr. 156). Varnon testified that he has been requested by crew members to replace broken seat belts (Tr. 158). Varnon said he never observed Turley or Mitchell working in a tractor without a seat belt (Tr. 160). Varnon was unaware that the seat belt on Turley's tractor was not working (Tr. 164).

Although foreman Mitchell apparently did not check the seat belt, he was required to perform daily inspections of all equipment and submit the inspection reports to BTI weekly (Exh. C-16).

The record establishes BTI's safety monitoring.

4. Enforcement

BTI's safety policy was enforced. Company president, Mike Burford, personally fired an employee for failing to wear a seat belt (Exh. R-6; Tr. 65, 180). Additionally, other employees have been written up and even terminated for violations of company safety rules (Exh. R-7; Tr. 108-109, 118-119, 135).

Both safety director Jones and general foreman Varnon testified they enforced safety policies (Tr. 127, 168-169). Varnon has written up and discharged employees for safety violations. All employees are informed that violation of safety rules can result in discipline including termination (Exh. R-7; Tr. 136-137).

According to BTI, every employee has the authority to shut down an operation if he perceives a safety violation (Tr. 106, 117, 128, 191).

BTI has established employee misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation no. 1, item 1, alleged serious violation of § 5(a)(1) of the Act, is hereby vacated and no penalty assessed, and
2. Citation no. 1, item 2, alleged violation of § 1910.269(b), is withdrawn by the Secretary.

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KEN S. WELSCH
Administrative Law Judge

Date: October 14, 2008