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. STEIN, INC. Respondent.	OSHRC DOCKET NO. 94-0810

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 April 6, 1995. The decision of the Judge will become a final order of the Commission on May 8, 1995 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 April 26, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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

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

FOR THE COMMISSION

Ray H. Darling, Jr./SKA

Date: April 6, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-0810

NOTICE IS GIVEN TO THE FOLLOWING:

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

John T. Billick, Esq.
Buckingham, Doolittle & Burroughs
1375 E. Ninth Street, Suite 1700
Cleveland, OH 44114

Tod Morrow, Esq.
Black, McCuskey, Souers & Arbaugh
1000 United Bank Plaza
220 Market Avenue South
Canton, OH 44702

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00103509618:05

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,
Complainant,

v.

STEIN, INC.,
Respondent.

OSHRC Docket No.: 94-810

Appearances:

Betty Klaric, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

John Billick, Esquire
Buckingham, Doolittle & Burroughs
Cleveland, Ohio
For Respondent

Tod Morrow, Esquire
Black, McCuskey, Souers & Arbaugh
Canton, Ohio
For Brechbuhler

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Stein, Inc. (Stein), operates a business that offers steel mill services, slag processing, heavy equipment rental, and heavy equipment maintenance. Stein's headquarters are located in Cleveland, Ohio, and its area of operation is northeastern Ohio (Tr. 400). On October 21, 1993, an employee of Brechbuhler Scales was electrocuted while serving as a ground man for a Stein crane operator (Tr. 19). Beginning on October 28, 1993, Occupational Safety and Health Administration (OSHA) compliance officer Frank Coffelt inspected the worksite where the fatality occurred. On February 22, 1994, the Secretary issued a citation to Stein containing seven items alleging serious violations of the

Occupational Safety and Health Act of 1970 (Act). At the hearing, the Secretary moved to vacate item 6, which the court granted (Tr. 13).

Background

The fatality occurred at a worksite located at 3341 Jennings Road in Cleveland. The site was owned by LTV, one of Stein's major customers. Stein provides two basic services for LTV: (1) it processes steel slag and scrap produced in the steel-making process at LTV; and (2) it furnishes its heavy equipment and heavy equipment operators to LTV (Tr. 336).

The steel slag and scrap is transported to the processing area by truck. Prior to the actual processing, the slag is weighed (Tr. 21-22). LTV wanted Stein to provide a new truck-weighing scale to weigh the slag (Tr. 337-338). Stein contracted with Brechbuhler Scales, Inc. (Brechbuhler), to provide and install a truck-weighing scale. Stein agreed to provide the crane and crane operator needed for the installation of the scale (Exh. C-1).

On the morning of October 21, 1993, a truck brought the scale parts to the worksite. Ned Ellsworth, Stein's turn-foreman supervisor, assigned Scott Steiskal, a mechanic for Stein, to operate a 390 Grove crane to unload the scale assembly parts. The crane's boom was 75 feet long when fully extended. During the unloading process, the boom was extended about 30 feet (Tr. 176). Steiskal, for some reason, was unable to move the crane. Therefore, the unloading took place 100 to 150 feet from the location originally planned for the unloading (Tr. 35, 287, 301). Eugene Wind, an employee of Brechbuhler's, served as Steiskal's ground man (Tr. 151). A ground man is one who uses hand signals to direct the crane operator from the ground (Tr. 305).

Later that day, Ellsworth changed operators and assigned James Cyrulik, a crane operator for Stein, to operate the same crane that Steiskal had operated earlier. Cyrulik was able to move the crane without any problem (Tr. 194). Wind again served as ground man. While Wind was attaching a chain to one of the scale pieces so that the crane could move it, the crane's boom came into contact with a 13,000-volt line and Wind was electrocuted (Tr. 201, 206).

Was Stein an Employer Within the Meaning of the Act?

Stein raises the threshold issue of whether or not it was the employer of any exposed employee within the meaning of the Act. Stein argues that it merely leased equipment and equipment operators to Brechbuhler, and that, as a mere lessor, Stein did not control the work or those performing it on October 21, 1993.

Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(6) of the Act defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." "Only an 'employer' may be cited for a violation of the Act." *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1992 CCH OSHD ¶ 29,775 (No. 88-1745, 1992).

A number of Review Commission cases have addressed the issue of the employment relationship, most recently, *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 1994 CCH OSHD ¶ __ (No. 91-2929, 1994). *Abbonizio* emphasized that the key factor in defining the employment relationship is the right to control the work. This is consistent with the earlier decisions on the issue, such as *MLB Industries, Inc.,* 12 BNA OSHC 1525, 1985 CCH OSHD ¶ 27,408 at p. 35,570 (No. 83-231, 1985), where the Commission explained:

> The express purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To effectuate this purpose it is appropriate for the Commission, in considering whether an employment relationship exists, to place primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained.

See also Nationwide Mutual Insurance Co. v. Darden, 112 S.Ct. 1344, 1348 (1992).

Also somewhat helpful in resolving employment questions is the "economic realities test" reiterated in *Loomis Cabinet Co.,* 15 BNA OSHC 1635, 1637, 1992 CCH OSHD ¶ 29,775 (No. 88-2012, 1992). [1]

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[1] Answers to the questions posed by the "economic realities" test (other than questions (3) and (4) which relate to control) are as follows:

1) Whom do the workers consider their employer? Both Steiskal and Cyrulik testified that Stein was their employer (Tr. 146, 190).

(continued...)

Stein claims that once it assigned Steiskal and then Cyrulik to operate the crane for Brechbuhler, it relinquished all control over the workers and had no responsibility for safety at the scale installation site. Analyzing Stein's relationship with the workers, however, supports the Secretary's claim that Stein was Steiskal's and Cyrulik's employer within the meaning of the Act.

The crucial test of control may be analyzed in terms of questions (3) and (4) of the economic realities test:

3) Who has the responsibility to control the workers? and

4) Does the alleged employer have the power to control the workers?

Turning to question (4) first, the record establishes that Stein did have the power to control the workers. Stein's turn-foreman supervisor, Ellsworth, and Stein's master mechanic, David Pafford, told Steiskal that he did not need to return to operate the crane (Tr. 177). Cyrulik testified that if Brechbuhler had asked him to leave, he "would have gone to Ned Ellsworth and told him that Brechbuhler told me to leave or they were done with me or whatever the case would be" (Tr. 236-237). Ellsworth testified that Cyrulik

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[1](...continued)

2) Who pays the workers' wages? Stein paid Steiskal and Cyrulik (Tr. 162, 205).

5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers? Stein hired Steiskal and Cyrulik. It had the power to fire or to modify their condition of employment. Brechbuhler did not have power to fire or modify the condition of employment of Steiskal and Cyrulik (Tr. 162, 205).

6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight? No evidence was adduced on this point.

7) How are the workers' wages established? Stein established the workers' wages (Tr. 162, 205).

As demonstrated by these answers, Stein was the employer of Steiskal and Cyrulik to the extent that it was responsible for setting the employment conditions. These are less significant factors, however. In *MLB,* the Commission held that, although who pays the employees' wages "has some bearing on the employment relationship, [it is] not directly related to the issue of control, and should normally be accorded less emphasis in determining the employment relationship under the Act." *MLB,* 1985 CCH OSHD at p. 35,510.

threatened to file a grievance with the union if Ellsworth did not assign Cyrulik instead of Steiskal to operate the crane (Tr. 287). Cyrulik, the union's steward, wanted a crane operator and not a mechanic operating the crane (Tr. 287).

The record establishes that Stein had the power to control its employees. Ellsworth assigned Steiskal to operate the crane, and then replaced him with Cyrulik. This change had nothing to do with Brechbuhler's control of the site or of the work. It was a decision made by Stein to avoid a conflict with its own personnel. Cyrulik would go to Ellsworth if released by Brechbuhler. Steiskal reported to Brechbuhler when assigned by Ellsworth and then stayed away when Ellsworth told him he was no longer needed. Both Steiskal and Cyrulik looked to Ellsworth as their authority to work. Stein had the power to control the workers.

