

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

SIMKINS-HALLIN LUMBER COMPANY,

Respondent.

OSHRC DOCKET NO. 01-0664

APPEARANCES:

For the Complainant:

Kim Prichard Flores, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Mark R. Kaster, Esq., Dorsey & Whitney LLP, Minneapolis, Minnesota

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Simkins-Hallin Lumber Company (Simkins-Hallin), at all times relevant to this action maintained a place of business at 326 N. Broadway, Bozeman, Montana, where it operated a lumberyard. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 26, 2001, after Respondent reported a fatality on the work site, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's Bozeman facility. As a result of that inspection, OSHA issued citations to Simkins-Hallin alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Simkins-Hallin brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 23, 2001, a hearing was held in Bozeman, Montana. During the hearing the parties reached an agreement settling serious citation 1, items 2a, 2b, and 3, and other-than-serious citation 2. Respondent withdraws its notice of contest to items 2a and 2b; those items will be affirmed, and a single penalty of \$1,375.00 assessed, as agreed upon by the parties. The Secretary withdraws item 3 and citation 2, in exchange for Respondent's agreement to abate the cited conditions (Tr. 81-82). The

parties have submitted briefs on the remaining item, serious citation 1, item 1, and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of being caught between moving parts of equipment or equipment and materials:

On or about January 26, 2001 and at times prior thereto, employees operating lift trucks were permitted to leave the operator's position and climb onto the fenders while the load-engaging means was not fully lowered.

Among other methods, feasible and accept able abatement methods to correct this hazard would be to follow the Safety Standard for Low Lift and High Lift Trucks, ASME B56.1-1993, 5.2.11(d) and assure the load engaging means are fully lowered before the operator leaves the operator's position.

Facts

This action concerns the means by which Simkins-Hallin's fork lift drivers stack lumber products. Both Trina Mailloux, the OSHA Compliance Officer (CO), and Thomas R. Simkins, Respondent's president (Tr. 36, 141), described the process. According to Simkins, the forklift operator lifts a load of lumber on the horizontal tines on the front of his forklift; he then tilts the "mast," *i.e.*, the two parallel vertical members of the forklift which house the hydraulic lift system for the fork tines (Tr. 43-44; Exh. C-2, C-3), towards him, and raises the load. The load is driven over an existing stack, and lowered to a few inches above its intended location (Tr. 147-48). The operator then leaves the forklift seat, and climbs out onto the fender of the forklift (Tr. 49; C-5). While holding onto the forklift's overhead guard with one hand, with his other hand the operator slides a spacer, or "sticker," which is a four foot long 2 x 4 board (Tr. 43, 147; Exh. C-5), onto the top of the existing stack (Tr. 148). He then moves to the opposite fender and slides in a second sticker. The operator then returns to his seat, lowers the load onto the stickers, and backs out (Tr. 148). Apparently the forklift, while in neutral, is running during this operation.

This litigation presumes that the deceased was engaged in the described loading operation when he was killed on January 26, 2001. Complainant maintains that the deceased was crushed while passing from fender to fender between the mast and the overhead guard or roll bars when the mast (Tr.

17). It is stipulated that there were no eyewitnesses to the fatal accident which took place. Respondent acknowledges, however, that the deceased was found between the two uprights of the mast (Tr. 25).

CO Mailloux testified that by leaving the operator's position, the operator, or another party could inadvertently contact the controls, moving the load (Tr. 39). Mailloux further stated that if the controls were abandoned, there would be no one to intervene in the event of a problem with the load (Tr. 40). Martin Robertson, a consulting engineer previously providing technical support to Caterpillar's legal department (Tr. 100-01; Exh. C-9), testified that someone could walk into, or under, the load if the operator were not in a position to warn them (Tr. 126). Robertson further testified that the forklift, when unmanned, is prone to tipping. According to Robertson the entire forklift could tip over should the load move, or another vehicle bump it (Tr. 126).

Mailloux and Robertson further testified that the cited forklift's fenders did not have skid resistant material on them, and had headlights mounted on them (Tr. 44-47, 117-18). According to those witnesses, employees using the forklift fender as a work platform could slip, or trip, inadvertently grabbing the uprights of the mast (Tr. 48, 119-20) or falling into the controls, which are less than a foot from the employee's working position on the fender (Tr. 47-48, 119). Were the controls accidentally engaged, the load could inadvertently rise or fall, and/or the mast could tip forward or back (Tr. 48). The mast uprights are not guarded against accidental contact; it is uncontested that the moving chains in the uprights pose a recognized amputation hazard (Tr. 48, 120; Exh. C-21). Mailloux and Robertson testified that Respondent could eliminate the practice of climbing on the forklift by placing loads on pallets, by placing stickers on top of each load before stacking, or by banding stickers to the bottom of loads to be stacked; the latter two practices are already used under some circumstances (Tr. 51, 133, 193, 207-08).

