

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama Street, S.W., Room 2R90
Atlanta, Georgia 30303

SECRETARY OF LABOR,

Complainant

v.

Applied Aquatic Management, Inc.,

Respondent.

OSHRC Docket No. 12-2562

Appearances:

Dane Steffenson, Esquire.
U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Jack Morgan III, Esquire
Fort Myers, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Applied Aquatic Management, Inc., (AAM) provides aquatic plant management services throughout Florida. AAM employees routinely use airboats to access aquatic plants. On May 24, 2012, two airboats operated by AAM employees collided at a water treatment facility in Clewiston, Florida. The two occupants of one of the airboats were thrown from the boat. One of the employees was seriously injured; the other employee died when he struck the propeller of the second airboat.

The Occupational Safety and Health Administration (OSHA) began an inspection of the worksite on May 25, 2012. As a result of the inspection, the Secretary issued a one-item Citation and Notification of Penalty to AAM on November 23, 2012, alleging a serious violation of the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651.657. The Secretary proposed a penalty of \$6,300.00 for the item.

AAM timely contested the Citation. The Court held a hearing in this matter on May 31, June 13, and June 14, 2013, in Fort Myers, Florida. AAM stipulated the Commission had jurisdiction over this proceedings under § 10(c) of the Act and it is an employer engaged in a

business affecting interstate commerce under § 3(5) of the Act (Tr. 4). AAM contends the Secretary failed to establish a § 5(a)(1) violation. AAM also asserted the affirmative defense of employee misconduct.¹

For the reason discussed below, the Court determines the Secretary failed to establish a § 5(a)(1) violation. The Citation is vacated and no penalty is assessed.

Background

AAM was founded in 1981 by the Myers family. Paul Myers, Jr., now operates the company as general manager. A significant percentage of its contracts are with governmental agencies, including the Army Corps of Engineers, Florida Fish and Wildlife Commission, and South Florida Water Management, to control unwanted invasive plants by applying herbicide to land and aquatic plants (Tr. 759-760).

AAM owns approximately 58 boats. The majority of these are airboats (Tr. 772). An airboat is a flat-bottomed boat propelled forward by an aircraft-type propeller and powered by either an aircraft or automotive engine. The airboats are used in shallow or marshy waters where a boat engine with a submerged propeller would be impractical. The three airboats in use the day of the accident were aluminum hulled and powered by 350 Chevrolet engines. The engines have belt reduction units on them, which reduce the propeller speed to approximately 2,500 rpms (Tr. 766-767). (A propeller spinning over 3,000 rpms “will have a tendency to come apart” (Tr. 767).)

Airboats are not equipped with braking devices and are not operable in reverse. An airboat operator can turn the vessel left or right, but only when its speed is sufficient to cause it to “plane” or ride on the surface of the water (Tr. 36, 439-440). Airboat engines are quite loud. Operators cannot carry on conversations or hear other airboat engines when their engines are running (Tr. 42).

On May 24, 2012, four AAM employees on three airboats were working at a water treatment area (referred to as a “cell”) in central Florida pursuant to a contract with South Florida Water Management. The water treatment cell is a private area near Lake Okeechobee and is not open to the public (Tr. 181). The cell at issue is one square mile and broken up with vegetation

¹ This defense was not developed at the hearing and AAM does not address it in its post-hearing brief. It is deemed abandoned.

strips (Tr. 449). Employee #1 was training a Trainee, who was positioned in the front of his airboat. Employee #2 and Employee #3 each operated his own airboat (Tr. 48).

Employee #1 sent Employees #2 and #3 to work together applying herbicide to aquatic plants in another area of the cell. Employee #1 and the Trainee stayed closer to the boat ramp, where they began spraying herbicide (Tr. 814).

A storm began developing and Employee #1 determined the employees should leave the cell and meet back at the boat ramp. He could not reach Employees #2 and #3 on their cell phones so he and the Trainee went over in the airboat to the area where they were working. Employee #1 told the others to return to the boat ramp. (Tr. 51)

AAM's procedure for airboats traveling together is for them to proceed in a single line. At the level of the water's surface it can be difficult to locate other airboats through the tall grass. If another airboat is not visible, an airboat operator will sometimes turn off his engine so he can locate the other airboat by sound (Tr. 30).

