UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. S.G. LOEWENDICK & SONS, INC., Respondent.	OSHRC Docket No. 91-2487

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The issue in this case is whether S.G. Loewendick & Sons, Inc. ("Loewendick") violated 29 C.F.R. § 1926.550(b)(2)[1] by using a backhoe to demolish bridge piers on a bridge replacement project while the backhoe and its operator were suspended 80 feet in the air. We conclude that the company was in violation and find that the violation was willful.

FACTS

As part of a bridge-replacement project in Fairmont, West Virginia, Loewendick's job was to demolish the top 12 feet or so of the four piers that supported the bridge but to leave

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[1]That standard provides:

> All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Section 5-3.2.3(e) of ANSI B30.5-1968, which is entitled "Moving the Load," provides, "The operator shall not hoist, lower, swing, or travel while anyone is on the load or hook."

the bottom 70 feet of each pier intact. Before work began, Loewendick performed an engineering survey and concluded that the safest way to perform the demolition was to suspend a piece of machinery and an operator from a crane.

Following this approach, Loewendick used a wrecking ball suspended from a crane to demolish as much of the superstructure of the bridge as possible. It then used the crane to position a 7-ton backhoe on the top of the piers, approximately 70 feet above the ground. The outriggers of the backhoe rested on the edge of the pier and a cable raised the opposite end of the backhoe slightly to put more of the machine's weight on the outriggers. A Loewendick employee in the cab of the backhoe operated a hydraulic ram attached to the rear of the backhoe to cut down into the concrete, like a large jackhammer. The backhoe was lifted by four bridle slings, one at each corner, which were attached to the main cable of the crane. Each sling had a capacity of 28 tons, and the main cable had a capacity of more than 90 tons. The safety cable, which was attached to the front of the backhoe, ran to a separate drum, so that it could be operated independently. Loewendick also made modifications to the crane and the backhoe that it claimed assured the safety of the operation. These included welding metal braces to the telescoping outriggers on each side to prevent them from retracting accidentally and installing new ¾-inch cables on the crane instead of the ⅜-inch cables.

When a compliance officer from the Occupational Safety and Health Administration ("OSHA") arrived to inspect the worksite, Loewendick had completed work on two of the four piers and was working on the third. During the inspection the compliance officer told Loewendick that, in his opinion, the backhoe operation did not comply with OSHA's regulations. The following day, before Loewendick resumed work, Loewendick's vice president telephoned the compliance officer to discuss the operation. They disagreed about whether the operation qualified for the exception in 29 C.F.R. § 1926.550(g)(2)[2] which

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[2]Section 1926.550(g) provides:

> **§ 1926.550 Cranes and derricks.**
>
> . . . .
>
> (2) *General requirements.* The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and

(continued...)

permits employees on a personnel platform to "ride the load." The compliance officer's supervisor insisted that the backhoe was not a personnel platform, while Loewendick's vice president strongly asserted that he believed the backhoe, as modified, did qualify for the exception and stated that he would resume operations the following Monday unless OSHA issued a stop-work order.

After the compliance officer returned to Fairmont and learned that Loewendick had finished removing the tops of the piers with the backhoe, the Secretary of Labor issued a citation to Loewendick alleging a willful violation of 29 C.F.R. § 1926.550(b)(2). Loewendick contested that citation, and a hearing was held before a Review Commission administrative law judge. At that hearing, both Loewendick and the Secretary presented witnesses experienced in construction or demolition who expressed the opinion that the method used by Loewendick was the least dangerous way to perform the job. In addition, Loewendick presented two construction safety experts, one of whom was a former OSHA area director, who testified that Loewendick's method was the least dangerous way to perform the work and that the backhoe should be considered a personnel platform. The Secretary presented the compliance officer, his supervisor, and the area director for that area, who all expressed the view that the backhoe was not a personnel platform under the standard.

Administrative Law Judge John H. Frye vacated the citation. He concluded that the suspended backhoe was not a load because it was not being transported from one place to another but was being held in a stationary position to perform work. Therefore, the judge found, the modified backhoe was being used as a personnel platform. He also found that Loewendick had established that it was entitled to the exception to the prohibition against riding the load because the use of conventional means of access would be more hazardous. The judge observed that Loewendick should have been cited for noncompliance with various

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[2](...continued)

> dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

sections of the personnel platform standard, 29 C.F.R. § 1926.550(g), rather than for violations of the standard charged.

DISCUSSION

Section 5-3.2.3 of ANSI B30.5-1968, Safety Code for Crawler, Locomotive, and Truck Cranes, which is incorporated by reference into section 1926.550(b)(2), prohibits a crane operator from hoisting, lowering, swinging or traveling the load while anyone is on the load or hook. Loewendick claims that its backhoe comes within an exception to that prohibition, 29 C.F.R. § 1926.550(g)(2), which provides that a personnel platform may be used to hoist employees only if the use of conventional means "would be more hazardous or are not possible because of structural design or workplace conditions." We find that the backhoe does not come within the exception to the prohibition against "riding the load," and that Loewendick's operation violated section 1926.550(b)(2) because the backhoe operator was "riding the load." We also find that Loewendick has failed to establish any affirmative defenses.

The judge's finding that the backhoe was not a load because it was used to perform work in a stationary position is in error. Although we have never encountered a situation like this, involving a machine being used in a manner like Loewendick's backhoe, the Commission has generally accepted the Secretary's position that a load is "anything hoisted by a crane." *Havens Steel Co.*, 6 BNA OSHC 1740, 1978 CCH OSHD ¶ 22,875 (No. 15538, 1978). Both of Loewendick's construction safety experts, as well as the compliance officer's supervisor, testified that even a personnel platform is a load. The evidence therefore clearly establishes, and Loewendick does not dispute, that the backhoe was a load.

We also find, however, that the backhoe was not a personnel platform. Whether the backhoe was a personnel platform is a question of fact to be answered by examining its features. *See Superior Elec. Co.*, 16 BNA OSHC 1494, 1496, 1993 CCH OSHD ¶ 30,286, p. 41,721 (No. 91-1597, 1993). The backhoe here was clearly designed and intended to be operated on the ground in the manner of a motor vehicle, to propel itself along the ground as well as to perform work such as digging and plowing. The backhoe had four wheels and rubber tires. Even with the outriggers extended to lift the rear wheels off the ground, the front tires would bear much of the machine's weight. Welding metal bars to the outriggers to prevent them from retracting may have constituted a reasonable safety measure under

these circumstances, but it did not transform the essential nature of the machine into a personnel platform. Although its power train was capable of operating devices such as the ram being used here, the designers of the backhoe clearly intended it to be used on the ground, not suspended in the air. In contrast, a personnel platform is designed to transport employees as safely as possible from one place to another, usually from the ground to a work station and back. Although the Secretary's witnesses agree that work may be performed by an employee aloft in a personnel platform, that is not the primary intent of section 1926.550(g)(2). Moreover, the object of a personnel platform is to position the employee where he can perform the work, in contrast with the backhoe which is designed to perform work itself. The presence of the backhoe operator was merely a necessary incident to the purpose of the machine; he had to operate the ram for the backhoe to accomplish its task. Accordingly, we find that the backhoe was not a personnel platform.

Loewendick has presented a number of other arguments which must fail because they are based on the premise that the backhoe was a personnel platform. The company argues that ANSI B30.5-1968 has been revised a number of times to modify its prohibition on riding the load, and that OSHA itself recognized that an absolute prohibition on riding the load was not practical, pointing to various OSHA documents. These ANSI and OSHA documents show the background for the 1988 adoption of section 1926.550(g), but they are not pertinent here because the adoption of section 1926.550(g) has established the law. That standard governs the limited exception to the prohibition on riding the load, and it requires that a personnel platform be used. Loewendick also relies on *Crane or Derrick Suspended Personnel Platforms*, a pamphlet published by OSHA to help familiarize employers with the requirements of section 1926.550(g), which states that the standard "allows employers flexibility in deciding how to provide the best protection." That flexibility, however, is also based on the premise that the employer is using a personnel platform, which precludes Loewendick from relying on it.

AFFIRMATIVE DEFENSES

Loewendick has failed to establish that its failure to comply with the cited standard should be excused because literal compliance either was infeasible, or would expose employees to a greater hazard than would non-compliance. Loewendick raised the first of these affirmative defenses in its answer to the Secretary's complaint, alleging that compliance

with the cited standard was infeasible. In order to prove the affirmative defense of infeasibility, an employer must prove that (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) *either* an alternative method of protection was used *or* no alternative means of protection was feasible. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160, 1993 CCH OSHD ¶ 30,042, p. 41,226 (No. 90-1620, 1993). Here, the evidence establishes that compliance with the standard was feasible. Loewendick could have kept the backhoe operator off the load by using an alternative method to perform the work. Loewendick asserts that it could not do this because all the alternative demolition methods permitted by its contract were more dangerous. This argument, however, is more properly addressed to the greater hazard affirmative defense, not the infeasibility defense.

