



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR  
Complainant,  
v.  
CONCRETE CONSTRUCTION COMPANY  
Respondent.

OSHRC DOCKET  
NO. 92-1488

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 9, 1993. The decision of the Judge will become a final order of the Commission on January 10, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before December 29, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

*Ray H. Darling, Jr. / RHA*  
Ray H. Darling, Jr.  
Executive Secretary

Date: December 9, 1993

DOCKET NO. 92-1488

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld  
Administrative Law Judge  
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SECRETARY OF LABOR,

Complainant,

v.

CONCRETE CONSTRUCTION COMPANY,

Respondent.

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OSHRC Docket No. 92-1488

Appearances:

Janice L. Thompson, Esq.,  
 Office of the Solicitor  
 U.S. Department of Labor  
 For Complainant

Roger L. Sabo, Esq.  
 Shottenstein, Zox & Dunn  
 Columbus, Ohio  
 For Respondent

Before Administrative law Judge Michael H. Schoenfeld

DECISION AND ORDER

Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

For periods of time from October 23, 1991 through December 9, 1991, one and sometimes two Compliance Officers ("C.O.") employed by the United States Department of Labor, Occupational Safety and Health Administration ("OSHA"), conducted an inspection of a work site of Concrete Construction Company ("Respondent") at Interstate 70 near Springfield, Ohio, at which Concrete Construction Company was the general contractor.

As a result of that inspection, both serious and "other" Citations were issued against Respondent, alleging it had committed violations of Section 5(a)(2) of the Act. 29 U.S.C. § 654(a)(2). The Respondent Concrete Construction Company filed a timely Notice of

Contest. Pursuant to Notice, the case was heard before this Administrative Law Judge, in Columbus, Ohio on December 8, 9, 10, 11, 14, 15, 16, 17 and 18, 1992. No additional parties appeared to intervene. Both parties have filed post-hearing briefs.

### Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in highway construction. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.<sup>1</sup> Accordingly, the Commission has jurisdiction over the subject matter and the parties.

### Search Warrant Issues and Background Slings or Slings and Arrows ?

Respondent vigorously argues that the nature of the inspection and the citations issued to it as a result of the inspection constitute harassment allegedly due to its assertion of its right to have a search warrant. It describes the alleged violations contained in the 33 pages of citations issued to it as "run[ing] from the ridiculous to the sublime" and maintains that the entire matter should be dismissed on that basis. Respondent's motion to dismiss as well as its motion to reopen the record as to "defenses" which it alleges require dismissal of the entire proceeding have been and are once again, denied.

The parties' positions have long ago been cast and have hardened. Their actions in this case illustrate that they see themselves as more than mere adversaries. They see themselves as enemies. Their animosity towards each other unnecessarily complicated and lengthened this litigation. Throughout this entire case, from the beginning of the inspection, to prehearing discovery, pretrial motions, and the hearing itself, needless arguments and

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<sup>1</sup> Title 29 U.S.C. § 652(5).

motions were made. Discussions degenerated into arguing and arguing into quibbling. The parties positions with regard to slings inspected on the job site is illustrative.

After first being denied entry, OSHA agents applied to a U.S. Magistrate-Judge for an administrative search warrant. The warrant was issued. The Compliance Officers then conducted the inspection. Relying on one's constitutional right to have an OSHA inspection supported by a duly issued warrant is a far cry from Respondent's president standing on the end of an extension cord to prevent the compliance officer from taking a photograph of it (Tr. 1722). Respondent's president's actions were continuously obstructive. Respondent's president testified at the hearing. Again, he was far from cooperative. On cross examination, he was often evasive and non-responsive. His behavior and replies were not those of a forthright witness. I find that the record as a whole shows that Respondent's actions in regard to the inspection went far beyond the defense of ones constitutions rights. Respondent's management, at the highest level, continually attempted to thwart and impede OSHA's objectives. There is, as usual, another side to the story.

Respondent maintains that it was "punished" for demanding a search warrant. As an example of such harassment, Respondent complains in its post-hearing brief that "OSHA cited for slings whenever they could find them." (R. Brief, p. 16). For example, two slings which were on a truck on the site (and which were never seen in use at the site) were the subject of at least four instances of citation (Tr. 470-72). These same two slings resulted in charges that Respondent failed to have its slings properly inspected (Item 1(c)), used defective slings (Item 3(a)), used slings with broken or worn stitches (Item 3(b)), failed to train its employees regarding slings (Item 4(c)), and lacked proper identification tags (Item 12(a)). In his post-hearing brief, the Secretary correctly states that the Commission has held that violations are duplicative where they require the same abatement conduct. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993) but also accepts that the Commission;

has wide discretion in the assessment of penalties for distinct, but potentially overlapping violations and it is appropriate to assess a single penalty for overlapping violations.

The Secretary goes on to "request the court to assess penalties it deems appropriate" because "some citation items require the same abatement."<sup>2</sup> The Secretary thus, for all practical purposes, concedes that some items are duplicative. Counsel leaves it up to the administrative law judge to sort it all out. This judge will do so and to the degree that items are duplicative they shall be dismissed as harassing.

After reviewing the history of this inspection and listening to the testimony of the Compliance Officer and other OSHA officials, I find that the nature of the citations, especially in their repetitive, redundant and multiple duplicative allegations of violations is demonstrative of the fact that citing Respondent in this manner was done in response to Respondent's obstructionist tactics. Such retribution is unacceptable.

Citation 1 - Item 1  
29 C.F.R. § 1910.94(a)(5)(ii)(b)

This item of the citation alleges a failure to comply with a general industry standard in that "abrasive blasting respirator(s) were not used by all abrasive blasting operator(s) using silica sand in manual blasting operations . . . ." A penalty of \$4,000 was proposed.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Respondent argues for the first time in its post-hearing brief that the standard cited does not apply because it is pre-empted by a more applicable construction standard.

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<sup>2</sup> The Secretary's "request" amounts to an entreaty to the Commission that it perform its statutory duty. It will do so regardless of the "request."

Respondent relies on the rationale of the administrative law judge in *Miller & Long Co.*, 15 BNA OSHC 1924 (No.91-1536, 1992) (ALJ) (Digest) ("*Miller*").

Although citing different precedent Commission decisions, the parties agree that "[G]eneral industry standards apply to construction work to the extent that specific standards for the construction industry do not apply." (Sec. brief, p.3)

Under 29 C.F.R. § 1910.5(c), general industry standards apply to all types of employment (including construction) unless "preempted" by a more specific standard. *Western Waterproofing, Inc.*, 7 BNA OSHC 1499, 1501 (No. 14523, 1979). The construction industry standard at 29 C.F.R. § 1926.103(a)(1) requires the use of "air-line abrasive-blasting" respirators by employees engaged in construction activities who are exposed to "particulate contaminants not immediately dangerous to life and health." (Table E-4). The general industry standard under which Respondent was cited provides for essentially the same thing *i.e.*, that employees engaged in abrasive blasting using sand and silica must use respirators where their operations are not in an enclosure. The means and manner of abatement are the same under either the general industry or the construction standard. Moreover, both standards cover the same conditions. This administrative law judge, in *Miller*, held that:

In sum, the Commission has established a test of applicability of general industry standards to construction. Under its decisions, where there are Part 1926 construction standards specifically applicable to cited hazards at a construction site, the construction standards take precedence over general industry standards which may also be applicable to the same conditions, even where the general industry standards impose more stringent requirements on the employer.

*Miller*, slip. op. at p.7 (Footnote Omitted).

Respondent is correct in its position that the construction, not the general industry standard is applicable. Its reliance on *Miller* in regard to this alleged violation is, however, misplaced because the issue here was tried with the consent of the parties. See, *Miller*, Slip. Op., n. 11, p. 8. Concrete had a full and complete hearing on the substantive issue of whether 29 C.F.R. § 1910.94(a)(5)(ii)(b) was violated. The requirements of the two standards are virtually the same thus, Respondent has had a full opportunity to defend against the same allegation even if it were based upon 29 C.F.R. § 1926.103. Amendment

of the pleadings under Rule 15(b) of the Federal Rules of Civil Procedure is thus appropriate.

The employee identified by the CO as the one seen sand blasting without the use of a respirator claimed that he used a respirator "most of the time" (Tr. 1339) and conceded that he had not done so because he merely stopped to show another employee how to sand blast. Respondent does not dispute the fact that, as Compliance Officer Medlock testified, one employee of Respondent stopped to help a less experienced employee in a sand blasting process. The senior employee did not use any respirator. The violation occurred in plain view and supervisory personnel of Respondent who were in the area. On this evidence, the essential elements of a non-complying condition, Respondent knowledge and employee access have been shown. Although Respondent claims that the employee was aware that respirators were to be worn and that the employee engaged in sand blasting for only a short period of time, it points to no evidence supporting such a claim. Respondent's failure to support its arguments with evidentiary references warrants according those arguments little or no weight. Moreover, even if the employee knew he was supposed to wear a respirator and even if he spent only a little time sand blasting without one, such evidence would not, by itself, rebut the evidence of the violation.

Respondent was permitted to amend its answer to add the affirmative defense of unpreventable employee misconduct (Tr. 46). The Commission has long held that in order to prevail on the affirmative defense of unpreventable employee misconduct an employer must show by a preponderance of the evidence that: (1) it established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover violations of those rules, and effectively enforced the rules when violations were discovered. *Jensen Construction Co., 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979)*. See also, *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987).

In its post-hearing brief Respondent no longer argues unpreventable employee misconduct as to this item. I conclude that Respondent has abandoned its defense. In addition, in only three (¶¶ 49, 64 & 65) of its 119 proposed findings of fact does Respondent suggest findings relevant to the defense. Even if those findings were accepted

in full, the defense would not be made out. I thus conclude that even if not abandoned, the defense has not been established by the record in this case. The alleged violation is **AFFIRMED**.

The Secretary has not shown by any evidence at all that such a brief, transitory exposure to sand and silica presented the hazard of contracting silicosis. There is no evidence that under the circumstances of this case, the hazard created by not wearing the respirator was likely to cause serious injury or death. The Secretary has thus not shown the violation to have been serious as was alleged.

The Secretary correctly notes that the determination of penalties in contested cases is to be made by the Commission. *Secretary v. OSHRC*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, 29 U.S.C. § 666(i), the Commission considers the size of the employer's business, the gravity of the violation, the good faith of the employer, and its history of previous violation in assessing an appropriate amount of penalty. The gravity of the violation is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972).

Respondent employed approximately 150 employees at any given time during the year. It has a significant history of past violations. The gravity of this violation was low in that one employee was exposed for a brief period of time. On the other hand, Respondent's personnel displayed a lack of cooperation during the inspection which can fairly be interpreted as seeking to undermine OSHA's ability to inspect. In sum, I find that a penalty of \$250 is appropriate.<sup>3</sup>

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<sup>3</sup> After the hearing Respondent's President filed an affidavit stating that Respondent has disposed of all of its construction related assets and is no longer engaged in construction in any manner. Moreover, the affidavit states that both company share-holders have contracted not to engage in construction for a period of five years and that there are presently only three employees, none of whom are doing construction work of any kind. Nonetheless, Respondent remains in business, has assets and may, at any time, hire additional employees and carry out any kind of business activities other than construction. The imposition of monetary penalties is not precluded under these circumstances.

