Secretary of Labor, Complainant, v. Crowley American Transport, Inc., Respondent.	OSHRC Docket No. **97-1231**

Appearances:

Michael K. Hagan, Esq.
Dana Ferguson, Esq.
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

Robert Parrish, Esq.
Michael A. Garfield, Esq.
Moseley, Warren, Prichard & Parrish
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Crowley American Transport, Inc., contests a one-item citation issued to it by the Secretary on July 7, 1997, alleging a serious violation of the general duty clause, §5(a)(1) of the Occupational Safety and Health Act. Crowley operates a marine terminal in Jacksonville, Florida. The citation alleges that Crowley failed to require drivers of Capacity brand tractors to wear seat belts while moving trailers onto and off of barges.

Occupational Safety and Health Administration (OSHA) compliance officer Joann Garner inspected Crowley's worksite following the report of an employee fatality on January 24, 1997. Crowley employee Scott Scuncio was killed while operating a Capacity tractor. Upon completion of Garner's investigation, the Secretary issued the citation which gave rise to this proceeding.

Crowley admits jurisdiction and coverage. A hearing was held in this matter on March 12 and 13, 1998, in Jacksonville, Florida. The parties have filed post-hearing briefs. Crowley contends that the Secretary failed to establish any of the elements of a §5(a)(1) violation. The undersigned finds that the Secretary failed to establish the hazard, *i.e.*, that as the Capacity tractor

was operated, its drivers were exposed to a hazard of being thrown around inside of the tractors or thrown from the tractors in the event of an accident. The citation is, therefore, vacated.

The Citation

The Secretary alleges that Crowley committed a serious violation of §5(a)(1), which provides:

> SEC. 5. (a) Each employer-
>
> (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[.]

In the citation, the Secretary alleges Crowley violated §5(a)(1) by exposing employees "to the hazards associated with the failure to use seatbelts," specifically stating:

> On January 24, 1997, employees who drive Capacity Trucks were not wearing seatbelts while moving trailers from the San Juan Barge, exposing the employees to the hazard of being thrown around in the vehicle or thrown from the vehicle in the case of accident.

Background

Crowley operates a marine terminal located at 1163 Talleyrand Avenue in Jacksonville, Florida. One-, two-, or three-level cargo barges dock at Crowley's terminal and are then loaded or unloaded. The barges carry trailers which eventually are to be hauled over-the-road by semi-tractor trailer trucks (Tr. 19-24, 27, 89-90). The barges are referred to as "ro-ro" vessels (short for "roll-on/roll-off"), meaning that the trailers are hauled onto and off of the barge by tractors, and are not loaded and unloaded by cranes (Tr. 19). Crowley's worksite consists of a terminal and a yard. The yard, referred to as the Trumball yard, is located across Talleyrand Avenue from the terminal and contains parked and moving tractors and vehicles. The dock and ramp area of the terminal consists of three levels of ramps and platforms over which the operators of the Capacity tractors gain access to all levels of the docked barges. The Capacity tractor drivers are referred to as the barge crew (Tr. 26-29, 115-116). The longest distance a Capacity tractor would be required to travel with a trailer is a quarter of a mile (Tr. 272).

Crowley uses Capacity brand tractors (also referred to as yard jockeys, trailer jockeys, and hustlers) to hook up to the trailers in order to load and unload the barges (Tr. 18-20, 124). Capacity tractors weigh over 26,000 pounds (Tr. 392).

On January 24, 1997, driver Scott Scuncio drove his Capacity tractor up to the second level ramp to unload a trailer from the barge that was in the dock. As Scuncio approached a turnaround area at the top of the ramp, he pulled forward to make a turn so that he could back up into a lane on the barge and align with one of the trailers. At this point the driver would usually reverse his tractor, but Scuncio apparently was unable to shift gears into reverse. Instead, the tractor went forward, jumped a low curb, crashed through a guardrail, and fell to the concrete dock 20 feet below. Scuncio was killed in the fall. He was not wearing a seat belt at the time of the accident (Tr. 9, 234-235).

At the hearing, the Secretary and Crowley reached certain stipulations which were entered into the record. The stipulations are as follows (Tr. 239-241):

- There are no written established traffic patterns at the worksite.
- Six to ten Capacity tractors are at the platform/ramp/barge area at any one time. There are over-the-road vehicles in other areas of the worksite.
- The work is noisy.
- Capacity drivers work up to 16 hours at a time.
- Capacity drivers drive up the ramp on the left most of the time.
- Each Capacity tractor has a seat belt assembly.
- Certification training is performed as a staged operation using empty loads with one driver at a time during daylight hours.
- Crowley does not instruct drivers that they must use seat belts. Crowley does not enforce a seat belt policy requiring the use of seat belts.
- Crowley maintains its Capacity tractors in good working order.
- At the time of the accident, the curb and the guardrail on the two platform levels were within OSHA regulations.
- Crowley's drivers drive the Capacity tractors across Talleyrand Avenue to and from the yard without wearing seat belts.

