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

SECRETARY OF LABOR, Complainant, v. BARLAMENT ERECTION CRANE RENTALS, Respondent.	OSHRC Docket No. 12-1516

APPEARANCES:

Edward V. Hartman, Esquire, U.S. Department of Labor
Chicago, Illinois
For the Complainant.

Michael Barlament,
Green Bay, Wisconsin
For the Respondent, *pro se*.

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

On May 8, 2012, Barlament Erection Crane Rentals (Respondent) was operating a truck-mounted mobile crane at a residential construction site in Hobard, Wisconsin, when an Occupational Safety and Health Administration (OSHA) compliance officer (CO) conducted an inspection of the worksite in response to a complaint regarding the activity of another employer at the same worksite.

As a result of the inspection, on June 28, 2012, OSHA issued a Citation to the Respondent alleging four serious violations of construction standards under the Occupational Safety and Health Act of 1970. 29 U.S.C. § 651 *et seq.* (the Act).

Item 1 of the Citation alleged that Barlament violated the standard pertaining to "rigging equipment for material handling" at 29 C.F.R. § 1926.251(b)(1) in that a welded alloy steel chain sling used in hoisting did not have a permanently affixed tag that stated the size, grade, rated capacity, and manufacturer of the chain sling. OSHA proposed a $2,000 penalty for Item 1.

Grouped Items 2a, 2b, and 2c alleged serious violations of the inspection requirements of the crane standards at 29 C.F.R. §§ 1926.1412(d)(3), (e)(3)(i), and (f)(7), with a proposed grouped penalty of $2,800. Item 2a alleged that the Respondent violated § 1926.1412(d)(3) because the Respondent did not remove the crane from service when the shift inspection revealed the following two deficiencies: (1) the hoist hook did not have a safety latch; and (2) the "wedge socket" end connection was improperly installed. Item 2b alleged a violation of § 1926.1412(e)(3)(i), because the Respondent failed to properly document and maintain the results of *monthly* inspections of the crane. Item 2c alleged a violation of § 1926.1412(f)(7) because the Respondent failed to properly document and maintain the results of the *annual/comprehensive* inspection of the crane.

The Respondent timely contested the Citation and proposed penalties, and the case was docketed by the Occupational Safety and Health Review Commission (Commission) on July 30, 2012. The matter was then designated to be heard pursuant to the Commission's rules for Simplified Proceedings, 29 C.F.R. §§ 2200.200 through 2200.211 (Subpart M of Part 2200). The undersigned conducted a hearing in Green Bay,

Wisconsin, on January 29, 2013. At the close of the hearing, the parties presented oral closing arguments in lieu of filing written post-hearing briefs. The hearing transcript was filed on February 25, 2013.

For the reasons set forth below, the undersigned finds the Secretary has proven the alleged violations, with the exception of instance "b" of Item 2a, which was not proven. The Respondent has not proven the affirmative defenses of greater hazard or infeasibility. The Citation is affirmed and penalties totaling $1,500 are assessed.

Jurisdiction

The Respondent timely filed a notice of contest. The Commission has jurisdiction over the matter pursuant to § 10(c) of the Act. 29 U.S.C. § 659(c).

The Respondent is a sole proprietorship owned by Michael Barlament with an office and place of business in Green Bay, Wisconsin. (Stipulation 1; Tr. 15). At all times relevant to the Citation, the Respondent had one employee (Gus Barlament, who is the adult son of Michael Barlament) and was engaged in a business affecting commerce. (Stipulation Nos. 2 and 3; Tr. 16-17). The Respondent is active in the construction industry, which is a class of activity that as a whole affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The Respondent therefore was an "employer" engaged in a business affecting commerce with employees as defined in § 3(5) of the Act, 29 U.S.C. § 652(5), and was thus subject to the requirements of the Act.

Background

On May 8, 2012, the OSHA area office in Appleton, Wisconsin, received a report of a workplace safety hazard at a multi-employer residential construction site in Hobard, Wisconsin. (The reported hazard pertained to the activity of an employer other than the

Respondent.) (Tr. 45-46). OSHA CO Jason Grunow was dispatched to investigate, and he arrived at the construction site around 10:00 a.m.

Upon arrival, the CO observed the Respondent's truck-mounted crane, a "National 1800" model, hoisting a bundle of approximately six to eight triangular-shaped wooden roof trusses to the second level of a building under construction. (Tr. 41). The Respondent's employee, Gus Barlament, was operating the crane. (Stipulation 7; Tr. 18). The Respondent was *not* engaged in setting individual trusses while the CO was at the construction site. (Stipulation No. 6; Tr. 17).

Identification Tag on Chain Sling

The bundled trusses were rigged to the crane by lashing a welded alloy steel chain sling through an opening in the bundled trusses, and then connecting the chain sling to the crane's hoist hook. (*See* photographs at Exhibits C-4 and C-5). The chain sling was about six feet in length. (Tr. 185). The Respondent fabricated the chain sling from separate components that it purchased. (Stipulation 11; Tr. 19, 183-84). The chain sling did not have a permanently affixed durable identification tag stating its size, grade, rated capacity, or manufacturer, as required by 29 C.F.R. § 1926.251(b)(1). (Stipulations 10, 12; Tr. 18-19, 31, 184). The Respondent's longstanding practice when hoisting wooden trusses was to use chain slings that did not have such an identification tag. (Tr. 31, 184, 231). The Respondent developed this practice because in its experience such tags could become snagged in a truss's gable, requiring a worker to be exposed to a fall hazard to unsnag it.[1] (Tr. 31, 183-84, 190-91).