See, also, *Secretary v. H.M.S. Direct Mail Service, Inc.*, 752 F.Supp. 573 (W.D.N.Y. 1990) (Successor corporation may be held liable for violating the Act where violator sold or  
(continued...)

Citation 1 Item 2  
29 C.F.R. § 1910.184(d)

This item alleges that in three separate instances, "slings and fastenings were not inspected by a competent person each day, before being used, for damage or defects." The cited standard, a general industry standard requires that slings be inspected each day before use by a competent person and that defective slings be taken out of service.<sup>4</sup>

Once again, Respondent argues that it cannot be cited under a general industry standard because there exist construction industry standards covering the same subject. It cites 29 C.F.R. § 1926.251(e) which requires slings to be marked or coded according to capacity and that each sling shall not have its rated capacity exceeded.<sup>5</sup> As with the use of respirators, however, Respondent raises this argument only after a hearing during which it had a full opportunity to defend the alleged violation on its merits. For the reasons stated before, amendment, not dismissal of the citation items is appropriate. Thus, Item 2 is

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<sup>3</sup>(...continued)

transferred its entire operation to another entity which, in essence, merely continued business using some premises, machinery, employees and supervisory personnel.) Which of either entity, Respondent or its successor, is the party responsible for payment of the civil penalties or for compliance with the abatement requirements, or both, is a matter for the Secretary to pursue in any future enforcement proceedings.

<sup>4</sup> Title 29 C.F.R. § 1910.184(d) provides:

*Inspections.* Each day before being used, the sling and all fastenings and attachments shall be inspected by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.

<sup>5</sup> Although not included in Respondent's argument, it is noted that a more universal provision of the construction sling standards, 29 C.F.R. § 1926.251(a)(1), requires the inspection of slings prior to use on each shift and the removal from service of defective slings.

amended to reflect an alleged violation of the standard contained in 29 C.F.R. § 1926.251 (a)(1).<sup>6</sup>

As to each of the "instances" cited, the Secretary has to show that slings were used without being inspected prior to use or that a defective sling was not removed from service. The reason for the three alleged instances of violation appears to be that the CO, who understood that the employee using a sling was expected to inspect it prior to use, formed the opinion that two employees (Mr. Luttrell and Mr. Cheatham) who used slings were not competent to do the pre-use inspections. Apparently, the CO concluded that Mr. Luttrell did not display sufficient knowledge in his conversation with the CO to be classified as "competent" to inspect slings and that Mr. Cheatham had some, but not enough, familiarity with slings (Tr. 71, 74-7 5).

The testimony of the two employees shows that each, generally speaking, looked at the slings before using them and each used his own judgment as to whether they were fit for service (Tr. 732, 742, 1281). The evidence thus does not support the Secretary's contention that the slings were used without any pre-use inspection. There is no indication, other than their judgment, as to what criteria each man used to determine whether the sling they were inspecting was unfit for service. Moreover, the same testimony bears out the Secretary's contention that neither received safety training dealing with sling inspection or use (Tr. 729, 1286, 1294). While each employee's failure to describe in any detail what criteria were used to determine the fitness of a sling for continued use might be attributed to the pressures and

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<sup>6</sup> The standard at 29 C.F.R. § 1926.251(a)(1) provides;

Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

While the construction industry standard does not state that the sling inspection be conducted "by a competent person," the competence of the person conducting the inspection must be a requirement of the standard as a rule of reason. There is no construction standard requirement that an employer specifically designate people to inspect slings.

difficulties in appearing on a witness stand, it is nonetheless clear that their criteria for evaluating slings was amorphous at best and that Respondent had taken few if any steps to assure that the employees inspecting the slings and making daily judgments as to their fitness for use were doing so properly. Simply relying on the judgment of certain employees, however experienced they might be, as to when to remove a sling from service without knowing in any way how that judgment was being exercised, leaves to chance whether employees will be endangered by the use of infirm slings. There is nothing in this record, other than the concession by one employee that he had been instructed not to use slings with red threads showing (Tr. 731, 753), that Respondent took any meaningful steps to assure the proper inspection and use of slings. While the degree of damage to the slings might be the subject of some dispute between the parties, it is clear, at least as to these allegations, that Respondent was in violation of the standards requiring a reasonable pre-use inspection of slings. Moreover, as indicated above, inasmuch as the employees were not shown to have been properly instructed in the inspection and evaluation of slings, Respondent cannot prevail on a defense of unpreventable employee misconduct. Accordingly, item 2 of citation 1, alleging three instances as one violation, is **AFFIRMED**.

The possibility of a sling breaking while in use lifting even "light" loads of 1200 to 1800 pounds (Tr. 720, 724) would pose the hazard of serious physical harm to any employee who might be caught in the down-fall. Item 2 is thus a serious violation of the Act. Reviewing Respondent's size, history and lack of good faith, I find that a penalty of \$1,500 is appropriate.

Citation 1 - Item 3

29 C.F.R. § § 1910.184(i)(9)(iii) and (iv)

Item 3 of citation 1 consists of three sub-parts (a, b and c). Items 3a and 3b allege violations of 29 C.F.R. § § 1910.184(i)(9)(iii) and (iv), respectively, claiming that Respondent failed to remove from service slings which were damaged in specified ways (*i.e.*, broken or worn stitches (sub-section iii); or distortion of fittings (sub-section iv)). The citation described the conditions which triggered the removal requirement as "**punctures, cuts and**

tears with the colored indicator threads showing" (item 3a) and "torn fabric, broken stitching, (some severe), and areas with warning cord showing through" (item 3b).

As to item 3, Respondent's argument that the cited standard does not apply is correct. Distinguishing this item from items 1 and 2, however, is the fact that there is no clearly parallel construction standard to which an amendment can be made.

The general industry standard under which Respondent is cited requires the removal from service of any synthetic web sling which shows any of a series of specified conditions<sup>7</sup> while the construction standard applicable to the slings, 29 C.F.R. § 1926.251 has no such exacting list of defects which would require the removal from service of synthetic slings (§ 1926.251(e)) but has only the general admonition that "[d]efective rigging equipment shall be removed from service." (§ 1926.251(a)). For the reasons discussed in detail in *Miller*, supra., the existence of a specifically applicable construction standard preempts the application of a general industry standard even though the construction standard imposes a less stringent requirement. *Miller*, supra., slip op. at p. 7 citing *Daniel Construction Company*, 10 BNA OSHC 1549 (No. 16265, 1982). It is concluded that the standard under which Respondent was cited does not apply. Had there been no trial by consent of the parties regarding the fitness of the slings for use, these allegations might have been vacated. Both parties, however, called both fact and expert witnesses and presented evidence and testimony not only as to whether the identified slings had any condition listed in the inapplicable general industry standard, but also as to whether the condition of the identified slings was so poor as to render them defective to the degree that removal from service was warranted. Thus, the parties, tried by consent the issue of whether there was a violation of the applicable standard, 29 C.F.R. § 1926.251(a).

To establish a violation of 29 C.F.R. § 1926.251(a), the Secretary, by a preponderance of the evidence, must show that slings were defective to a degree which significantly

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<sup>7</sup> The verboten conditions are as follows: (i) Acid or caustic burns; (ii) Melting or charring of any part of the sling surface; (iii) Snags, punctures, tears or cuts; (iv) Broken or worn stitches; or (v) Distortion of fittings.

compromised their safety and that the defective slings were not removed from service.<sup>8</sup>

The slings on Cheatham's truck were photographed by the compliance officers. (Tr. 77-81, 87-88; C-13 through C-22a; C-23 through C-34) Complainant called as a witness (but did not proffer as an expert) Mr. Anthony Mazzella, the president of a firm which manufactures slings of various kinds. He has been in the business for many years but has no formal education in the technical aspects of slings (Tr. 757-759). Mr. Mazzella reviewed the photographs of the slings cited in Item 3a. He identified snags and cuts to the slings (Tr. 781-786). In regard to instance (a) of Item 3a, he would remove from service the slings shown in photographs C-15, C-16, C-17, C-18, C-22 and C-22A (Tr. 781-782). Based upon the damage shown in the photographs Mazzella could not tell the current capacity of the slings (Tr. 783). In regard to instance (b) of Item 3a, he would remove from service every one of the slings shown in the photographs C-23 through C-32 (Tr. 786).

Respondent relied on the testimony of Bernard Enfield, a consulting engineer in heavy construction including the hoisting rigging field (Tr. 1491). Mr. Enfield has written approximately twenty construction standards for ANSI and has worked on the C-30 standards committee (Tr. 1497). He has been an expert in numerous cases involving cranes and rigging (Id.). Unlike Mr. Mazzella, Mr. Enfield does not sell slings to make a living (Tr. 1499-1500).

Mr. Mazzella, on reviewing the photographs, stated that one of the slings "looks fine" (Tr. 781, see, C-19). He could not tell with respect to another one (Tr. 781, C-21). He would remove from service any sling in which the red threads were visible. Mr. Mazzella stated that he would remove from service a sling even for a "snag," (Tr. 800). Mr. Enfield also reviewed pictures and concluded the slings need not be removed from service (Tr. 1507-1509, Ex. C-16, 17, 18). His testimony was to the effect that he couldn't see any defects that would cause removal from service (Tr. 1505-1519). He would reduce the sling capacity

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<sup>8</sup> The degree to which a sling must be shown to be defective must be controlled by a rule of reason in light of the purpose of the standard. The standard, for example, would make little sense if it were interpreted as requiring any sling with any defect whatsoever to be removed from service. The degree of the defect should reasonably be related to the use of the sling.

by 50% but he wouldn't remove them from service (Tr. 1508, 1514, 1518). Mr. Enfield conceded that there were no published criteria for reducing the capacity by 50% (Tr. 1565-1566).

The opinion of Mr. Enfield warrants far greater weight. He is considerably more experienced in the field and has nothing to gain or lose if slings are or are not removed from service. Mr. Enfield's vast experience with the theory and practice of sling use as well as a demonstrated understanding of the purpose and development of standards regarding the use of slings lends considerable credence to his opinion.

For the reasons discussed above, it is the Secretary's burden to show that the slings in question were damaged or defective to the degree that their safe use was significantly compromised. He has failed to do so. Mr. Enfield's opinion, that a sling with some damage may continue to be used with a reduced capacity, is a reasonable approach in accord with the standard. If the Secretary wants to impose an all or nothing, "remove the sling if any red threads show" requirement, as he did for general industry, a new standard would have to be promulgated in accord with the requirements for rulemaking under § 6 of the Act. As the case stands, the Secretary has failed to show a violation by a preponderance of the evidence. Accordingly, items 3a and 3b are VACATED.<sup>9</sup>

Citation 1 - Item 4

29 C.F.R. § 1926.21(b)(2)

The Secretary has alleged three specific instances in which Respondent "did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazardous or

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<sup>9</sup> If item 3c, was not dismissed at the hearing as redundant it would be vacated on its merits. The standard cited in item 3c, 29 C.F.R. § 1926.20(b)(3), requires a showing that the delinquent equipment was "not in compliance with any applicable requirement of this part." (Emphasis added.) As the discussion of applicability indicates, there is no other applicable requirement in part 1926.

other exposure to illness or injury."<sup>10</sup> A penalty of \$4,000 was proposed.