This leave for consideration question (3) of the economic realities test: Who has the responsibility to control the workers? This is the question that most closely approaches the Supreme Court's formulation of the issue in *Darden*, in which the Court states: "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 112 S. Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

In the present case, Stein argues that Brechbuhler had sole responsibility for the worksite. Stein had no supervisory personnel on the site at the time of the accident. Brechbuhler's representatives were the ones signaling the crane operators and directing them what to do. A closer examination of Stein's involvement with the site and the scale installation process reveals that its relationship with Brechbuhler is more complicated than Stein represents.

Stein had an ongoing relationship with LTV. Stein leased property from LTV. Stein took slag and scrap metal owned by LTV and processed it in its processing plant. Stein's trucks were used to haul the slag and scrap metal. Stein leased the site of the scale installation from LTV (Tr. 372-375).

Stein had a contractual agreement with LTV to provide LTV with a new scale that was to be totally automated (Tr. 336). Stein contracted with Brechbuhler to install a Thurman #8120 Heavy Duty Mechanical/Electronic Motor Truck Scale. Stein agreed to

supply the "site preparation, crane service, backfill, conduit, trenching, [and] power supply" (Exh. C-1). Stein was quite familiar with the site of the scale installation. Stein's trailers are located approximately 500 yards from the scale installation site (Tr. 286).

Lou Hanson, who had acted as a purchasing agent for Stein at the time of the accident, explained why Stein negotiated to provide the crane service (Tr. 247):[2]

> Well, it was a two-fold reason. One for costs and one it was more reasonable. We provide the lift because we had the machines right there to do it, the time it needed to be done, rather than Brechbuhler subcontracting that out and probably costing us more to do it.

James Conlon, Stein's vice-president and general counsel, agreed with Hanson that Stein benefitted economically from its arrangement with Brechbuhler (Tr. 341):

> Essentially, Brechbuhler would have hired a subcontractor or they would have put one of their lifting pieces of crane and transported it from their facility in Canton, which is where their headquarters are, to the site in LTV. By providing that service, essentially, the economic benefit was not to have to pay a third party for the crane service which we had the capacity on site.

Finding Stein to be the employer is consistent with the holding in *Abbonizio, supra*. Further, the present case is distinguishable from *Union Drilling,* 16 BNA OSHC 1741, 1994 CCH OSHD ¶ 30,376 (No. 93-154, 1994), an unreviewed decision on which Stein relies for support of its position. In *Union Drilling,* which was decided by the undersigned, a company known as CNG was in the process of preparing a gas field for the underground storage of natural gas. CNG was short of manpower, so it decided to contract with an outside company for help. Union Drilling had previously done some drilling for CNG. Union Drilling sent over 2 two-man crews. From that point on, Union Drilling had no other involvement with CNG's project, except for paying the employees.

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[2] Stein attacks Hanson's credibility, painting him as a disgruntled former employee who was terminated under a cloud of suspicion. Hanson's specific testimony regarding why Stein provided crane service to Brechbuhler, however, was undisputed. In fact, Conlon, Stein's vice-president and general counsel, corroborated Hanson's testimony on this point.

The employees that Union Drilling sent over had no experience in the type of work CNG required them to do. The CNG supervisor stated that CNG could have picked the people off of the street to do that job. No special expertise was required.

Stein's situation in the present case is significantly different from that of Union Drilling. Union Drilling's only point of contact with CNG was for the purpose of supplying its employees to help with CNG's manpower shortage. In contrast, Stein was the company responsible to LTV for getting a scale installed, and it was the company that contracted with Brechbuhler to install the scale. Union Drilling's supervisors never visited the site where the work for CNG was being done. Stein actually leased the site of the scale installation and had trailers located about 500 yards from the installation site. Steiskal and Cyrulik were both qualified to operate a crane, unlike the unskilled laborers in *Union Drilling.*

Stein's familiarity with the LTV property increases its responsibility for controlling the employees. The witnesses were unanimous in their testimony regarding the presence of overhead wires on the LTV site. Steiskal stated that there were wires "all over the mill" (Tr. 149). He stated that "you always have to be aware of them" (Tr. 150). Cyrulik testified that there are "wires everywhere we work in the steel mill" (Tr. 194). Stein's Hanson told the court that when the scale installation was being planned, "The electrical wires were there. We were aware of them" (Tr. 250). David Pafford, a master mechanic for Stein, testified that he stopped by the installation site the morning of the accident. Steiskal was operating the crane. Regarding the power lines, Pafford stated, "I pointed up to Scott and he nodded his head 'I see them.' I jumped back in my truck and took off" (Tr. 273).

