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

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>HAYWARD BAKER, INC.<br>Respondent. | OSHRC Docket No. 12-0859 |

APPEARANCES:

Susan B. Jacobs, Esquire, U.S. Department of Labor, New York, New York
For the Secretary

Michael J. Vollbrecht, Esquire, Gordon & Rees, LLP, New York, New York
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

## DECISION AND ORDER

This proceeding is before the Occupational Health and Safety Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659 ("the Act"). On October 26, 2011, the Occupational Safety and Health Administration ("OSHA") inspected a worksite of Hayward Baker, Inc. ("Respondent" or "Hayward"). The inspection was in response to a reported accident at a worksite in East Syracuse, New York ("worksite" or "Bridge Street project"). OSHA issued a serious citation to Hayward on March 2, 2012. Hayward filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Syracuse, New York on October 15, 2012. Both parties filed post-hearing briefs.

The following individuals testified at the hearing: Douglas Combes, injured employee; Frank Stosal, Site Superintendent for Hayward; Michael Grant, Area Manager for Hayward;

Bryan Schertz, corporate safety director for Hayward; David Pacini, OSHA Compliance Officer ("CO"); and Christopher Adams, OSHA's Syracuse office Area Director.[1]

## Stipulated Facts

The parties' joint pre-hearing statement stipulated the facts listed below.

1. Respondent Hayward Baker, Inc., is a corporation organized under the laws of the State of Delaware, does business in the State of New York, and maintains its principal office at 1140 Annapolis Road, Suite 202, Odenton, Maryland.

2. Respondent Hayward Baker, Inc., is engaged in geotechnical construction activities.

3. Respondent Hayward Baker, Inc., was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Occupational Safety and Health Act of 1970 (the "Act").

4. Respondent Hayward Baker, Inc., is an employer within the meaning of section 3(5) of the Act.

5. On October 26, 2011, employees of Respondent Hayward Baker, Inc., were performing work including drilling operations at a job site located at Bridge Street (under the 690 overpass), East Syracuse, New York 13057.

6. Douglas Combes, an employee of Respondent Hayward Baker, Inc., was injured while working at the job site located at Bridge Street (under the 690 overpass), East Syracuse, New York, on October 26, 2011.

7. On or about March 2, 2012, Complainant issued one citation with one item to Respondent alleging violations at a worksite located at Bridge Street (under the 690 overpass), East Syracuse, New York, with a total proposed penalty of $7,000.00.

8. Respondent Hayward Baker, Inc., has contested the Citation issued by Complainant.

## Background and Relevant Facts

At the time of the accident, Hayward was using a Davey Drill to install (drill) soil nails at its Bridge Street project. (R. Br. 2; Tr. 11). Hayward was nearly finished with this job; it was half-way through the last of three rows of soil nails. (Tr. 97). The soil nails were a structural component in the construction of a concrete retaining wall at the worksite. The soil nail drilling

[1] The transcript is amended to reflect the corrections listed on the errata sheet filed with the Secretary's post-hearing brief. The Secretary and Respondent agreed to the errata sheet suggested corrections. The transcript corrections include page 70, line 7, change from "unguarded," to "guarded," and page 85, line 3, change from "(indiscernible)," to "FOM."

process entailed: (1) loading 15 feet of casing[2] onto a drill shaft to be connected to the drill head; (2) drilling the casing 12 to 15 feet into the ground;[3] (3) leaving the casing in the hole; (4) filling the hole with grout / concrete; (5) inserting a bar into the hole as an anchor; and (6) then removing the casing from the hole for re-use. (Tr. 11-12, 92, 132, 149; Exh. CX-3 at 1).

To connect the casing to the drill head, the first 5-foot casing section is slid onto the drill shaft; it is moved into place between the jaws, and the jaws then clamp down and hold the casing in place as the drill head is screwed onto the casing. The next 10-foot section of casing is then slid onto the shaft and screwed onto the first section to form a 15-foot long casing. (S. Br. 3; Tr. 142-43). Mr. Stosal and Mr. Grant both testified that the 5-foot section was generally loaded onto the drill shaft by hand and the 10-foot section by forklift. (Tr. 93, 98, 124-25, 142-44). Mr. Combes testified he had used this method to load casings throughout the project. (Tr. 19).

