



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

S & R Enterprises, LLC,
Respondent.

OSHRC Docket No. **20-0276**

Appearances:

Jonathan Hoffmeister, Esq.
U.S. Department of Labor, Office of the Solicitor, Atlanta, GA
For Complainant

Frank L. Kollman, Esq.,
KOLLMAN & SAUCIER, P.A., Timonium, MD
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

S&R Enterprises, LLC, is a steel erection contractor. Around 2017, S&R began work as a subcontractor erecting structural steel on a renovation project at the decommissioned Riverside Power Plant in Savannah, Georgia. The new owner was repurposing the power plant as a luxury hotel that would be part of a new mixed-use development. On June 23, 2019, an S&R crew attempted to lift an industrial grappler (a giant steel claw), weighing over five tons, to a hook suspended from an overhead crane in the room destined to become the new hotel's atrium lobby. The overhead crane was a remnant of the power plant's original equipment and was no longer functional—the owner had asked the general contractor to arrange for S&R to hang the grappler from the crane hook as a decorative element for the lobby. As S&R attempted to lift the grappler to the hook, it fell, resulting in serious injuries to three workers.

The Occupational Safety and Health Administration conducted an inspection of the incident. As a result of the inspection, the Secretary issued a two-item Citation and Notification of Penalty to S&R on December 20, 2019, under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657-78 (Act), for violations of sections of the steel erection standard. Item 1a

of the Citation alleges a serious violation of 29 C.F.R. § 1926.752(d) for failing to adequately pre-plan a steel erection hoisting operation. Item 1b alleges a serious violation of 29 C.F.R. § 1926.753(d)(2)(i) for failing to rig hoisted materials so as to prevent unintentional displacement. The Secretary proposes a grouped penalty of \$13,260 for Items 1a and 1b.

S&R contests the Citation, arguing the cited standards do not apply to the cited conditions, and, assuming they do apply, the Secretary failed to establish noncompliance with the terms of the standards. The Court held a videoconference hearing in this matter on December 9, 2021. The parties filed briefs on February 7, 2022. For the reasons that follow, the Court finds the cited standards apply, but the Secretary failed to establish noncompliance with them. Accordingly, the Court **VACATES** Items 1a and 1b of the Citation.

JURISDICTION AND COVERAGE

S&R timely contested the Citation. The parties stipulate the Commission has jurisdiction over this action and S&R is a covered employer under the Act (Exh. J-1, *Stipulated Principles of Law*, ¶¶ 1-2; Tr. 14-15). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and S&R is a covered employer under § 3(5) of the Act.

STIPULATIONS

The parties stipulate the following facts:

- 1) The location of the incident “worksite” was at or near 200 River Street in Savannah, Georgia.
- 2) Respondent maintained a principal place of business at 7385 Allentown Boulevard, Harrisburg, Pennsylvania 17112 at all times relevant to this action.
- 3) The grapppler that was hoisted weighed approximately 10,500 pounds.
- 4) S&R attached padeyes to the girders approximately 9.5” above the bottom flange of the girders.
- 5) The dimensions of each girder was approximately 4 feet, 4.5 inches deep; with flanges that were 1 foot, 10 inches wide and 1.25 inches thick.

(Exh. J-1; Tr. 14-15)

BACKGROUND

By June 2019, S&R had been erecting structural steel at the Savannah hotel worksite for approximately two years (Tr. 31, 63, 199). Around that time, the hotel owner asked the general contractor (who in turn asked S&R) to hang, as a decorative detail, a red steel grapppler from the

hook of an existing overhead crane in the area that had been renovated to function as the hotel lobby.¹ The grappler is a large articulated claw used to lift heavy equipment.² The suspension of the grappler was not part of S&R's original scope of work on the project, but S&R agreed to perform the task at the general contractor's request (Tr. 37-38, 202-03).

The overhead crane was a relic of the building's past as an electrical power plant and was no longer in service. It was supported by two horizontal girders (the east and west girders) and located above an open basement area. S&R determined it was not possible to position a crane in the area to perform a conventional lift. S&R decided to use an air tugger (or winch), a lifting device consisting of a drum and cable (Exh. C-1, p. 1; Tr. 202-03).