[1] Such snags sometimes occurred with "sheeted" trusses, which have one side entirely covered by plywood-like material. (Tr. 188-190). In order to lash the chain sling through such sheeted trusses, a hole must be created in the sheeting through which the chain sling passes. (Tr. 188-190). In the Respondent's experience, when the chain sling was being

The Respondent believed that it was not necessary to have identification tags on the chain slings that it used to hoist wooden trusses, because the only persons who operate the Respondent's cranes (Michael and Gus Barlament) both know and abide by the rated capacity of the untagged chain slings. (Tr. 31, 183-84). Michael Barlament has been a self-employed crane operator for about 40 years (Stipulation 8; Tr. 18, 185), and neither he nor Gus Barlament has had a chain break because it was underrated for the load. (Tr. 185).

Self-closing Safety Latch on Hoist Hook

The crane's hoist hook, to which the chain sling was attached, did not have a self-closing safety latch because the Respondent had intentionally removed it. (Stipulations 16 & 17; Tr. 20, 183). Michael Barlament testified that the Respondent's practice is to remove the safety-latch for "truss jobs or when we feel it is safer for us to unhook ourselves." (Tr. 184). The Respondent believed that when *setting* individual trusses, it was generally safer to use an unlatched hoist hook (in combination with a chain sling) than a latched hoist hook (in combination with "J" hooks, which have no latches), because the former method eliminated any need for a worker to have to climb a truss to unhook it and thereby be exposed to a fall hazard. (Tr. 31-32, 183, 256-57). Michael Barlament testified that neither he nor his son has had an incident in which a chain sling was unintentionally disconnected from an unlatched hoist hook, and that "we feel that we're smart enough to realize when we need [the safety-latch] and when we don't." (Tr. 184).

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disconnected from a sheeted truss after the truss had been set, the identification tag would sometimes snag in the hole as the chain sling was being pulled through it. (Tr. 31, 184, 188-190). To unsnag the tag, a worker would sometimes climb up on the truss that had been set, and be exposed to a fall hazard. (Tr. 31, 188-190). The Respondent decided to avoid such snags by using chain slings having no identification tags. (Tr. 188-190).

Installation of Wedge Socket -- Wire Rope's "Dead End"

The crane's rigging hardware included a "wedge socket" that served as the end connection for the wire hoist rope. (Tr. 56-57). The wedge socket was manufactured by The Crosby Group LLC, and had the commercial name "Terminator," model number US-422T. (Ex. C-8; Tr. 57-58). The manufacturer's directions for installing the wire rope to the wedge socket required that the end of the wire rope protrude at least six inches from the wedge socket in the manner depicted in Figure 2 in Exhibit C-8.[2] (Tr. 58). The protruding tail length of the wire rope is known as the "dead end" (because it must not bear any of the load). (Exs. C-8, C-9 & C-10).

The wire rope was properly installed in the wedge socket in that the dead end was at least six inches in length. (This finding is made upon conflicting evidence as to the length of the dead end. This conflicting evidence is discussed below.)

The dead end of the wire rope had been seized before it had been installed in the wedge socket. However, the dead end had been subjected to multiple impacts from jostling with other equipment that had occurred when the truck-mounted crane was in transit. These unintentional impacts caused the seizing at the dead end to become undone, and this resulted in the dead end becoming partially unraveled and the individual wire strands becoming bent, as depicted by Exhibit C-7. (Tr. 193-94).

Documentation of Monthly and Annual/Comprehensive Inspections

Sometime after the inspection, in response to the CO's request that the Respondent provide annual and monthly inspection records for the National 1800 crane, the Respondent provided five pages of inspection records. (These inspection records

[2] *See* Ex. C-8 (manufacturer's instructions for wedge socket, which specify that the "tail length of the dead end should be a minimum of 6 rope diameters, but not less than 6 [inches]."). The wire hoist rope being used at the time of the inspection had a diameter of five-eighths of an inch. (Stipulations 20 & 21).

were received in evidence as Exhibit C-13.) Each of the five pages of Exhibit 13 constitutes a record of a single inspection. The first page of Exhibit C-13 constitutes the entirety of the documentation for an annual inspection conducted on January 2, 2012 -- it is a simple form with the word "Annual" handwritten as a caption, the entire text of which provides as follows: "I, Gus Barlament have inspected National 1800 crane." (Ex. C-13). The form bears Gus Barlament's signature.

Each of the remaining four pages of Exhibit C-13 constituted the documentation of monthly inspections for, respectively, February, March, April and May of 2012. These four one-page monthly inspection records are identical in every respect to the annual inspection record, except for the different dates and the absence of the caption "Annual." (Ex. C-13).

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violation. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A violation is "serious" if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Constr.*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative

condition but, rather, that a serious injury is the likely result if an accident does occur." *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31, (No. 97-0469, 2003) (consolidated) (citation omitted).