When driving up and down the ramps, the Capacity drivers drive on the left-hand side. The ramps to the two platforms are 25 feet wide, with two lanes across. There is no center dividing line (Tr. 28-29, 224). The second level platform measures approximately 90 feet from the edge nearest the barge to the edge farthest from the barge. The third level platform measures approximately 70 feet from those same points (Tr. 30-31).

The drivers drive forward up the ramps and use the platform space to turn, preparatory to backing up to either hook up or unhook a trailer. One driver estimated that 70% of the time spent driving a Capacity tractor is spent in reverse (Tr. 48).

The fourth gear in each of the Capacity tractors is blocked so that the maximum speed the tractors can be driven is approximately 25 m.p.h. (Tr. 136, 223, 288, 329, 406).[1] The maximum speed the Capacity tractors can be driven in reverse is approximately 6 m.p.h. (Tr. 254).

In 1989, two Crowley vehicles collided at the Jacksonville Port Authority (Tr. 136-137, 173, 287). During that time period, Crowley was aware that the Secretary was attempting to promulgate a standard requiring drivers of vehicles used in marine terminal operations to wear seat belts (Tr. 385).

On December 20, 1989, Crowley issued a memorandum to its employees stating (Exh. C-7, p. 8 of 20):

> Safety shall be used at all times in all company owned vehicles used on company business . . . Any injury sustained when safety belts are not in use may be cause for disciplinary action.
>
> Please advise all applicable employees in your respective areas of responsibility of this requirement.

On March 13, 1990, Crowley issued a second memorandum stating (Exh. C-7, p. 9 of 20):

> Please by advise[d] it is our policy that [ ] Safety Belts shall be used at all times in all company vehicles used on company business.

[1] All of the witnesses who testified regarding the maximum speed of the Capacity tractors agreed that 25 m.p.h. was a reasonable estimate. Witnesses also estimated the maximum speed as being 18 (Tr. 60), 19 (Tr. 60, 256), and 27 m.p.h. (Tr. 254). Twenty-five m.p.h. is accepted as the most credible estimate.

The evidence is overwhelming and undisputed that Crowley's safety belt policy was universally ignored within hours of its issuance. Terry Rountree had been a Capacity driver for Crowley for almost 10 years at the time of the hearing (Tr. 16). He testified that he wore a seat belt for "about two hours" after the new seat belt policy was announced (Tr. 81). Samuel Clark, a driver with 12 years of experience at the time of the hearing, testified that he had never worn a seat belt at Crowley (Tr. 267). Kerry Boatwright, who began driving for Crowley in 1989, stated that when he first went to the barge crew, he wore a seat belt for less than a day after he was told to do so by one of the other barge crew drivers. Boatwright soon noticed that none of the other barge crew members was wearing a seat belt, and he stated that he realized that the other driver "was pulling my leg," (Tr. 245) and was "getting a joke" (Tr. 247).

Robert McFeeley, Crowley's manager of loss prevention and hazardous material, stated that in 1989 and 1990 he monitored the drivers' use of seat belts and attempted to enforce the policy for "a month or two" (Tr. 295).[2] McFeeley conceded that although the seat belt policy was never rescinded, Crowley is aware that none of its Capacity drivers wear seat belts and Crowley does nothing to enforce the policy (Tr. 287, 293).

Crowley gave two primary reasons for its unwillingness to enforce the seat belt policy: (1) when backing up to load or unload a trailer, the drivers have to bend forward and turn in their seats to see where they are going (Tr. 243, 266, 386). The driver "almost [has] to come out of the seat to look out the window on the blind side," and the seat belt restricts his movement (Tr. 95); and (2) the seat belts are subject to a ratcheting effect which eventually causes the seat belt to become uncomfortably tight across the drivers' thighs (Tr. 243). Rountree explained that the tractors "are solid axle Capacitys with no springs on the rear, and every small bump that you hit jars, and the seat belt just gets tighter and tighter" (Tr. 95). A third consideration is that in the event that the tractor overturns or goes into the water, the wearing of a seat belt could impede an emergency exit from the cab of the tractor, resulting in a more serious injury or death (Tr. 96, 354, 386-388).