To perform the lift, an S&R welder welded a padeye (a steel plate with a hole in it used as an attachment point) to the east girder and another padeye to the west girder.³ The plan was for S&R to run a wire rope from the padeye on the east girder down to the rigging attached to the grappler, up to the padeye on the west girder, and down again to the air tugger, which would pull the wire rope to raise the grappler (Tr. 31-32, 35, 42, 188-89). This plan was conceived and supervised by S&R's Assistant Superintendent, who drew up a diagram for the lift (Exh. C-3; Tr. 55). S&R vice president Mark Yerke prepared an activity hazard analysis (AHA) for the lift based on the Assistant Superintendent's diagram (Exh. R-1; Tr. 204).

On June 23, 2019, as the air tugger hoisted the grappler, the padeye on the west girder tore away from the girder surface, causing the grappler and rigging to fall into the open basement (Tr. 48).⁴ The weight of the grappler dragged the wire rope against the personnel basket of an aerial lift, damaging the basket and injuring two S&R employees who were standing in it.⁵ The wire rope then struck S&R's Assistant Superintendent, who was supervising the lift from the ground, standing next to the air tugger (Tr. 30, 38-39). The two S&R employees and the Assistant Superintendent were hospitalized due to their injuries (Tr. 74).

¹ Witnesses and counsel used the terms *grappler* and *grapple* interchangeably at the hearing.

² Photographs and diagrams of the grappler can be seen in Exhibits C-1 (pages 4 and 6) and C-2 (pages 2 and 3), respectively.

³ Page 10 of Exhibit C-1 is a photograph of the padeye that was welded to the west girder.

⁴ The weld between the padeye and the girder remained intact—the weight of the grappler tore a triangular hole in the girder where the padeye was attached, as seen in photographs admitted as part of Exhibit C-1 (Exh. C-1, pp. 3, 10, 25; Tr. 105).

⁵ Page 8 of Exhibit C-1 is a photograph of the mangled personnel basket.

OSHA assigned Compliance Safety and Health Officer (CSHO) John Vos to investigate the incident. He arrived at the worksite on June 24, 2019. He conducted interviews, took photographs and measurements, and retrieved two pieces of steel from the west girder where the padeye had torn away from it, which he submitted to OSHA's Salt Lake City Technical Center (SLCTC) for analysis (Exh. C-14;9 Tr. 29-32, 122).⁶ CSHO Vos also obtained a video within a video from the Savannah Police Department. Exhibit C-12 is a video taken by a police officer as he watches a cellphone video showing the attempted lift of the grappler (Tr. 44-47).⁷

CSHO Vos determined S&R's Assistant Superintendent had mistakenly believed the east and west girders were solid and were each about an inch thick. The Assistant Superintendent did not measure the thickness of the girders. During his inspection, CSHO Vos discovered that each girder consisted of two vertical pieces placed side by side, with a small gap between them. The vertical pieces were each approximately a quarter of an inch thick, as measured by CSHO Vos (Exh. C-1, p. 24; Tr. 55-56). A number of holes in the east girder were visible from the ground, including one located a few inches from the padeye welded to the east girder (Exh. C-1, pp. 7, 9, 27; Tr. 56-57).⁸ CSHO Vos believed that "the measurement [of the thickness of the girder] could've been taken there" to obtain an accurate measure to better calculate the load capacity of the girders (Tr. 56) He also learned that the Assistant Superintendent had done no metallurgical testing to ascertain the strength of the girders (Tr. 71-72).

Based on his inspection, CSHO Vos recommended that the Secretary cite S&R for serious violations of §§ 1926.752(d) and 753(d)(2)(i). The Secretary issued the Citation on December 20, 2019, giving rise to this proceeding, which is ready for disposition.

THE CITATION

Item 1a of the Citation alleges a serious violation of § 1926.752(d), which provides, "All hoisting operations in steel erection shall be pre-planned to ensure that the requirements of § 1926.753(d) are met." Item 1a alleges:

⁶ The steel samples were tested at the SLCTC by Daniel Crane, a lead physical scientist for OSHA (Exh. C-14; Tr. 118). His report concluded, "The submitted samples were low carbon or mild steel based upon the chemistry, hardness as well as observed deformation and the presence of ductile fracture." (Exh. C-14, p. 4) Crane testified that "mild steel is more likely to bend relative to a medium or high carbon steel." (Tr. 125)

⁷ The police footage appears to be taken by an officer's body camera as he holds the cellphone (belonging to an S&R employee) at arms' length as the cellphone video of the lift plays (Exh. C-12; Tr. 46).