All the Citation items alleged violations of certain standards applicable to the construction industry contained within 29 C.F.R. Part 1926. It is undisputed that the Respondent was "engaged in construction work" at all times relevant to the Citation. 29 C.F.R. § 1910.12(a) & (b). Accordingly, the construction industry standards of Part 1926 are applicable.

Item 1 – Identification Tag for Steel Chain Sling

Item 1 of the Citation alleges as follows:

> 29 CFR 1926.251(b)(1): Welded alloy steel chain slings did not have permanently affixed durable identification stating size, grade, rated capacity, and sling manufacturer:
>
> a) The tag was missing from the chain sling being used to hoist the bundle of wood trusses.

The cited standard provides in pertinent part as follows:

> **§ 1926.251 Rigging equipment for material handling.**
> (a) *General.* (1) ….
> ….
> (5) *Scope*. This section applies to slings used in conjunction with other material handling equipment for the movement of material by hoisting, in employments covered by this part. The types of slings covered are those made from alloy steel chain….
> ….
> (b) *Alloy steel chains.* (1) Welded alloy steel chain slings shall have permanently affixed durable identification stating size, grade, rated capacity, and sling manufacturer.

The Respondent was using a welded alloy steel chain sling in connection with other material handling equipment while engaged in construction activity, and thus the provisions of the cited standard apply to the chain. 29 C.F.R. § 1926.251(a)(5).

The Respondent did not meet the terms of the cited standard – the Respondent acknowledges that the chain sling lacked any identification stating the sling's size, grade, rated capacity, and manufacturer.

The purpose of a permanent identification tag on a chain sling is to enable the rigger to verify that the chain's rated strength is sufficient to support the load. (Tr. 48-49). The Respondent's only employee at the construction site was the crane operator. Employees of another employer at the work site were involved in rigging the bundled trusses with the chain sling, and those workers were exposed to the violative condition.

The "access to violative condition" element of the alleged violation is established even though the workers exposed to the resulting hazard were the employees of another employer. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976) ("on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site"); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197-99 (No. 3694, 1976)(consolidated); *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982-83 (7th Cir. 1999)("when an employer on a work site violates a safety regulation, it can face liability under the Act regardless of whether those exposed to the resulting danger were the employer's own employees or those of another").

The Respondent knew of the violation. During the inspection, upon being asked about the absence of a tag on the chain sling, Gus Barlament told the CO that "we don't have them" and "we don't use them." (Tr. 49). Michael Barlament manufactured the chain sling himself using materials that he purchased and thereafter fabricated into the chain sling. (Tr. 183-184). Michael Barlament suggested in his testimony that in the past

he has tagged the chain slings that he made, but that he later discontinued that practice because "periodically the tag would get hooked in a gable end if were setting a truss one at a time, individually, and then we would have a mess trying to figure out how to get somebody up there to get it untangled, so – so through the years, we've decided when -- whenever we made them again, we would leave the tags off just so they wouldn't get caught and put somebody's life in jeopardy." (Tr. 184).

OSHA properly classified Item 1 as a serious violation. As noted above, the purpose of the permanent identification tag required by 29 C.F.R. § 1926.251(b)(1) is to allow a rigger to verify that the chain is strong enough to support the load. (Tr. 48-49). The failure of a chain sling due to overloading could very obviously result in death or serious injury to a worker within the fall zone.

Affirmative Defenses to Item 1 – Greater Hazard and Infeasibility

Before the commencement of the hearing, the Respondent had raised the affirmative defenses of "greater hazard" and "infeasibility," and thus those issues were joined for hearing in these simplified proceedings pursuant to Commission Rule 207(b), 29 C.F.R. § 2200.207(b). (Tr. 22-23; "Respondent Pretrial Submission," filed January 21, 2013).

To establish the affirmative defense of "greater hazard," an employer must show (1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance under § 6(d) of the Act is not available or that application for a variance is inappropriate. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991). Each prong of this three-part test must be satisfied to establish the defense. *See Dole v. Williams Enters., Inc.*, 876 F.2d 186, 190 n. 7 (D.C. Cir. 1989).

The Respondent has failed to establish any of the three elements of the greater hazard defense with respect to Item 1. Most obviously, the Respondent acknowledges that it did not apply for a variance, and was not even aware that a process existed for seeking a variance. (Tr. 228). The variance requirement is central to the greater hazard defense, and an employer's failure to establish this element is fatal to the defense.[3, 4]

In regard to the first element of the greater hazard defense, the Respondent was cited for using the chain sling in its operation of hoisting the bundled trusses to the second level of the building. In completing the hoist, the Respondent laid the bundled trusses flat on the top plate of the second floor wall. If a tag on the chain sling had become snagged in the bundled trusses, a worker would have been able to reach the snag without having to climb any ladder or truss, and thus would not have been exposed to a fall hazard. (Tr. 76-77, 123, 164). Thus, if the Respondent had complied with the standard during the operation of hoisting the bundled trusses, no worker would have been

[3] *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1389 n.13 (D.C. Cir. 1985) (finding affirmative defense not proved because no evidence of application for variance); *Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 178 n.12 (D.C. Cir. 1984) (finding greater hazard defense not possible because company did not apply for variance); *Modern Drop Forge Co. v. Sec'y of Labor*, 683 F.2d 1105, 1116 (7th Cir. 1982) ("If the greater hazard defense could be raised in an enforcement proceeding without first exhausting the variance procedure, employers would tend to bypass that procedure."); *Caterpillar, Inc. v. Herman*, 131 F.3d 666, 669 (7th Cir. 1997) ("Doubtless an employer should seek a variance when it can, and an unjustified failure to do so defeats a greater-hazard defense.").