As the senior employee at the site, Employee #1 would have normally taken the lead. However, since the Trainee was positioned in the front of his airboat, Employee #1 did not want him being hit in the face by cattails and other debris. Employee #1 instructed Employee #2 to take the lead, followed by Employee #1 and the Trainee, with Employee #3 bringing up the rear (Tr. 51).

To return to the boat ramp, the airboats had to cross several vegetation strips using trails made through the vegetation. Airboat operators try to use existing trails, but trails often look alike (Tr. 56-58). Employee #2 entered the opening of what he believed was a trail head to the boat ramp. Employee #1 and Employee #3 followed, losing sight of Employee #2 as he entered the trail. As Employee #2 went on, he realized the trail led to a dead end. Employee #2 made a U-turn and headed out of the same trail he had entered. Meanwhile, Employee #1 and the Trainee were following behind in the same trail. The curve of the trail created a blind turn.

As Employee #2 exited the trail, his airboat collided with Employee #1's airboat. The Trainee was thrown into the water. Employee #1 was ejected into the propeller of Employee #2's airboat and died. (Tr. 460-461). The Florida Fish and Wildlife Commission investigated the accident. It did not issue a citation in the matter (Tr. 255).

The Citation

The Secretary charges AAM with a serious violation of § 5(a)(1). The original citation alleged:

The employer did not furnish employment and a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to employees.

On or about 05/24/2012, the employer failed to provide and enforce safe procedures for operators of airboats who were navigating waters that had unmarked routes, exposing employees to struck-by hazards from collisions between airboats. An employee who was operating an airboat and had been applying herbicide, was fatally injured in a collision with another airboat that had taken an incorrect route that led to a dead end, after it had made an evasive maneuver at Storm Water Treatment Area (STA 5) Cell 2B, South Florida Water Management District, Lake Okeechobee, Clewiston, Florida, 33440.

Among other methods of abatement, some feasible and acceptable methods to correct the hazard are to:

- a. Use the provided Global Positioning Devices to identify and follow the established routes of travel.
- b. Use items such as but no limited to marking tape and signs / flags attached to structures such as posts in the water to identify established safe routes of travel.
- c. Use a means of instant and direct communication between boat operators such as head-sets that serve as hearing protection.
- d. Increase the distance between boats when traveling in formation to provide for more reaction time to unexpected emergencies.

On May 29, 2013, two days before the hearing, the Secretary filed a motion to amend the Complaint and Citation by substituting a different feasible means of abatement. The Secretary moved to amend the proposed feasible abatement to state:

Among other methods of abatement, a feasible and acceptable method to correct the hazard is to adopt and ensure all employees follow “rules of the road” for boaters consistent with the Inland Navigation Rules contained in the Inland Navigational Rules Act of 1980 and similar rules established by the State of Florida such as those discussed in the Florida Boater’s Handbook.

The Court granted the motion without objection (Tr. 5).

Elements of a § 5(a)(1) Violation

Section 5(a)(1) of the Act mandates that each employer “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). To establish a violation of the general duty clause, the Secretary must show 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 a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHC ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

Erickson Air-Crane, Inc., 2012 WL 762001 at *2 (No. 07-0645, 2012).

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff’d Deep South Crane & Rigging Co. v. Seth D. Harris*, 24 BNA OSHD 1089 (5th Cir. 2013).

(1) The Cited Condition Presented a Hazard

The Commission has held that as part of his burden of proving a § 5(a)(1) violation, the Secretary “must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control.” *Otis Elevator Co.*, 21 BNA OSHC 2205, 2206 (No. 03-1344, 2007).

The Secretary defined the hazard in this case as “struck-by hazards from collisions between airboats” created by AAM’s failure “to provide and enforce safe procedures for

operators of airboats who were navigating waters that had unmarked routes.” This description adequately informed AAM of the conditions alleged to be dangerous.

It is evident from the tragic death of Employee #1 and the injury to the Trainee that struck-by hazards due to airboat collisions existed. The Secretary has established the first element.

(2) Employer of Industry Recognition of Hazard

The Secretary alleges that both AAM specifically and the aquatic plant management industry generally are aware of struck-by hazards created by airboat collisions. Seven current or former employees of AAM testified at the hearing. All of them agreed they recognize the danger posed by airboat collisions.