Loewendick did not plead the greater hazard affirmative defense in its answer as required by Rule 34(b)(3) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.34(b)(3). In determining whether it is appropriate to amend the pleadings under Rule 15(b) of the Federal Rules of Civil Procedure[3] to allege that defense, we consider whether the parties clearly recognized that the evidence was directed toward an unpleaded issue. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1516-17, 1993 CCH OSHD ¶ 30,300, p. 41,749-50 (No. 91-373, 1993). The prerequisites for using a personnel platform are essentially the same as the first two elements of the greater hazard defense, (1) that the hazards caused by complying with the standard are greater than those encountered by not

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[3]Under section 12(g) of the Act, 29 U.S.C. § 661(f), the Federal Rules of Civil Procedure apply to Commission proceedings unless the Commission has adopted a different rule. None of the Commission's Rules of Procedure addresses this situation, so the Federal Rules apply. Rule 15(b) of the Federal Rules provides:

> **Rule 15. Amended and Supplemental Pleadings**
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> . . . .
>
> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

complying, and (2) that alternative means of protecting employees were either used or were not available. *Peterson Bros. Steel Erec. Co.*, 16 BNA OSHC 1196, 1204, 1993 CCH OSHD ¶ 30,052, p. 41,304 (No. 90-2304, 1993), *aff'd,* No. 93-4913 (5th Cir. July 21, 1994). Loewendick introduced evidence relevant to these issues in its attempt to prove that it had satisfied the prerequisites for using a personnel platform. If this were the only evidence, we could not find that the Secretary had consented to try the affirmative defense. However, on cross-examination of Loewendick's witnesses the Secretary raised the third element, that a variance under section 6(d) of the Act is not available or that application for a variance would be inappropriate. *Id.* He also argued to both the judge and the Commission that the exception contained in 29 C.F.R. § 1926.550(g)(2) should be viewed in terms of the traditional greater hazard defense. Under these circumstances, we find that the parties squarely recognized that they were trying that affirmative defense. Accordingly, we amend the pleadings to allege that defense.

We find, however, that Loewendick has not proved that defense. We need not examine each element of the defense but direct our attention to the third element, the variance application requirement, which is well established in Commission precedent and has been endorsed by a number of courts of appeals.[4] Were we to find that Loewendick had proved the first two elements of that defense, we would still not find that Loewendick had proved the defense because it has not established the third element. Loewendick admits that it had not applied for a variance, and it has not established that application for a variance would have been inappropriate. Loewendick presented testimony by a former OSHA area director that a variance application involves several steps, that it takes OSHA a long time to act on applications, and that variances are rarely granted. Neither of these factors, however, prevented Loewendick from filing an application for a variance. Nor has Loewendick persuaded us that its situation should be distinguished because it involved a temporary rather than a permanent worksite. Even if we were to make this distinction, this situation did not arise in the middle of a job and unexpectedly require an immediate resolution. Loewendick performed an engineering study before beginning any work and

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[4]*Spancrete Northeast, Inc.,* 15 BNA OSHC 1021, 1023 n.3, 1991-93 CCH OSHD ¶ 29,313, p. 39,357 n.3 (No. 86-521, 1991), and cases cited therein.

concluded at that time that suspending a backhoe from a crane was the safest way to do the work.

We also find without merit Loewendick's claim that it did not apply for a variance because it believed that it was operating a personnel platform. The evidence establishes that Loewendick was aware that the backhoe did not comply with a number of the requirements in section 1926.550(g) governing personnel platforms, including those for guardrails, interior grabrails, and an anti-two-blocking device. With this knowledge, Loewendick could not have believed that it was operating a personnel platform. Loewendick's reliance on the testimony of two safety consultants does not provide support for its argument. The record indicates that it did not consult them until after the inspection. The only support for Loewendick's belief that it believed it was properly operating a personnel platform is the company's assertion, and we note that Loewendick's engineering study referred to the backhoe as an "aerial work station," not a personnel platform. Considering the facts before us, we find that Loewendick has not shown that application for a variance was inappropriate.[5]

WILLFULNESS

To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶ 30,046, p. 41,256 (No. 89-433, 1993). A

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[5]Chairman Weisberg notes that Commissioner Montoya has proposed that this case be remanded to permit the judge to consider whether Loewendick has established that it falls within a purported "good faith" exception to the variance application requirement under the greater hazard defense. Chairman Weisberg observes that the greater hazard defense was not raised by Loewendick in its answer to the complaint nor is there any Commission precedent for a "good faith" exception to the variance application requirement under the greater hazard defense. Even assuming the existence of a "good faith" exception, it would need to be established on an objective, rather than subjective, basis. *Cf. General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated cases); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1259, 1986-87 CCH OSHD ¶ 27,893, p. 36,591 (No. 85-355, 1987). Accordingly the judge would not be in a better position than the Commissioners to determine this issue.

violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one - whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991).

We find that the evidence establishes that the violation was willful. Once the telephone conversation with the compliance officer and his supervisor had taken place, Loewendick was aware that using the backhoe in this manner was prohibited. By electing to resume the operation, it intentionally disregarded the requirements of the Act. Given the disparate natures of backhoes and personnel platforms, we find that Loewendick's belief that it was operating a personnel platform was not reasonable under the circumstances. Nor could Loewendick have relied on an opinion from the consultant it called the day after the inspection. He testified that he could not say whether there was a violation because he had not seen the operation and did not know all the facts.

PENALTY

The Secretary proposed a penalty of $50,000 for the violation. Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). The most significant factor to be considered in assessing an appropriate penalty, however, is gravity. *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, p. 20,968 (No. 401, 1973).

Gravity includes a number of factors, including the number of employees exposed to the hazard, the duration of their exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Turner Co.*, 4 BNA OSHC 1554, 1567, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), *rev'd on other grounds*, 561 F.2d 82 (7th Cir. 1977). Examining those factors here, we find that only one employee was exposed, but his exposure lasted for the duration of Loewendick's work on the piers. Loewendick took several precautions, set out above, to prevent the occurrence of an accident, and we find that the likelihood of an accident was low.

Considering the other three statutory penalty factors, we find that Loewendick is not a large company. It has 60-75 permanent employees and has approximately 150 employees at its busiest. The compliance officer testified that the company had no history of violations in West Virginia, and, while the record indicates that it had received a citation in Ohio, there is no information whether that citation was contested or had become a final order. Therefore we will not assume that it had become a final order and will give the company credit for a good history. Although a willful violation precludes us from according the company full credit for good faith, it is not inconsistent to find a violation willful and find that the employer exhibited some degree of good faith. *C.N. Flagg & Co.*, 2 BNA OSHC 1195, 1196, 1974-75 CCH OSHD ¶ 18,686, p. 22,586 (No. 1734, 1974). Commissioner Foulke would give some credit for good faith because the record shows that the company was very active in its trade association's safety committee, followed that organization's safety manual, and had an extensive safety program of its own. We therefore conclude that a penalty of $33,000 is appropriate.[6]

CONCLUSION

For the reasons above, we find that the judge did err in vacating the citation alleging a willful violation of 29 C.F.R. § 1926.550(b)(2). We set aside the judge's decision and find that Loewendick committed a willful violation of that standard. We assess a civil penalty of $33,000.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke Jr.
Edwin G. Foulke, Jr.
Commissioner

Dated: August 9, 1994

[6]Although Chairman Weisberg would not afford the company credit for good faith in this case, he would find that the extensive precautions taken by the company here reduce the gravity of the violation. Hence he agrees that a reduction of the proposed penalty to $33,000 is warranted.

MONTOYA, Commissioner, concurring and dissenting:

I concur with my colleagues' holding that the judge erred in concluding that the backhoe was wrongly cited as a load under 29 C.F.R. § 1926.550(b)(2) rather than as a nonconforming personnel platform pursuant to the exception provided in 29 C.F.R. § 1926.550(g). I join in their finding that the backhoe was not a personnel platform as defined in 29 C.F.R. § 1926.550(g) and that Loewendick was therefore properly cited with a violation of 29 C.F.R. § 1926.550(b)(2). I also agree with their finding that the greater hazard defense is properly before the Commission, as all of the elements, including the requirement that a variance be applied for, were raised by the parties at the hearing.

I disagree, however, with my colleagues' conclusion that the greater hazard defense must fail simply because Loewendick neglected to apply for a variance. My colleagues have chosen to decide this issue themselves without benefit of the judge's insight. In my opinion, this finding should be made in the first instance by the judge who heard the case. The judge was present for the entire hearing, as my colleagues were not. He has observed the witnesses and no doubt formed opinions as to their sincerity and credibility. He is therefore better placed than my colleagues to determine whether (1) Loewendick's management officials held a good faith belief that they had in fact satisfied the preconditions for operating a personnel platform under section 1926.550(g)(2) and (2) they in good faith believed that the backhoe, as modified, constituted a personnel platform.

If the judge were to find that the company held such good faith beliefs, he could conclude that Loewendick had established that it was not appropriate for the Commission to require an application for a variance. See *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1224, 1991-93 CCH OSHD ¶ 29,442, p. 39,680 (No. 88-821, 1991). After all, why should the Commission require a company to apply for a variance from a standard if that company honestly believes, before it has had the benefit of a Commission opinion, that it is operating under an exception contained within the standard? In my opinion, it would not be appropriate to require an employer to engage in such a redundant compliance effort.

This seems especially so here, as an application for a variance would not only have been very time-consuming, it likely also would have been an exercise in futility. Federal

OSHA has shown itself to be reluctant to grant variance applications. Indeed, in Fiscal Year 1993, of 50 applications for variances received by Federal OSHA, only *one* was granted.[1]

Therefore, I would remand this case to the judge for further consideration consistent with the concerns I have expressed.

Velma Montoya
Commissioner

Date: August 9, 1994

[1]In contrast, the twenty-five OSHA state plans (including those of Puerto Rico and the Virgin Islands) granted 121 variances during the same period. (Data supplied by Federal OSHA's Directorate of Technical Support and Directorate of Federal/State Programs.)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant, v. S.G. LOEWENDICK & SONS, INC., Respondent.	:	Docket No. 91-2487

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on August 9, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

August 9, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

NOTICE IS GIVEN TO THE FOLLOWING:

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

Catherine Oliver Murphy
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Roger L. Sabo, Esq.
Schottenstein, Zox & Dunn
The Huntington Center
41 South High Street
Columbus, OH 43215

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th Street, Suite 990
Washington, D.C. 20036-3419

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX:
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,
v.

LOEWENDICK CONTRACTORS
AND
VECELLIO & GROGAN, INC.,
Respondent.