For each of the three instances, the Secretary points to employee testimony that, prior to the OSHA inspection, he had received no training in the OSHA requirements.

The Commission has held that under this standard "an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992).

The evidence as a whole in this case shows that Respondent failed to fulfill this requirement. Testimony of employee after employee (*e.g.*, Tr. 732, 855, 1286) showed that they received no safety training from Respondent and what safety information they received as employees of Respondent came to them in a haphazard and unplanned manner. While some employees might have some knowledge of safety matters or of OSHA requirements (Tr. 856), there is nothing in this record to show that such knowledge was obtained as a result of a serious, concerted effort by Respondent. Moreover, in attempting to rely on the experience of the employees as a substitute for training them (R.Brief, p. 24) Respondent points to evidence that other construction employers do the very type of training Respondent should have been doing (Tr. 854, 1287, 1320, 1328-29). Although not specified in its post-hearing brief, there is evidence as to Respondent's safety program. Respondent's executive vice-president identified written materials making up the company safety program (Ex. R-1, 2, 4, 8 & 9) and noted that the foreman or superintendents were to give a weekly safety talk (Tr. 1711). Respondent's program could hardly be considered to be effective or effectively communicated where, as here, despite the program's existence on paper, employees interviewed consistently stated that they had not received relevant safety training from Respondent. The employees are credible. It is therefore concluded that either they received no training or what training they did receive was highly ineffective. Moreover, there

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<sup>10</sup> The standard, 29 C.F.R. § 1926.20(b)(2), provides, in pertinent part;

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment . . . .

is no record that Respondent effectively enforced its paper program. The alleged violation is **AFFIRMED**. The penalty proposed is appropriate.

Citation 1 - Item 5  
29 C.F.R. § 1926.28(a)

Respondent was cited for two instances in which, it is alleged, that "appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions." In the first instance, the Secretary claims that the operator of a loader which was equipped with roll over protection operated the vehicle without wearing the seat belt that was provided on the machine. Second, it is alleged that an employee operating a drum compactor should have, but was not wearing footwear which had safety toe protection.

Despite Respondent's post-hearing arguments to the contrary;

§ 1926.28(a) requires an employer to require the wearing of appropriate safety equipment by his employees when ever a reasonably prudent employer, concerned with the safety of his employees, would recognize the existence of a hazardous condition and protect against that hazard by the means specified in the citation.

*Ray Evers Welding Co. v. OSHARC*, 625 F.2d 726, 731 (6th Cir. 1980).

In this vein, little need be said about recognizing a hazard of driving on a highway without using a seat belt. Respondent claims, however, that whether the operator in fact used a seat belt is "simply based on inference and speculation" (R. Brief, p. 11). This is hardly a fair reading of the case. The lack of direct factual testimony as to seat belt use (the employee involved could not recall whether he used the seat belt) does not end the matter. Factual conclusions can be reached either by direct testimony or by considering the reasonable inferences to be drawn from factual testimony. In this case, the testimony of Ohio State Highway Trooper Anthony Burke who investigated an accident involving the loader, is clear, reasonable and warrants reliance. The finding, after an accident of a seat belt lying on the driver's seat of the overturned loader still buckled in a position so tight that a person could not slide underneath it reasonably infers that the seat belt was not being worn while the vehicle was in operation. Respondent's statement that **the operator**, after

being struck by a car from behind, "could have just as easily gotten out and removed it [the seat belt] himself or someone else could have rebuckled the belt [after the accident but before Trooper Burke investigated]" is far more speculative. In the presence of a reasonable inference which is not contradicted by any evidence or other reasonable inference, the factual conclusion is warranted. I so find.

To the degree that Respondent argues either unpreventable employee misconduct or that it could not have known of an idiosyncratic behavior of an employee in operating the equipment without a seat belt, the argument is rejected. There is no showing by Respondent that it has a thorough and adequate safety program effectively communicated to its employees. Instance a is AFFIRMED.

It is undisputed that the compactor operator was, in fact, operating the equipment without wearing steel-toed safety shoes or any other foot protective devices. It is also undisputed that the compactor could not operate in reverse (towards the operator) unless the control was held down in place by the operator (Tr. 1354-55). The CO's opinion testimony which is not credited for the reasons discussed above, is also unreliable as to this specific matter because there is no indication that he knew or understood that when in reverse, the compactor would automatically shut off as soon as the operating handle was released (Tr. 117). The Secretary has failed to show employee exposure to a hazard. Instance b is VACATED.

The single instance of driving without a seat belt which exposed one employee to serious injury or death is indicative of Respondent's lack of a coordinated and enforced safety program. A penalty of \$1000 is appropriate.

Citation 1 - Item 6

29 C.F.R. § 1926.59(f)(5)(ii)

The cited standard, 29 C.F.R. § 1926.59(f)(5)(ii), requires, with certain exceptions not applicable here, that "the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with \* \* \* [an] appropriate hazard warning." Four specific instances were cited by the Secretary.

Respondent's sole argument (R. Brief, p. 34), relying on the unreviewed decision of Judge Blythe, is that the violations should be classified as other than serious by taking into account the training (conducted by others) of an employee handling one container and the use of one set of unmarked containers at the shop where the hazards of gasoline were "known".

As summarized in Complainant's brief (C. Brief, Pp. 14-5), each instance of violation has been established. The violation is AFFIRMED.

Respondent's argument as to seriousness is rejected. Having unmarked containers which, in fact, contain highly flammable materials presents a reasonable likelihood that, in the event of an accident, serious injury could occur. The violation, as a group, is serious. A penalty of \$1,000 is appropriate.

Citation 1 - Item 7  
29 C.F.R. § 1926.102(a)(1)

The Secretary alleges that in three separate instances employees who were performing job duties which presented the hazard of potential eye or face injury were not wearing the required personal protective equipment.<sup>11</sup>

Complainant's summary of factual testimony as to the alleged violations (Brief, Pp.15-16) is not disputed. The violations are thus established.

To the extent that Respondent's statement that all of the employees involved knew of the necessity for using safety glasses seeks to raise either the claim of lack of knowledge or unpreventable employee misconduct, it falls far short. Respondent's supervisors or, in one instance, its corporate assistant safety officer (Tr. 128-9) were either present or in the area. The low possibility of eye injury supports a penalty lower than that proposed by the

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<sup>11</sup> The cited standard, 29 C.F.R. § 1926.102(a)(1) provides, in pertinent part;

Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

Secretary. Item 7 is thus AFFIRMED as a single serious violation. A penalty of \$1000 appropriate in that it is reflective of the laxity of Respondent's attitude towards the safety of its employees.

Citation 1 - Item 8  
29 C.F.R. 1926.152(a)(1)

Respondent offers no defense to the allegation that there was a 5-gallon red metal partially filled container of a gas/oil mix used without a self-closing lid located in the storage/brake trailer adjacent to the southeast area of Osborn bridge contravening the cited standard. The item is AFFIRMED. A penalty of \$500 is appropriate for this single instance.

Citation 1 - Item 9  
Section 5(a)(1)

On October 21, 1991, an employee of Respondent, Michael Sanders, was operating a backhoe on Interstate 70 in the high speed lane (Tr. 842-844). Sanders was working with Darrell Fahnestock, the carpenter foreman that day (Tr. 1671). The foreman supervises the operators (Tr.841). Fahnestock had told Sanders to conduct backfilling at the wall at the Smith Ditch bridge (Tr.1670-1672). Sanders' backhoe had entered the highway from the work area in the median strip and was hit by a tractor-trailer. He was thrown from the backhoe (Tr. 842-844). A passenger car then hit the rear tire of the backhoe (Tr. 843). The tractor-trailer jack-knifed and went on through the concrete barrier wall (Tr. 844). There were amber flashers in use on the backhoe but no arrow board<sup>12</sup> was used (Tr. 845, 1674). The accident was investigated by Trooper Anthony Burke, of the Ohio State Highway Patrol

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<sup>12</sup> An arrow board is a large sign either on its own small trailer or on the roof of a car or truck. The sign is usually composed of a series of flashing yellow lights in the shape of an arrow to indicate to oncoming motorists that they have to move to either the right or left (the direction of the arrow).

(Tr. 957; C-53). His investigation revealed that the tractor-trailer had been operating in the left lane as was required (Tr. 988). The speed limit was 55 miles an hour (Tr. 1012). There was no slow moving vehicle sign found at the scene of the accident (Tr. 968, 989). There was no arrow board, no other vehicle signs, no escort vehicle, no reports to the highway patrol that a vehicle was to be moved (Tr. 989-993). Trooper Burke had seen Respondent moving construction equipment along this section of the highway on prior occasions. At those times they either used a low-boy (trailer) to move the equipment or the equipment was followed by a pick up truck with flashing yellow lights or an arrow board (Tr. 1006-7). Sanders was severely injured.

News reports of this incident triggered the initial inspection.

Item 9 of the serious citation alleges that Respondent violated section 5(a)(1) of the Act in that its employees operated a back hoe (and other off road equipment) on the regular public travel lanes of the interstate highway without using low-boys (trailers) to move the equipment or arrow boards or other equivalent signaling devices to protect the operators from other vehicular traffic.<sup>13</sup>

To establish a violation of § 5(a)(1) of the Act, the Secretary must prove that; (1) a condition or activity in the employer's workplace presented a hazard to its employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm , and (4) feasible means existed to eliminate or materially reduce the hazard. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1963 (No. 84-546, 1991).

The slow movement of construction equipment on to and along a highway which is carrying regular traffic at much greater speeds is an activity which clearly presents a hazard

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<sup>13</sup> The citation also alleged, as an alternative, that Respondent violated two construction standards, 29 C.F.R. § § 1926.200(a) and .201(a)(1), which deal with signs and signals. Respondent's argument in its post-hearing brief that the cited standards are not applicable is correct. There is nothing in those standards which could be read to require arrow boards or flashing lights under the circumstances of this case. Complainant must agree because he essentially abandons the position in his post-hearing brief. Indeed, in his post hearing brief, the Secretary fails to identify what, if any specific violations in this item he believes the evidence supports.

to those employees operating such equipment. Respondent knew or should have recognized that the activity was hazardous. First, virtually any reasonable person, whether or not engaged in the construction industry would recognize the activity as hazardous. Second, the undisputed facts are that Respondent was admonished several times by Ohio Department of Transportation officials of the dangers of moving equipment in such a manner (testimony of Balzer and Lay) and the operational plan notes for the project included a similar warning.<sup>14</sup> The type of injuries sustained by Mr. Sanders demonstrate that the hazard caused and was likely to cause serious injury. Indeed, Mr. Sanders is fortunate to have survived. Finally, the testimony of Ohio State Highway Patrolman Burke establishes that the use of a low-boy, or following a pick-up truck with an arrow board would materially reduce the hazard to the driver of the construction equipment. Respondent's post-hearing claim that the Secretary "cannot demonstrate. . .that a flashing arrow board would have done anything other than cause injury to the driver of the vehicle hauling the arrow board" (R. brief, p. 10) is unsupported by evidence or reason. The use of more highly visible flashing lights as on an arrow board behind the slow moving equipment would reasonably make the equipment more visible to those approaching from behind. As such, it would give oncoming drivers more warning and greater time to slow down or otherwise react. It is thus concluded that all of the elements of the alleged violation of § 5(a)(1) have been established.