⁸ The Court notes the words *hole* and *holes* are incorrectly transcribed as *hull* and *hulls* at various points in the hearing transcript (Tr. 35, 36, 42, 44, 49, 56, 57 106, 109, 110).

29 CFR 1926.752(d): All hoisting operations in steel erection were not pre-planned to ensure that the requirements of 29 CFR 1926.753(d) were met:

A) Hotel lobby area, on or about June 23, 2019, and or times prior to, the employer did not adequately preplan the lift of a grappler by a winch. The thickness and strength of the east and west side girders where the padeyes were attached was not determined before attaching the padeyes or making the lift, exposing employees to a struck[-]by hazard.

Item 1b of the Citation alleges a serious violation of § 1926.753(d)(2)(i), which provides, “When working under suspended loads, . . . [m]aterials being hoisted shall be rigged to prevent unintentional displacement[.]” Item 1b alleges:

29 CFR 1926.753(d)(2)(i): Materials being hoisted were not rigged to prevent unintentional displacement:

A) Hotel lobby area, on or about June 23, 2019, and or times prior to, the employer did not adequately rig the grappler to prevent unintentional displacement. The girders where the padeyes were welded was not strong enough to support the load and stresses put on them while lifting the grappler, exposing employees to a struck[-]by hazard.

ANALYSIS

The Secretary’s Burden of Proof

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., Inc., No. 90-1747, 1994 WL 682922, at *6 (OSHRC Dec. 5, 1994).⁹

The facts of this case are not in dispute. The primary issues involve the interpretation of the steel erection standard’s requirements and definitions: (1) whether S&R was engaged in steel erection when it attempted to raise the grappler to the overhead crane hook on June 23, 2019; (2) whether S&R violated § 1926.752(d) by failing to preplan the lift so that no one would be

⁹ The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Savannah, Georgia, in the Eleventh Circuit. S&R’s principal place of business is in Harrisburg, Pennsylvania, in the Third Circuit. The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission’s precedent. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the parties do not contend, and the Court has not found, relevant circuit court precedent that differs from the Commission’s precedent. The Court therefore applies Commission precedent in this case.

working under the suspended load; and (3) whether S&R violated § 1926.753(d)(2)(i) by improperly rigging the grappler for the lift.

(1) The Cited Standards Apply

Section 1926.32(g) of Part 1926 (*Safety and Health Regulations for Construction*) provides definitions that apply to the construction standards. It defines *construction work* as “work for construction, alteration, and/or repair, including painting and decorating.”

The cited standards, §§ 1926.752(d) and 753(d)(2)(i), are found in Subpart R (*Steel Erection*) of the Part 1926 construction standards. Section 1926.750 is its *Scope* section. It provides:

This subpart sets forth requirements to protect employees from the hazards associated with steel erection activities involved in the construction, alteration, and/or repair of single and multi-story buildings, bridges, and other structures where steel erection occurs. The requirements of this subpart apply to employers engaged in steel erection unless otherwise specified. This subpart does not cover electrical transmission towers, communication and broadcast towers, or tanks.

The *Definitions* section of Subpart R, §1926.751, defines steel erection as “the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection.” There is no question that S&R was engaged in steel erection at the Savannah worksite for nearly the entire time it was onsite—it had been subcontracted to install structural steel for the renovation (alteration) of the old Riverside Power Plant to repurpose it as a hotel. The area of the old power plant where S&R attempted to lift the grappler on June 23, 2019, was to become the hotel’s atrium lobby. The *Note to paragraph (a)* of § 1926.750(a) includes these specific areas as typical sites where steel erection is performed: “Examples of structures where steel erection may occur include but are not limited to the following: . . . power plants . . . [and] atriums[.]”