Brian Knapp is a retired Coast Guard officer with over 25 years of experience investigating marine casualties. He was qualified as an expert in the rules of the road for boaters (Tr. 344-345, 363-364). Knapp testified the rules of the road are intended to help boat operators avoid collisions (Tr. 370).

The Secretary has established struck-by hazards created by airboat collisions are recognized hazards both by AAM and by its industry.

(3) The Hazard Was Likely to Cause Death or Serious Physical Harm

The facts of this case establish struck-by hazards created by airboat collisions are likely to cause death or serious physical harm.

(4) Feasible Means of Abatement

“The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.” *Beverly Industries, Inc.*, 19 BNA OSHC 1161, 1190 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000).

After initially recommending four methods of abatement (use of GPS; use of sign or flags to mark routes; use of radio headsets; and increased distance between boats) that it later discarded, the Secretary settled on this phrasing for its recommended feasible method of abatement designed to eliminate or materially reduce the cited hazard:

[A]dopt and ensure all employees follow “rules of the road” for boaters consistent with the Inland Navigational Rules Act of 1980 and similar rules established by the State of Florida such as those discussed in the Florida Boater’s Handbook.

At the hearing, the Secretary focused on certain rules of the road found in the U.S. Coast Guard’s *Navigation Rules*. The rules addressed look-out, safe speed and risk of collision. They provide in pertinent part:

RULE 5
Look-out

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk collision.

RULE 6
Safe Speed

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

- (a) By all vessels:
 - (i) the state of visibility;
 - (ii) the traffic density including concentration of fishing vessels or any other vessels;
 - (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
 - (iv) at night, the presence of background light such as from shore lights or from back scatter of her own lights;
 - (v) the state of wind, sea, and current, and the proximity of navigational hazards;
 - (vi) the draft in relation to the available depth of water.

RULE 7
Risk of Collision

- (a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

In addition to these rules, the Secretary also emphasized that the operator of a boat should stay to the right of a channel where appropriate and know which boat has the right of way (Tr. 251).

The Secretary's phrase "adopt and ensure all employees follow the 'rules of the road'" created some confusion at the hearing. Upon questioning by the Court, the Secretary's counsel and the CSHO explicitly stated that AAM was not cited for a training violation or for not having written rules of the road:

The Court: Wait a minute. Counsel, the Secretary is not changing their theory of the case, are they? The citation is not a citation for failing to train or the inadequacy of the training program, correct?

The Counsel: Correct.

The Court: The citation is for failing to have and enforce certain what you're calling rules of the road, correct?

The Counsel: Right. The Secretary has cited that the policies that would ultimately need to be trained on would need to exist first.

The Court: But, there's not an issue before me as to the adequacy or inadequacy of training. That's not what the Secretary is citing for.

The Counsel: I think the testimony has been elicited since the only potential policy or procedure is verbal, that the training is sort of how people are talking about establishing whether or not there is a policy or procedure.

The Court: But, the bottom line is -- and maybe I should ask you, [CSHO] -- is there any requirement specific to 5(a)(1) that the Company have verbal rules of the road as opposed to written rules of the road?

CSHO: To my knowledge, OSHA does not impose requirements either way as to in this particular instance how the rules of the road are communicated, are even established and communicated to the employees.

The Court: So, OSHA would accept from the Company if there were verbal rules of the road?

CSHO: Yes, sir.

The Court: That you could confirm that they had rules.

CSHO: Yes, sir.

The Court: They didn't have to be written; they could be verbal.

CSHO: Correct.

The Counsel: Your statements about training, I didn't view this as a training violation, per se, but it does say "failed to provide and enforce."

So, I think although it's not training, per se, because I would believe that there was no policies to train on, that the abatement does require that once you have a policy, they are policies that actually get communicated to the employees.

In other words, you can't just adopt policies and procedures for safe boating operations without a policy and procedures –

The Court: The citation reads "to provide and enforce safety procedures."

The Counsel: Yes.

The Court: It doesn't say, "provide training and enforce."

The Counsel: I guess you could provide and enforce without communicating or training.

The Court: I'm just asking what the nature of the citation is. In my mind, I didn't read it – until you asked those last questions, I didn't read this as an alleged training violation. I read it as alleged failing to have procedures, in this case rules of the road that were being enforced.