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[2] The testimony of the Capacity drivers establishes that the seat belt policy was never effectively enforced beyond the first day it was issued.

The drivers who testified were questioned regarding their history of accidents while driving Capacity tractors. Rountree stated that he had once hit a trailer while backing up. He was not hurt or jostled (Tr. 51). Boatwright testified that he had bumped into curbs and that he had once backed into a telephone pole, knocking it over, but that he was not hurt (Tr. 231-232). Bartley Brocato stated that he once ran into his supervisor's personal vehicle in the Trumball yard, but that he was not hurt (Tr. 250). Brocato was also involved in an accident five years prior to the hearing in which another driver going forward struck the trailer that Brocato was backing into a barge lane. Brocato was not hurt, but the other driver "was bruised up" (Tr. 251). Brocato described another accident he witnessed a year and a half prior to the hearing, in which two tractors collided, but he did not know if the drivers were hurt (Tr. 252).

Six or seven months prior to the hearing, Samuel Clark hit the overhead ramp of the barge with his tractor while going 10 to 15 m.p.h. Clark was thrown from his seat onto the steering wheel and suffered chest injuries. The record does not indicate whether Clark lost any work time as a result of his injuries (Tr. 259). Clark also backed into a trailer stand going 5 m.p.h. and hurt his lower back. He missed approximately two days of work (Tr.260, 262).

Discussion

In order to establish a violation of the general duty clause,

> [T]he Secretary must show that (1) a workplace condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it.

Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996).

The Secretary argues that it has established the four elements of a §5(a)(1) hazard by showing that (1) it is general knowledge that operating vehicles at maximum speeds of 25 m.p.h. presents a hazard to drivers of being thrown around inside the vehicle or of being thrown from the vehicle in the event of an accident; (2) Crowley's 1989 implementation of its seat belt policy demonstrates that the company recognized the hazard; (3) the hazard of being thrown around inside of or being thrown from a vehicle could cause death or serious physical injury; and (4) the Capacity tractors were already equipped with seat belts so that a feasible means of abatement existed.

Crowley counters that (1) the Secretary failed to provide any empirical evidence that operating a vehicle at 25 m.p.h. presents a hazard to the driver of being thrown around inside of or thrown from the vehicle; (2) that the 1989 implementation of the seat belt policy was done in anticipation of a new OSHA standard that would require drivers for marine terminal operations to wear seat belts, and was not in recognition of an actual hazard[3]; (3) the Secretary did not prove that failure to wear seat belts in the Capacity tractors could result in death or serious physical injury, and that, in fact, the wearing of seat belts increases the risk of injury[4]; and (4) that use of seat belts is not economically feasible because the time that it would take a driver to buckle and unbuckle his seat belt (estimated to be 18 to 20 times an hour) would double or triple the amount of time it takes the barge crew to load or unload a barge.[5]

Did a Hazard Exist?

> [W]hen citing a violation of the general duty clause, the Secretary must establish that the cited condition actually poses a hazard to employees. . . . [T]he general duty clause, while intended to protect employees from hazards that have yet to be addressed by standards, is not intended to replace standards as an enforcement mechanism.

Waldon Healthcare Center, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

The only non-employee witness called by the Secretary was OSHA compliance officer Joann Garner. Garner testified that the hazard she identified was "that the driver is driving a

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[3] The Secretary gave notice of proposed rule making, OSHA's Occupant Protection in Motor Vehicles regulation, 55 Fed. Reg. 28728, on July 12, 1990. The final rule was never promulgated.

[4] Although Crowley argues that the wearing of seat belts increases the risk of hazards due to restricting the driver's view while in reverse and to the ratcheting effect, Crowley did not properly assert the affirmative defense of greater hazard.

[5] Because the undersigned has determined that the Secretary failed to establish that a hazard existed, it is not necessary to address this element. However, it is noted that Crowley adduced no credible evidence supporting its contention that the use of seat belts would significantly increase its production time. David Holman, Crowley's director of staff operations, stated that during the aborted implementation of the seat belt policy in 1989-90, the barge crews' functions "doubled in time" (Tr. 304). Holman could not state over what period of time the functions doubled (Tr. 306), and conducted no studies and cited no statistics in support of his assertion (Tr. 307). Considering the uncontradicted testimony that the drivers ignored the seat belt policy either immediately or within hours of its taking effect, Crowley's contention that the enforcement of the policy would result in increased production time is rank speculation.

vehicle and being thrown around inside of the truck in case they hit something or each other or the rails or whatever" (Tr. 134). Garner based this determination of a hazard on "general knowledge," Crowley's past history of accidents[6], the fact that Crowley had instituted a seat belt policy in 1989, and the number of vehicles involved in the operation (Tr. 134-135).