On the morning of accident, Mr. Combes was installing casings on the drill shaft for soil nailing. Mr. Combes credibly testified that he performed the task of installing casings on the drill rod that day exactly as he had been trained. Mr. Stosal was the site superintendent at the Bridge Street project. Mr. Stosal was at the other end of the 5-foot casing, near the jaws, to assist Mr. Combes. Another employee was operating the controls on the Davey Drill. Mr. Combes was injured while he was loading the 5-foot section of casing over the drill shaft. (Tr. 20-23, 90, 99-101).

Mr. Combes testified that he had trouble getting the 5-foot section of casing to properly line up with the jaws. Mr. Combes testified he had made sure there was no dirt or other obstructions that would prevent the casing from loading onto the drill shaft. Mr. Stosal was present during this time and would have been aware that this casing was difficult to load. While moving the can toward the jaws, he signaled to the operator to move the drill shaft up and down ("stroking") in an attempt to get the casing between the jaws. During the movement of the drill, Mr. Combes' hand became caught in the area between the casing and the drill shaft. Mr. Combes believes that loose threads on his glove got caught and then pulled his hand into the pinch point. The operator immediately shut down the machine. Mr. Stosal saw the drill shaft's movement and immediately heard Mr. Combes' scream. To free Mr. Combes' hand, a sling was

[2] This component was variously referred to as a can, casing, sleeve, or canister. (Tr. 148-149).
[3] The drill shaft was also described as the hammer, drill rod, or drill steel.

hooked onto the casing and the casing was then pulled off using a service winch. Mr. Combes' hand was trapped for about 30 minutes resulting in a crushed thumb.[4] (Tr. 17-21, 33-35, 99-100).

**Jurisdiction**

Based upon the record, I find that at all relevant times Hayward was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter in this case.

**Citation**

*The Secretary's Burden of Proof*

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

*Citation 1, Item 1(a)*[5]

This item alleges a serious violation of 29 C.F.R. § 1926.300(b)(2), which states:

> Belts, gears, shafts, pulleys, sprockets, spindles, drums, fly wheels, chains, or other reciprocating, rotating or moving parts of equipment shall be guarded if such parts are exposed to contact by employees or otherwise create a hazard. Guarding shall meet the requirements as set forth in American National Standards Institute, B15.1-1953 (R1958), Safety Code for Mechanical Power-Transmission Apparatus.

The actual or constructive knowledge of an employer's foreman can be imputed to the employer. *See N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citations omitted). Here the employer's site superintendent, Mr. Stosal, was standing near Mr. Combes at the time of the accident and knew he was loading the casing onto the drill shaft by hand. I find Hayward had knowledge of the violative condition through Mr. Stosal.

[4] At the time of the hearing, Mr. Combes was scheduled to have a wrist replacement and his thumb amputated because it was not healing properly. (Tr. 21).

[5] The Secretary amended citation 1, item 1(a) to allege a violation of 29 C.F.R. 1926.300(b)(2). (Tr. 5, 50-51; Exh. CX-2, Complaint, para. 5). This citation item had originally been alleged as a violation of 29 C.F.R. 1926.300(b)(4)(ii). (Tr. 50, 69; Exh. CX-1 at 5).

Hayward argues that the standard is not applicable because there was no exposure to moving parts while loading the casing. (R. Br. 4-5). For the following reasons, I find that the standard does apply, that its terms were violated, and that there was actual employee exposure.

Hayward asserts there was no exposure to a moving part because the company's procedure requires an employee to step away before the drill shaft is moved. (R. Br. 4-5). The events of the accident contradict Hayward's assertion. The drill shaft did move while Mr. Combes was loading the casing onto the drill shaft. He was injured when his hand was caught in a pinch point between the casing sleeve and the drill shaft. I find the drill shaft was a moving part and the standard is applicable. I also find that Mr. Combes was exposed to a moving part.

