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

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET No. 04-1654
KINSLEY CONSTRUCTION, INC., Respondent.	:	

APPEARANCES:

Judson H. P. Dean, Esq. U.S. Department of Labor Philadelphia, PA 19106-3396 For the Department of Labor	Thomas Benjamin Huggett, Esq. Morgan, Lewis & Bockius, LLP Philadelphia, PA 19103-2921 For the Employer

BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission"), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review (1) a citation issued by the Secretary of Labor ("the Secretary") and (2) a proposed assessment of penalty therefor. On June 28, 2004, Respondent had a ten-person crew performing site cleanup at a worksite in Cumru Township, Pennsylvania. (Joint Prehearing Statement, Stipulation #1). The job required the removal of a large rock. The rock was approximately 88 inches long, 83 inches wide, and varied between 14 and 26 inches thick. Its circumference was 22 feet. (Tr. 87-88) After grade-all operator Todd Pfleuger was unable to lift the rock into the grade-all, foreman Chris Brockmeyer picked the rock up in a Caterpillar 953 C Track-Type front-end loader and prepared to load it into a dump truck. (Tr. 28) The rock was larger than the bucket and the thicker half of the

rock protruded above the lip of the bucket. (Tr. 32-33, 105, 109, 230)

After determining that to load the rock into the truck, it was necessary to remove the tailgate, (Tr. 28, 192) Brockmeyer left the loader in idle and, with the rock inside, lowered the bucket to the ground in a curled up, closed position. (Tr. 31, 69, 156) Athough on the ground, the bucket relied on a hydraulic cylinder to maintain it in the curled, closed position. (Tr. 41, 69-71, 160) At this point, the bucket of the loader was approximately 15-20 feet from the back of the truck where Joseph Costello, the truck operator, and Brockmeyer, were attempting to remove the tailgate. (Tr. 97, 232) The ground sloped downward from the loader to the truck at an angle of approximately 3/4 inch per foot. (Tr. 84) After approximately 15 minutes, while Brockmeyer and Costello worked to remove the tailgate from the truck, the rock fell out of the bucket, rolled or flipped over toward the truck, striking Brockmeyer and fatally injuring Costello. (Tr. 34, 79, 169)

As a result of the accident, OSHA conducted an inspection of the worksite on June 28-29, 2004. (Tr. 76) As a result of that inspection, OSHA issued a citation to Kinsley alleging serious violations of section 5(a)(2) of the Act for failure to comply with the standards at 29 C.F.R. §§1926.20(b)(4)[1] and 1926.21(b)(2)[2]. A combined penalty of $7,000.00 was proposed.

In her complaint, the Secretary moved to amend the citation to allege a violation of

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1 The standard states:

> The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.

The description of the violation states:

Cumru Township Building-Three (3) employees performing site clean-up and dirt and rock removal work were exposed to the hazard created by placing a large, top-heavy, odd-shaped rock into the bucket of a 953C track type Caterpillar loader that was parked on a slight incline, on or about June 28, 2004.

2 The standard states:

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

The description of the violation states:

Cumru Township Building-Three (3) employees performing site clean-up and dirt and rock removal work were not trained regarding the hazard created by placing a large, top-heavy, odd-shaped rock into the bucket of a 953C track type Caterpillar loader that was parked on a slight incline, on or about June 28, 2004.

Section 5(a)(1)[3] of the Act rather than a violation of §1926.20(b)(4). The motion to amend was granted. The description of the alleged violation of Section 5(a)(1) states:

> The employer failed to furnish to each of its employees employment and a place of employment free from the recognized hazard that exists when the bucket of a tractor loader is used to lift, hold, and transport a heavy and irregularly-shaped object despite the fact that the bucket is insufficient in size and shape to adequately and safely perform the task. This hazard caused the death of one exposed employee, and was likely to cause death or serious physical harm to the other exposed employees.

A hearing was held in Harrisburg, PA, on April 29, 2005. Both parties have filed post-hearing briefs and this matter is now ready for disposition.

Jurisdiction

Kinsley Construction is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over this matter. (Complaint and Answer Paragraphs II. III and IV.)