OSHRC DOCKET
NOS. 91-2487
91-2618

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 January 29, 1993. The decision of the Judge will become a final order of the Commission on March 1, 1993 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 February 18, 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 29, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 91-2487 & 91-2618

NOTICE IS GIVEN TO THE FOLLOWING:

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

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Roger L. Sabo, Esquire
Schottenstein, Zox & Dunn
The Huntington Center
41 South High Street
Columbus, OH 43215

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/C
1825 K Street, N.W.
Washington, DC 20006 1246

00100781822:03

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON DC 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR, Complainant, v. LOEWENDICK CONTRACTORS and VECELLIO & GROGAN, INC., Respondents.	:	Docket Nos. 91-2487 91-2618

Appearances:

Joseph T. Crawford, Esquire
Gayle M. Green, Esquire
Office of the Solicitor, USDOL
Philadelphia, Pennsylvania
For Complainant

Roger L. Sabo, Esquire
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondents

BEFORE: Administrative Law Judge JOHN H FRYE, III

DECISION AND ORDER

This case arises under the Occupational Safety & Health Act of 1970, 29 U.S.C. 651-678 (1970) (Act). On March 28 and April 12, 1991, Arnold Persinger, a Compliance Officer employed by the Occupational Safety and Health Administration, conducted an inspection of a work site in Fairmont, West Virginia, at which Respondent Vecellio & Grogan, Inc. was the general contractor and Respondent Loewendick Contractors was a subcontractor engaged in demolition work.

As a result of that inspection, separate citations were issued against both Respondents alleging they had committed serious violations of Section (5)(a)(2) of the Act.[1] Respondent Loewendick Contractors also received citations for a willful and an other than serious violation.

Both Respondents filed timely notices of contest. Following the filing of complaints by the Secretary, both answered admitting the jurisdiction of the Commission and that they are employers engaged in a business affecting commerce within the meaning of § 3(5) of the Act.[2] The cases were ultimately consolidated and were heard in Charleston, West Virginia on August 4th and 5th, 1992.

I. INTRODUCTION

A. The Fairmont, West Virginia Project.

In 1991, Vecellio & Grogan, Inc. ("V&G")[3] received a contract from the West Virginia Department of Transportation to demolish an existing bridge in downtown Fairmont, West Virginia, and replace it with a new structure.[4] The design set out in the contract called for V&G to demolish the superstructure of the existing bridge, leaving the bottom portion of the piers in place. The piers were approximately eighty-eight feet in height. Because of their deteriorated state, the top twelve feet of the piers was to be removed and replaced. V&G contracted with Loewendick Contractors ("Loewendick") for the demolition work.[5]

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[1]29 U.S.C. § 654(a)(2).

[2]Although the United Steel Workers and Local Union #14614, District 23, intervened as the authorized bargaining agent for the employees of Vecellio & Grogan in Docket 91-2618, they did not participate in the case. No other party intervened.

[3]V&G is a corporation and a general contractor with a mailing address at P.O. Box V, Beckley, W.Va. 25802-2819.

[4]Tr. 173, 260.

[5]Loewendick is a corporation headquartered in Columbus, Ohio. It is an established, unionized demolition contractor operating primarily in Ohio, Kentucky, and West Virginia since 1929. In 1991, Loewendick had approximately one hundred and fifty to two hundred employees. It is a member of various associations

(continued...)

B. Loewendick Conducts a Pre-engineering Study and Formulates a Plan for the Fairmont, West Virginia Project.

Because of the unique aspects of demolition as opposed to construction, Loewendick routinely undertakes a "Pre-engineering Study" for each demolition project. This includes meeting with the field superintendents and employees to review procedures.[6]

For the Fairmont project, Company Vice President, David Loewendick, with his father, the Company President, formulated a demolition plan. Because initial demolition of the pier caps was to be accomplished by means of an eighty ton crane with a three and one-half ton wrecking ball to remove as much of the pier caps as possible without destroying integrity of that portion of the pier which was to remain, the Loewendicks concluded that a severe potential for employee exposure existed. In their opinion, this exposure resulted from the existence of unstable concrete and rebar left on the pier caps by the wrecking ball. Thus employees could not safely be placed on top of the caps to remove this material, because they would lack secure footing and would be removing what footing they had as a part of their operation. Nor could they be placed on scaffolding next to the pier caps, because to do so would necessarily expose them to overhanging unstable material.[7]

Accordingly, Loewendick devised a plan utilizing an aerial platform, specifically, a rubber-tired backhoe weighing seven tons outfitted with a hydraulic hammer. The backhoe

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[5](...continued)
including the National Association of Demolition Contractors ("NADC"). See Tr. 88, 174, 197-199, 261, 383-84, 389.

[6]See Tr. 274, 323, 387; R. Exh. 1, at page 1.

[7]See Tr. 282, 390-393; R. Exh. 16. Loewendick also considered drilling into each pier and placing explosives. They could not do that, however, due to the structural fatigue to the adjacent buildings and the requirements of the West Virginia Department of Highways. Tr. 194, 393.

was suspended by an eighty-two ton Link-Belt crane. Loewendick suspended the backhoe by means of a four-point hitch bridle attached to the main line of the crane. Two of the four points of the hitch bridle were attached to the rear outriggers of the backhoe and two to the front axle. A second line, which served as a stabilizing and safety line, ran from the backhoe's front bucket to a second drum on the crane. Loewendick utilized newly installed three-quarter inch 17 ton capacity cable instead of the three-eighths inch cable. The backhoe operator was belted to the backhoe seat and, in addition, wore a safety belt attached by two lanyards to either side of the backhoe.[8]

C. Vecellio & Grogan, Inc. Review the Operations of Loewendick and Concur in the Results of the Pre-Engineering Study.

John Jones was the Project Superintendent for V&G at the Fairmont project. His duties were to oversee the entire project and to correct any unsafe conditions. When Jones learned that Loewendick was going to utilize a backhoe suspended by a crane for this operation, he contacted his immediate supervisor, V&G Project Manager John West, as well as Company Safety Manager, Kenny Hatfield. Both came to the project to review the procedure.[9]

West reviewed this procedure and possible alternatives to it, and discussed these with Jones and Danny Castordale, V&G Vice President of Construction and a civil engineer, along with Company representative John Conkwright. All agreed that there was no other

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[8]See Tr. 284-85, 324, 327, 396, 338, 340, 394. Loewendick has used similar methods of demolition on prior occasions. Consequently, Loewendick assigned experienced employees to this particular job. Tr. 280-81, 323-24, 337, 393-94.

[9]See Tr. 188, 199.

feasible or safer method to perform the work and that this procedure was an appropriate method.[10]

Hatfield is the Company Safety and Risk Manager for V&G. Hatfield observed the operations on February 7th and March 6th of that year. The procedure was described to him by both Jones and Loewendick Superintendent Harry Keith. He concluded that there was no safer method of performing the work.[11]

D. OSHA Inspects the Fairmont Operation and Issues Citations.

The Charleston office of the Occupational Safety & Health Act Administration received a photograph from a state official depicting the crane holding the backhoe aloft. As a result, OSHA Safety Supervisor Jerry Good directed Mr. Persinger to inspect the worksite. Mr. Persinger did so for the first time on March 28, 1991, accompanied by Chuck Green, a new OSHA Compliance Officer. Mr. Persinger returned to the worksite for a second visit on April 12, 1991, following an anonymous tip.[12] As a result of these inspections, citations were issued to Loewendick and V&G. The following were contested at the trial.

1. Citations issued to Loewendick.

a. Serious Citation 1

Item	Standard	Description
3	1926.20(b)(3)	Employee performed maintenance on crane while it was in operation.

[10]See Tr. 194, 194, 198, 258, 260, 264, 268.

[11]See Tr. 162, 164-66, 171, 177-79; R. Exh. 11.

[12]See Tr. 16, 25, 145.

4 a	1926.59(e)(2) (i)	Failure to develop a method to ensure MSDS were available to another employer on site.
b	1926.59(e)(2) (ii)	Failure to develop a method to inform other employers of information and precautionary measures for hazardous materials.
c	1926.59(e)(2) (iii)	Failure to develop a method to inform other employers of labeling system used.
5 a	1926.251(a)(1)	Rigging equipment not inspected prior to use or as necessary.
b	1926.251(a)(1)	Defective rigging equipment not removed from service.
6	1926.550(a)(1)	Non-compliance with manufacturer's specifications for operating a crane: employee riding load.
7	1926.550(a)(12)	Crane window shields cracked and distorted.
8 a	1926.550(b)(2) & § 5.1.7.4. ANSI B305-1968	Crane sheave wheels damaged.
b	1926.550(a)(5)	Crane not inspected, as evidenced by sheave wheels.

b. Other Than Serious Citation 2

1	1926.550(a)(14)(i)	Fire extinguisher not accessible in cab of crane.

A total penalty of $16,750 was proposed for Citations 1 and 2.[13]

c. Wilful Citation 3

1	1926.550(b)(2) & 1968 ANSI	A 20 ton FMC Link-Belt crane was supporting a seven-ton caterpillar backhoe, serial number

[13]Citation 1, Items 4a, 4b, and 4c were reduced to other than serious at the hearing and the proposed penalty was reduced from $1250 to $00.

§ 5.3.2.3e	7BC007B, approximately 70 ft. in air, with operating ram on backhoe on 3/28/91 and 4/12/91.

A fine of $50,000 was proposed for Citation 3.

2. Citation Issued to V&G.

A serious citation identical to Wilful Citation 3 issued to Loewendick was issued to V&G. The penalty proposed was $7000. These two citations and Citation 1, Item 6, issued to Loewendick are discussed first.

II. USE OF THE BACKHOE AS AN AERIAL WORK PLATFORM

A. Applicability of 29 C.F.R. §1926.550(b)(2).

1. The Secretary's Position.

The Secretary has cited Respondents for violating 29 C.F.R. § 1926.550(b)(2) which provides that:

> All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Section 5-3.2.3(e) of the referenced ANSI standard includes the provision that:

> The operator shall not hoist, lower, swing, or travel while anyone is on the load or hook.