Hayward asserts that this work activity (loading the casing) is excluded by the incorporated ANSI standard.[6] Hayward argues that the casing, after it is installed, is a point of operation[7] during the soil drilling process and therefore excluded from the scope of ANSI B15.1.[8] (R. Br. 5-6). However, the casing was not in its functional operating position; it was being installed at the time of the exposure and accident. I find that Mr. Combes was not working at a point of operation when installing the casing; therefore, the exclusion set out in ANSI B15.1 is not relevant to this matter.

It is undisputed that the pinch point Mr. Combes was exposed to was not guarded. (Tr. 146-47). At the hearing, Hayward seemed to argue that there are no guards available for this particular pinch point or work activity. (Tr. 141-42). However, Hayward did not raise the affirmative defense of infeasibility in its answer or its subsequent pleadings.[9] Rule 34(b)(3) of the Commission's Rules of Procedure requires an employer to raise an affirmative defense in its

[6] In its Answer, Hayward raised an affirmative defense that the *Safety Code for Mechanical Power-Transmission Apparatus*, American National Standards Institute, B15.1-1953 (R1958), *(*"ANSI B15.1") consensus standard was inapplicable. Hayward did not seek to have this document admitted into the record.

[7] "Point of operation is the area on the machine where work is actually performed upon the material being processed." 29 C.F.R. § 1926.300(b)(4)(i). The ANSI B15.1 definition is "[t]he term 'point of operation' shall be understood to mean that point at which cutting, shaping, or forming is accomplished upon the stock and shall include such other points as may offer a hazard to the operator in inserting or manipulating the stock in the operation of the machine." ANSI B15.1 at 12.

[8] The scope of ANSI B15.1 reads as follows: "This code applies to all moving parts of equipment used in the mechanical transmission of power, including prime movers, intermediate equipment and driven machines, excluding point of operation." ANSI B15.1 at 9.

[9] To succeed in an infeasibility defense, an employer must "prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection." *Armstrong*, 17 BNA OSHC at 1387.

answer. *See Armstrong Steel Erectors, Inc*., 17 BNA OSHC 1385, 1387 (No. 92-262, 1995) ("*Armstrong*") (citations omitted). Further, the Secretary's objection at the hearing shows there was no consent to try this defense. (Tr. 144). I find that the defense of infeasibility was not tried by the parties and, therefore, I will not consider it in my decision.[10]

Mr. Combes' testimony was credible and trustworthy. I credit Mr. Combes' testimony regarding the events that occurred on the day of the accident. (Tr. 17-35). Based on his inspection interviews, CO Pacini's understanding of the events is consistent with Mr. Combes' description. (Tr. 48, 54). The testimony of Hayward's Area Manager, Mr. Grant, showed his accident report also supported Mr. Combes' description of the work activity. (Tr. 138-40; Exh. CX-4).[11]

With respect to the practice of "stroking" the drill rod to move the casing into the jaws, evidence indicates this was not uncommon. Mr. Grant's and Mr. Stosal's testimony confirm that it was standard practice for the 5-foot casing section to be loaded by hand. (Tr. 93, 98, 124-25, 142-44). The drill operator's understanding of Mr. Combes' head and voice signals shows a pre-established understanding of the work practice. (Tr. 18-19).[12] Finally, Mr. Stosal made no effort to stop or correct Mr. Combes' actions of giving head and voice signals to the drill operator to stroke the drill rod, even though Mr. Stosal was present to assist Mr. Combes and would have been aware of the difficulty Mr. Combes encountered in loading this casing. (Tr. 99-100).[13]

For the reasons set out above, I find that the Secretary has met her burden and shown that Hayward violated the standard. This citation item is affirmed as a serious violation.

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[10] Further, the Commission has held that it is not necessary for the Secretary to show whether it is possible for a guard to be placed on a machine; that burden rests on the employer. *Buckeye Indus., Inc.*, 3 BNA OSHC 1837, 1839-40 (No. 8454, 1975) *aff'd on other grounds*, 587 F.2d 231 (5th Cir. 1979).

[11] Mr. Stosal's testimony is not credited, where his recollection differs from that of Mr. Combes. The record reveals that Mr. Stosal's recollection of exactly what happened on the day of the accident had faded. (Tr. 122. See also Tr. 97).