In *MLB*, the Commission found that MLB was not an employer under the Act after an MLB employee was killed while working on a project for Crown, a general contractor. MLB was a subcontractor who supplied three employees to Crown at Crown's request. The Commission found that MLB's power to control the employees after they had been assigned to work for Crown was "largely indirect or theoretical." *MLB,* 1985 CCH OSHD at p. 35,511. The Commission found it significant that "there is no indication that MLB knew of any circumstances that would have required it to take action with respect to the workers' employment, either for safety purposes or for any other reason." *Id.*

In the present case, Stein had every reason to know of a circumstance, *i.e.,* electrical wires all over LTV's property, including at the scale installation site, that would have required it to take action for its employees' safety. Stein had actually leased the site from LTV. Stein was ultimately responsible for the installation of the scale. Its trailers were situated not far from the installation site. Stein knew where Brechbuhler wanted to use its crane and crane operators to move the scale pieces. Pafford pointed the wires out to Steiskal, who assured him that he knew they were there. Stein cannot simply keep its supervisory personnel away from the site during a crane operation and thus claim that it had no responsibility for controlling its employees. The scale was being installed by Brechbuhler on Stein's behalf. Stein shared control over Steiskal and Cyrulik. Stein was an employer of Steiskal and Cyrulik within the meaning of the Act.

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that Stein committed a serious violation of § 1926.20(b)(2), which provides:

> (b) *Accident prevention responsibilities.* (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Stein finds itself in a difficult position with respect to this item. The whole thrust of Stein's case at the hearing was that it had no responsibility and exercised no control over the scale installation site. Not surprisingly, Stein finds it contradictory to argue strongly that it designated a competent person to make frequent and regular inspections of the worksite.

Compliance officer Coffelt testified that Pafford and Ellsworth told him that they had been on the site the day of the accident (Tr. 88). Ellsworth denied this at the hearing (Tr. 285). Pafford testified that he had stopped by the site the morning of the accident, but not to make an inspection of the site (Tr. 272): "I stopped to see how much longer Scott was going to be there because I needed him."

Pafford told Coffelt that it was "not his responsibility to observe and to evaluate the job site but rather it was the foreman's responsibility or the general foreman's responsibility" (Tr. 29). Stein's foreman, Ellsworth, told Coffelt that it was a Mr. Peskar's responsibility to

evaluate the site with respect to safety and health issues. Peskar told Coffelt "that he did not evaluate the job site. He did not visit the job site" (Tr. 31).

Stein contends that its employees were well aware of the presence of the power lines at the site, and that signs were posted in the crane cab warning of the hazards of operating around power lines. The cited standard, however, requires frequent and regular inspections of the site by a designated competent person. No such inspections were made. Stein was in violation of § 1926.20(b)(2).

The Secretary alleged the violation was serious. Failure to designate a competent person to conduct frequent and regular inspections of a work site where energized power lines are present and where a crane operation is planned leads to a substantial probability that death or serious physical harm could result. The tragic outcome of this case offers sufficient proof of the serious nature of the violation. The violation is affirmed as serious.

Item 2: Alleged Serious Violation of § 1926.20(b)(4)

Section 1926.20(b)(4) provides:

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

The Secretary contends that Steiskal was not qualified by training or experience to operate the Grove crane that Ellsworth assigned him to operate. Section 1926.32(m) defines "qualified" as:

> one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.

The Secretary bases his allegation that Steiskal was unqualified to operate the crane on two grounds: first, that Steiskal had no formal training in crane operation; and second, that Steiskal was unable to move the crane to where Brechbuhler wanted it. Both grounds are without merit.