[4] Where, as here, the employer has not applied for a variance for regularly performed operations, and has failed to explain why doing so would have been inappropriate, it is unnecessary to address the first two elements of the greater hazard defense. *Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011)(consolidated), *petition denied,* 498 Fed.Appx. 145 (3d Cir. 2012); *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1022-23 (No. 86-521, 1991). Nevertheless, since the evidence respecting the remaining two elements bears some relevance to the asserted infeasibility defense, the first and second elements are also addressed herein.

exposed to any greater hazard (i.e., any fall hazard). The evidence is insufficient to establish the first element of the greater hazard defense.

With respect to the second element of the greater hazard defense, Michael Barlament acknowledged in his testimony that there existed a method to lash the chain sling to a sheeted truss that would eliminate the possibility of an identification tag becoming snagged. (Tr. 197-98, 214-15). He stated, however, that such a method was "feasible" but "not practical or probable," because of the "mass confusion on every job site" relating to the number of persons who are not employees of Barlament who are involved in rigging loads onto the Respondent's cranes. (Tr. 215-217).

This contention is rejected. The applicable standard specifies that all "materials must be rigged by a qualified rigger." 29 C.F.R. § 1926.1425(c)(3). A "qualified rigger" is defined as a person who meets the objective criteria of a "qualified person," which is defined as "a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems relating to the subject matter, the work, or the project." 29 C.F.R. § 1926.1401. The asserted "greater hazard" could be avoided by the Respondent directing qualified riggers to rig the sheeted trusses in a manner that would avoid the potential for snagging the tag – a practice that Michael Barlament acknowledged was "feasible." (Tr. 199-200, 215). The evidence is insufficient to establish the second element of the greater hazard defense.

"To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or

economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection." *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). The Respondent has failed to present prima facie evidence that would support the elements of an infeasibility defense as to Item 1. The Respondent does not assert that it is technologically infeasible to place an identification tag on the steel chain. To the contrary, the Respondent has actually done so with other steel chains that it has fabricated. (Tr. 217-18).

In regard to economic infeasibility, Michael Barlament suggested in his testimony and closing argument that compliance with this and other OSHA standards strain the "tight budgets" involved in residential construction (Tr. 229-233) and that "OSHA is making it more difficult for anybody to survive." (Tr. 257-58). This argument suggests that the Respondent's competitors do not comply with the standards, and that for the Respondent to comply would put it at a competitive disadvantage. This argument must be rejected. "[A]n employer cannot be excused from compliance on the assumption that everyone else will ignore the law." *State Sheet Metal Co., Inc.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993) (consolidated). "A primary goal of the Act was to eliminate any competitive disadvantage that a safety-conscious employer might suffer by requiring that every employer comply with the applicable OSHA standards." *Id.* at 1161, citing *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 521 n. 38 (1981).

Moreover, the Respondent has not shown that alternative forms of protecting against the hazard were used, or that no alternative form of protection was available, (e.g., alternative means of informing a rigger of the steel chain's rated strength.)

The Respondent has failed to establish the affirmative defense of infeasibility as to Item 1.

Grouped Items 2a, 2b and 2c – Inspections

Item 2a of the Citation alleges two instances of a serious violation of the required "daily" (i.e., "shift") inspection as follows:

> 29 CFR 1926.1412(d)(3): The employer did not ensure the equipment was removed from service when the daily inspection revealed deficiencies in items (d)(1)(i) through (d)(1)(xiv) of this section, and 1926.1413(a)(2)(D).
>
> a) The hoist hook safety latch was missing.
>
> b) The Crosby Terminator wedge socket was not installed properly or according to manufacturer's directions.

Items 2b and 2c allege serious violations of the documentation requirements for, respectively, monthly and annual/comprehensive inspections as follows:

> Item 2b
>
> 29 CFR 1926.1412(e)(3)(i): The employer did not document and maintain the results of the monthly inspection including the items checked along with the date and signature of the person performing the inspection.
>
> a) Inspection documentation did not include any details of the items checked or the results of the inspection.
>
> Item 2c
>
> 29 CFR 1926.1412(f)(7): The employer did not document, maintain, or retain for a minimum of 12 months the items checked, the results of the inspection, the name and signature of the person conducting the inspection, and the date of the inspection. Inspection documentation did not include any details of the items checked or the results of the inspection.

Standards relating to the grouped items include the following:

> **§ 1926.1412 Inspections.**
> (a) ....
> ….
> (d) *Each shift.*
> (1) A competent person must begin a visual inspection prior to each shift the equipment will be used, which must be completed

before or during that shift. The inspection must consist of observation for apparent deficiencies…. At a minimum the inspection must include all of the following:

(i) ….

….

(v) Hooks and latches for deformation, cracks, excessive wear, or damage such as from chemicals or heat.

….