Respondent again seeks to raise the affirmative defense of unpreventable employee misconduct. Once again, there is no showing on this record that Respondent had an adequate safety program which was effectively communicated and enforced. The defense is rejected. Item 9, to the extent that it alleges a violation of § 5(a)(1) of the Act is **AFFIRMED**. A penalty of \$1,000 is appropriate therefore.

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<sup>14</sup> Having found that Respondent knew or reasonably should have known the activity to be hazardous, it is irrelevant whether other evidence establishes the state of knowledge of the industry.

Citation 1 - Item 10  
29 C.F.R. § § 1926.20(b)(3) and .251(a)(1)

Item 10 was withdrawn by the Secretary (Tr. 11-12).

Citation 1 - Item 11  
29 C.F.R. § 1926.251(b)(5)

This item alleged that Respondent failed to remove from service a piece of machinery (a Blaw-Knox spreader) which had a steel chain under tension which included overworn links.<sup>15</sup>

The C.O. measured the diameter of the links and took photographs of a chain on the spreader (Tr. 167-70, Ex. C-54, 55). The C.O. opined that the chain had been tightened down and was under tension (*Id.*). Mr. Mazzella, based on his examination of the photographs, stated that the links were stretched and otherwise damaged (Tr. 796). Respondent, not denying that the links were damaged, takes the position that the chain was not under tension, that it merely served as a means to keep the beam from bouncing (Tr. 1759, 1711). The parties are thus in disagreement as to whether, as a matter of fact, the chain was "in use."

It is found that the preponderance of the reliable evidence does show that the cited chain was in use. First, even if not under tension at the time of the inspection or not used to constantly support a load, a chain must be said to be in service within the meaning of the cited standard if it is in place to back-up another support mechanism or to stop unwanted movement (Tr. 1777). Under those circumstances the chain's presence is intended as a limiting device operable only when certain parameters are exceeded. As long as the chain is in position and is counted upon to properly operate when called upon it is in service.

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<sup>15</sup> The cited standard, 29 C.F.R. § 1926.251(b)(5), provides, in pertinent part;

(5) *Alloy steel chains.* (5) Whenever wear at any point of any chain exceeds that shown in Table H-2, the assembly shall be removed from service.

Item 11 is **AFFIRMED**. Even if portions of the spreader would not have collapsed if the chain **broke**, the dangers of flying pieces of chain and a whipping piece of chain present hazards which are serious under the Act. A penalty of \$1,000 is appropriate therefor.

Citation 1 - Item 12  
29 C.F.R. § 1926.251(e)(1)

Item 12 claims that slings without proper tags or informational labels were in use at two locations. All slings cited under this item were also cited under items 2 and 3.

There is no factual dispute that the cited slings did not have the required legible information. Complainant would have an employer remove from service any sling which was not properly marked or coded. Thus, the hazard created by any slings found to be in non-compliance under this item would be abated by the same method of abatement under item 3 of this citation. As such, this item is redundant. It is **VACATED**.

Citation 1 - Item 13  
29 C.F.R. § 1926.300(a)

Item 13 alleges that the use of a sand-blasting nozzle with an inoperable "dead-man" control violated the cited standard which states "[a]ll hand and power tools and similar equipment...shall be maintained in a safe condition."

The facts are not in dispute. The sand-blasting operation (which is also the subject of item 1 of this citation) was being conducted with the spring controlled cut-off mechanism, designed to automatically shut off the flow upon release of the valve, being held in place by a wire tied around the handle. The wire prevented the operator from shutting off the sand-blast flow without going over to the sand blasting pot to shut off the pressure.

Respondent defends (R. brief, p.31) solely on the argument that because the 'dead man' switch was inactivated does not mean that the equipment was not being operated in anything but a safe condition." Respondent's comment, approaching the flippant, totally

misses the mark. The standard requires that equipment provided for employee use be properly maintained. The disabling of a mechanism universally regarded as a safety device cannot be considered to be maintenance in a safe condition. The alleged serious violation is AFFIRMED in all respects. The proposed penalty of \$1,600 is appropriate.

Citation 1 - Item 14  
29 C.F.R. § 1926.300(b)(2)

The C.O., having observed a concrete smoothing machine, known as a power screed, with an area of its belt and pulley drive unguarded. The Secretary alleges in this item that the condition violated the requirements of the standard at 29 C.F.R. § 1926.300(b)(2)<sup>16</sup> and proposes a penalty of \$3,000 because "moving parts of equipment exposed to contact by employees or which otherwise created a hazard, were not guarded."

There is little dispute other than whether employees were exposed to the area within a metal lattice framework where a belt and pulley meet. The Secretary's basic contention is that employees working close to the screed would necessarily be standing in "soupy" concrete which, he argues, "made for unsure footing, increasing the potential for a hand coming into contact with the unguarded portions of the pulley." Respondent points out that the machine had its factory installed guards in place and that the cited pulley is encased in a cage-like structure. Moreover, during the normal and expected use of the machine, the motor is stopped and started on the side opposite the cited pulley.

The Secretary does not have to prove actual exposure to a hazard, but need show only that employees had access to an area of potential danger based on reasonable predictability. The question of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-

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<sup>16</sup> The standard provides;

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.

gress, and their comfort activities." The question is whether the employees, within reasonable predictability, were within the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263 (4th Cir. 1974), *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 14909 (No. 3042, 1976); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). See also, *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No.89-0553, 1992) (The general industry machinery guarding standard, 29 C.F.R. § 1910.212(a)(1), requires more than proof that employees could possibly come into contact with unguarded machinery. The Secretary must show that employees were exposed to the hazard "as a result of the manner in which the machine functions and the way it is operated.")("Jefferson").

The Commission's reasoning in *Jefferson* is applicable here. Only by the most unusual series of unanticipated events could an employee be injured as envisioned by the Secretary. At some point reason must rule. Under the circumstances of this case, the chance that employees in their normal course of duties, etc., would be exposed to the cited hazard is so unlikely as to fall totally outside of any reasonable likelihood. The Secretary has thus failed to demonstrate employee exposure to the cited hazard. The item is VACATED.

Citation 1 - Item 15  
29 C.F.R. § 1926.301(d)

The C.O. testified that he found two hammers with cracked and/or splintered handles. One (instance a) was being used by one of Respondent's employees, the other (instance b) was on a crane. These cracks, the Secretary, maintains are violative of the requirement of the standard at 29 C.F.R. § 1926.301(d) that "[t]he wooden handles of tools shall be kept free of splinters or cracks..."

Again, there is no dispute about many of the operative facts. The hammers were either in use or readily available for employee use and each had splinters or cracks. Respondent's post-hearing claim that employee exposure has not been demonstrated is rejected. In terms of defective tools such as these, employee exposure is actual use of the

tool or facts which demonstrate that their use is reasonably predictable. Having defective hammers in locations where they are readily available for employee use is sufficient, without specific rebuttal evidence, to conclude that their use is reasonably predictable.

The sole basis of issuing an alleged serious violation appears to be the C.O.s testimony that a hammer head could fly off and strike the employee using the damaged tool or another employee nearby. Slim chances do not necessarily justify a finding of serious. These are not, however, household hammers. They are both sledge hammers weighing about 8 pounds. An 8 pound hammer head flying off the handle as an employee attempts to use the tool in the manner it is usually used, justifies the C.O.'s concern for possible concussion or broken bones. The hazard might not be that of being beaten to death as noted by Respondent (R. Brief, p. 34) but concussions or broken bones are serious within the meaning of the Act. The alleged violation is AFFIRMED. It is serious. A penalty of \$1,000 is appropriate.

Citation 1 - Item 16  
29 C.F.R. § 1926.302(b)(7)

Alleging a violation of the standard at 29 C.F.R. § 1926.302(b)(7), this item refers to the same incident giving rise to item 1 of this citation.

Again, the operative facts are undisputed. An employee, Mr. Craig, a laborer for nineteen years, voluntarily stopped to help a less experienced employee, Ms. Smith, with some sand-blasting with which she appeared to be having problems. As part of his solution, Mr. Craig removed a pressure reducing device on the air compressor. The use of the sand-blasting equipment without the pressure reducing device is violative of the requirements of the cited standard.

Respondent maintains that Mr. Craig's unpredictable and unauthorized removal of the device was unknown to it and cannot be attributed to it.

The Secretary's argument that Mr. Craig's knowledge as a supervisor is to be imputed to his employer fails on the facts of this case. Mr. Craig has not been shown to have been

a supervisor and the mere acceptance of his help by another non-supervisor (Ms. Smith) cannot promote him to such a position. Only the employer can delegate supervisory authority. It has not done so in this case. Absent imputing Craig's knowledge to Respondent, the Secretary broadly states that management offices and people were in the area. The fact that Respondent had supervisory personnel in an area during a walk around inspection is insufficient in law to provide the basis for a showing of employer knowledge of a violation. Moreover, this was a condition which was not in plain view and in fact was only discovered when the hose was removed from the compressor at the request of OSHA officials. Thus, it cannot be found that Respondent knew or reasonably should have known of the violative condition. The item is VACATED.

Citation 1 - Item 17  
29 C.F.R. § 1926.350(a)(9)

Respondent's sole defense to the undisputed testimony of the C.O. that, in both instances, compressed gas cylinders were not secured in an upright position as required by the cited standard<sup>17</sup> is a reference to another sub-section<sup>18</sup> which provides that cylinders, other than those in a "special carrier," must have regulators removed and valve caps in place. Respondent's defense is specious at best.

The cited cylinders were clearly not in any kind of "special carrier" (Ex. C-68, 69, 70). That they were in an upright position and, perhaps, in no danger of falling, does not negate

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<sup>17</sup> The cited standard, 29 C.F.R. § 1926.350(a)(9) states:

**Compressed gas cylinders shall be secured in an upright position at all times, except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.**

<sup>18</sup> Title 29 C.F.R. § 1926.350(a)(6) provides:

**(6) Unless cylinders are firmly secured on a special carrier intended for this purpose, regulators shall be removed and valve protection caps put in place before cylinders are moved.**

the fact that they were not secured in an upright position. The item is AFFIRMED. Given the hazards of explosion or a missile type flying cylinder, the violation is serious even if the likelihood of an accident is not great. The proposed penalty of \$1,200 is appropriate.