[12] The record reveals that it was common practice for employees to communicate with the drill operator by signaling. (Tr. 18-19, 30, 35, 39, 95, 106-07, 115-16; Exhs. JX-2, JX-3; CX-4, RX-4, RX-11, RX-16). Employees present at the time of the accident corroborate that Mr. Combes signaled the drill operator to slide the drill head. (Exh. CX-4)

[13] Mr. Stosal testified that on the day of the accident he did not know why the drill rod was moving. (Tr. 100). He testified that on this *"particular loading"* it was not normal for the drill rod to move back and forth while an employee was loading the casing. He stated that the drill rod would not move while an employee was touching a can *"unless we had a different plan."* (Tr. 95, 100, 123-24). (Emphasis supplied). Mr. Stosal did not testify regarding how employees in the field handled difficult to load casings. The only suggestion in his testimony regarding how this situation would be handled was his reference to a "different plan" involving the drill rod moving while an employee was touching a casing.

*Citation 1, Item 1(b)*

This item alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), which states:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The parties do not dispute that the cited standard is applicable and that an employee was exposed to the cited hazard. Further, Hayward's knowledge of the hazard of pinch points and that the "[c]asing can catch clothing, pull man into machine" is shown in the job hazard analysis for the Bridge Street project. (Tr. 63; Exh. JX-2 at 20. See also, Exhs. JX-1 at 1, JX-3). I find that Hayward knew of the hazards associated with this work activity. The issue in dispute here is whether Hayward's training program meets the requirements of the cited standard.

To prove a violation of 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061(No. 98-0471, 2000) ("*O'Brien"*) (citations omitted). "An employer's instructions must be 'specific enough to advise employees of the hazards associated with their work and the ways to avoid them,' and modeled on the applicable OSHA requirements." *Id.* The Secretary must show "that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1134 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164, 1168 (11th Cir. 2011) ("*Compass"*) (citations omitted).[14]

Hayward argues that it "met its obligation of informing its employees of the hazards involved with sliding a casing onto the Davey Drill drill rod and up to the jaws." (R. Br. 9). It asserts that training on the hazards of pinch points and rotating parts was routinely provided to its employees. (R. Br. 8-9). Hayward argues that Mr. Combes was properly trained; he simply chose to not follow proper procedure.[15] (R. Br. 8).

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[14] Hayward also cites to a judge's decision to support its position that there is no requirement for an employer to "effectuate" training instructions. (R. Br. 9, *citing to Danis Shook Joint Venture XXV,* 1999 WL 1278172 (OSHRCALJ). However, the judge's decision that Hayward relies on was subsequently overruled by the Commission and is therefore not a final order of the Commission. *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1500-01 (No. 98-1192, 2001), *aff'd,* 319 F.3d 805 (6th Cir. 2003) ("*Danis*").

[15] Hayward did not assert the affirmative defense of unpreventable employee misconduct. *See* discussion above in regard to affirmative defenses that are not properly raised.

Hayward does have routine safety training and safety manuals. (Exh. RX-18, 19; JX-1). Hayward had a site specific job hazard analysis. (Exh. JX-2). It had daily task analysis sheets for a review of hazards each day. (Exh. JX-3). Hayward's job hazard analysis for the Bridge Street project notes that loading the casing was a potential hazard ("casing can catch clothing, pull man into machine"). (Exh. JX-2 at 20). Mr. Grant testified it was a routine practice to load the 5-foot casing onto the drill shaft by hand; however, he offered no testimony that training was conducted on how to avoid the pinch points while loading the casing.[16] (Tr. 142).

In particular, training did not include a method, means, or process to load a casing and not be exposed to a pinch point when the casing is stuck or difficult to load. In other words, there was no training on how to deal with the routine problem of a stuck or difficult-to-load casing. The employer's daily task sheets show that soil nailing was a routine activity at this work site. (Exh. RX-4, 6, 9, 11-13, 15-16). Testimony shows that Hayward just gave the general warning to avoid pinch points. (Tr. 19, 111-12 ).

The plain language of the standard and Commission case law require more. The standard states that training should instruct an employee to recognize and avoid unsafe conditions and that the employee must be trained on how to control or eliminate the hazards. Here, no training was provided on how to load a casing by hand to avoid the pinch points, including difficult to load casings, and I find that a simple warning to avoid the pinch point is inadequate.