The Secretary argues that Loewendick violated § 1926.550(b)(2) because it used its Link Belt truck crane to hoist a manned load, consisting of a Caterpillar backhoe on which an employee was riding, approximately 70 feet in the air. She correctly points out that there is no dispute concerning the facts that a Loewendick employee was riding the backhoe and that the management of both Loewendick and V&G were aware of the operation and had

approved it. To establish a violation of any standard, the Secretary notes that she must establish the applicability of the standard, non-compliance with it, employee exposure or access to the resulting hazard, and employer knowledge of the hazard.[14] The facts recited above are sufficient in the Secretary's view to meet that burden.

Recognizing that Respondents rely on § 1926.550(g)(2), which permits the use of personnel platforms where it can be shown that "conventional means of reaching the worksite ... would be more hazardous," the Secretary makes two points. First, a backhoe is not a personnel platform within the meaning of that standard, and second, its use as a personnel platform is prohibited because Respondent has not shown that conventional means of reaching the worksite would be more hazardous.[15] The Secretary supports her first point by citing various requirements for personnel platforms contained in § 1926.550(g) which she alleges were not satisfied by the backhoe. She points out that OSHA determined that compliance with the specific provisions of the standard was essential to minimize the significant risks posed by such operations.[16]

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[14]The Secretary relies on Dunn-Par Engineered Form Co., 12 BNA OSHC 1949 (No. 79-2553), Rev'd and remanded on other grounds, 843 F.2d 1135(8th Cir. 1988), decision on remand, OSHRC Docket No. 79-2553 (April 12, 1989).

[15]See Secretary's brief, pp. 13-23.

[16]See Secretary's brief, pp.13-20. The specific requirements related to personnel platforms which are allegedly violated by the backhoe are: 1. that the backhoe be designed by a qualified engineer (§ 1926.550(g)(4)(i)(A)); 2. that the backhoe incorporate guardrails (§ 1926.550(g)(4)(ii)(A)); 3. that the backhoe incorporate a grab rail (§ 1926.550(g)(4)(ii)(B)); 4. that the backhoe incorporate sufficient headroom to permit employees to stand (§ 1926.550(g)(4)(ii)(E)); and 5. that the backhoe incorporate a plate indicating the weight of the backhoe and its rated load capacity or maximum intended load (§ 1926.550(g)(4)(ii)(I)). In addition, although it is not a requirement applicable to personnel platforms, the Secretary has pointed out that the crane allegedly failed to comply with § 1926.550(g)(2)(ii)(C) which requires the use of a device to prevent two-blocking.

Although § 1926.550(g)(2) specifically provides that it must be shown that conventional means constitute a greater hazard, the Secretary views the second point[17] in terms of the greater hazard defense, which requires a respondent to show that the hazards of complying with a standard are greater than the hazards of not complying, other means to protect employees from the hazard are not available, and a variance is either not available or not appropriate.[18] The Secretary asserts that Respondents have not convincingly established that a more conventional means of reaching the worksite, such as scaffolding, would be more hazardous than the intrinsically hazardous practice of suspending personnel from a crane. The Secretary states that OSHA found that accidents resulting from the use of cranes or derricks to hoist personnel result in approximately 63 injuries annually, including fifteen fatalities and seven totally disabling injuries,[19] and that Respondent's witnesses acknowledged these hazards.[20]

While the Secretary notes that Respondents adduced evidence that use of a conventional means of reaching the worksite, scaffolding, would be more hazardous because it would force employees to work beneath hanging debris,[21] she also notes that

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[17]The Secretary's discussion of this point is found on pp. 20-24 of her brief.

[18]The Secretary relies on *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1224 (Rev. Comm. 1991).

[19]See 53 Fed. Reg. at 29117, August 2, 1988.

[20]Bernard Enfield, a safety and health consultant who testified for Respondent, stated his opinion that the OSHA regulation on personnel platforms is too permissive and will result in more accidents because it too readily permits the use of crane suspended personnel platforms (Tr. 243). Ken Hatfield, Corporate Safety Manager of Vecellio & Grogan testified that crane manufacturers in the United States are emphatically opposed to the use of cranes for personnel hoisting under any circumstances whatsoever (Tr. 229).

[21]See Tr. 391-93, 408-09.

Loewendick's witness, James Fry, testified that during demolition of the pier cap, Loewendick suspended an employee from a man cage to burn off steel rods with a torch.[22] Therefore, the Secretary speculates, it should also be possible to eliminate overhanging debris and loose material by employees working from a suspended man cage prior to the erection and use of conventional scaffolding for the remainder of the demolition.

The Secretary makes much of the fact that Respondents did not request a variance.[23] She maintains that a review of the regulations regarding personnel platforms would have made it clear that the operation was not in compliance. She asserts that Respondents presented no evidence as to the unavailability or inappropriateness of a variance other than the testimony of James Vaughan, a former OSHA Area Director from the Columbus, Ohio office, who testified that in his experience, the variance process is slow and seldom successful.[24] She believes that Respondents had ample opportunity to request a variance in advance of the performance of the operation. She does not specify whether Respondents should have sought a variance from § 1926.550(b)(2) or (g).[25]

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[22]See Tr. 342-343.

[23]Mr. Loewendick testified that he did not request a variance because he believed he was in compliance with the standard (Tr. 399-400).

[24]See Tr. 364-66.

[25]The Secretary's position is unclear. On the one hand, at pp. 21-22 of her brief the Secretary appears to take the position that Respondents should have requested a variance in connection with their assertion of the greater hazard defense. Thus, as a part of that showing, the Secretary asserts that Respondents should have applied for a variance or shown why a variance would not be appropriate. *Seibel Modern Manufacturing & Welding Corp., supra*, note 18. While the Secretary does not say, one would presume that the variance would be sought from the requirements of § 1926.550(b)(2). However, the Secretary goes on to imply at pp. 23-24 that, because the backhoe is at best a nonconforming personnel platform, a variance from the mandatory provisions of § 1926.550(g) relating to personnel platforms should have been sought. This position presupposes that Respondents have shown that conventional means of reaching the worksite are more hazardous and that a variance from these mandatory provisions is thus necessary. Indeed, the Secretary explicitly adopts this latter position in her reply brief at p.9.

2. The Respondents' Position.

Respondents begin their response to the Secretary by arguing that the prohibition on "riding the load" contained in § 1926.550(b)(2) is no longer an absolute one. They point out that the ANSI B30.5-1968, incorporated by reference in § 1926.550(b)(2), has been revised on several occasions since 1968. In 1982, the requirement that the operator shall not hoist, lower, swing or travel when anyone is on the load or hook was removed from the ANSI standard and existing § 5.3.2.2, "Personnel Lifting," was inserted in its place. This section provides in part:

> This Standard recognizes that mobile and locomotive cranes are designed and intended for handling materials. They do not meet personnel lifting or elevator requirements. Therefore, no crane function shall be performed while a person is on the hook, load, manlift platform, boom or other personnel lifting device attached to the crane load line or boom, unless each of the specific special following requirements are met. . . .

They also point out that in 1988, OSHA also adopted standards for personnel platforms,[26] and that prior to 1988, OSHA recognized the necessity of "riding the load" in certain situations. The preamble to the 1988 regulation recites the history of the pre-1988 treatment of crane-suspended personnel platforms as exceptions to § 1926.550(b)(2). It states:

> Since 1975, OSHA has issued four interpretations which provided guidelines for use of crane suspended work platforms. ... On October 8, 1981, the revisions of these guidelines were incorporated into OSHA Instruction STD1-11.2A. ... That instruction, in turn, was replaced by OSHA Instruction STD1-11.2d on August 8, 1983.[27]

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[26]53 Fed. Reg. 29116 August 2, 1988.

[27]*Id.*

In promulgating § 1926.550(g), OSHA clearly recognized (1) at some worksites conditions were such that methods other than personnel platforms could not be utilized, and (2) the 1968 ANSI standard on this point was clearly out-of-date. On the first issue the Agency stated:

> Based on its review of the record, OSHA has determined that hoisting with crane or derrick suspended personnel platforms constitutes a significant hazard to hoisted employees, and that it will not be permitted unless conventional means of transporting employees are not feasible, or unless they present greater hazards.[28]

Turning to the second issue, OSHA recognized the lack of clear guidance:

> OSHA believes that the primary cause of non-compliance is the lack of clear regulatory language in subpart N 29 C.F.R. part 1926. In particular, existing §1926.550(b)(2) provides no direct regulatory guidance. It simply incorporates ANSI B30.5 - 1968 by reference. Therefore, under current regulations, employers are expected to obtain and read an ANSI document, which, as stated above, has been superseded, and determine from it the procedures for personnel hoisting.[29]

Focussing on the provisions of § 1926.550(g), Respondents point out that OSHA has taken the position in its publication entitled *Crane or Derrick Suspended Personnel Platforms*[30] and in the Statement of Considerations[31] accompanying the promulgation of that standard that its provisions are performance oriented, thus allowing employers the flexibility to decide how best to meet them. Respondents also cite two decisions of Commission judges in which the use of personnel platforms was approved over the challenge

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[28]53 Fed. Reg. at 29117 (1988).

[29]*Id.*

[30]See Respondents' Ex. 18.

[31]Respondents cite 53 Fed. Reg. at 29126, 29128, and 29129.

that they violated the 1968 ANSI standard.[32] In their brief, Respondents then go on to review the process by which they devised the procedure used, Mr. Persinger's inspection of it and OSHA's review of his conclusions, and the conclusions of the experts retained by Respondents to review the procedure.[33]

Respondents then proceed to discuss the infeasibility and greater hazard defenses. They assert that, because of the unstable nature of the material to be removed from the piers, there was no feasible means to comply with the cited standard. Workers could not safely stand on top of the piers, nor could they safely work from adjacent scaffolding. They assert that the Secretary's position is based only on speculation that it should be possible to eliminate overhangs and to bring in loose materials while employees are working from a suspended man cage. They believe this position ignores the amount, height, size and nature of the concrete and steel overhang which presents the hazard. They point out that it is one thing to have an individual cut individual pieces of steel left dangling - alluded to by Mr. Fry and relied on by the Secretary - but quite another to attempt to remove sufficient concrete and steel to eliminate the hazard.