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). *Citation of The Hazard/Preemption by a Specific Standard*

The citation states that Simkins-Hallin exposed its forklift operators to the hazard of "being caught between moving parts of equipment, or equipment and materials," by allowing said operators to

leave the operator's position to set stickers from the forklift fenders while the forklift's load engaging means was elevated. The purpose of §5(a)(1) is to provide protection against recognized hazards where no duty under a specific standard exists. Specific, promulgated standards will preempt the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards. *Con Agra, Inc.*, 11 BNA OSHC 1141, 1983 CCH OSHD ¶26,420 (No. 79-1146, 1983).

Simkins-Hallin maintains that the standards at §1910.178 *et seq.*, governing **Powered Industrial Trucks** comprehensively address the hazards at issue in this matter. Simkins-Hallin argues that its compliance with the provisions of §1910.178 *et seq.*, specifically paragraph (m)(2), (4) and (5), insulates it from citation under §5(a)(1)(Respondent's Brief, p. 23-26). This judge does not agree. Where compliance with a specific standard or set of standards does not eliminate the hazard addressed in the citation, no preemption will be found. *See, Coleco*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991). Section 1910.178(m), the standard Simkins-Hallin relies on, states *inter alia*:

(m) *Truck operations.*

(2) No person shall be allowed to stand or pass under the elevated portion of any truck, whether loaded or empty.

* * *

(4) The employer shall prohibit arms or legs from being placed between the uprights of the mast or outside the running lines of the truck.

(5)(i) When a powered industrial truck is left unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shall be shutoff, and brakes set.

Wheels shall be blocked if the truck is parked on an incline.

(ii) A powered industrial truck in unattended when the operator is 25 ft or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.

(iii) When the operator of an industrial truck is dismounted and within 25 ft. of the truck still in his view, the load engaging means shall be fully lowered, controls neutralized, and the brakes set to prevent movement.

Subparagraph (m)(5)(i) addresses the possibility that the operator of a powered industrial truck, such as a forklift, might leave his vehicle unattended. Subparagraph (m)(5)(iii) contemplates that the operator might dismount the vehicle, but keep it under observation. Under either circumstance, the standard requires that the vehicle be neutralized and the load engaging means lowered to prevent any unanticipated movement. Paragraph (m)(5) does not contemplate the circumstances being litigated here, *i.e.* wherein a forklift operator with an elevated load leaves the forklift's operating position to climb around on the forklift itself, using the forklift fenders as a work platform. While subparagraph

(m)(4) requires employers to prohibit employees deliberately placing limbs between the uprights of the mast, it neither contemplates the possibility that an employee climbing on the vehicle might accidentally fall into the mast, or sets forth means of addressing that hazard. In short, nothing in paragraph (m) addresses the danger to forklift operators of being caught between moving parts of equipment, or equipment and materials, when leaving the operator's position to climb onto the fenders. Compliance with paragraph (m) would not eliminate the possibility of an operator slipping and falling into the forklift's controls or mast while clambering about on the vehicle.

Because §1910.178 does not address the named hazard, the citation under §5(a)(1) is not preempted.

Recognition of the Hazard

Martin Robertson testified to the contents of industry standards applicable to forklifts, including rough terrain forklifts. Robertson testified that standards applicable to the manufacture and operation of forklifts are promulgated by the American National Standards Institute (ANSI), sponsored by the American Society for Mechanical Engineers (ASME). The promulgating body is made up of committees made up of representatives of lift truck manufacturers, users, trade associations, insurance companies and trade unions (Tr. 111). The relevant ANSI standards are published at ASME/ANSI B56.1 and B56.6 (Tr. 110-11; Exh. C-6, C-7, C-8). 1993 ASME B56.6.2.12, **Safety Standard for Rough Terrain Forklift Trucks; OPERATING SAFETY RULES AND PRACTICES** states:

Before leaving the operator's position:

- (a) Bring rough terrain forklift truck to a complete stop;
- (b) place direction controls in neutral;
- (c) apply the parking brake;
- (d) lower load-engaging means fully, unless supporting an occupied elevated platform.¹

(Tr. 122; Exh. C-6). ASME B56.1.5.2.11, **Safety Standard for Low Lift and High Lift Trucks; OPERATING SAFETY RULES AND PRACTICES**, states:

Before leaving the operator's position:

- (a) Bring truck to a complete stop;
- (b) place direction controls in neutral;
- (c) apply the parking brake;
- (d) lower load-engaging means fully, unless supporting an occupied elevated platform.

¹ OSHA STANDARDS REQUIRE THAT A MEANS OF SHUTTING OFF POWER TO THE TRUCK BE PROVIDED ON ALL PERSONNEL PLATFORMS.