Garner testified that by "general knowledge," she meant that everybody knows that "[a]ny kind of vehicle that's driven, the potential is there for hazards, striking other vehicles, running into something, turning over, anything like that" (Tr. 172). Garner also stated her opinion that, "Two vehicles hitting each other even if they were just going five miles an hour potentially could cause serious harm" (Tr. 136).

In her post-hearing brief, the Secretary asserts that the accident that killed Scuncio is additional proof of the hazard. It is well-established that "it is the hazard, not the specific incident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard." *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th cir. 1984). It is true, however, that an accident may convincingly demonstrate that a condition presents a hazard to employees. *See Coleco Industries, Inc.*, 14 BNA OSHA 1961, 1964 (No. 84-546, 1991). Here, the accident does not sufficiently relate to the cited hazard.

Although the Secretary defines the hazard to be the possibility of being thrown around inside of or from the vehicle, she also describes it as a "failure to use seatbelts." There is no real suggestion that use of a seat belt would have prevented Scuncio's death (*See* Sec. brief footnote 7). Scuncio plunged over the side of the platform in what must be regarded as an improbable and very unfortunate accident. Proof that a hazardous incident can occur under "a freakish or utterly implausible concurrence of circumstances" is insufficient to establish a hazard. *See Waldon Healthcare Center*, 16 BNA OSHC at 1060. Scuncio's tragic accident triggered OSHA's investigation, but it is irrelevant to the determination of whether the cited hazard existed.

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[6] Garner relied on three accidents reported to her during her investigation: the 1989 collision that occurred at the Jacksonville Port Authority, an incident where an employee "almost ran into a reefer trailer," and an incident involving "brake failure which OSHA had no facts on" (Tr. 173). There is no evidence that any of the drivers were thrown around inside of or thrown from their vehicles as a result of these accidents. No evidence of lost work time was adduced for any of the drivers involved in these incidents.

The Secretary presented no expert testimony regarding hazards resulting from a collision between two tractors traveling at a maximum speed of 25 m.p.h. She offered no empirical evidence to support her claim that the use of seat belts in a vehicle such as the Capacity tractor would reduce the potential for injury in the event of such a collision. The testimony of the drivers establishes that, on those occasions when they do collide with another vehicle or object, they were not thrown around or out of the vehicle, or at least not to a degree that would be different if a seat belt had been worn.

Garner believes that it is safer to wear seat belts any time one is in a moving vehicle, and it is a belief shared by many. Seat belts are required to be worn in moving vehicles on the public roadways in all fifty states. Interstate travelers are frequently greeted with roadside signs telling them to buckle up as they traverse our highways. To Garner, the belief that driving without seat belts constitutes a hazard is "general knowledge"; it has (fortunately) become a national tenet that seat belts save lives. The rationale for wearing seat belts in vehicles capable of traveling at high speeds on public roadways does not, however, necessarily apply to vehicles that make frequent stops, travel a quarter of a mile at the most at one time, and are capable of a maximum speed of only 25 m.p.h.

Clark, the driver who sustained chest injuries when he was thrown onto the steering wheel when his tractor hit the overhead ramp of the barge, stated (Tr. 265):

> Well, I'm glad I wasn't wearing [a seat belt] because I felt like if I had been wearing the type belts that's in there, which is a lap belt, my injuries would have been more severe than what they was. I would have had maybe stomach injuries, kidney injuries, or, you know, I would have had severe stomach injuries.

Clark's assertion, like so many others in this case, is unsupported by expert testimony, studies, or statistics. His testimony is instructive, however, in showing that the use of seat belts is not universally regarded as a useful means of abatement. Clark believes that the use of seat belts would have exacerbated his injuries. Garner maintains that using seat belts is always safer than not using them.

Both the Secretary and Crowley rely on the *ipse dixit* of their witnesses. Neither side is convincing, but it is the Secretary who must meet the burden of proof. She has failed to do so here. Without some evidence other than the compliance officer's sense that seat belts should be

worn, the Secretary cannot prove that a hazard existed. The citation alleging a serious violation of §5(a)(1) is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of §5(a)(1) for failing to require drivers of Capacity tractors to wear seat belts, is vacated and no penalty is assessed.

NANCY J. SPIES
Judge

Date: June 14, 1999