The Counsel: Right. It's a very fine line for me for the few weeks I've had the case that I'm staying on the one side away from training.

(Tr. 223-226).

According to the parameters set out by the Secretary, AAM is not required to train its employees in the rules of the road nor is it required to issue its employees a written copy of the rules of the road. It is only required to (1) "adopt" the rules and (2) ensure that its employees follow them.

(1) "Adoption" of the Rules of the Road

Jerry Renney is AAM's safety manager. He has been with the Company for over 25 years (Tr. 120). He testified that new hires are trained in airboat safety using a two or three week "hands-on apprenticeship" (Tr. 135, 139). The new hire is partnered with one of the Company's twelve to fifteen competent trainers (Tr. 189). AAM also holds weekly safety meetings (Tr. 444).

Robert Green is AAM's primary trainer (Tr. 667). He testified he trains new hires in the rules of the road. Green explained his understanding of the rules of the road:

Traveling on the right side. If you come to a blind curve or something, stay to the right. If you should meet an oncoming boat or vessel in the trail, you always go right so that the other person who's training, if he goes right and you go right, you avoid a collision.

We come to intersections in trails or canals, crossing a canal, we always come off plane to a stop, idle, look both ways, I'll signal the boat behind me that it's clear.

They still don't get on plane, they idle up to it because they know – if I see something coming, I'll point that there's a boat coming. And, they do the same all the way back.

When we're traveling out there, every once in a while, look behind you to make sure the people are still behind you because if someone breaks down or something, you can go three miles and if you don't look back, and then, you know, they're lost.

If for some reason you should have to stop in the trail, get off the trail and not stop in the trail because you know there's oncoming boats. Never, never turn around in the trail and go back the same way. If for some reason you need to stop, you need to get off the trail, stop and wait for the other boats and preferably stop in an open area where they can see you off to the side and wait until everybody is in the area, whatever your problem is and then go from there.

(Tr. 672-673)

Green confirmed that these are “fairly basic principles” for any kind of boating and that when he trains new hires, he goes over these rules with them “constantly” (Tr. 674).

(1) *Ensure All Employees Follow “Rules of the Road”*

The second factor in the Secretary's formulation of his proposed abatement is to “ensure all employees follow ‘rules of the road.’” All of the employee witnesses who testified stated that they were aware of the rules of the road.

The Trainee injured in the airboat collision stated his trainer was Employer #2, the first day he started work. Employee #2 gave the Trainee some site-specific instructions regarding rocks and low water “and stuff like that that I would have to watch out for” (Tr. 816). The Trainee had previous experience operating an airboat and was permitted to operate one his first week, but Employee #2 drove back one day “because it was an area where the rocks were bad”(Tr. 818). His third day on the job, the Trainee switched to Employer #1 as his competent trainer because Employer #1 did not think Employee #2 was adequately training him in herbicide

application (Tr. 49, 819-820). The Trainee testified he was aware the rules of the road require boat operators to maintain a safe speed, maintain a safe lookout, and to pass on the right (Tr. 837-839).

Employee #4 is an herbicide applicator for AAM (Tr.746). Safety director Renney trained Employee #4 for two weeks. Employee #4 testified Renny “discussed the proper and safe way to navigate the waterway that we were on” (Tr. 748). AAM also conducted weekly safety meetings during which the rules of the road are reiterated. Employee #4 testified, “[W]hat we discuss is maintaining good spacing between the boats. Again, controlling your speed and try to maintain a visual sighting of the boat ahead of you, and occasionally look behind you to see what’s going on behind you” (Tr. 755). He also stated that passing and keeping to the right of a channel is “one of the things we discuss at safety meetings” (Tr. 758).

Employee #5 transports crews on airboats for AAM (Tr.718). He was trained by an AAM trainer before he was allowed to operate an airboat alone (Tr. 724). He was taught to keep a good lookout, operate at a safe speed, avoid other boats, and keep to the right (Tr. 726-727).