Discussion

A. The 5(a)(1) Violation.

To establish a violation of section 5(a)(1) of the Act, the Secretary must show (1) that condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (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. *Arcadian Corp.,* 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004); *Well Solutions, Inc.* 17 BNA OSHC 1211, 1213 (No. 91-340, 1995); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986)

As alleged by the amended citation, the recognized hazard is using the bucket of a tractor loader "to lift, hold, and transport a heavy and irregulary-shaped object despite the fact that the bucket is insufficient in size and shape to adequately and safely perform the task." At the hearing, the Secretary adduced no evidence to establish that the bucket was of insufficient size and shape to transport the load, even though the rock was of such size and shape that part of it stuck out of the bucket. Instead, the Secretary treated the hazard as a moving target. First, the Secretary focused on a theory concerning what caused the accident,

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3 Section 5(a)(1) states that:

> Each employer-(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

a phenomenon called "hydraulic drift." According to the Secretary, when a boom or bucket is in a position held in place by hydraulics, the rod of the hydraulic cylinder slowly seeps out, resulting in "hydraulic drift" which causes changes in the position of the bucket or boom. (Tr. 39-41, 151-152) It was the Secretary's premise that "hydraulic drift" is a recognized hazard in the industry insofar as loads subjected to this drift could destabilize. Respondent's employees were allegedly exposed to that hazard when they were permitted to work nearby and down-slope of the front-end loader.

There were two basic problems with this theory. First, the Secretary introduced this definition of the recognized hazard for the first time at the hearing, thereby denying Respondent an opportunity to prepare a defense. Second, even if properly raised, the Secretary failed to establish that the Caterpillar 953C was subject to "hydraulic drift." In her post-hearing brief, the Secretary agrees that the actual cause of the accident remains unknown. As she properly notes, there does not need to be a proximate cause relationship between the accident that preceded an inspection, and the alleged recognized hazard. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979); *The Boeing Company*, 5 BNA OSHC 2014, 2016 (No. 1289, 1977). However, that does not free the Secretary from establishing that a recognized hazard existed. In that regard, the Secretary failed to meet her burden.

The Secretary established that "hydraulic drift" was a problem with older model loaders. (Tr. 43, 153) However, the evidence also established that the hydraulics on the Caterpillar 953C were upgraded, and both Brockmeyer and Todd Pfleuger, who also had experience operating the Caterpillar 953C, testified that "hydraulic drift" was not a problem with this model. (Tr. 43, 153, 180)[4] Moreover, unresolved was whether "hydraulic drift" occurs when a loader is in idle as it was here, or whether it only occurs when the machine is turned off. (Tr. 43) One would also expect that, if "hydraulic drift" were a concern, the rapidity of that drift would increase as the load approached the capacity of the front-end loader. However, the Secretary failed to establish either the weight capacity of the front-end loader, or the weight of the rock. Thus, while there *could* be "hydraulic drift," the record fails to demonstrate that this model of front-end loader was subject to that condition. (Tr. 245)

The Secretary also attempted to establish that having employees work down-slope of the front-end loader while it held the rock was a recognized hazard insofar as the hazard was

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4 At the hearing, the Secretary called James L. Jury, to testify about "hydraulic drift." Because Mr. Jury could only testify about "hydraulic drift" in general and had no knowledge or experience concerning the Caterpillar 953C, his testimony was disallowed. Also disallowed, were several documents the Secretary sought to introduce that Mr. Jury pulled off the Internet as a result of a Google search. These documents were excluded because they were not authenticated and no attempt was made to contact the source of the documents to determine their authenticity or credibility. See Fed.R.Ev. 901.

"obvious and glaring" *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984)(citing *Tri-State Roofing v. OSHRC*, 685 F.2d 878, 880) (4th Cir. 1982)) In support of this theory, the Secretary tried to analogize working *under* a load held in the air or working near an object being loaded or unloaded with working *near* a load, lying on the ground in a curled up bucket 15-20 feet away. (Tr. 46-47, 154, 242-244, Secretary's post-hearing brief at 11, 13-14) The analogy is faulty. That walking under a load is an "obvious and glaring" hazard needs no elaboration. As the witnesses testified, a myriad of things can go wrong, including snapped lines, broken hoses, failed hydraulics, driver error. (Tr. 46, 155, 243-245) In such an event, the load has only one way to go; straight down onto any employee standing beneath it. Similarly, when loading or unloading, the load could slip or be dropped onto employees standing nearby. Here, however, the load was apparently securely in the bucket, on the ground with the bucket curled up and tilted back past the center of gravity. (Tr. 246) Unlike a suspended load, there is no evidence to suggest that it was "obvious and glaring" that the rock would flip over and roll toward the truck and endanger employees 15-20 feet away, especially since it was rolled up with the center of gravity away from the employees.