(Tr. 123-24; Exh. C-7). The 2000 ASME B56.1.5.2.11 standard is identical, except that the word “occupied” is omitted from the text (Tr. 124-25; Exh. C-8).

Robertson further testified that there was no safe place to work from a forklift other than the operators seat, and that using forklift fenders as a work platform was hazardous and contrary to the intent of the forklift manufacturer (Tr. 117, 121). Robertson pointed to the absence of anti-skid treads on the fenders (Tr. 117-18), and to an FIEI safety manual for rough terrain forklifts, which, while discussing safety during operations, states “Never allow anyone to stand on the overhead guard or fenders.” (Tr. 118-19, Exh. C11, p. 5). Robertson admitted that there was no warning on the cited Caterpillar forklift, or in its safety manual, advising users that it was dangerous to stand on the fenders (Tr. 137-38). The Caterpillar manual does not refer to the FIEI manual (Tr. 138). Finally, Robertson testified, he had never heard of the cited practice of placing stickers from the forklift’s fenders prior to this litigation (Tr. 115-116).

Thomas Simkins testified that he had never seen the FIEI safety manual for rough terrain forklifts (Tr. 154). He further testified that setting stickers from the forklift fenders is a common practice in all lumber yards and is not recognized as a hazardous practice (Tr. 151-52). Simkins’ testimony was confirmed by Ronald Koons, a safety consultant who has designed a safety program which is in use in excess of 4,500 lumber yards (Tr. (Tr. 160-66). Koons testified that, prior to this action, he never heard of any prohibitions against, or any injuries associated with using the fender platforms to set stickers (Tr. 168). In addition, Koons testified that some forklift manufacturers, Toyota and Taylor seem to anticipate that their forklifts’ fenders will be used as work platforms, providing anti-skid pads on the fenders (Tr. 173-74, 177; Exh. C-51, C-64). Koons testified that he found no warnings against standing on the fenders of any of the forklifts he examined; none of the forklifts safety manuals he examined prohibited the practice (Tr. 178, 181). Sidney Voorhees, executive director of a regional association of 315 lumber dealers, also testified that setting stickers from the fender of a forklift is common practice among the members of his organization (Tr. 205). Voorhees did not consider the practice hazardous (Tr. 206).

CO Mailloux agreed that the practice of setting stickers from forklift fenders was common practice in the lumber industry (Tr. 5485). Mailloux did not know of any prior injuries resulting from a fall from the fender of a forklift, or from the practice of placing stickers from the fender (Tr. 68-69, 73, 98). This judge finds that the Secretary failed to make out her burden of proof in this matter, in that she did not establish, by a preponderance of the evidence, that the cited hazard was recognized by knowledgeable persons familiar with the lumber industry and/or the use of powered industrial trucks.

The record establishes that leaving the operator's position on a forklift results in recognizable hazards, including the danger that someone will walk under or into the load, and the danger that the unattended forklift may tip, should the load shift, or the forklift be struck. However, the *recognized* hazards are eliminated during stacking operations, during which time the forklift is butted up against a stack, and the load suspended only a few inches over that stack. Under those circumstances, there is no danger of anyone walking under the load, or into the forks. There is no danger of the load dropping, or the forklift tipping. Rather, the Secretary maintains, leaving the operator's position to insert stickers, creates a *new* hazard, that of slipping and falling from the fender into the mast and/or forklift's controls. It is clear from the evidence that no one engaged in the lumberyard industry recognized this hazard. The practice of placing the stickers from the fenders appears to have been universal, and, prior to this incident, no accidents or injuries had resulted from it. Although Robertson testified that he, a safety expert knowledgeable in powered industrial trucks, recognized that the custom of working from the fender was hazardous, he admitted that he had never heard of the practice prior to this incident. Perhaps because it was unfamiliar with the practice, or because no injuries associated with the practice had been reported, the forklift industry neither established guidelines governing, nor issued warnings prohibiting the use of fenders as a work platform.²

Because the Secretary failed to establish that Simkins-Hallin's employees were exposed to a recognized hazard, the cited violation must be vacated. This judge notes, however, that hazard recognition is not a static area. New accident and injury data may result in either actual knowledge of, or industry-wide acknowledgment of a previously unrecognized hazard. This opinion should not, therefore, be viewed as an endorsement of the cited stacking technique, and Simkins-Hallin should note that if it continues to use the technique, it does so at its own, and its employees' peril.

ORDER

1. Citation 1, item 1, alleging violation of §5(a)(1) is vacated.

/s/

James H. Barkley
Judge, OSHRC

Dated: January 31, 2002

² This judge finds that the single reference in the FIEI safety manual prohibiting standing on the fenders during the operation of rough terrain forklifts constitutes insufficient notice, in that it is not clear what hazard it is meant to prevent.