The Commission's decisions in *Danis* and *O'Brien* are instructive. In *Danis*, the Commission found the employer's training program was inadequate because it did not give specific instructions on how to recognize and avoid the particular hazard at issue. *Danis,* 19 BNA OSHC at 1500-01. In *O'Brien*, the Commission found that the employer did provide training and a general warning; however, the training did not include instructions on OSHA's guarding requirements and the employer did not provide specific safety instructions on the work activity, leaving each employee to develop his own methods. *O'Brien,* 18 BNA OSHC at 2061.

[16] Hayward asserts that the evidence shows the process it used represented industry practice and was designed to prevent the accident that occurred. (R. Br. 8). However, I have reviewed the transcript pages Hayward cites to support this position and find the testimony was not about the industry's standard practice for this work activity. (Tr. 145-46). Hayward's Area Manager did testify that he had spoken with competitors after the accident about the availability of guards for this work activity. (Tr. 141-42). Further, Hayward's Corporate Safety Manager testified that he discussed the accident with other drilling contractors to learn if they had experienced a similar accident and, if so, had they been able to correct the situation. He did not testify regarding what, if any, response he received to his inquiries. Rather, he generally testified that his conversations with competitors did not prompt Hayward to develop any new policies or procedures. (Tr. 164-65).

Similarly, Hayward did not provide training on how to avoid a pinch point while engaged in a routine work practice (loading the casing). I recognize that Hayward has a generally beneficial safety program. The testimony of its employees and managers supports the claim that Hayward takes its safety responsibilities seriously. However, this unfortunate accident reveals a significant gap in its training instructions for this routine work activity. There is no evidence that training was provided on the requirements of the OSHA standard or how to load a casing (especially a difficult one) in a way to avoid the pinch points. I find Hayward's instructions were insufficient and did not provide a method to avoid the pinch-point hazards when loading a casing onto the drill shaft; therefore, the instructions do not meet the requirements of the standard. I find the Secretary has met her burden and proven a violation of the standard.[17] This item is affirmed as a serious violation.

**Penalty**

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary has classified both of the violations as serious and proposed a total penalty of $7,000.00. A violation is classified as serious if "there is substantial probability that death or serious physical harm could result" if an accident occurs. *See Compass*, 23 BNA OSHC at 1136. Here, an employee suffered actual serious injury related to the violations. The serious classification is therefore appropriate.

OSHA's Area Director for its Syracuse office, Christopher Adams, testified that no reductions were applied to determine the penalty amount. (Tr. 84-85). Hayward was not eligible for a size reduction because it has 250 employees. No reduction was given for good faith, as the

[17] Hayward further argues that the cited standard only requires it to provide the training; it does not require it to enforce its own safety instructions. (R. Br. 9, citing to *Dravo Eng'rs and Constructors*, 11 BNA OSHC 2010, 2011-12 (No. 81-748, 1984). However, the Commission has also stated that "an employer cannot wash its hands of all responsibility to assure that the instructions given are understood. A reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees." *Pressure Concrete Const. Co.*, 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992). Regardless, I need not address this argument because this case is related to the provision of adequate training.

violation was rated as a high gravity violation, and no reduction was given for history due to Hayward's prior OSHA violations. (Tr. 84-87; Exh. CX-5).

The Commission may provide a penalty reduction for good faith when considering the employer's safety and health program and its commitment to safety. *Capform, Inc*., 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001). Overall, Hayward has a useful, albeit insufficient, safety training program. As discussed above, the program does not provide instructions for this serious hazard. Therefore, I find a reduction for good faith is not appropriate. *Id.*

I find the proposed penalty appropriate. A penalty of $7,000.00 is assessed.

**Findings of Fact and Conclusions of Law**

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that: Item 1(a) of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.300(b)(2), and Item 1(b) of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2) are AFFIRMED and a penalty of $7,000.00 is assessed.

*/s/ Carol A. Baumerich*
Carol A. Baumerich
Judge, OSHRC

Date: April 19, 2013
Washington, D.C.