Respondents assert that the Secretary's position is also inconsistent with opinions of the experts who testified. Mr. Hatfield considered the procedure as the only safe alternative Loewendick had to perform the work.[34] Mr. Jones, Project Superintendent, stated that,

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[32]*Tower King, Inc.*, 12 BNA OSHC 1581 (Salyers, J. 1985); *Mead Corp., Chillicothe Paper Co.*, 12 BNA OSHC 1999 (Brady, J. 1986).

[33]See Respondents' brief, pp.21-27. At pp.27-29, Respondents address the Secretary's two-blocking argument. See footnote 16.

[34]See Tr. 171, 176.

because of the deterioration of the concrete and rebar, alternative ways to take the piers down would expose more people to a more dangerous situation.[35] Mr. Enfield knew of no other method which would be safer than the procedure the Company utilized.[36]

The Respondents spend considerable effort addressing the Secretary's contention that, in connection with the greater hazard defense, Respondents have not demonstrated that a variance is either not available or inappropriate. They make the following points.[37]

First, the instant case does not present an issue of a recurring operation at a permanent work place, such as the one addressed by the Commission the *Seibel*.[38]

Second, where a deviation from 29 C.F.R. § 1926.550(b)(2) is concerned, OSHA has determined a variance is not necessary.

Third, OSHA was not in a position to issue a variance.

3. The Secretary's Reply

In her reply to Respondents' brief, the Secretary makes the following points.[39]

First, § 1926.550(b)(2) has not been superseded and applies. Because subsection (b)(2) incorporates ANSI B30.5 - 1968, that provision is applicable.

Second, although subsection (g) provides for the use of conforming personnel platforms in certain circumstances, it is not applicable for two reasons: 1) a backhoe is not

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[35]See Tr. 194.

[36]See Tr. 228.

[37]See Respondents' brief, pp.32-35.

[38]*Supra*, note 18. Respondents also cite *H.S. Holzte Construction Co. v. Marshall and OSAHRC*, 627 F.2d. 149 (8th Cir. 1980); and *Giffen Industries of Jacksonville, Inc.*, 6 BNA OSHC 2001 (1978).

[39]See Secretary's reply brief, pp.2-12.

a personnel platform; and 2) Respondents have not met the prerequisite for application of subsection (g) - a showing that conventional means of reaching the worksite are more hazardous.

Third, Loewendick has not made a convincing showing that conventional means of reaching the worksite would be more hazardous:

A. Loewendick's position that it was in compliance with all regulations was not reasonable, given its long experience in demolition and use of similar techniques in the past;

B. V&G's review of the operation was not based on the safety requirements, and Respondents did not conduct a detailed study of alternative methods; and

C. Respondents' position that they need not apply for a variance is incorrect -

> In this case, assuming that Respondent could show that conventional means of reaching the worksite would be more hazardous or impossible, Respondent would be required to apply for a variance because it wanted to use equipment and an operation that did not conform to the design requirements of the applicable regulation, §1926.550(g).[40]

Fourth, the suspended backhoe did not comply with the requirements of § 1926.550(g) applicable to personnel platforms:

A. The requirements which the Secretary alleges the backhoe failed to satisfy are not optional; and

B. A backhoe is not a personnel platform.

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[40]See Secretary's reply brief, p.9. See also the discussion in note 25, *supra*.

4. Discussion.

Respondents have clearly demonstrated that § 1926.550(b)(2), which they are charged with violating, is not to be read as an absolute prohibition on the use of crane-suspended personnel platforms. The Secretary agrees that § 1926.550(g) constitutes an exception to the prohibition contained in subsection (b)(2). However, the parties disagree with respect to whether a backhoe may be said to be a personnel platform. The Secretary adamantly insists that a backhoe is not a personnel platform, and that therefore Respondents were correctly cited under § 1926.550(b)(2) rather than § 1926.550(g). The Secretary points out that:

> Backhoes, however, were not designed to be lifted in the air, just as automobiles were not designed to float down rivers like barges. Backhoes are wheeled vehicles clearly designed to be driven on the ground. ... They were not designed, as a personnel platform would be, with consideration given to their stability when suspended in air.[41]

As a result, in the Secretary's view, § 1926.550(g) is not applicable. While the Secretary is correct that, in general, backhoes were not designed to serve as personnel platforms, nevertheless the fact remains that in this case a modified backhoe was being used as a personnel platform.

The backhoe in question was modified by welding rods so as to prevent the outrigger pads on which the backhoe would normally rest while working from collapsing in the event of hydraulic failure. Thus, while the Secretary is correct that in general backhoes are wheeled vehicles designed to be driven on the ground, this modification prevented this particular backhoe from operating as a wheeled vehicle. The cables suspending the backhoe

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[41]See Secretary's brief, p.15; Tr. pp. 149, 421.

were attached to these pads and to the front axle. In this manner, Loewendick provided for the stability of the suspended backhoe.[42]

Moreover, Loewendick recognized that use of a backhoe in this manner posed the risk that the action of the ram impacting on the pier could cause the backhoe to swing unless appropriate precautions were taken. In order to prevent this, Loewendick rested the outrigger pads on the pier and operated the ram vertically for the most part, so that it was cutting straight down.[43]

The Secretary points out that the backhoe did not comply with certain mandatory technical requirements for personnel platforms, and thus should not be considered to be a

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[42]See Tr. pp.264, 327, 340. Exhibits G-1, G-2, and G-3 show the suspended backhoe resting its outrigger pads on the pier and illustrate that, so long as the pads are extended in that fashion, they would prevent the rear wheels from reaching the ground.

[43] JUDGE FRYE: Mr. Keith, you heard the question I put to Mr. West I think, you were in the Courtroom, regarding the stability of the backhoe as the ram is chipping away.
THE WITNESS: The outriggers.
JUDGE FRYE: Well, my question was really having to do with the ram impacts on the pier, isn't it going to push the backhoe back, I am curious about that?
THE WITNESS: Most of our operation was cutting straight down.
JUDGE FRYE: I see.
THE WITNESS: And the stability of the pad setting on the concrete itself is more or less stationary.
JUDGE FRYE: I see. So in that matter you avoided --
THE WITNESS: Yes, --
JUDGE FRYE: -- any pushing --
THE WITNESS: -- you couldn't actually hit in sideways, because you would just keep pushing yourself out.
JUDGE FRYE: Then you would get it swinging, right?
THE WITNESS: Right.
Tr. 315-16.

Q [Mr.Sabo] And when he is actually physically up there, what kind of contact is the backhoe making with the pier concrete?
A [Mr. Malcovsky] The way we set it up, he based himself where the operator would sit down on a shelf, he only needed 6 inches to actually put the machine down, and he rested the back of the machine on there and I stabilized him with the front line. I picked him up just a hair and made the machine solid so he could work.
Tr. 332. Additionally, Exhibits G-1, G-2, G-3, and G-4 illustrate the procedure used to prevent the backhoe from swinging while chipping away at the tops of the piers.

personnel platform.[44] Whether these technical requirements are relevant to the configuration of the backhoe and the use to which it was put, and whether Loewendick was in violation of them should have been raised by a citation specifically so charging.[45] The fact that backhoes in general are not designed for use as personnel platforms does not dictate the conclusion that § 1926.550(g) is inapplicable to the use to which the modified backhoe was put in this case. Indeed, the use to which the modified backhoe was put by Loewendick is directly addressed by subsection (g), which governs the use of crane suspended platforms from which work is performed, not subsection (b)(2), which prohibits riding a bare hook or load of material. Here the suspended backhoe was used to perform work. It was not a load simply being transported by the crane from one point to another. Given the safety of the design and the fact that the backhoe served as an elevated platform from which work was performed, Respondents' expert, Mr. Enfield, regarded it as a personnel platform.[46]

The Secretary next points out that, by its terms, subsection (g) does not come into play unless Respondents demonstrate that conventional means of reaching the worksite are either more hazardous or not possible. There is no dispute that a conventional means of reaching the worksite, scaffolding, was possible. However, the parties sharply disagree concerning whether scaffolding would have been more hazardous than the method of

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[44]See note 16, *supra*.

[45]I note that the Mr. Persinger originally sought to charge Loewendick under § 1926.550(g), but was overruled. See Tr. pp. 88, 148-49; Respondents' Ex. 3.

[46]See Tr. 228, 231. Mr. Enfield is a recognized expert on cranes and hoisting equipment with many years of experience. Tr. 210-18.

operation chosen.[47] The Secretary maintains that Respondents have not shown that it would be.

While Loewendick's Vice-President, Dave Loewendick, acknowledged that there is no impediment to the erection of the scaffolding to the height required to reach the pier caps, he also pointed out that the removal of the pier caps by many workmen using 90 pound hammers would necessarily

> ...expose a lot more man hours of risk, working men in an elevated position, climbing up and down scaffolding that is going to be collecting accumulated debris....[48]

He elaborated on that risk as follows.

> Q [By Mr. Crawford] Mr. Loewendick, you stated during your direct examination that one of your concerns with scaffolding those piers and taking the material off manually was that there was loose debris and material overhead that could potentially fall on the scaffolding?
>
> A Correct, not on the scaffold, fall on the personnel on the scaffold.
>
> * * *
>
> Q And by loose material, were you referring to material of the type that appears in [exhibit] R-16?
>
> A Correct.
>
> Q Would it be possible based on your experience to remove that loose material before you scaffold that area?
>
> A What's loose and what isn't, we just fractured the structure with a 3 ton ball, there will be some internal breakage that you don't know about.
>
> * * *

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[47]Scaffolding is the only alternative method which was seriously advocated at the hearing. Other alternatives mentioned were use of explosives and placing employees on top of the piers. See note 7, *supra*, and accompanying text.

