

## Legal Corner

### **Imputed Knowledge of a Non-Compliant Practice Based On An Ineffective Program**

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A recent OSH Review Commission ALJ decision provides some valuable reminders about grinder wheel safety and also illustrates how the absence of an effective safety program can be used to impute employer knowledge of a non-compliant condition.

URS Federal Services (“URS”) is a large global engineering, design and construction firm with 92,000 employees. URS assigned approximately 375 employees to work under the direction of five supervisors in numerous departments spread across a large area of the U.S. Marines Logistics Base in Barstow, California.

In July of 2018, a URS employee was operating an electric grinder in a welding shop at the base when the grinding stone experienced a catastrophic failure. Although the URS employee was wearing an appropriate face shield, stone fragments penetrated the face shield. He was knocked to the ground and suffered a severe forehead laceration and a concussion that kept him out of work for six months. It is interesting to note that he was not hospitalized, and the resulting OSHA inspection was triggered by a complaint rather than an employer report of a serious injury.

One aspect of the OSHA investigation focused on what had happened and whether there was any history of similar events. It was discovered that the grinder spindle operated at 12,000 RPM but the maximum operating speed of the grinding wheel was 9,070 RPM. The investigation also revealed two previous incidents involving electric grinders. In one case, the rubber backing broke off the grinding wheel and hit an employee in the groin. There was no evidence of a catastrophic failure of the wheel or that the RPM ratings of the wheel and grinder were incompatible. The second case also involved a catastrophic failure of a grinding wheel. There was no information on compatibility and apparent speculation that the wheel was defective. The evidence indicated that a member of the URS safety committee was aware of the incident, but no evidence that URS management was aware of the incident.

Given that OSHA’s Abrasive Wheel Machinery Standard, 29 CFR 1910.215(d)(1) requires, among other things, checking the spindle speed of the grinding machine before mounting the grinding wheel to be certain that it does not exceed the maximum operating speed marked on the wheel, the focus of the OSHA investigation shifted to whether that check had been performed. OSHA and URS quickly determined that the required check had not been performed and then the focus of the investigation shifted to whether URS had actual or constructive knowledge that the required check had not been performed.

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<sup>1</sup>Secretary v. URS Federal Services, Inc., OSHRC Docket No. 18-0278, September 23, 2019.

[https://www.oshrc.gov/assets/1/18/Decision\\_18-0278\\_URS\\_Federal\\_Services\\_\(003\).pdf?9956](https://www.oshrc.gov/assets/1/18/Decision_18-0278_URS_Federal_Services_(003).pdf?9956)

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The primary issue was whether URS had a work rule addressing this required compatibility check, whether it was effectively communicated to all personnel who would be installing grinding wheels on the machines or using the machines, and whether it was enforced. URS demonstrated that its 2016 Tool Safety training for its Barstow personnel covered the grinder wheel compatibility issue. However, OSHA established that URS had assigned new personnel to the welding department subsequent to that 2016 training without confirming they already understood the compatibility issue or providing them with training on the compatibility issue, which was not repeated until after the July 2018 incident.

At some time in 2017, URS issued a written work rule, available on the URS intranet, stating:

Ensure the RPM (as posted on the wheel) is equal to or greater than that posted on the grinder, the disk/wheel is the correct size for the grinder, and the type of wheel is compatible with the material being ground or cut.

However, the work rule was not posted by the grinding machines and a review of the URS safety program at the site failed to establish the work rule was effectively communicated through some other mechanism. URS established that it took the following steps to implement its safety program:

- Gen. safety training was provided to all employees, during orientation and annually, but URS was not able to demonstrate that it covered the compatibility of the grinder spindle and grinder wheel speeds (“the Compatibility Issue”).
- Manager safety training module was provided to all managers.
- Daily tailgate training sessions were provided on a safety topic, which did not include the Compatibility Issue.
- A general job hazard analysis (JHA) was performed by each employee before beginning new work in a different department, but URS did not ensure it covered the Compatibility Issue.
- A task-specific JHA was performed by each employee for each day’s activity, but URS did not ensure it covered the Compatibility Issue.
- There were occasional behavior-based safety (BBS) observations of fellow employees, but URS did not ensure they covered the Compatibility Issue.

The following was viewed as evidence of an inadequate safety program:

- The supervisor of the injured URS employee was responsible for seven departments “spread out all over the base,” which apparently was over 1500 acres, and had limited familiarity with the work being performed in those seven departments.
- The supervisor and on-site safety supervisor supposed to conduct walkarounds, but there was little evidence of that being done.
- In the three years leading up the July 2018 incident, the entire company had only three documented disciplinary actions, two of which were in 2015; none were at the Bartow base or at any URS welding department.

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OSHA issued a serious citation to URS alleging a violation of OSHA's Abrasive Wheel Machinery Standard, 29 CFR 1910.215(d)(1), based on the failure of URS to exercise reasonable diligence by performing spot checks to confirm the maximum rated speeds of the grinding wheels were compatible with the machines on which they were mounted.

The Review Commission ALJ upheld the citation. After explaining why neither of the two previous grinder incidents established actual knowledge of the failure to check for wheel/grinder compatibility, the judge found that the evidence demonstrated constructive knowledge, relying primarily on the principle stated by the Review Commission in *Jacobs Field Svcs. N.A.*, 25 BNA OSHC 1216 (No. 10-2659, 2015):

According to the Commission, the determination of whether an employer has exercised reasonable diligence is based on multiple factors, including “an employer’s obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately supervise employees, and implement adequate work rules and training programs.”

In addition to the factors previously discussed, the evidence presented during the hearing led the judge to conclude:

- that URS “management was largely hands off when it came to inspections and supervision” and instead “placed a significant amount of responsibility for conducting inspections on the employees themselves.”
- the URS “management team ... was shorthanded.”
- URS “did not provide [the supervisor of the injured employee] with sufficient training to perform a more careful and critical examination of his employee’s equipment” beyond mostly checking for required PPE.
- The “appointed supervisor had no experience, and ... no substantive knowledge, in the department he was supposed to oversee; was responsible for six other departments in which he had no substantive knowledge; and had a team lead that had no discernible responsibility or authority over the employees in the ... department.”

Finally, in a warning at self-directed workforces, the judge stated while job hazard analyses and behavior-based safety checklists are laudable efforts, an employer “cannot delegate its duty to supervise and inspect its employees to the employees themselves.”

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*This article is intended to inform readers of recent developments and issues to consider in the field of workplace safety and health. It is not legal advice and may not be relied upon in determining whether a facility or activity is in compliance with applicable legal requirements.*