(vii) Wire rope, in accordance with § 1926.1413(a).

….

(xiv) Safety devices and operational aids for proper operation.

(2) If any deficiency in paragraphs (d)(1)(i) through (xiii) of this section … is identified, an immediate determination must be made by the competent person as to whether the deficiency constitutes a safety hazard. If the deficiency is determined to constitute a safety hazard, the equipment must be taken out of service until it has been corrected. *See* § 1926.1417.

(3) If any deficiency in paragraph (d)(1)(xiv) of this section (safety devices/operational aids) is identified, the action specified in § 1926.1415 and § 1926.1416 must be taken prior to using the equipment.

(e) *Monthly.*

(1) Each month the equipment is in service it must be inspected in accordance with paragraph (d) of this section (each shift).

(2) Equipment must not be used until an inspection under this paragraph demonstrates that no corrective action under paragraphs (d)(2) and (3) of this section is required.

(3*) Documentation.*

(i) The following information must be documented and maintained by the employer that conducts the inspection:

(A) The items checked and the results of the inspection.

(B) The name and signature of the person who conducted the inspection and the date.

(ii) This document must be retained for a minimum of three months.

(f) *Annual/comprehensive.*

(1) At least every 12 months the equipment must be inspected by a qualified person in accordance with paragraph (d) of this section (each shift)….

(2) In addition, at least every 12 months, the equipment must be inspected by a qualified person. Disassembly is required, as necessary, to complete the inspection. The equipment must be inspected for all of the following:

[(i) through (xxi) ….]

….

(7) *Documentation of annual/comprehensive inspection.* The following information must be documented, maintained, and retained for a minimum of 12 months, by the employer that conducts the inspection:

(i) The items checked and the results of the inspection.

(ii) The name and signature of the person who conducted the inspection and the date.

The provisions of § 1926.1413(a), which is cited in § 1926.1412(d)(1)(vii), provides in pertinent part as follows:

§ 1926.1413 Wire rope -- inspection.

(a) *Shift inspection.*

(1) A competent person must begin a visual inspection prior to each shift the equipment is used, which must be completed before or during that shift. The inspection must consist of observation of wire ropes (running and standing) that are likely to be in use during the shift for apparent deficiencies, including those listed in paragraph (a)(2) of this section….

(2) *Apparent deficiencies.*

(i) *Category I.* Apparent deficiencies in this category include the following:

(A) Significant distortion of the wire rope structure such as kinking, crushing, unstranding, birdcaging, signs of core failure or steel core protrusion between the outer strands.

….

(D) Improperly applied end connections.

(3) ….

(4) *Removal from service.*

(i) If a deficiency in Category I (*see* paragraph (a)(2)(i) of this section) is identified, an immediate determination must be made by the competent person as to whether the deficiency constitutes a safety hazard. If the deficiency is determined to constitute a safety hazard, operations involving use of the wire rope in question must be prohibited until [certain alternatives actions are taken].

Also relevant to instance "a" (self-closing latch on hoist hook) of Item 2a are the provisions of 29 C.F.R. § 1926.1425, which provide in pertinent part as follows:

§ 1926.1425 Keeping clear of the load.

(a) ….

….

> (c) When employees are engaged in hooking, unhooking, or guiding the load, or in the initial connection of a load to a component or structure and are within the fall zone, all of the following criteria must be met:
>
> (1) ….
>
> (2) Hooks with self-closing latches or their equivalent must be used. *Exception*: ‘‘J’’ hooks are permitted to be used for setting wooden trusses.
>
> (3) The materials must be rigged by a qualified rigger.

Also relevant to instance "b" (installation of the wedge socket) of Item 2a are the provisions of 29 C.F.R. § 1926.1414, which provide in pertinent part as follows:

> **§ 1926.1414 Wire rope – selection and installation criteria.**
>
> (a) Original equipment wire rope and replacement wire rope must be selected and installed in accordance with the requirements of this section….
>
> ….
>
> (g) Socketing must be done in the manner specified by the manufacturer of the wire rope or fitting.
>
> (h) Prior to cutting a wire rope, seizings must be placed on each side of the point to be cut. The length and number of seizings must be in accordance with the wire rope manufacturer's instructions.

Item 2a – Instances "a" and "b"

Item 2a alleges that the crane should have been taken out of service pursuant to subparagraph (d)(3) of § 1926.1412 because of deficiencies that should have been identified in the "shift inspection." Subparagraph (d)(3) pertains only to identified deficiencies in "safety devices and operational aids" as specified in subparagraph (d)(1)(xiv). Neither the safety latch nor the wedge socket is a "safety device" or "operational aid" within the meaning of subparagraph (d)(1)(xiv). As used in subparagraph (d)(1)(xiv), the terms "safety device" and "operational aid" are both terms of art that are defined elsewhere in Subpart CC, specifically in §§ 1926.1415 ("Safety

Devices") and 1926.1416 ("Operational Aids").[5] Neither a hoist hook safety latch nor a wedge socket is identified in those sections.[6] Thus, the cited standard (§ 1926.1412(d)(3)) is not applicable.