The Secretary's insistence that things can go wrong with mechanical devices, though true, hardly rises to the level of establishing a "recognized" hazard. From riding in cars, to flying in planes, people depend on the reliability of mechanical devices, even though they are aware that "something could go wrong." While there *could* be mechanical type failures, the record fails to demonstrate anything but the remotest possibility of such occurrences. (Tr. 245-247) A recognized hazard is not established where the evidence establishes that an accident could occur only under freakish or utterly implausible concurrence of circumstances. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (DC.Cir. 1973); *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). Based on the record, that appears to be exactly what happened here. Accordingly, while this was a tragic accident, there is nothing in the record to demonstrate that the employees were exposed to a "recognized" hazard.

B. §1926.21(b)(2)

As noted earlier, this standard requires that

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

To establish a violation of §1926.21(b)(2), the Secretary must demonstrate that the employer failed to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Secretary of Labor v. Fabi*, 370 F.3d 29, 35-36 (D.C. Cir 2004); *Superior Masonry Builders Inc.*, 20 BNA OSHC

1182,1187 (No. 96-1043, 2003); *Pressure Concrete Constr. Co.,* 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992). To demonstrate that a hazard was one of which a reasonably prudent employer would have been aware, the Commission has looked to whether the employer instructed employees about hazards that were obvious, *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000), *aff'd* 285 F.3d 499 (6th Cir. 2002); covered by OSHA standards, *CMC Electric Inc.,* 18 BNA OSHC 1737, 1739 (No. 96-0169, 1999); discussed in industry manuals, *Superior Masonry Builders Inc;* or whether the employer's safety instructions were so general as to be ineffective, *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997), *aff'd*, Fifth Cir. No. 97-60769, September 2, 1998 (unpublished).

The evidence demonstrates that Kinsley employees were adequately trained to recognize and avoid hazards that a reasonably prudent employer would be aware. John Kotisch, Kinsley's Director of Employee Services and Risk Manager, testified that new employees undergo a four-hour safety orientation where they are instructed on major hazards encountered on a construction site. (Tr. 211) All employees also undergo the OSHA 10 hour training course. (Tr. 211) Foreman Brockmeyer testified that his heavy training instruction included the lifting and loading of rocks (Tr. 195). Moreover, Brockmeyer's employee training report demonstrates that he has taken numerous safety courses including subjects such as "Excavation and Trenching Competency," "Heavy Equipment Training, Level 1, "OSHA 10 Hour Course," and "Rough Terrain Forklift." (Ex. R-2) Brockmeyer also testified about numerous toolbox talks conducted during 2003-2004 including such topics as "Attitude & Behavior-A Major Cause of Accidents," "Construction Equipment Dangers," and "Carelessness." (Tr. 186-189, Ex. R-16)

Todd Pfleuger testified that he was trained on the composition and stability of loads. (Tr. 66) His employee records also reveal that he twice received the OSHA 10 Hour course, and also took the "MSHA Part 46" course, the "New Hire Safety Orientation", and the course on "Rough Terrain Forklift," (Ex. R-3) in addition to attending toolbox talks (Ex. R-16). Joseph Costello's employee records establish that he received similar training. (Ex. R-1)

In short, the evidence demonstrates that Kinsley had an extensive program designed to "recognize and avoid hazards that a reasonably prudent employer would be aware." The Secretary points out, however, that the evidence failed to demonstrate that employees were trained either in the hazard of "hydraulic drift" or carrying oversized rocks in a forklift bucket. (Complainant's Post-hearing brief at 21). However, as noted above, the evidence demonstrated that the employees were aware of the phenomena of "hydraulic drift" but that it was not considered a problem with the Caterpillar 953C Forklift. The Secretary introduced no contrary evidence and her working theory regarding "hydraulic drift" as a cause of this tragic accident remains mere speculation. Absent the "hydraulic drift" theory, the record contains no evidence to suggest what caused the rock to roll out of the bucket or that a reasonably prudent employer would have been aware that there was any danger to employees working 15-20 feet from a forklift containing a large rock when the bucket was lying on the

ground with the forklift curled up with the center of gravity away from the employees.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

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

1. Citation 1, item 1a, alleging a serious violation Section 5(a)(1) is VACATED.
2. Citation 1, item 1b, alleging a serious violation of 29 C.F.R. § 1926.21(b)(1) is VACATED
3. The combined penalty proposed therefore is VACATED.

/s/

Covette Rooney
Judge, OSHRC
Washington, D.C.

Dated: September 12, 2005