Citation 1 - Item 18  
29 C.F.R. § 1926.403(i)(2)(i)

This item is the first in a lengthy series of alleged electrical violations.<sup>19</sup> It alleges that live parts of electric equipment operating at 50 volts or more were not appropriately guarded against accidental contact by any of the means identified in the standard.<sup>20</sup>

Sub-item (a) described a breaker box in a mechanics' storage shed. The front panel cover to the box was not in a closed position but rather was on top of the box (Tr. 207; Ex. C-71). At least one employee worked in the shed using electrical tools. Sub-item (b) deals with a 1" by 1" opening in an electrical control panel in the company office trailer (Tr. 209-10; Ex. C-72, 73). The existence of these conditions is undisputed. The parties do not agree, however, as to whether there were employees exposed to the hazards.

Respondent takes the position that the purpose of the standard is to prevent accidental contact with live electrical parts. This is correct. The Secretary appears to rely on the four detailed descriptions of how such guarding is to be accomplished without giving due consideration to the prefatory language of the standard. The standard requires the

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<sup>19</sup> Respondent aptly describes these as follows; "[t]he electrical items at issue in this case are not numerous, only the citations involving them are numerous." The multiplicity of separate items of alleged electrical violations, each as a separate serious item, is "overkill" which unnecessarily complicated and protracted this case.

<sup>20</sup> The cited standard identifies specific means of guarding electrical parts as "(A) [b]y location...that is accessible only to qualified persons; (B) [b]y partitions or screens (to which) only qualified persons have access...within reach of the live parts; (C) [b]y location on a balcony...so elevated and arranged as to exclude unqualified persons; (D) [by] by elevation of 8 feet or more above the floor...."

guarding of live electrical parts against accidental contact "by cabinets or other forms of enclosures, or by any of the following means...." Then it goes on to list four other specific methods of **guarding**. The Secretary's case gives no consideration that each of the "live" parts cited in ~~this~~ item were enclosed in cabinets. The basic requirements of the cited standard were met by the installation of "cabinets or other forms of enclosures." The four methods which follow are in the disjunctive. Leaving the door to an electrical breaker box (instance a) or having a one inch square opening in the front panel of such a box (instance b) doesn't mean that the live parts of the wiring are not enclosed in a cabinet. They are. Moreover, it would be ludicrous at best to agree with the C.O. (instance b) that an opening in a panel of 1" by 1" could allow accidental contact with electrical wires behind the panel. It is beyond credulity that a person would poke a finger through such an opening by chance which is what would have to happen in order to have "accidental contact" with live electrical parts. For these reasons, Item 18 is VACATED.

Citation 1 - Item 19  
29 C.F.R. § 1926.403(i)(2)(ii)

The cited standard requires that;

In locations where electrical equipment would be exposed to physical damage, enclosures or guards shall be so arranged and of such strength as to prevent damage.

The C.O. described a 4" x 4" electrical gang box with "knockouts" in it being used, essentially as a place to plug in various electrical tools (Ex. C-75). The box is designed to be mounted on or in a wall and the "knockouts" are pre-positioned perforated circles which will form the correct size openings in the box by punching or poking out the circles. Thus, the person **installing** the box can connect additional cables or electrical conduits into the box without having to drill holes. The "knockouts" are usually poked out by using a hammer or screw driver. The C.O. was concerned that the "knockouts" could be accidentally knocked out raising the hazard of unintended contact with the wires inside when an employee touched or picked up the box to plug or unplug a tool. Respondent put into evidence a sample electrical box (Ex. R-63).

The carpenter foreman who owned the box had it made by an electrician and had been using it **on job** sites for 10 years without problems (Tr. 1681-83). This undisputed testimony as well as an examination of Exhibit R-63 is more convincing than is the C.O.'s speculation as to the likelihood of employee exposure. I credit the testimony of the foreman. Under the Secretary's theory of the violation and the requirements of the cited standard, the hazard, to exist at all, would have to be created by the unintentional punching out or dislodging of one or more of the "knockouts." The evidence as a whole does not show that the knockouts were likely or reasonably likely to be accidentally dislodged. While perhaps a bit more likely that an employee accidentally poking his finger through a 1" by 1" opening in an electrical panel, it is concluded that the Secretary has failed to show employee exposure to any hazard which would be created under the circumstances which would have to occur in order to give rise to the hazard. This item is VACATED.

Citation 1 - Items 20(a) and (b)  
29 C.F.R. § § 1926.404(f)(6) and .20(b)(3)

The first of these sub-items is a prime example of this compliance officer's overreaching. Sub-item a alleged a violation in that an extension cord in a storage trailer which was not plugged in or otherwise connected to anything at all failed to have a continuous path to ground because it was lacking a grounding pin on the "male" (plug) end. Since a "path to ground" can only exist, if at all, when an extension cord is plugged into something else, all extension cords lack a path to ground when not connected to anything at either end (Tr. 221-224). The compliance officer's reactions and responses to questioning in this area were in the opinion of this administrative law judge, intentionally evasive and obfuscating (See also, e.g., Tr. 259, lines 15-23). He responded to questioning as if he were afraid of being "pinned down." He had far crossed the line from that of an investigator, charged with gathering the facts, to that of a prosecutor. In sum, the nature of the citation items issued, the substance of the Compliance Officer's answers to questions, his manner and method of testifying and his demeanor as a witness leads to the conclusion that he was neither a forthright nor credible witness. I so find. Sub-item a is VACATED.

Sub-item b is to the point. The undisputed facts are that an extension cord, with the grounding plug removed, was available and ready for use. With the grounding pin removed, any equipment powered with that cord would not have the continuous path to ground required by § 1926.404(f)(6). The cited standard, § 1926.20(b)(3) requires such a potentially hazardous extension cord to be tagged, rendered inoperable or removed from service. The alleged violation is AFFIRMED.

This violation has not been shown to be serious. If the defective cord is not tagged or removed from service it might or might not be used. Even if used, it might well be used to power a tool which is double insulated or a piece of equipment which has an independent grounding circuit. Thus, the degree and nature of any hazard is speculative at best. A penalty of \$100 is appropriate.

Citation 1 - Item 21  
29 C.F.R. § 1926.405(a)(2)(ii)(I)

The cited standard states, in pertinent part:

(I) Flexible cords and cables shall be protected from damage.

The operative facts are not in dispute. Under instance a, an orange extension cord ran from the breaker box in the mechanics shed, along the floor and through the wall to an ice machine located outside the building. Parts of the cord were covered with materials and a shovel (Tr. 235-36, 888-891; Ex. C-77, 78). Employees worked in the shed and used the ice machine. In instance b, another orange extension cord ran from a generator to the bridge deck at the Osborne Bridge. Rebar was laying on top of the cord (Tr. 240-41; Ex. C-79, 80). The C.O. opined that the hazard, in each instance, was "damage to the cord and employees coming into contact with that, those areas" (instance a) (Tr. 239), and "the damage to the cord and employees coming in contact with those damaged areas and being, getting shocks or burns or potential electrocution" (instance b) (Tr. 242).

Respondent begins by arguing that the standard cited does not apply to the extension cords complained of by the C.O.. Comparing the cited sub-section, .405(a)(2)(ii)(I), with the next subsection .405(a)(2)(ii)(J), Respondent argues that since sub-section (J) refers to

"extension cord sets" and sub-section (I) refers to "flexible cords and cables," the former sub-section cannot apply to extension cords. Respondent maintains that extension cords and flexible wiring are distinct and separate with extension cords being moved about and temporary wiring staying in place but not part of the final construction.

It is the Secretary's initial burden to demonstrate that the cited standard applies to the allegedly violative condition. The cord to the ice machine had apparently been secured in position but the cord cited at Osborn bridge was an extension cord in the usual sense...it was merely laying on the ground (or bridge surface) before other material had been laid or placed on it. cord exposing the cord to physical damage. Both items fall under paragraph (a)(2) of 1926.405. The scope provision, (a)(2)(i) seems to indicate that there are various classes of temporary electrical power and lighting wiring methods. In addition, a note following § 1926.450(a)(2)(ii)(J) also indicates that various types of wiring fall under different classifications. Respondent's interpretation that flexible cords and extension cords are not one and the same is consistent with and can be the only explanation for the presence of the provision in § .405(g)(1)(ii) which requires that flexible cord must be equipped with a plug and be energized from a receptacle outlet when the cable is used for certain specified purposes. This provision would be a nullity if "flexible cords" included extension cords which invariably are equipped with a plug at one end and a receptacle at the other.

The Secretary put in no evidence or argument as to the applicability of this standard. He thus failed to make out the initial element of a *prime facie* case of violation. The item is VACATED.<sup>21</sup>

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<sup>21</sup> Even if found to be applicable, there would be no violation because there is no showing of a hazard to which employees were exposed. The C.O. failed to testify as to reasonably anticipated employee exposure to hazards arising from the cited conditions. As the discussion of his testimony indicates, he stated that there would be a shock hazard if the cords were damaged and if employees then came into contact with the damaged areas of the cords. This is speculation upon speculation. There is no showing that the cords were damaged or were reasonably likely to be damaged nor was there any evidence, other than the usual, "employees worked in the general area," statements by the C.O. as to exposure. Whether or not citations are issued in infinitesimal detail as they were here, the Secretary bears the burden of proving every element of every alleged violation. He is not allowed  
(continued...)

Citation 1 - Item 22  
29 C.F.R. 1926.405(e)(1)

This item again refers to the cutout box with the knockouts (item 19), which was not waterproof and was used in a wet location where water could enter. It is alleged that its use in a damp or wet location raised the hazard of short circuit and/or shock to employees.

Respondent does not defend against this allegation. The facts, as summarized above, are undisputed. The violation is AFFIRMED as serious.

Given the facts that the box was the property of a foreman, who brought it on the site a penalty of \$1,000 is appropriate.

Citation 1 - Item 23  
29 C.F.R. § 1926.405(g)(1)(iii)

Because an extension cord was wired from the electrical panel to the ice maker as described in item 21, Respondent allegedly failed to comply with the cited standard which prohibits using flexible cords or cables;

(A) [a]s a substitute for the fixed wiring of structure; (B) Where run through holes in walls, ceilings, or floors: (C) Where run through doorways, windows, or similar openings...(D) Where attached to building surfaces; or (E) Where concealed behind building walls, ceilings, or floors.

Here, again, Respondent argues that the cited standard is not applicable. First, says Respondent, the extension cord is not a flexible cord at all. The Secretary, aware that numerous distinctions are made under the electrical standards depending upon the nature of the wiring methods, components and equipment, made no showing that the cited standard applies to the extension cord claimed by the C.O. to be in violation. The Secretary has not

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<sup>21</sup>(...continued)

short-cuts because he saw fit to issue voluminous, highly detailed and often repetitive citations.

fulfilled such a burden. The item is VACATED.<sup>22</sup>

Citation 1 - Items 24(a) and (b)  
29 C.F.R. § 1926.405(g)(2)(iv)  
29 C.F.R. § 1926.20(b)(3)

In item 24(a) of the citation the Secretary claims that in six instances "flexible cords were not connected to devices and fittings so that strain relief is provided to prevent pull from being directly transmitted to joints or terminal screws." Four of the instances (a, c, d and e)<sup>23</sup> deal with frayed or worn insulation on power cords while instances b and f refer to a radial arm saw in the mechanic's shed.