However, § 1926.1412(d)(2) *is* applicable. It pertains to the shift inspection items specified in subparagraphs (d)(1)(i) through (xiii). A shift inspection of the hoist hook and its safety latch falls within the scope of subparagraph (v), and a shift inspection of the installation of the wire rope in the wedge socket falls within the scope of subparagraph (vii). Item 2a of the Citation is thus deemed amended to allege a violation of subparagraph (d)(2) of § 1926.1412, rather than subparagraph (d)(3).[7]

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[5] The regulation defined the terms "safety devices" and "operational aids" in §§ 1926.1415 and 1926.1416 "because the industry did not have clear, consistent definitions" for those terms. 73 Fed. Reg. 59769 (Oct. 9, 2008).

[6] The parties stipulated that a safety latch on a hoist hook "is properly classified as a safety device." (Stipulation 15; Tr. 19-20). The undersigned accepts the stipulation only in the generic sense of the term "safety device." It would be an error of law to accept this stipulation to the extent that the parties intended to bring the safety latch within the purview of subparagraph (d)(2)(xiv). Such a stipulation would be tantamount to expanding the list of equipment set forth in § 1926.1415 that constitutes a "safety device" as that term is used in subparagraph (d)(2)(xiv). Stipulations as to conclusions of law are not binding on a court. *Thorleif Larsen & Son, Inc.*, 2 BNA OSHC 1256, 1258 n.4 (No. 370, 1974).

[7] There was no complaint or answer filed in this matter because those pleadings are not required in Simplified Proceedings. 29 C.F.R. §§ 2200.200(b) & 2200.205. In Simplified Proceedings, the issues for hearing are defined initially by the Citation and are thereafter refined through prehearing proceedings. 29 C.F.R. §§ 2200.200(b)(2), 2200.207(b), and 2200.209(b).

An administrative law judge may amend a citation item *sua sponte* after the close of the hearing pursuant to the standards set forth in current Rule 15(b)(2) of the Federal Rules of Civil Procedure. *Fossett*, 7 BNA OSHC 1915 (No. 76–3944, 1979); *Torry v. Northrup Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005) (upholding trial judge's *sua sponte* amendment of complaint under Rule 15(b)(2)). Amendment under Rule 15(b)(2) "is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so." *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984) (emphasis in original). "Trial by consent may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue." *Id.* at 2129-30.

Instance "a" of Item 2a: Hoist Hook Safety Latch

With respect to instance "a" of Item 2a, which pertains to the absence of a self-closing safety latch on the crane's hoist hook, the parties stipulated that the Respondent had removed the safety latch from the hoist hook that it was using to hoist the bundled trusses. (Stipulations 16 and 17; Tr. 20). Section 1926.1425, quoted above, requires that hooks with self-closing latches be used in hoisting operations. It provides an exception for unlatched "J" hooks when "used for setting wooden trusses." The reason for this exception was explained when the final rule was issued as follows:

> Paragraph (c)(2) requires the use of hooks with self-closing latches or their equivalent, to prevent accidental failure of the hooks. However, the use of ''J'' type hooks is permitted for setting wooden trusses. This exception is designed to enable the truss to be unhooked without the need for an employee to go out on the truss. This avoids the additional exposure to fall hazards that would otherwise occur from going out on the truss to release a latched hook.

75 Fed. Reg. 48007 (Aug. 9, 2010).

This exception is not applicable here because the Respondent's activity was the hoisting of about eight bundled trusses, not the setting of individual trusses, which is the only activity to which the exception applies.[8] Based on the shift inspection required by §

The matter of the conformance of the hoist hook and installation of the wedge socket to applicable standards were the underlying matters at issue as to Item 2a. The parties squarely recognized that they were trying the issue of whether the conditions of the hoist hook and wedge socket installation were deficiencies that should have been identified and acted upon as a part of the required shift inspection. Those matters were fully and fairly tried with the consent of the parties.

Item 2a alleged that the Respondent violated subparagraph (d)(3) by failing to take the crane out of service. This is the same action that would have been required for a violation of subparagraph (d)(2). There is thus no prejudice to the Respondent resulting from the Secretary's erroneously alleging a violation of subparagraph (d)(3) rather than (d)(2).

Accordingly, amendment of Item 2a to allege a violation of § 1926.1412(d)(2) is appropriate.

[8] Because Item 2a pertains to the Respondent's activity of hoisting the bundled trusses, and not setting individual trusses, it is not necessary to decide whether the

1926.1412(d)(1)(v), the Respondent should have taken the crane out of service until the deficiency was corrected (by employing a hoist hook with a safety latch to hoist the bundled trusses). The Respondent violated the standard by failing to do so. An employee was exposed to the hazard, as is depicted by photographs showing a worker guiding the load. (Exs. C-4 & C-5). The Respondent had actual knowledge of the violation, in that the Respondent had intentionally removed the self-closing safety latch from the hoist hook.

The purpose of the standard is to prevent the unintentional unhooking of a load and the resulting risk to employees in the fall zone, and thus instance "a" of Item 2a was properly classified as serious because violation of the standard could result in death or serious injury. 29 U.S.C. § 666(k); *Mosser*.

The affirmative defense of "greater hazard" fails because proof of the essential element respecting application for a variance from the standard is absent. Also, as with Item 1, there is no evidence that compliance with the standard could have caused a worker to become exposed to any greater hazard (i.e., a fall hazard). This is because a worker would have been able to unlatch the hoist hook without having to climb a ladder or scale a truss. (Tr. 76-77, 164).