Steiskal had worked for Stein for seven years at the time of the hearing. Steiskal received what he called on-the-job training from Stein (Tr. 146). Steiskal explained that

while learning to operate heavy equipment at Stein, the operator is observed by at least two union members before he is allowed to operate on his own. If the operator has a problem, he meets with representatives of Stein and the union. He is not allowed to operate the piece of heavy equipment until he is approved by the two observers (Tr. 173-175). Stein has a committee that evaluates crane operators (Tr. 362). Conlon testified that he had observed Steiskal operate a crane and that he rated his crane operating ability as "excellent" (Tr. 360). Cyrulik also testified that Steiskal was a qualified crane operator (Tr. 220-221).

On the second point, Steiskal's inability to move the crane to where Brechbuhler wanted it, the Secretary suffers from a lack of evidence regarding the incident. The only explanation given for Steiskal's inability to move the crane was that given by Steiskal, who stated that it was a mechanical failure and not a failure of his operating ability (Tr. 186). Steiskal's testimony is undisputed on this point. Steiskal stated that once Wind saw he was unable to move the crane, he directed him to unload the scale pieces from where he was (Tr. 154-156). Wind did not ask Steiskal to spend any time attempting to fix the problem. The fact that Cyrulik was able to move the crane later in the day does not reflect on Steiskal's qualifications as a crane operator.

The Secretary has failed to establish a violation of § 1926.20(b)(4). Item 2 is vacated.

Items 3, 4 and 7: Alleged Serious Violations
of §§ 1926.416(a)(1), 1926.416(a)(3) and 1926.550(a)(15)(i)

The Secretary charged Stein with serious violations of §§ 1926.416(a)(1), 1926.416(a)(3) and 1926.550(a)(15)(i), items 3, 4 and 7, respectively.

Section 1926.416(a)(1) (item 3) provides:

> (a) *Protection of employees.* (1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Section 1926.416(a)(3), (item 4) provides:[3]

> (3) Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

In *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1986-87 CCH OSHD ¶ 27,829 (No. 84-696, 1987), Cleveland Consolidated, Inc., (Cleveland) was charged with violating § 1926.400(c)(1) and (c)(2), which are verbatim the same standards now found at § 1926.416(a)(1) and (a)(3), respectively. In *Cleveland,* the Review Commission found that Cleveland had violated § 1926.400(c)(1) (which corresponds to § 1926.416(a)(1) cited in item 3 of this case) because employees were working in proximity to energized wires. The Commission found that it would be duplicative to also find Cleveland in violation of § 1926.400(c)(2) (which corresponds to § 1926.416(a)(2) cited as item 4 in this case). The Commission reasoned:

> As a practical matter, however, the way by which Cleveland would meet section 1926.400(c)(1) is to instruct employees working in proximity to electric power circuits to de-energize the circuit or to use insulation or other protective measures. This would, of course, meet the requirement of section 1926.400(c)(2) that employees be advised of the "protective measures to be taken." In short, because the two citation items involve substantially the same violative conduct, we find only a single violation and assess a single penalty.

Id at p. 1118.

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[3] Item 4 of the citation alleged:

> On October 21, 1993, the employer did not consider the hazards involved with working near the 13,000 volt power lines nor the protective measures to be taken such as, but not limited to:
>
> (1) Moving, insulating or deenergizing the lines;
> (2) Maintaining absolute limit of approach by the crane; and
> (3) Using boom guards or proximity warning devices.

Here, the way by which Stein would meet § 1926.416(a)(1) would be to instruct employees working in the proximity of energized, uninsulated electrical power lines to maintain a 10 foot clearance from the lines. Item 4 involves substantially the same violative conduct as item 3. Therefore, item 4 will be vacated as duplicative of item 3.

As was true for items 3 and 4, the standards at issue as items 3 and 7 (§ 1926.550(a)(15)(i)) address the same hazard, *i.e.* an employee coming into contact with an electrical power source from overhead electrical power lines.

Section 1926.550(a)(15)(i) (item 7) provides:

> (15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:
>
> > (i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.