In instances c, d and e, each of the cited power cords had insulation pulled away or frayed at the base of either the plug or the receptacle (*e.g.*, Tr. 257-58, 259-60; Ex. C-80, 84, 86). It became clear in cross examination that the C.O. cited Respondent under this standard for each instance in which insulation was frayed, split or broken between a cord and the plug or receptacle (Tr. 576-82).

Respondent argues initially that the more appropriate standard is the one at 29 C.F.R. § 1926.416(e) which prohibits the use of "[w]orn or frayed electric cords or cables . . . ." Further, Respondent argues that the pulling away of outside insulation in no way affects the ability of the cord to relieve strain.

For the reasons previously discussed in detail, the C.O.'s testimony is given little credence. It is not necessary to consider whether it is rebutted by the testimony of Mr. Gallucci (Tr. 1725), because the Compliance Officer's testimony that outside insulation constitutes a strain relief device within the meaning of the standard is inconsistent with the

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<sup>22</sup> Respondent's further argument as to applicability, that even if the extension cord is classified as flexible cord, its use to connect the ice maker renders it exempt pursuant to .405(g)(1)(i) since it was a connection of an "appliance" would be rejected. An ice maker is not portable in the sense that portable lamps are. It is a large, heavy machine not frequently moved. The exemption is designed to facilitate the wiring of items which need to be able to be moved frequently.

<sup>23</sup> Instance a of item 24a was withdrawn after the hearing.

clear wording of the standard which contemplates a device or fitting of some sort which is not an integral part of an extension cord itself. No violative condition has been shown in regard to instances c, d and e.

Instances b and f refer to a power cord which ran to the blade motor of a radial arm saw. Complainant maintains that there was a defect on the power cord in that it had been pulled away from the motor housing exposing the conductors. In another area of the saw, according to the C.O., screws were missing from a strain relief device. Although not "tagged" as out of service, it is undisputed that the saw was chained and locked to the trailer. Even without a tag, chaining the saw to a trailer hitch effectively removed the saw from its place of operation as required by 29 C.F.R. § 1926.20(b)(3), the standard cited in item 2(b). There were no violations as alleged. Items 24a and b are VACATED.

Citation 1 - Item 25  
29 C.F.R. § 1926.405(g)(2)(v)

For the reasons set forth in the discussion of item 21, the Secretary has failed to prove the initial element of a *prima facie* case of a violation of § 5(a)2) of the Act -that the standard under which Respondent is cited is applicable to the allegedly violative condition.

Item 25 is VACATED.

Citation 1 - Item 26  
29 C.F.R. § 1926.500(d)(1)

This item alleges that employees working on the "wing walls" at the east end of the Osborn Bridge should have been protected by the installation of standard guardrails as specified in the cited standard which provides, in pertinent part:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent . . . .

The Compliance Officer described seeing employees working on a wing wall (Tr. 269-217). He took photographs (Ex. C-90, 155, 156, 157). The working surface, according to

the C.O. was 18 inches in width. Respondent's carpenter foreman described the process of the construction of wing walls. He stated that guardrails on wing walls are usually constructed after the wall has been poured and set and the forms used for the concrete pouring have been removed and the nearby bridge deck has been put up (Tr. 1680). He stated that the only reason an employee would possibly be in the position as in exhibits C-155 and 156 is to remove the wooden forms which were used to hold the concrete in place while it set. He opined that guardrails could not possibly be in place during the removal of the wooden forms ("wrecking") (Tr. 1681).

Respondent argues that not every wall on a construction site can be reasonably expected to have guardrails. It claims that much of the width of a wing wall would be taken up if a guardrail were installed. More importantly, it also argues the impossibility or least infeasibility of installing guardrails on such narrow surfaces. In essence, relying on the unrebutted testimony of the carpenter foreman, Respondent claims that such rails could not be placed there because of the presence of the forms and, in any event, would have to be removed when the forms were removed (R. Brief, p. 30). Not having been timely raised as an affirmative defense nor tried by the express or implied consent of the parties, the affirmative defense is not before the Commission. Moreover, Respondent failed to show that alternative measures of protection were unavailable - a burden it must fulfill to make out the affirmative defense. The violation has been established by the testimony of the C.O. and the carpenter foreman. Item 26 is AFFIRMED.

It is alleged as serious. A potential fall of almost 7 feet on a construction site might or might not result in serious injuries or death. There is no evidence as to the nature of the surface below which might make a great deal of difference in a fall of this distance. The Secretary has not fulfilled his burden of showing that a fall from a wing wall would likely result in serious injuries or death. The violation must thus be found to be other than serious. A penalty of \$500 is appropriate.

Citation 1 - Item 27  
29 C.F.R. § 1926.500(d)(2)

This item, when reviewed carefully, deals only with stanchions in a guardrail being spaced at more than the permitted 8' from stanchion to stanchion (Tr. 276-78; Ex. C-93, 94, 95). The employee who installed the rail conceded that he should have placed guardrails differently (Tr. 856). Item 4, which alleged a lack of proper training, has been affirmed because the training of this employee was found lacking. This item is a violation because the lack of proper distancing between the stanchions was shown to exist. However, whether there was a hazard to employees using the ramp has not been shown. The CO's opinion was speculative and unreliable. That Respondent's executive vice president found the rails capable of holding a person is also rejected as unreliable. Thus, there is no preponderant evidence that the spacing of the stanchions at 13' rather than 8' produced a hazard to employees. While the failure to comply with a specification standard such as this gives rise to the presumption that the violative condition was hazardous, there is virtually no reliable, probative evidence to that effect on this record. Accordingly, the violation is **AFFIRMED** as an other than serious violation with no penalty assessed because the secretary has failed to show that any employee was confronted with a hazard.

Citation 1 - Items 28(a) through 28(d) and 28(e).  
29 C.F.R. § 1926.550(b)(2) (Items 28a through 28d)  
29 C.F.R. § 1926.20(b)(3) (Item 28e)

Items 28a through 28d arise from the Secretary of Labor promulgating the standard at 29 C.F.R. § 1926.550(b)(2) which incorporated, in its entirety, the American National Standards Institute B30.5-1968 Safety Code for Crawler Locomotive and Truck Cranes ("the ANSI standard") (Ex. C-98). The ANSI standard contained highly detailed recommended standards regarding construction, use and maintenance of cranes for manufacturers and users of such equipment. The adoption of the 1968 ANSI code has frozen the Secretary's crane requirements into an antiquated and highly outdated set of regulations of which

numerous experts complain.<sup>24</sup> Nonetheless, the Secretary has not seen fit to modify these requirements through appropriate standards setting procedures. With a significant exception to be discussed later, the construction safety standard at § 550(b)(2) makes a failure to comply with any part of the ANSI standard a violation under the Act.

Item 28a refers to the one requirements adopted by OSHA which is found at § 5-2.1.2(a)(4) of the ANSI standard. That paragraph requires that anytime a hydraulic leakage is found upon inspection of a crane it must "be carefully examined and [a] determination made as to whether [it] constitute[s] a safety hazard."<sup>25</sup> In this item, the Secretary alleges that hydraulic leaks were found by a compliance officer on three of Respondent's cranes at the site. Without further argument or rationale as to why there was a violation, the Secretary points out that "employees who were aware of the hydraulic leaks testified that they were not concerned about the leaks" (S. Brief, p. 38). (Citations omitted). If employees inspected the equipment, were aware of the leaks and stated that they were not concerned, they perforce made a determination of some kind or another. If the Secretary wanted to allege that their determination was somehow improper it should be done with some specificity. The Secretary's post hearing brief presents factual references with no rational whatsoever. The evidence the Secretary does point to shows that some determination was made. There is no showing of a violation as alleged in item 28a.

Item 28b alleges a violation of the ANSI standard which the Secretary specifically declined to adopt as an OSHA standard. The Secretary's standard at § 1926.550(b)(2) provides, in part;

Instead [of keeping records of inspection of cranes required by ANSI] the employer shall prepare a certification record . . . .The most recent certification record shall be maintained on file until a new one is prepared.

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<sup>24</sup> The expert in this case, highly qualified to speak to the subject, described the standards being enforced by the Secretary as "archaic" (Tr. 1522).

<sup>25</sup> Respondent's post-hearing argument that all that is required is an inspection, is rejected. The requirement seems clear, there must be an inspection and a determination as to whether any listed deficiency amounts to a safety hazard.

Again, in his post-hearing brief, the Secretary merely cites to factual testimony, including the fact that upon request the C.O. was provided with "the certification records for the cranes and was given copies of the annual inspections of the cranes (Tr. 1143, Ex. C-96, 97). OSHA thus specifically declined to adopt a requirement for monthly inspections. The Secretary presents no argument or explanation as to why the materials supplied by Respondent do not meet the requirement of § 550(b)(2). Item 28b is VACATED.

Item 28c is much like 28a. Under § 5-2.1.3(a)(11) of the ANSI standard "[e]xcessively worn or damaged tires" "shall be carefully examined and [a] determination made as to whether they constitute a safety hazard." As with the hydraulic leaks, at least one crane operator testified that he was aware of the gash on a tire but determined to operate in that manner reasoning that the damaged tire was required to bear little weight (Tr. 1300). While testifying that the crane operator had discovered the cut in the tire shortly before the OSHA inspection (Tr. 1097) there is no rationale as to why the CO believes there was a violation of the requirement to observe and make a determination. Item 28c is VACATED.

As referred to by item 28(d), the ANSI standard at § 5-2.3.3.(c)(2) requires that "cracked, broken, corroded, bent, or excessively worn" "critical parts" of a crane be repaired or replaced promptly "as needed for safe operation." One of three instances ("b") was withdrawn. The parties dispute whether the defects cited in these items, particularly bent lacings in two lattice booms, constitute defects to "critical" parts of the crane. The Secretary's post-hearing brief points to no evidence to this effect. Respondent relies on the testimony of Mr. Enfield, who appeared as an expert and whose testimony is accorded considerable weight for the reasons given previously. He stated that the bent lacings shown and identified as part of this alleged violation were not critical. He provided a rationale in support of his opinion (Tr. 1538). His opinion is accepted. It is found that the bent lattice members were not critical parts of the cranes' structures. No violation has been shown. Item 28d is VACATED.

Item 28e again alleges that equipment not in compliance with another applicable requirement contained in part 1926 was not removed as required by § 1926.20(b)(3). For the reasons stated above, none of the cited crane equipment has been shown to have non-

compliant with any other requirement in part 1926. Therefore, no equipment was required to be removed from service by this standard. Item 28e is VACATED.

Citation 1 - Item 29  
29 C.F.R. § 1926.602(a)(2)(i)

Respondent raises no defense to the allegation that a tractor, equipped with roll-over protection was not equipped with seat belts as required by the cited standard. There is unrebutted testimony of the existence of the condition, employee exposure and that all such equipment had not been inspected (Tr. 281-84, 1040, 1453; Ex. C-142, 143, 144, 145). That the consequences of a lack of a seat belt would be serious injury or death can hardly be argued. The violation is a serious one. The penalty appropriate for the violation is \$1000 on the showing of one exposed employee. Item 29 is AFFIRMED.