The affirmative defense of infeasibility has also not been established. According to Michael Barlament, it would have taken about two minutes to install the self-closing safety latch onto the hoist hook. (Tr. 202-03). Adding two minutes to an operation in

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activity of setting an individual truss using the chain sling and hoist hook with no safety latch falls within the scope of the "J" hook exception of § 1926.1425(c)(2). [There were suggestions during the hearing that the use "J" hooks for the setting of individual trusses would necessarily be in combination with a hoist hook that was fitted with a self-closing latch. (E.g., Tr. 70-71, 120-28, 176-77, 187-89, 257).]

order to comply with a standard is far from rendering compliance technologically or economically infeasible.

Instance "b" of Item 2a: Wedge Socket Installation

The dead end of the wire rope was required to be at least six inches in length. (Stipulation 20; Tr. 21). The CO did not measure the dead end, but testified that based upon his six years of experience as a carpenter, he was able to visually estimate that the dead end was no longer than three inches (although the CO allowed that if the bent wires were straightened out, the dead end might have been longer than three inches). (Tr. 38, 56, 98-100). In contrast, Michael Barlament was at least equally assured in his testimony that the dead end was at least six inches in length. (Tr. 219-25). The sole photograph of the dead end was taken from an angle below the level of the wedge socket and dead end – the photograph is not conclusive as to whether the dead end was less than six inches long. (Ex. C-7). If the CO had simply measured the dead end during the inspection, there likely would not have been any issue of fact respecting its length. The undersigned does not doubt that the CO is sincere in his belief that the dead end was less than six inches in length, and it is entirely possible that the CO may be correct. The CO's testimony and photographic evidence, however, are simply insufficient to carry the Secretary's burden of proof on this contested issue of fact. The Secretary has failed to establish that the dead end of the wire rope was not the minimum required length of six inches.[9]

[9] In his testimony, the CO also suggested that the frayed condition of the dead end established that the Respondent had not properly seized the wire rope before it was cut as is required by 29 C.F.R. § 1926.1414(h). (Tr. 62). The CO also suggested that the frayed condition of the dead end was itself a deficiency that required the crane to be removed from service until corrected.

The Citation did not allege that the wire rope was not properly seized before it was cut as required by § 1926.1414(h), but in any event, there is insufficient evidence to establish that the Respondent had failed to do so.

The Secretary has failed to establish that the Respondent violated § 1926.1412(d)(2)(vii) with respect to installation of the wire rope in the wedge socket as alleged in instance "b" of item 2b.

Items 2b and 2c

The provisions of § 1926.1412 pertaining to both the monthly and the annual/comprehensive inspections require an employer to document "the items checked and the results of the inspection." 29 C.F.R. §§ 1926.1412(e)(3)(i)(A) and (f)(7)(i). With respect to monthly inspections, the regulation provides a list of 14 subparagraphs identifying items that must be inspected. § 1926.1412(e)(1). Regarding the annual/comprehensive inspection, the regulation requires an inspection that includes all items required in a monthly inspection, and also additional inspection items that are set forth in 21 subparagraphs (many of which have subparagraphs of their own). §§ 1926.1412(f)(2)(i) through (xxi).

The bare one-page documents prepared by Gus Barlament for each of the four monthly inspection records and for the single annual/comprehensive inspection record

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The Citation also did not allege that the frayed condition of the dead end was a deficiency that required the crane to be removed from service. Moreover, the matter of the frayed dead end was not raised in the Secretary's pretrial submission, opening statement, or oral closing argument.

The standard identified in Item 2a was subparagraph (D) of § 1926.1413(a)(2)(i), which pertains to the deficiency of "[i]mproperly applied end connections." Subparagraph (D) was appropriately cited with respect to the *length* of the dead end, but it is not applicable to the frayed condition of the individual wire strands of the dead end. Rather, subparagraph (A) of § 1926.1413(a)(2)(i), which pertains to "[s]ignificant distortion in the wire rope structure such as … unstranding," might arguably have been applicable to the frayed dead end. However, since Item 2a did not cite subparagraph (A), the evidence was not oriented to the applicability of that provision to the frayed condition of the dead end.

Thus, the frayed condition of the dead end constitutes an "unpleaded" issue for purposes of Fed. R. Civ. P. 15(b)(2). That unpleaded issue was not fully tried with the express or implied consent of the parties, and thus the Citation is not amended *sua sponte* to include it.

fail to reflect either the items checked or the results of the inspection, and thus the records do not meet the cited standards for documentation. (Ex. C-13). Workers were exposed to the operation of a crane that lacked the required documentation of the monthly and annual/comprehensive inspections. The Respondent had actual knowledge of the violation, having prepared the very spare records of monthly and annual inspections.