Both items 3 and 7 arose from the same incident, that of operating the Grove crane in proximity to the electrical power lines. Section 1926.416(a)(1) contemplates that compliance will be accomplished by deenergizing the circuit or guarding it by insulation or other means. Section 1926.550(a)(15)(i) requires that if the lines have not been deenergized or guarded, then the equipment or machines should be operated with a minimum clearance of 10 feet between the lines and any part of the machine. Stein's operation of the crane within 10 feet of lines that had not been deenergized or guarded is one violative act and the hazard that it creates is the same one addressed by both §§ 1926.416(a)(1) and 550(a)(15)(i). As such, items 3 and 7 are duplicative. Because § 1926.550(a)(15)(i) is more specific, addressing as it does the use of cranes, item 7 will be retained as the standard at issue. Item 3 is vacated.

> In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited, (2) the terms of the standard were not complied with, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence.

Kiewit Western Co., 16 BNA OSHC 1689, 1691, 1994 CCH OSHD ¶ 30,396, p. 41,398 (No. 91-2578, 1994).

Northwood Stone & Asphalt, Inc., 16 BNA OSHC 2097, 1994 CCH OSHD ¶ 30,583, p. 42,349 (No. 91-3409, 1994).

Section 1926.550(a)(15)(i) is applicable to the conditions cited. Cyrulik operated the Grove crane within 10 feet of the energized power lines, thus violating the terms of the standard. Cyrulik was exposed to the hazard of electrocution or electrical shock. Knowledge is established upon a showing that the employer could have ascertained the condition through exercise of reasonable diligence. *Prestressed Systems, Inc.*, 9 BNA OSHC 1865, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981). Ellsworth, Stein's supervisor on the day of the accident, was aware of the extent to which power lines existed over the immediate area where the crane was to operate (Tr. 292). It was not Stein's practice to de-energize or insulate the power lines when its employees worked around them (Tr. 366). A reasonable employer would have taken steps, at a minimum, to ensure that the 10-foot clearance rule was observed. While Stein may have had no actual knowledge that Cyrulik was operating the crane within 10 feet of the power lines, Stein could have known with the exercise of reasonable diligence that Cyrulik would be operating so close to the power lines that preventative action was required. "Reasonable diligence implies effort, attention, and action, not mere reliance upon the action of another." *Carlisle Equipment Co. v. Secretary of Labor,* 24 F.3d 790, 794 (6th Cir. 1994). Thus, Stein had constructive knowledge of the violation.

The Secretary has established a violation of § 1926.550(a)(15)(i). That the violation is serious is proven by the death of Wind.

Item 5: Alleged Serious Violation of § 1926.550(a)(2)

Section 1926.550(a)(2) provides:

> (2) Rated load capacities, and recommended operating speeds, special hazard warnings, or instruction, shall be conspicuously posted on all equipment. Instructions or warnings shall be visible to the operators while he is at his control station.

It is undisputed that Stein had a load capacity chart posted inside the crane cab (Tr. 74, 114, 221). It is also undisputed that the crane's load capacity was not stenciled on the outside of the crane at the time of the accident (Tr. 72). Stein later painted the load rating ("30 tons") on the crane boom, even before Coffelt suggested to it that failure to have the rating there constituted a violation (Exh. C-15, Tr. 72).

The Secretary argues that the standard requires that the crane's rated load capacity be marked on the outside of the crane. When asked if it was his position that posting a rated load capacity chart in the crane cab was insufficient to comply with § 1926.550(a)(2), Coffelt responded (Tr. 130): "That's correct. It is a vertical standard. It is required. Everyone knows it is required. It is just one of those things that is required on a crane."

Despite Coffelt's certitude, the standard itself makes no such demands on the employer. The wording of the standard makes it clear that a posting inside the crane cab is acceptable to meet its requirements. Furthermore, a survey of decisions dealing with § 1926.550(a)(2) demonstrates that it is necessary that accurate rated load capacities be posted in the crane cab.

The four most recent administrative law judges' decisions involving § 1926.550(a)(2) address the issue only in terms of the rated load capacity being posted on a chart inside the crane's cab. *See John Quinlan d/b/a Quinlan Enterprises,* (No. 93-817, 1994) (Judge Spies); *Anthony Crane Rental, Inc.* (No. 91-0556, 1993) (Judge Schoenfeld); *John Quinlan d/b/a Quinlan Enterprises* (No. 92-756, 1993) (Judge Burroughs); and *Capitol Tunneling* (No. 89-2248, 1991) (Judge Burroughs).