[48]See Tr. 403.

Q Based on your experience, is it possible to make an assessment on what loose material is available?

A No, you never assume anything in our business.

Q Can you make that assessment, I mean, when I say assume I mean can you make an assessment?

A The only way to make an assessment of the strength of the concrete is to core drill it and have it tested.

Q You can not assess, however --

A Not visually, no.

Q Were you in the courtroom when, I believe when Mr. Fry testified that in some cases you might have to burn off the metal of the type that is hanging in [exhibit] R-16 using a torch and a personnel basket?

A Yes, I was here.

Q Could that same basket be used to assess whether or not there is loose material that is still up there?

A Again, you can't see inside the concrete.

Q But you are concerned with the material that may potentially fall on the scaffold that you might build; is that correct?

A I have seen vibration cause chunks to fall that looked like they are very substantial. * * *

Q But you are concerned with the material that you saw to be loose; is that correct?

A No, my concern is -- in our business, what you see you can control, it is the unknown that gets you in trouble, and [therefore] you never assume the unknown.[49]

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[49]Tr. 408-10.

This testimony is uncontradicted and persuasive. It was corroborated by Messrs. Hatfield, Jones, Enfield, West, and Keith.[50] The hazard posed by the overhanging material to the use of scaffolding is dramatically illustrated by Exhibit R-16. Nonetheless, the Secretary maintains that time factors and economic considerations played significant roles in the selection of the suspended backhoe operation for the job, pointing to Loewendick's labor analysis for removal of the pier caps.[51]

While the Secretary may be correct that the labor analysis shows that the backhoe was a more economical way to accomplish the removal of the pier caps than scaffolding, that analysis also corroborates Mr. Loewendick's conclusions with regard to the relative risks posed by the backhoe and scaffolding.

Risk is routinely evaluated by multiplying the probability of an event by its consequences.[52] The OSHA Field Operations Manual, of which I take official notice, provides rules for evaluating the gravity of a violation in terms of probability and severity of consequences.[53] These rules provide a convenient and simple model to use to compare the relative risks posed by the backhoe and scaffolding. While I do not regard the results reached by using such a model to be dispositive, I do find that, because of the widespread and routine use of these rules by OSHA compliance officers, the results are valuable in

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[50]See Tr. 171 (Hatfield), 194 and 198 (Jones), 228-29 (Enfield), 268 (West), and 281 and 315 (Keith).

[51]See Secretary's brief, pp.22-23. Loewendick's labor analysis is Exhibit R-5.

[52]*Cf. Pratt & Whitney Aircraft v. Donovan and OSHRC*, 11 BNA OSHC 1641, 1646 (2d Cir. 1983): "Whether there exists a significant risk depends on the seriousness of the potential harm and the likelihood of that harm being realized."

[53]These rules appropriately provide for the exercise of professional judgment and do not require that a precise mathematical evaluation be performed. See Manual, Chapter VI, ¶ B.

assessing the testimony, all of which concluded that the backhoe provided a safer way of proceeding than scaffolding.

In ¶ VI(B)(6), "Severity Assessment," the Field Operations Manual provides four categories for consequences ranging from Minimal Severity to High Severity. In ¶ VI(B)(7), "Probability Assessment," it provides for the consideration of four factors in determining whether there is a greater or lesser probability that an injury will result from a particular hazard. The four factors are number of exposed workers, frequency of exposure, proximity to exposure, and relevant working conditions.

In comparing the risk posed by scaffolding with that posed by the backhoe, potential accidents involving both scaffolding and the backhoe are assumed to fall into the high severity category because a fall from the top of the scaffold would likely be fatal,[54] as would an accident resulting in the dropping of the backhoe from a height of 70 feet. Similarly, the probability factors applicable to both operations for proximity to the hazard and working conditions are considered to be great, because the evidence in the record substantiates that both are dangerous operations which place workers in the immediate vicinity of the hazard under working conditions which are less than ideal.[55]

Thus the relative risk of using scaffolding instead of the backhoe depends on the extent to which workers are exposed to the hazard. The labor analysis provides figures for worker hours required to accomplish the task of removing the pier caps by each method.

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[54]Conceivably, such a fall could be caused by debris from the overhanging pier caps impacting the scaffolding or a worker, or creating a tripping hazard. Of course, falling debris might also cause lesser injuries.

[55]While there is no testimony directly on this point, it would seem that using a jackhammer to break up concrete while standing on a scaffold 70 feet above the ground presents a perilous working environment.

Exhibit R-5 shows that about 5,920 worker hours would be required for removal of the pier caps by means of scaffolding, 37 times the 160 required if the caps are removed by means of the backhoe. This corroborates Mr. Loewendick's conclusion. Clearly, the use of scaffolding would have to be far safer than the backhoe before the relative risks would be equal. Because this record contains no basis on which to question Mr. Loewendick's conclusion that use of the backhoe is the least hazardous means of accomplishing the work, it is accepted.

There remains the question whether Respondents should have sought a variance as urged by the Secretary. As noted above,[56] the Secretary's position on the variance issue is not clear. On the one hand, the Secretary appears to take the position that Respondents should have requested a variance in connection with their assertion of the greater hazard defense, presumably from the requirements of § 1926.550(b)(2). Because I have concluded that Respondents were not properly cited for violating that standard, the Secretary's argument concerning it is moot.

The Secretary also asserts that, because the backhoe is at best a nonconforming personnel platform, a variance from the mandatory provisions of § 1926.550(g) relating to personnel platforms should have been sought. However, that position finds no support in the terms of the applicable standard, which requires only that the Respondents demonstrate that conventional means of reaching the worksite are either more hazardous or impossible. Had it been OSHA's intent to burden itself with advance review and approval of the use of

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[56]See footnote 25 and accompanying text, *supra.*

personnel platforms, surely appropriate requirements would have been stated in the standard. Their absence dictates that the Secretary's position must be rejected.

For the foregoing reasons, Citation 3 issued to Loewendick and the citation issued to V&G are vacated. In reaching this result, I have concluded only that the Secretary should have cited these Respondents for a violation of § 1926.550(g) rather than § 1926.550(b)(2). I reach no conclusions as to whether the operation in question complied with the former standard.

B. Violation of 29 C.F.R. § 1926.550(a)(1).

Section 1926.550(a)(1) states:

> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks.

The Secretary relies on Mr. Persinger's testimony, the Crane Operator's Manual, and a certain Operating Safety Manual for the proposition that Loewendick violated the manufacturer's specifications and limitations by permitting Mr. Fry to operate the backhoe while suspended by the crane.[57] All of the provisions cited by the Secretary refer to the practice of riding the hook or load. Because I have concluded that Loewendick's use of the backhoe did not violate the prohibition in § 1926.550(b)(2) against riding the hook or load, it follows that that use did not violate this particular standard. Citation 1, Item 6, is vacated.

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[57]See Secretary's brief, p.33; reply brief, p.16.

III. ALLEGED VIOLATIONS RELATING TO THE CRANE AND RIGGING

A. Failure to Inspect and Remove Defective Rigging from Service - 29 C.F.R. § 1926.251(a)(1).

Section 1926.251(a)(1) provides, in relevant part that:

> (a) General. (1) 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 shall be removed from service.

The Secretary charges that Loewendick was in serious violation of this standard in that

> After endloader/ram had made contact with concrete pier on several occasions, additional inspections were not completed and damaged wire slings were not removed ...,[58]

and

> ... [Three-quarter] choker cable hooked into out riggers and had four (4) wire[s] in one strand ... broken and was being used by a ... crane for holding a caterpillar [sic] ... backhoe in air with operator on backhoe....[59]

The wire slings and choker cable were part of the system for supporting the backhoe aloft and were attached to the outriggers and the front of the backhoe. Mr. Persinger testified that he observed that the sling contained four broken wires and supported this observation with a photograph. In Mr. Persinger's opinion, this damage reduced the carrying capacity of the cable and additional breakage could result in losing the load.[60] The Secretary asserts that, given the nature of the use to which the slings were put, the severity

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[58]Citation 1, Item 5a.

[59]Citation 1, Item 5b.

[60]See Tr 49-52; Gov't Ex. 8.

of the hazard is apparent. She contends that a prima facie case has been established for a violation of the cited standard.[61]

Loewendick's superintendent on the job, Mr. Keith, testified that Mr. Persinger was correct that there were some broken wires, but he was unable to identify any in the photograph. Similarly, Loewendick's expert witness, Mr. Enfield, was unable to find any broken wires when he reviewed the photograph on which Mr. Persinger identified the broken wires. Rather, Mr. Enfield found that the strands spread out as they passed through the shackles, a normal process.[62]

Loewendick points out that four broken wires would not make the sling defective within the meaning of the regulations. A separate paragraph of the standard under which Loewendick was cited specifies when wire rope shall be removed from service. Section 1926.251(c)(4)(iv) states:

> Wire rope shall not be used if, in any length of eight diameters, the total number of visible broken wires exceeds ten percent of the total number of wires, or if the rope shows other signs of excessive wear, corrosion or defect.

The Secretary's position with regard to this item is that the obvious nature of the broken wires indicates that Loewendick failed to inspect and replace the cable as required by § 1926.251(a)(1). She has made no attempt to demonstrate that the wire rope in question should have been replaced because it was in violation of § 1926.251(c)(4)(iv).

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[61]The Secretary argues that similar observational evidence of sling conditions was accepted by the Commission as a basis for violation of this standard in *Secretary v. A-1 Aggregates & Excavating, Inc.*, 12 OSHC 1448 (1985), where the observation of a compliance officer that a hook on the end of a sling was twisted out of alignment coupled with respondent's continued use of the sling established a violation of the standard.

[62]Tr. 227.