Citation 1 - Item 30  
29 C.F.R. § 1926.652(a)(1)

This item of the citation alleges that employees of Respondent were permitted to work in trenches which were not protected by adequate means against cave-ins or wall collapses. The cited standard, 29 C.F.R. § 1926.652(b)(1)(i), requires that the excavation was to be sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal).

There is no dispute as to the size of the cited trenches or the fact that employees worked in those trenches with the knowledge of their supervisors. Despite lengthy examination and cross examination of both Complainant's expert and an expert called by Respondent, there is also virtually no dispute that the soil in which the trenches were excavated was properly categorized as type "B" by OSHA's laboratory and that the sloping of the trenches did not meet the requirements for type "B" soil. Where the parties differ is the legal effect of Respondent having shown that the soil in which these trenches were excavated was "engineered fill" which, although "previously disturbed soil" had greater

stability that type "B" soils.

Much is made in the post hearing briefs of the processes of sampling and testing carried out by the two experts (Peck and Krieger). Whether OSHA's expert heard of or tested for "engineered fill" which Respondent claims is highly stable is beside the point under the cited standard. Respondent would like the Commission to treat the trenching standards in this case as "performance" standards, that is, assess on the particular evidence in the case, just how long the trench was likely to stand without collapse to determine whether the trench, at the time of the inspection, was safe. Respondent's argument is rejected. As Respondent finally recognizes in its post-hearing brief (R. brief, p. 21), "the OSHA standards do not recognize...the concept of an engineered fill material." Respondent's statement is true and the reason the violative condition is found to exist. Once established as a type of soil categorized by the mandatory soil classifications available under Appendix A to Subpart P, the design and specification of the sloping configuration is mandated by § 1926.652(b). The Commission cannot rewrite the requirements of a standard with such specificity. The evidence shows that Respondent's trenches did not comply with the sloping requirements for the type of soil in which they were dug.

Respondent's reliance on the Commission decision in *Concrete Construction Co.*, 15 BNA OSHC 1614 (No. 89-2019, 1992) is misplaced. There, a majority of the Commission, over the dissent of one of its members, held that since the evidence demonstrated that there was only a remote possibility that the backfill might collapse, the violation of 1926.652(e) was *de minimis*. That case is inapposite because the Commission applied its reasoning separate and apart from any violation of the general trench standards at §§ 1926.652(b) and (c), as cited herein. The Commission carefully limited its reasoning to "the particular safety [additional] measures needed to account for the existence of backfill." *Id.*, 15 BNA OSHC at p. 1622. Respondent here is charged under the very "general" trenching standards which were not in consideration in the Commission's 1992 decision.

Respondent's argument that the violation in this case should be classified as *de minimis* based on the likelihood of the trench collapsing is rejected on its merits. Even if the theory were correct, the evidence in this case does not support a finding that the

likelihood of trench collapse was so remote as to have "no direct or immediate relationship to safety and health" under § 658(a) of the Act. Respondent's expert here opined that the trench walls could have been even three feet higher and then concluded:

[h]ow safe banks [of a trench] are is a very subjective thing. Any bank, even at the prescribed one-on-one slopes has a potential slope (sic.). And I don't think, in my own mind, based on what I've done, there was a real danger of collapse of these trenches at the height they existed on this run.

To gamble lives of employees should the trench collapse against the admittedly "very subjective" conclusion of trench wall stability is just the type of approach to safety these standards seek to eliminate. Having acknowledged that the predictions of trench wall stability were indeed "very subjective," their failure to meet the specific requirements as to sloping cannot be found "have no direct or immediate relationship" to the safety or health of the employees who worked in those trenches. Trench collapses kill and severely injure employees buried by them. Item 30 is AFFIRMED. It is a serious violation for which a penalty of \$2500 is appropriate.

Citation 1 - Item 31  
29 C.F.R. § 1926.701(b)

The cited standard requires that;

All protruding reinforcing steel ["rebar"], onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

The citation, in item 31 alleges three instances in which employees were exposed to the hazard of contact with unprotected rebar. The CO's testimony is consistent with photographs of the scenes (Ex. C-154 through 157, 159, 160, 161, 163 through 166). Clearly, Respondent's employees worked around protruding rebar. The cited rebar is horizontal not vertical.

The Secretary submits that the standard intends to cover "impalement" even if the employee is not "above" the protruding steel. He relies on explanatory notes accompanying the publication of the standard in 1988; "OSHA realizes that employees could be, in fact,

often are, in a position where only part of their body is above the protruding steel, such as walking alongside of protruding rebar. . ." 53 Fed.Reg. 22612, at 22618, June 16, 1988. The Secretary claims that all protruding reinforcing steel "onto and/or into which employees could fall or come against" must be guarded against the hazard of impalement.

Respondent relies on the fact that the cited reinforcing steel was in a horizontal, not vertical, position in relation to the employees. Respondent notes that at one location employees were stripping formwork alongside the rebar. Employees testified that they had no problem in getting in or out of either area. Finally, Respondent notes that there have been no injuries as a result of the work near the rebar.

Complainant is correct in his theory. That is, the promulgation of the standard intended to cover protruding steel whether the steel protruded in a vertical or horizontal position. Complainant's quotation from the notes accompanying the publication of the standard are, however, incomplete. The very next two sentences of that publication state:

Likewise, there are situations where the steel is protruding from a horizontal direction and employees could fall or trip into the steel and become impaled. To properly protect employees from the hazard of impalement, OSHA has revised the provision to state clearly that all protruding reinforcing steel is to be guarded whenever employees could fall into or onto the steel and thereby become impaled.

The standard then does not, as claimed by the Secretary, "presume a hazard." As the publication relied on by the Secretary states, where, as here, the exposed rebar is in a horizontal position it "is to be guarded whenever employees could fall into or onto the steel." The language included in the promulgation of the standard imposes on OSHA the requirement to show that employees have or could fall into or onto the steel. Such a showing might include such factors as unstable footing, difficult walking conditions, narrow passageways, restricted lighting or visibility, Etc. Without such additional factors or conditions in the work area it is not reasonable to believe that employees will fall or trip onto or into horizontally protruding steel. In this case such factors are amply demonstrated by the photographs. Exhibits C-154, 155 and 156 show employees working in very close proximity to the protruding steel. They are actually reaching over the steel which is chest high. The combination of having one's attention on other work while standing on a berm

sloped towards the protruding steel provides the basis for finding that these employees were in a position in which they could fall onto the protruding rebar. Conditions are similar in the other instances. In Exhibits C-159 and C-160 the employees are concentrating on pouring and smoothing concrete, while the employees shown in Ex. C-163, 164 and 165 are also distracted by other work. The hazard of impalement existed for all three instances. Given the unprotected horizontal rebar in locations in which other circumstances make it possible for an employee to fall into or onto the protruding steel, the existence of a violative condition has been established. The photographs establish employee exposure. All elements of the alleged violation have thus been established for all three instances. Item 31 is **AFFIRMED**.

The Secretary points to no evidence as to the reasonably anticipated consequences of contacting the rebar under the circumstances of this case. Walking into, as opposed to falling some distance on to protruding rebar would seem to be less likely to produce serious injury or death. Under these circumstances the Secretary has not fulfilled the burden of proof in establishing that the violation is serious within the meaning of the Act. A penalty of \$1,000 is appropriate.

Citation 1 - Item 32  
29 C.F.R. § 1926.1051(a)

The cited standard requires that a stairway or ladder be "provided" where there is a break in elevation of a specified minimum distance and where "no ramp, runway, sloped embankment, or personnel hoist is provided."

In the two instances cited, regardless of the actual route used by employees, Respondent had provided either a sloped embankment (instance a) or a pull-out ramp leading up to the trailer (instance b). The issue is thus whether the cited standard requires that an employer not only provide an acceptable means of access but also must assure its use. It does. Here, Respondent's supervisory personnel were fully aware of the means of access being used by the employees (and in some cases also used by at least one foreman) and did nothing to alter the behavior. Item 32 is **AFFIRMED**.

The falls which might occur in either instance were not likely to cause serious bodily injury or death, however. Thus, they cannot be found to be serious within the meaning of the Act. Accordingly, they are other than serious violations. A penalty of \$500 is appropriate.

Citation 1 - Item 33  
29 C.F.R. § 1926.1053(b)(16)

Respondent, in this single instance item, is cited because a portable ladder with bent support rungs and a bent and partially split top step was found in the truck of an equipment mechanic. It is undisputed that the mechanic used the ladder by leaning it up against heavy equipment and climbing up just the first two or three steps which were undamaged.

Respondent maintains that these facts do not show the existence of a "structural defect so as to require it to be taken out of service." Quite the contrary. The cited standard includes "broken or split rails" in its list of examples of "structural defects" requiring removal from service or marking or tagging. The condition of the ladder violated the requirements of the standard. It was not only available for service, but it was in fact used by the mechanic. The violation has been established. Item 33 is AFFIRMED. There is no showing, however, that it was serious. Seriousness is to be measured by the circumstances of the particular case. Here, use of the first few rungs of a defective ladder could hardly result in serious injury or death. Since the defect was known to the mechanic and the ladder was part of this particular mechanic's equipment and on the truck he used exclusively, there is no reasonable inference that the ladder would be used in any other way by other employees. Moreover, the itself ladder was only five feet high. The violation is other than serious. The circumstances of the ladder's limited use only by an employee who was fully aware of the defect warrants a minimal penalty of \$100.

Citation 1 - Item 34  
29 C.F.R. § 1926.1060(a)(1)(v)

This item which alleges a failure to train employees with regard to ladders is redundant of item 4. It is VACATED.

Citation 2 - Item 1  
29 C.F.R. § 1903.2(a)(1)

It is alleged as an other than serious violation that there was no OSHA notice posted at the site.

Respondent does not deny the allegation. A penalty of \$500 is appropriate.

Citation 2 - Items 2 and 3  
29 C.F.R. § § 1926.25(a) and (c)

Charges that debris was not kept cleared from the one trailer area and that no waste container was provided in another, are not denied. Items 2 and 3 are AFFIRMED. The proposed \$0 penalty is appropriate.

Citation 2 - Item 4  
29 C.F.R. § 1926.59(f)(5)(i)

Since the container marked "gasoline" actually contained a mixture of gasoline and oil it was, as alleged, incorrectly tagged. Identifying a gas/oil mixture as gasoline, however, has no immediate impact on safety and health since the former is more volatile and dangerous than the latter. If a gas/oil mixture were treated as if it were gasoline some damage might be done to the equipment it was used in as fuel but no hazard to the employees would arise. Accordingly, this item is found to be *de minimis*. As such, no penalty is assessed.