Employee #2, who was driving the airboat that collided with the airboat carrying the deceased employee and the Trainee, testified at the hearing. He had been terminated approximately six months after the accident for falsifying his time sheets (he claimed to be at various worksites when his company truck GPS showed his truck was parked at the hotel where he was staying) (Tr. 83). Employee #2 was a witness for the Secretary. He testified AAM did not provide him with safety training: “I really wasn’t told anything” (Tr. 40); “[T]hey never gave me any information” (Tr. 44). He denied being told what to do if he went up a wrong trail or how to keep a lookout (Tr. 44-45). When asked about the rules of the road, however, Employee #2 knew them well;

Always try to stay to the right. If you’re going – running trails that are real narrow and curved, go slow. If you think you’re going to be running into like dark areas where there’s a bunch of trees and stuff, make sure you’re going at a slower speed. That way, you have time to react. Always try to stay 100 feet behind the person in front of you.

The testimony of the employee witnesses establishes AAM took steps to ensure its employees follow the rules of the road. AAM trained its employees for a minimum of two weeks. It taught its employees the rules of the road and reiterated the rules in weekly safety meetings. AAM’s supervisors and safety director Renney audit the employees on a daily basis.

If a supervisor sees a safety infraction, he gives the employee either a verbal or written reprimand and discusses it with the employee (Exhs. R-8, R-9; Tr. 172).

The Secretary framed his proposed method of abatement so that a minimal amount of evidence is required to meet it. All AAM must show is that it follows the rules of the road, its employees know it follows the rules of the road, and it takes steps to enforce the rules of the road. AAM has achieved that here. Its safety program is not formalized, systematic, or uniform. But it is sufficient to inform AAM's employees of the basic rules of the road at issue here. The rules of the road are not complicated. They are, essentially, watch where you are going, do not go too fast, and keep to the right. All of the employees who testified stated they were aware of these rules. Even Employee #2, who had been terminated by the company for falsifying documents and who claimed, alone of the employees, that he had not received training from AAM, conceded he was aware of the rules of the road.

After squabbling with AAM's counsel over who was at fault for the collision, Employee #2 admitted he knew the correct procedure to follow, he just did not follow it:

The Counsel: You're telling me that you did not pull off in 200 feet down, make the turn 200 feet back because you were afraid of [Employee #1's] driving but you trusted it enough to be on the left hand side?

Employee #2: Yes.

The Counsel: You won't agree with me that you were in a bad place?

Employee #2: Yes, I was in a bad place.

The Counsel: And, you had a lot of opportunities not to be there, right?

Employee #2: Yes.

The Counsel: And, that's something you know; am I right?

Employee #2: Yes.

The Counsel: Because you knew these two boats were coming?

Employee #2: Yes.

The Counsel: Regardless of whether anyone from Applied told you or didn't tell you that, you knew you should have gotten out of the way?

Employee #2: Yes.

(Tr. 116)

The fact that an accident occurred does not negate AAM's evidence that it took steps to ensure its employees follow the rules of the road. "Because OSHA is designated to encourage abatement of hazardous conditions themselves, however, rather than to fix blame after the fact for a particular injury, a citation is supported by evidence which shows the preventability of the *generic* hazard, if not this particular instance." *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 642 (5th Cir. 1979).

Employee #2 was not a supervisor and his knowledge cannot be imputed to AAM. AAM had no actual knowledge Employee #2 would violate the rules of the road. The Secretary also failed to establish AAM had constructive knowledge that Employee #2 was likely to violate the rules. AAM could not reasonably foresee Employee #2 would recklessly exit a trail when he knew he was being followed by two airboats entering the same trail.

Effectiveness of AAM's Abatement Method

"[T]he employer may defend against a general duty clause citation by demonstrating that it was using an abatement method that is as effective as the one suggested by the Secretary. *Brown & Root, Inc.*, 8 BNA OSHC 2140, 2144 (No. 76-1296, 1980)." *Waldon Health Care Center*, 16 BNA OSHC 1052, 1063 (No.89-3094,1993.)

AAM's abatement method of providing verbal training to its newly hired employees for a minimum period of two weeks and holding weekly safety meetings for all employees is as effective in materially reducing the hazard of airboat collisions as the one proposed by the Secretary.

Item 1 of the citation is vacated.

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 HEREBY ORDERED that the Citation and Notification of Penalty, alleging a serious violation of § 5(a)(1), is vacated and no penalty is assessed.

SO ORDERED.

/s/
KEN S. WELSCH
Administrative Law Judge

Date: December 30, 2013