Michael Barlament suggested that the maintenance the Respondent performs on its National 1800 crane, and the records relating to that maintenance, were superior to the monthly and annual/comprehensive inspections required by § 1926.1412. (Tr. 192-93, 226-27; *see also* Respondent's Pretrial Submission, p. 3). Notably, however, he did not testify that those maintenance records included a description of the items inspected and the results of the inspection, as the standard requires. The great weight of the evidence establishes that the Respondent violated the standards cited in Items 2b and 2c regarding documentation of inspections.[10]

The purpose of § 1926.1412 is "to prevent injuries and fatalities caused by equipment failures by establishing an inspection process that identifies and addresses safety concerns." 75 Fed. Reg. 47967 (Aug. 9, 2010). Violation of the standard relating to documentation of an inspection raises a serious question as to whether such inspections

[10] Michael Barlament also suggested in his testimony that the inspection documentation requirement was unreasonably burdensome. (Tr. 227). In this regard, OSHA specifically noted that during the rulemaking process, several "Small Entity Representatives" objected to the proposed "requirement for documentation of monthly and annual inspections, stating that such documentation would be unduly burdensome and would not, in their opinions, add to worker safety." Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59774 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926). OSHA expressly requested public comment on this issue. *Id.* After receiving those comments from the public, OSHA kept the requirement for inspection documentation in the final rule. Cranes and Derricks in Construction, 75 Fed. Reg. 479006, 47973 (Aug. 9, 2010) (to be codified at 29 C.F.R. part 1926).

were conducted in the manner required by the regulation. *See* 73 Fed. Reg. 59770 (Oct. 9, 2008) (noting that the documentation requirement for monthly inspections was intended to "increase the likelihood that more employers would implement systems for conducting and responding to inspections," and to "create a record that the employer could use to help track developing problems so that they could be corrected in time to assure continued safe operation of the equipment."); *see also* 75 Fed. Reg. 47973 (Aug. 9, 2010) (providing a similar rationale with respect to the documentation requirement for the annual/comprehensive inspection). Items 2b and 2c were properly classified as serious because the violation of the standards could result in death or serious injury. 29 U.S.C. § 666(k); *Mosser*.

Penalty Assessment

The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). The permissible range of penalties for a serious violation is from no penalty to $7,000. 29 U.S.C. § 666(b). The Complainant seeks imposition of an aggregate penalty of $4,800.00.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the S., Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). Gravity is the primary consideration among these four statutory criteria, and is determined by "such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A.*

Jones Constr. Co., 15 BNA OSHC 2200, 2214 (No. 87-2059, 1993). The matter of an employer's "good faith" should take into account such factors as "aggravated conduct, disregard of the Act, or flouting." *Potlatch Corp.*, 7 BNA OSHC 1061, 1064 (No. 16183, 1979).

In regard to size, the Respondent is a very small employer, having only one employee, and thus a significant reduction for size is appropriate.

As to good faith, the Respondent chose to disregard or ignore regulatory standards that it considered onerous, inconvenient, or unnecessary. The Respondent is due no reduction for good faith.

As to compliance history, the Respondent has no prior record of violations, but also had not been inspected in the five years previous to May 8, 2012. (Tr. 84). Michael Barlament asserts that he has had no instance of accident or injury in his 40 years of crane operating experience. While an accident-free or injury-free record may "properly be considered in determining the gravity of the violation for which it was cited," *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976), such a record does not necessarily reflect a history of compliance. *See Sec'y v. Union Oil of Cal.*, 869 F.2d 1039, 1044-45 (7th Cir. 1989) ("Accidents are, fortunately, low-probability events, and it is desirable to prevent hazards before they produce disaster. Recognition of a hazard should not wait upon the occurrence of a fatal accident.") (Posner, J.).

The undersigned concludes that the violations proven were all of high severity in that the standards violated could potentially result in death or serious injury as discussed above.

In regard to Item 1, the probability that an injury would result from the hazard created by the absence of the identification tag was a lesser probability, because it was apparent to the CO that the chain sling being used to hoist the bundled trusses had sufficient capacity to hoist the load. (Ex. C-1; Tr. 52).

With respect to Item 2a, instance "a", the probability that the bundled trusses would unintentionally become detached from the hoist hook was a lesser probability. (Tr. 184).

In regard to Items 2b and 2c, the probability that there would be an equipment failure and resulting injury as a result of the deficient documentation of the periodic inspections is a lesser probability. For purposes of determining probability of injury or death, it is assumed that the actual inspections were properly conducted and that any required corrective action was taken.

Considering these factors, the undersigned determines that the appropriate penalties are $750 for Item 1 and $750 for grouped Items 2a, 2b, and 2c.

Findings of Fact and Conclusions of Law

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

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ordered as follows:

1. Violation of 29 C.F.R. § 1926.251(b)(1) (Item 1, instance "a") is affirmed as a serious violation of the Act, and a penalty of $750 is assessed.

2. Violation of 29 C.F.R. § 1926.1412(d)(2) (Item 2a, instance "a") is affirmed as a serious violation of the Act. Instance "b" of Item 2a is vacated.

3. Violation of 29 C.F.R. § 1926.1412(e)(3)(i) (Item 2b) is affirmed as a serious violation of the Act.

4. Violation of 29 C.F.R. § 1926.1412(f)(7) (Item 2c) is affirmed as a serious violation of the Act.

5. A penalty of $750 is assessed for grouped Items 2a, 2b, and 2c.

SO ORDERED.

/s/_____
WILLIAM S. COLEMAN
U.S. OSHRC JUDGE

Date: June 13, 2013
Washington, D.C.