Citation 2 - Item 5  
29 C.F.R. § 1926.250(b)(9)

The cylindrical materials which were not stacked and blocked consisted of rebar steel which had been "shaken out" (unbundled) and laying on 2" x 4" lumber since it was in the process of being used. As such it was not stored within the meaning of the standard. There was no violative condition. Item 5 is VACATED.

Citation 2 - Item 6  
29 C.F.R. § 1926.601(b)(2)(i)

The mere fact that one of two tail lights might be inoperable is not, by itself sufficient to show a violation of the cited standard. There is only a violation where "visibility conditions warrant additional light" that vehicles must be equipped with "at least two taillights." Should the Secretary want to assure that all construction vehicles be equipped with two taillights unconditionally a standard saying that should be promulgated. Until then, this standard requires a demonstration that such lights were needed due to visibility conditions. No such evidence was offered. Item 6 is VACATED.

Citation 2 - Item 7  
29 C.F.R. § 1926.601(b)(5)

The C.O. could not testify that the truck was in use with a cracked windshield. He did know that it was in a "yard" when cited and when he later saw it back out on the site the glass had been replaced (Tr. 691-694).

Respondent argues that the cited standard sets out no specific time limit within which the broken glass must be replaced.

The C.O.'s testimony is inadequate to show a violation of this standard. A rule of reason must apply. Here a truck was seen at some point in time with a cracked windshield which the cited standard requires be replaced. At some other time the windshield had been

replaced. Without any information as to how much time transpired or how the truck was used, if at all, with a cracked windshield, there can be no inference that the cracked windshield had not been replaced with reasonable promptness. Complainant has not made a *prime facie* case. Accordingly, item 7 is VACATED.

Citation 2 - Item 8  
29 C.F.R. § 1926.601(b)(14)

This item alleges that motor vehicles in use had not been properly inspected at the beginning of each shift as required by the cited standard. The standard also requires that all defects shall be corrected before the vehicle is placed in service.

There is no factual dispute that the C.O. found two trucks on the site, each of which had a horn which was inoperable. One of them, a water truck, had to be jump started so the horn could be tested. This is hardly a piece of equipment which can be said to be "in use" as required by the standard. There is no violation as to the water truck. Instance a is VACATED.

The truck which is the subject of instance b, is a dump truck which is also the subject of item 6 of this citation. The vehicle was in use. It had thus not been removed from service due to the defective horn. To the degree that Respondent seems to argue that the vehicle was, in fact, underwent employee inspection the morning it was cited, such argument is unsupported. The standard requires both, employees checking the equipment before use, and the removal of equipment no meeting the inspection requirements. Instance b is AFFIRMED. A penalty of \$100 is appropriate.

#### FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

## CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of 29 C.F.R. § 1910.94(a)(5)(ii)(b), as alleged in Citation 1, Item 1. The violation was, however, other than serious. A penalty of \$250 is appropriate therefor.

4. Respondent was in violation of 29 C.F.R. § 1910.184(d), as alleged in Citation 1, Item 2. The violation was serious. A penalty of \$1,500 is appropriate therefor.

5. Respondent was not in violation of 29 C.F.R. § § 1910.184(i)(9)(iii), 1910.184(i)(9)-(iv) or 1926.20(b)(3), as alleged in Citation 1, Item 3.

6. Respondent was in violation of 29 C.F.R. § 1926.21(b)(2), as alleged in Citation 1, Item 4. The violation was serious. A penalty of \$4,000 is appropriate therefor.

7. Respondent was in violation of 29 C.F.R. § 1926.28(a), as alleged in Citation 1, Item 5, Instance a. The violation was serious. A penalty of \$1,000 is appropriate therefor.

8. Respondent was not in violation of 29 C.F.R. § 1926.28(a) as alleged in Citation 1, Item 5, Instance b.

9. Respondent was in violation of 29 C.F.R. § 1926.59F0(5)(ii), as alleged in Citation 1, Item 6. The violation was serious. A penalty of \$1,000 is appropriate therefor.

10. Respondent was in violation of 29 C.F.R. § 1926.102(a)(1), as alleged in Citation 1, Item 7. The violation was serious. A penalty of \$1,000 is appropriate therefor.

11. Respondent was in violation of 29 C.F.R. § 1926.152(a)(1), as alleged in Citation 1, Item 8. The violation was serious. A penalty of \$500 is appropriate therefor.

12. Respondent was in violation of Section 5(a)(1) of the Act as alleged in Citation 1, Item 9. The violation was serious. A penalty of \$1,000 is appropriate therefor.

13. Respondent was not in violation of 29 C.F.R. §§ 1926.200(a) or 1926.201(a)(1), as alleged in Citation 1, Items 9(a) and 9(b).

14. Respondent was not in violation of 29 C.F.R. §§ 1926.251(a) or 1926.20(b)(3), as alleged in Citation 1, Items 10(a) and 10(b).

15. Respondent was in violation of 29 C.F.R. § 1926.251(b)(5), as alleged in Citation 1, Item 11. The violation was serious. A penalty of \$1,000 is appropriate therefor.

16. Respondent was not in violation of 29 C.F.R. §§ 1926.251(e) or 1926.20(b)(3), as alleged in Citation 1, Items 12(a) and (b).

17. Respondent was in violation of 29 C.F.R. § 1926.300(a), as alleged in Citation 1, Item 13. The violation was serious. A penalty of \$1,600 is appropriate therefor.

18. Respondent was not in violation of 29 C.F.R. § 1926.300(b)(2) as alleged in Citation 1, Item 14.

19. Respondent was in violation of 29 C.F.R. § 1926.301(d), as alleged in Citation 1, Item 15. The violation was serious. A penalty of \$1,000 is appropriate therefor.

20. Respondent was not in violation of 29 C.F.R. § 1926.302(b)(7) as alleged in Citation 1, Item 16.

21. Respondent was in violation of 29 C.F.R. § 1926.350(a)(9), as alleged in Citation 1, Item 17. The violation was serious. A penalty of \$1,200 is appropriate therefor.

22. Respondent was not in violation of 29 C.F.R. § 1926.403(i)(2)(i) as alleged in Citation 1, Item 18.

23. Respondent was not in violation of 29 C.F.R. § 1926.403(i)(2)(ii) as alleged in Citation 1, Item 19.

24. Respondent was not in violation of 29 C.F.R. § 1926.404(f)(6) as alleged in Citation 1, Item 20a.

25. Respondent was in violation of 29 C.F.R. § 1926.20(b)(3), as alleged in Citation 1, Item 20b. The violation was other than serious.. A penalty of \$100 is appropriate therefor.

26. Respondent was not in violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I) as alleged in Citation 1, Item 21.

27. Respondent was in violation of 29 C.F.R. § 1926.405(e)(1), as alleged in Citation 1, Item 22. The violation was other than serious. A penalty of \$1,000 is appropriate therefor.

28. Respondent was not in violation of 29 C.F.R. § 1926.405(g)(1)(iii) as alleged in Citation 1, Item 23.

29. Respondent was not in violation of 29 C.F.R. § 1926.405(g)(2)(iv) as alleged in Citation 1, Item 24a.

30. Respondent was not in violation of 29 C.F.R. § 1926.20(b)(3) as alleged in Citation 1, Item 24b.

31. Respondent was not in violation of 29 C.F.R. § 1926.405(g)(2)(v) as alleged in Citation 1, Item 25.

32. Respondent was in violation of 29 C.F.R. § 1926.500(d)(1), as alleged in Citation 1, Item 26. The violation was other than serious. A penalty of \$500 is appropriate therefor.

33. Respondent was in violation of 29 C.F.R. § 1926.500(d)(2), as alleged in Citation 1, Item 27. The violation was other than serious.. A penalty of \$0 is appropriate therefor.

34. Respondent was not in violation of 29 C.F.R. § 1926.550(b)(2) as alleged in Citation 1, Items 28a, 28b, 28c and 28d.

35. Respondent was not in violation of 29 C.F.R. § 1926.20(b)(3) as alleged in Citation 1, Item 28e.

36. Respondent was in violation of 29 C.F.R. § 1926.602(a), as alleged in Citation 1, Item 29. The violation was serious. A penalty of \$1,000 is appropriate therefor.

37. Respondent was in violation of 29 C.F.R. § 1926.652(a)(1), as alleged in Citation 1, Item 30. The violation was serious. A penalty of \$2,500 is appropriate therefor.

38. Respondent was in violation of 29 C.F.R. § 1926.701(b), as alleged in Citation 1, Item 31. The violation was other than serious. A penalty of \$1,000 is appropriate therefor.

39 Respondent was in violation of 29 C.F.R. § 1926.1051(a), as alleged in Citation 1, Item 32. The violation was other than serious. A penalty of \$500 is appropriate therefor.

40. Respondent was in violation of 29 C.F.R. § 1926.1053(b)(16), as alleged in Citation 1, Item 33. The violation was other than serious. A penalty of \$100 is appropriate therefor.

41. Respondent was not in violation of 29 C.F.R. § 1926.1060(a)(1)(v) as alleged in Citation 1, Item 34.

42. Respondent was in violation of 29 C.F.R. § 1903.2(a)(1), as alleged in Citation 2, Item 1. The violation was other than serious. A penalty of \$500 is appropriate therefor.

43. Respondent was in violation of 29 C.F.R. § 1926.25(a), as alleged in Citation 2, Item 2. The violation was other than serious. A penalty of \$0 is appropriate therefor.

44. Respondent was in violation of 29 C.F.R. § 1926.25(c), as alleged in Citation 2, Item 3. The violation was other than serious. A penalty of \$0 is appropriate therefor.

45. Respondent failed to comply with the standard at 29 C.F.R. § 1926.59(f)(5)(i) (Citation 2, Item 4). The violation was *de minimis*.

46. Respondent was not in violation of 29 C.F.R. § 1926.250(b)(9) as alleged in Citation 2, Item 5.

47. Respondent was not in violation of 29 C.F.R. § 1926.601(b)(2)(i) as alleged in Citation 2, Item 6.

48. Respondent was not in violation of 29 C.F.R. § 1926.601(b)(5) as alleged in Citation 2, Item 7.

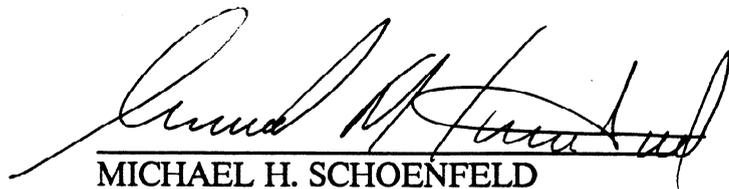
49. Respondent was not in violation of 29 C.F.R. § 1926.601(b)(14), as alleged in Citation 2, Item 8(a).

50. Respondent was in violation of 29 C.F.R. § 1926.601(b)(14), as alleged in Citation 2, Item 8b. The violation was other than serious. A penalty of \$100 is appropriate therefor.

ORDER

1. The citations issued to Respondent on April 9, 1992, are affirmed, modified or vacated as indicated above.

2. Civil penalties in the amounts set forth above are assessed.



MICHAEL H. SCHOENFELD  
Judge, OSHRC

Dated: **DEC 9** 1993  
Washington, D.C.