Given the overcapacity of the cables in question to support the backhoe,[63] it was incumbent on the Secretary to show that the breakage of wires at least approached that stated above in order to support the inference that Loewendick had failed to live up to the obligations imposed by § 1926.251(a)(1). The Secretary has failed to demonstrate by a preponderance of the evidence that Loewendick was in violation of § 1926.251(a)(1). Items 5a and 5b of Citation 1 are vacated.

B. Cracked or Broken Crane Windows - 29 C.F.R. §1926.550(a)(12)

Citation 1, Item 7, charged that the crane employed by Loewendick to lift the backhoe "...had overhead and front cab window shields cracked and broken and vision was distorted...."

The standard relied on by the Secretary, 29 C.F.R. §1926.550(a)(12), states that:

> All windows in cabs shall be of safety glass, or equivalent, that introduces no visible distortion that will interfere with the safe operation of the machine.

Mr. Persinger testified that he observed that the overhead and front cab windshields of the crane were broken and cracked windows and that this condition distorted the operator's view. Mr. Persinger took a photograph of the cracked overhead cab windshield from inside the cab. The view through the cracked overhead window would ordinarily yield a clear view of the boom on the crane. Mr. Persinger testified that because the crane operator would not be able to see clearly out the cracked windows, he could easily injure

[63]Mr. Malcovsky testified that each of the four cables which composed the sling was rated at 17 tons capacity while the backhoe weighed seven tons. Tr. 324. This provides almost ten times the capacity needed to support the backhoe.

someone because of an inability to judge distances. For instance, he could hoist the equipment too high and crush someone or knock something loose, injuring someone.[64]

The Secretary points out that there is employee exposure to this hazard because it is undisputed that there was an employee being hoisted on the crane. She also asserts that it is undisputed that Loewendick knew of this hazard. The cracked windshield was in plain view to the operator of the crane, who was also Loewendick's superintendent. She maintains that she has established her prima facie case, and that the $1,250.00 penalty for this serious violation proposed is reasonable and was calculated in accordance with Section 17(j) of the Act.

In its brief, Loewendick maintains that Mr. Persinger could only observe one window that was broken -- the overhead window -- and that the only picture taken by Mr. Persinger was of that window. Loewendick further maintains that Mr. Persinger did not know if it was possible to open the top window or if one needed to look out of the top of the crane in order to view the backhoe. Loewendick points out that another exhibit, which depicts the windows of the crane from the rear, does not reveal any distortion or cracks in the windows facing forward, and that Mr. Keith, who was operating the crane on the day of the inspection, testified that there was no need to use the skylight window in the operation of crane. Moreover, he stated he was in radio contact with operator of the backhoe at all times.[65]

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[64]See Tr. 58-61; Gov't Ex. 9.

[65]Tr. 105-06, 296-97; Gov't Ex. 4. Loewendick relies on *Rutherford Steel Erectors, Inc.*, 9 BNA OSHC 1876 (1981) for the proposition that the damaged window in this case should not be found sufficient to support a violation. In *Rutherford*, a single crack existed in a window located behind the operator's head. This crack (continued...)

I find that the Secretary has demonstrated that the cracked window located above the operator's head violates the cited standard. While I do not doubt the testimony elicited by Loewendick that it was not necessary for the crane operator to utilize that window during normal operations, nonetheless the possibility exists that in an emergency it could be necessary for the operator to have an unobstructed view upward. Indeed, the standard is not written so as to limit its requirements to windows which are utilized by the operator during normal operations.

However, the Secretary has not demonstrated that any other window was similarly damaged. Mr. Persinger's testimony was somewhat vague with respect to whether other windows were damaged. Mr. Keith testified that no other window was damaged[66] and Gov't Ex. 4 fails to reveal any damage, although it appears to show a considerable portion of the windows facing forward. Because the penalty assessed clearly appears to have been based on more than one window being damaged, I conclude that it is appropriate to assess only one-half of it, or $625.00.

C. Failure to Inspect and Correct Damaged Sheave Wheel - 29 C.F.R. §1926.550(b)(2) and (a)(5)

Citation 1, Item 8a directed to Loewendick charges that the crane being used to hoist the backhoe had a "...lower hook block sheave wheel bent, cracked and worn...." Item 8b

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[65](...continued)
had existed for seven years and did not distort the operators view. It was held not to violate the standard. This situation is distinguishable from the instant situation in which the window, located directly over the operator's head, was severely cracked.

[66]See Tr. 297.

directed to Loewendick charges that the damaged sheave indicates that Loewendick had failed to inspect the crane as required. The standard at 29 CFR §1926.550(b)(2) provides, in relevant part that:

> (2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler Locomotive, and Truck Cranes. ...

Section 5-1.7.4 of the referenced ANSI standard provides that:

> a. Sheave grooves shall be smooth and free from surface defects which could cause rope damage. The cross sectional radius at the bottom of the groove should be such as to form a close fitting saddle for the size rope used and the sides of the groove should be tapered outwardly to facilitate entrance of the rope into the groove. Flange corners should be rounded and the rims should run true about the axis of rotation.

The standard at 29 CFR §1926.550(a)(5) provides, in relevant part that:

> (5) The employer shall designate a competent person who shall inspect all machinery and equipment prior to each use, and during use, to make sure it is in safe operating condition. Any deficiencies shall be repaired, or defective parts replaced, before continued use.

Mr. Persinger testified that he observed that on the Link-Belt crane the "lower hooks sheave wheels were cracked [and] had pits in them...."[67] Apparently, the sheave wheels in question were located on the block and hook to which the sling supporting the backhoe was attached.[68] Mr. Persinger opined that the deficiencies he noted could damage

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[67]Tr. 62.

[68]Tr. 63, Gov't Ex. 10. Exhibit 10 shows two sheave wheels located on what appears to be a block. Only one sheave wheel was in use. Mr. Persinger identified defects in each wheel.

the cable as it is taken up around the sheave wheels. He further testified that the defects were not hidden or obscured in any way and could readily be seen.[69]

The Secretary maintains that defects such as those depicted in Mr. Persinger's picture are identified in the ANSI standard as conditions which could contribute to rope damage. Given the nature of the load being carried by the crane, the Secretary believes the severity of the hazard is apparent, and contends that a prima facie case has been established for a violation of the cited standards.

Loewendick maintains that the defects identified in Mr. Persinger's picture could not contribute to rope damage. Loewendick relies on its expert on cranes, Mr. Enfield, who stated that the defects identified were not a cause for concern. In Mr. Enfield's opinion, one needs to be concerned about indentations in the sheave caused by the wire rope. These would occur in the groove where the rope runs and should be measured with the use of gauges.[70] Loewendick points out that Mr. Persinger did not take any physical measurements or use any instruments to determine the extent of the defects he believes are illustrated in the picture, nor did he find that the wire rope running through one of the sheaves was damaged.[71] Loewendick points out that absent evidence that defects which could damage wire rope were present in the sheave wheels, there is no basis for the citation for failure to inspect the crane on a daily basis.[72]

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[69]See Tr. 62-66.

[70]Tr. 230.

[71]Tr. 123.

[72]Loewendick also points to testimony that the crane was inspected. Mr. Keith indicated that he had checked all safety aspects of the rig including the cables, the slings, and the backhoe (Tr. 311), and that the regular (continued...)

I find that Loewendick's position is persuasive. Mr. Enfield is an acknowledged expert in the use of cranes and their maintenance. Consequently, I accept his testimony that the defects identified in the sheave wheels were not a cause for concern.[73] It follows that there is no basis for the citation alleging a failure to inspect the crane. Items 8a and 8b of Citation 1 are vacated.

D. Failure to Place a Fire Extinguisher in the Cab of the Crane - 29 C.F.R. §1926.550(a)(14)(i)

Other than serious Citation 2 contains one item which charges that Loewendick had not placed a fire extinguisher in the cab of the crane in violation of 29 C.F.R. §1926.550(a)(14)(i), which provides that:

> An accessible fire extinguisher of 5BC rating, or higher, shall be available at all operator stations or cabs of equipment.

Mr. Persinger testified that he did not see a fire extinguisher when he inspected the cab of the crane, and that Mr. Keith, who was the crane operator on the day of the inspection, did not know where it was. Mr. Keith testified that there was a fire extinguisher in the cab but that he didn't see it because it was covered by a raincoat. The Secretary submits that this explanation is implausible and, in any event, a fire extinguisher that the operator cannot find is not accessible as required by the regulation. Mr. Persinger testified

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[72](...continued)
operator, Mr. Malcovsky, would also inspect the crane on a daily basis (Tr. 287, 321). Mr. Malcovsky reviewed the sheave after the inspection and could not identify anything detrimental to the cable (Tr. 329). See also Respondents' Ex. 14, the weekly checklist for the crane in question.

[73]Loewendick also argues that there was no basis to issue a citation with respect to the sheave wheel which was not in use because it could not cause damage to the wire rope. I reject this argument. Clearly, that sheave wheel was available for use and would have been used had Mr. Malcovsky desired a greater mechanical advantage in lifting the backhoe. See Tr. 328.

that the absence of a fire extinguisher exposed the crane operator to a burn hazard should a fire occur.[74]

Loewendick argues that the standard provides that the fire extinguisher must be readily accessible, not that it be physically located within the crane cab.[75] It points out that there was a fire extinguisher in this in the cab, but it was hidden by Mr. Malcovsky's coat which was hanging over it. It maintains that there is no basis for a violation.

The Secretary's position is persuasive. The standard clearly contemplates that "an accessible fire extinguisher ... shall be available at all operator stations or cabs...." The Secretary's interpretation was adopted by the Commission in *Austin Engineering Co., Inc.*, 12 BNA OSHC 1187 (Rev. Com. 1985). A fire extinguisher which the crane operator is unable to locate is not accessible in the event it is needed. Item 1 of Citation 2 is affirmed; a penalty of $00 is assessed.