In *The Towne Construction Co.*, 12 BNA OSHC 2185, 1986-87 CCH OSHD ¶ 27,760 (No. 83-1262, 1986), *aff'd* 847 F.2d 1187, the Review Commission reversed Judge Burroughs' decision which had found a § 1926.550(a)(2) violation against Towne. Towne's crane operator had removed the load capacity chart from the crane cab's door on the day before the inspection. The crane operator looked at the chart during his lunch hour and then placed the chart in his toolbox instead of back on the cab door. In reversing Judge Burroughs's affirmation of the item, the Commission stated:

> About 3 weeks before the accident, Richard Mazeroski, an "oiler" employed by Towne, inspected the crane and found the load chart was posted on the inside of the door to the crane's cab. The crane operator stated that the chart was there when he took it to read the day before the accident. It was not established that any supervisory employee of Towne would have had the opportunity to observe that the load chart was not posted inside the cab. Because Towne could not reasonably have known of the absence of the load chart, we vacate citation 2.

Id at p. 36,313.

Clearly, posting the rated load capacity is sufficient under Commission precedent to satisfy the requirements of § 1926.550(a)(2). Item 5 is vacated.

PENALTY DETERMINATION

> Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business; gravity of the violation; good faith; and prior history of violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon 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,* 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Stein had between 250 and 400 employees at the time of the inspection (Tr. 400).[4] Coffelt testified that Stein was not completely cooperative with him during his inspection because he was not allowed to see a certain process that Stein had told him he could witness (Tr. 128-129). Conlon explained that he had scheduled a day for Coffelt to observe the process, but that it did not take place on that day. Conlon stated that he had no control over whether or not a certain process occurred on certain days (Tr. 369-370). Bad faith is not attributable to Stein because of this incident, although it is expected that employers will

[4] Coffelt said he was told that Stein employed 75 employees. Conlon's estimate of 250 to 400 is deemed more reliable.

make every reasonable effort to accommodate such accident investigations. Stein had previous serious OSHA violations within a three year period prior to Coffelt's inspection (Tr. 126-127).

The Secretary and Stein spent some time at the hearing discussing Exh. R-2, an internal OSHA memorandum addressing OSHA's policy in calculating certain penalties. Internal memoranda do not have the force and effect of law, nor do they confer important procedural or substantive rights or duties on individuals. *See Caterpillar, Inc.,* 15 BNA OSHC 2153, 1993 CCH OSHD ¶ 29,962 (No. 87-0922, 1993).

The gravity of the two affirmed items is severe. Item 1, a violation of § 1926.20(b)(2) for failure to designate a competent person to make frequent and regular inspections, and item 7, a violation of § 1926.550(a)(15)(i), for failure to ensure a minimum clearance of 10 feet between the crane and the power lines, involve high risk factors. The likelihood of electrocution or electrical shock was great. Wind's death is sufficient proof of the dire consequences that could result from violations of these standards at this particular site.

Although the Secretary has devised a formula to calculate uniform proposed penalties with certain percentage discounts assigned to the statutory factors, that formula is not binding on the Commission. The Commission need not assign the same monetary weight to each penalty consideration as did the Secretary, even if the resulting penalty is the same. *Roberts Pipeline Const. Inc.*, 16 BNA OSHC 2029, 94 CCH OSHD ¶ 30,576 (No. 91-2051, 1994). Based upon consideration of the foregoing criteria, a penalty of $7,000.00 for each item is appropriate and is assessed.

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 upon the foregoing decision, it is ORDERED:

1. That item 1 is affirmed and a penalty of $7,000.00 is assessed;
2. That item 2 is vacated;

3. That item 3 is vacated;

4. That item 4 is vacated;

5. That item 5 is vacated; and

6. That item 7 is affirmed and a penalty of $7,000.00 is assessed.

NANCY J. SPIES
Judge

Date: April 3, 1995