IV. ALLEGED MISCELLANEOUS VIOLATIONS

A. Performing Maintenance on Operating Crane - 29 C.F.R. § 1926.20(b)(3).

Citation No. 1, Item 3, directed to Loewendick charges that an employee performed maintenance on [the crane] with motor running and crane with load on hoist line and controls were not locked out and motor turned off....

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[74]Tr. 77, 299-300.

[75]Loewendick cites *M&O Steel Erection, Inc.*, 7 BNA OSHC 2136 (1979) (extinguisher located in truck next to crane was accessible and available to operators) and *Merritt-Meridian Construction Corp.*, 13 BNA OSHC 1133 (1987) (extinguisher located at an office forty to fifty feet from crane cab was not in violation of standard).

The standard in question, 29 C.F.R. §1926.20(b)(3), provides:

> The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.

The Secretary notes that 29 C.F.R. §1926.20(b)(3) is a general safety and health provision relating to accident prevention which requires the employer to tag or lock-out equipment when its use would not be in compliance with an applicable requirement. Mr. Persinger observed an employee kneeling on top of the crane and performing some kind of work while the crane was operating. Mr. Persinger did not obtain the name of the employee because the employee disappeared before Mr. Persinger could talk to him.[76] By working on top of an operating crane, the employee was exposed to a number of serious hazards. Vibrations could cause him to slip and fall a distance of three or four foot into cables or other machinery, or to fall off the crane. In the absence of a fall, he was exposed to the hazards of the motor, burns from hot exhaust or the hot muffler, or injury from other parts of the equipment.[77]

Mr. Keith, the Loewendick job superintendent who was operating the crane, testified that the employee was checking and filling the anti-freeze. He stated that it is necessary that the motor be running when filling anti-freeze so as not to crack a block or head.[78] The

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[76]Tr. 45-48; Gov't Ex. 4.

[77]Tr. 47-48, 101-104.

[78]Tr. 299.

Secretary seizes on Mr. Keith's negative response on cross-examination to the proposition that the employee was "changing the cooling" and his clarification that the employee was only "checking" it[79] to argue that there is no reason why the employee should have been working on top of the operating crane.

The Secretary argues that there can be no question but that Respondent Loewendick had knowledge of the hazard. The employee was photographed on top of the crane being operated by Mr. Keith and Mr. Keith testified to what the employee was doing. The Secretary urges that she has established her *prima facie* case, that Citation No. 1, Item 3, should be sustained, and that the $1,750.00 penalty proposed is reasonable and was calculated in accordance with Section 17(j) of the Act.

Loewendick does not dispute that an individual was on top of the crane to replenish antifreeze. It asserts that the crane motor needs to be running during this process in order to prevent damage and thus could not be locked out. Because, during this operation, the crane was not moving but was holding the ram stationary, there was no additional hazard presented to the individual replenishing the antifreeze by the fact that the crane was suspending the ram. Those same hazards would be present whether the crane was locked out or tagged out.

It appears from Mr. Keith's testimony that the crane had a faulty water pump which required that the antifreeze be checked and replenished periodically.[80] Thus while the Secretary is correct that it would have been possible for Loewendick, after having lowered

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[79]Tr. 313-14.

[80]Tr. 298-99.

the backhoe to the ground, to shut the crane down in order to permit the antifreeze to be checked while the crane was locked out, it would have been necessary to restart the crane engine prior to replenishing the antifreeze. Loewendick's position that these extra steps would not reduce the hazard to the employee is well taken.

Moreover, the standard prohibits "[t]he *use* of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part...." (Emphasis supplied.) Here the Secretary has cited Loewendick for performing maintenance, rather than using the equipment. And none of Loewendick's alleged failures to comply with applicable requirements relating to the crane which the Secretary raised in her citations would have, if true, made this maintenance more hazardous. I conclude that the checking and replenishing of the antifreeze while the crane was operational did not violate § 1926.20(b)(3). Citation 1, Item 3, is vacated.

B. Failure to Develop a Hazard Communication Program - 29 C.F.R. § 1926.59(e)(2)(i), (ii), and (iii).

Citation 1, Item 4 directed to Loewendick charges a failure to develop a method: 1) to ensure that Material Safety Data Sheets (MSDS)[81] were available to V&G (Item 4a), 2) to inform V&G of information and precautionary measures for hazardous materials (Item 4b), and 3) to inform V&G of the labeling system used (Item 4c). Originally raised as a serious citation, this item was reduced to other than serious prior to the hearing and the proposed penalty was reduced to $00.

The standard in question, 29 C.F.R. §1926.59(e)(2)(i), (ii), and (iii), provides that:

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[81]Material safety data sheets describe the hazard of the material, emergency numbers, information about protective clothing and precautions, and where to get medical assistance. Tr. 283.

> Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:
>
> (i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;
>
> (ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,
>
> (iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

Mr. Persinger testified that Loewendick used or stored lubricants, diesel fuel, and acetylene at the worksite.[82] It is not disputed that the worksite was a multi-employer worksite, where both V&G and Loewendick were present. Accordingly, 29 C.F.R. §1926.59(e)(2) applies to Loewendick.

The Secretary asserts that Loewendick was in violation of this regulation because it had not developed a method for sharing MSDS with V&G, had not developed a method to inform V&G of necessary precautionary measures to protect employees from hazardous chemicals, and had not developed a labeling system for all chemicals used on the worksite. Mr. Persinger testified that he asked Mr. Keith, the superintendent for Loewendick, whether Loewendick had a method for sharing MSDS or precautionary measures with V&G, and Mr. Keith could not identify such a method. Mr. Persinger also testified that not all of the containers used to store lubricants, diesel fuel, and acetylene were labeled.[83] Mr. Keith

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[82]Tr. 75.

[83]Tr. 72-75.

testified that he gave some MSDS to V&G, but he couldn't say which ones were shared. He also testified that Loewendick held weekly safety meetings but that V&G employees were not required to attend.[84] John Jones, V&G's job superintendent, testified only that V&G had some of Loewendick's MSDS.[85]

The Secretary asserts that, by not developing a method for sharing information, and by not labelling all hazardous chemicals, Loewendick exposed other employees working on the site to unidentified chemical hazards. Thus, the Secretary urges, employee exposure is established. The Secretary also urges that Loewendick knew or should have known of the requirement for a plan governing the sharing of information on hazardous chemicals. Indeed, the Secretary points out that the fact that Loewendick gave some of this information to V&G indicates knowledge. However, it is undisputed that no method was in place providing for the systematic sharing of this information.

Loewendick regards the sole issue presented by this item to be whether a method for sharing existed. It believes it to be unimportant under the standard whether each employer had all of the data sheets of the other, pointing out that if they did, there would no longer be a necessity to have a method to share them. It believes that the testimony of V&G's job superintendent, John Jones, establishes that a method for sharing existed.

> Q Did he (Persinger) discuss any issues about sharing information on material data sheets?
>
> A Yes, he did.
>
> Q What did you tell him.

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[84]Tr. 283-84.

[85]Tr. 200.

A. I told him me and Harry would share the sheet, you know, and corresponded with one an other about it.

Q Did you have Loewendick's MSDS sheets?

A I had some of them, yes.

Q And did they have any of yours?

A Possibly so. They were available to them.

Q When was this discussed, where would they be available?

A Pardon?

Q When did you discuss this, sharing of communication data sheet?

A Off and on, all the time.[86]

The testimony of Messrs. Keith and Jones does not establish that a method for sharing information existed. Rather, it shows that information was shared on a haphazard basis. The standard requires that an employer must formulate and follow at least some minimal plan for sharing information. Citation 1, Items 4a, 4b, and 4c, are affirmed as an other than serious violation for which no monetary penalty is assessed.[87]

V. FINDINGS OF FACT

All facts 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

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[86]Tr. 200.

[87]Loewendick has not put forth a defense to the charge that it failed to label containers of hazardous chemicals stated in Item 4c.

Civil Procedure. All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

VI. CONCLUSIONS OF LAW

A. Respondents were at all times pertinent to this decision employers within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970).

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

C. The Secretary of Labor failed to establish by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.20(b)(3) as recited in Citation 1, Item 3.

D. The Secretary of Labor established by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.59(e)(2)(i), (ii), and (iii) as recited in Citation 1, Item 4a, 4b, and 4c. A civil penalty of $00 is appropriate.

E. The Secretary of Labor failed to establish by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.251(a)(1) as recited in Citation 1, Items 5a and 5b.

F. The Secretary of Labor failed to establish by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.550(a)(1) as recited in Citation 1, Items 6.

G. The Secretary of Labor established by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.550(a)(12) as recited in Citation 1, Item 7. A civil penalty of $625 is appropriate.

H. The Secretary of Labor failed to establish by a preponderance of the evidence that Loewendick Contractors breached the standards at 29 CFR § 1926.550(b)(2) and (a)(5) as recited in Citation 1, Items 8a and 8b.

I. The Secretary of Labor established by a preponderance of the evidence that Loewendick Contractors breached the standard at 29 CFR § 1926.550(a)(14)(i) as recited in Citation 2, Item 1. A civil penalty of $00 is appropriate.

J. The Secretary of Labor failed to establish by a preponderance of the evidence that Loewendick Contractors breached the standards at 29 CFR § 1926.550(b)(2) as recited in Citation 3, Item 1.

K. The Secretary of Labor failed to establish by a preponderance of the evidence that Vecellio & Grogan, Inc., breached the standards at 29 CFR § 1926.550(b)(2) as recited in Citation 2, Item 1.

VII. ORDER

Based on the above findings of fact and conclusions of law, it is hereby ORDERED that:

A. Item 7 of Citation 1 is affirmed as a serious violation of the Act;

B. Items 4a, 4b, and 4c of Citation 1 and Item 1 of Citation 2 are affirmed as other than serious violations of the Act; and

C. A total civil penalty of $625 is assessed.

JOHN H. FRYE, III
Judge, OSHRC

Dated: JAN 28 1993
Washington, D.C.