S&R does not dispute that its purpose at the worksite was to erect structural steel but argues it was not engaged in steel erection on June 23, 2019, when it attempted to lift the grappler to the overhead crane hook. In support of its argument, S&R contends,

The owners of the hotel wanted a decorative “grapple” attached to an existing, nonfunctional overhead crane located in the original structure (Tr. 198). Although the hoisting of the decorative grapple was the work of a millwright, someone who rigs and hoists materials used in the assembly and repair of machinery, the owners specifically asked the Respondent to hoist it into place (Tr. 200). It was not steel erection: “There’s no steel members that we’re hoisting with cranes connecting together.” (Tr. 200). Executive Vice President of Respondent, Mark Yerke, called

the grapple a “chandelier” (Tr. 201). Moreover, he testified that it was not “ornamental ironwork,” which he described as catwalks, railings, stairs, walkways, and other miscellaneous steel that “become[s] part of the permanent structure.” (Tr. 201).

(S&R’s *Brief*, p. 3) S&R also notes CSHO Vos “testified that if the grapple had not been steel, it would not have been steel erection (Tr. 92).” (*Id.*, n. 1)

S&R’s argument is not supported by the text of Subpart R. S&R claims raising the grapples was a task typically done by millwrights, not steel erectors. Subpart R, however, defines steel erection in terms of the activities performed, not the job titles of the employees performing the tasks. S&R vice president Yerke stated that the lift was not steel erection because there were “no steel members that we’re hoisting with cranes connecting together.” (Tr. 200) Yerke’s conception of steel erection activities is much narrower than that of Subpart R. Its *Scope* section lists various steel erection activities, demonstrating Subpart R applies to more than hoisting structural steel with cranes and connecting them together. Section 1926.750(b)(1) provides:

Steel erection activities include hoisting, laying out, placing, connecting, welding, burning, guying, bracing, bolting, plumbing and rigging structural steel, steel joists and metal buildings; installing metal decking, curtain walls, window walls, siding systems, miscellaneous metals, ornamental iron and similar materials; and moving point-to-point while performing these activities.

The above-quoted section sets out three separate types of steel erection activities, separated by semicolons. Relevant here is the second type of activity: “installing . . . miscellaneous metals, ornamental iron and similar materials.” These terms are not defined in the standard. Yerke testified these materials have specific meanings within the steel erection industry that do not encompass a large steel grapple hanging from a hook for decorative purposes.

We do some ornamental ironwork, which we also call "miscellaneous steel." Again, that's more elements that have been designed as part of the project and become part of the permanent structure. We install a lot of railings, monumental stairs, different types of catwalks and walkways that are considered ornamental steel or ornamental metal. Typically, there's a separate specification for that, but this didn't fall under ornamental metal because, like I said, it was more of a decoration.

(Tr. 201)

Again, Yerke’s definitions of terms found in Subpart R are more restrictive than those of the standard itself. Section 1926.750(b)(2) explicitly contemplates the installation of decorative

metal as part of steel erection activities, as well as the installation of nonmetal materials.¹⁰ It provides:

The following activities are covered by this subpart when they occur during and are a part of steel erection activities:

[R]igging [and] hoisting . . . of materials and assemblies such as . . . non-ferrous metals and alloys; glass; plastics and synthetic composite materials; . . . miscellaneous, architectural and ornamental metals and metal work[.]

Neither the Secretary nor S&R cites case law in support of their arguments on the issue of applicability of the cited standards. S&R relies on the testimony of Yerke and on the comment by CSHO Vos that, had the grappler not been made of steel, he would not have recommended that the Secretary cite S&R for violating the standards at issue. The statements of Yerke and CSHO Vos are at odds with the text of Subpart R.¹¹ Contrary to Yerkes's understanding of the standard, steel erection activities are not restricted to hoisting and connecting functional steel

¹⁰ The range of activities covered by Subpart R far exceeds S&R's limited conception of what constitutes steel erection. In its entirety, § 1926.750(b)(2) provides:

The following activities are covered by this subpart when they occur during and are a part of steel erection activities: rigging, hoisting, laying out, placing, connecting, guying, bracing, dismantling, burning, welding, bolting, grinding, sealing, caulking, and all related activities for construction, alteration and/or repair of materials and assemblies such as structural steel; ferrous metals and alloys; non-ferrous metals and alloys; glass; plastics and synthetic composite materials; structural metal framing and related bracing and assemblies; anchoring devices; structural cabling; cable stays; permanent and temporary bents and towers; falsework for temporary supports of permanent steel members; stone and other non-precast concrete architectural materials mounted on steel frames; safety systems for steel erection; steel and metal joists; metal decking and raceway systems and accessories; metal roofing and accessories; metal siding; bridge flooring; cold formed steel framing; elevator beams; grillage; shelf racks; multi-purpose supports; crane rails and accessories; miscellaneous, architectural and ornamental metals and metal work; ladders; railings; handrails; fences and gates; gratings; trench covers; floor plates; castings; sheet metal fabrications; metal panels and panel wall systems; louvers; column covers; enclosures and pockets; stairs; perforated metals; ornamental iron work, expansion control including bridge expansion joint assemblies; slide bearings; hydraulic structures; fascias; soffit panels; penthouse enclosures; skylights; joint fillers; gaskets; sealants and seals; doors; windows; hardware; detention/security equipment and doors, windows and hardware; conveying systems; building specialties; building equipment; machinery and plant equipment, furnishings and special construction.

¹¹ The Court does not credit the opinion of CSHO Vos on this point.

The Secretary and the Commission are not bound by the legal conclusions of the OSHA compliance officer. *See Kasper Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) ("the Commission is not bound by the representations or interpretations of Compliance Officers"); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (the Secretary is not bound by the "narrow construction of citations issued by his inspectors," compliance officers who are not legal professionals).

components. And, contrary to the opinions of Yerke and CSHO Vos, steel erection activities include hoisting non-steel material for architectural and ornamental purposes.¹²

Here, S&R employees were engaged in lifting a steel grappler to the hook of an overhead crane to make it a permanent decorative fixture in the hotel lobby. The plain language of § 1926.750 of Subpart R establishes its applicability to the cited activity. The Court finds §§ 1926.752(d) and 753(d)(2)(i) apply.

(2) The Secretary Failed to Establish S&R's Noncompliance with the Terms of the Standards

The standards cited in Items 1a and 1b must be cross-referenced to understand the issues presented. Item 1a alleges S&R violated § 1926.752(d), which refers to § 1926.753(d), a subsection of which is cited in Item 1b.

Section 1926.752 is titled *Site layout, site-specific erection plan and construction sequence*. Section 1926.752(d) (cited under Item 1a) provides:

Pre-planning of overhead hoisting operations. All hoisting operations in steel erection shall be pre-planned to ensure that the requirements of § 1926.753(d) are met.

Section 1926.753(d), titled *Working under loads*, provides in its entirety:

(1) Routes for suspended loads shall be pre-planned to ensure that no employee is required to work directly below a suspended load except for:

- (i) Employees engaged in the initial connection of the steel; or
- (ii) Employees necessary for the hooking or unhooking of the load.

(2) When working under suspended loads, the following criteria shall be met:

- (i) Materials being hoisted shall be rigged to prevent unintentional displacement;
- (ii) Hooks with self-closing safety latches or their equivalent shall be used to prevent components from slipping out of the hook; and
- (iii) All loads shall be rigged by a qualified rigger.

Item 1b alleges S&R violated § 1926.753(d)(2)(i) (“When working under suspended loads, . . . [m]aterials being hoisted shall be rigged to prevent unintentional displacement.”).

Item 1a

The alleged violation description (AVD) of Item 1a alleges S&R violated § 1926.752(d) because it “did not adequately preplan the lift of a grappler by a winch. The thickness and

¹² Dr. Brian Ewing is a civil engineer specializing in structural steel (Tr. 143). He testified that ornamental steel “would be non-structural steel, meaning they’re not intended to carry any of the load-resisting capacities for the building.” (Tr. 186) Here, the intended purpose of the grappler was to be decorative (ornamental) and not load-bearing (non-structural).

strength of the east and west side girders where the padeyes were attached was not determined before attaching the padeyes or making the lift[.]” The language of the AVD does not specify which subsection of § 1926.753(d) S&R failed to meet in planning the lift of the grappler.

In his brief, the Secretary argues S&R violated § 1926.752(d) because its inadequate preplanning failed to ensure employees were not required to work directly below suspended loads, as required by § 1926.753(d)(1). At the hearing, however, CSHO Vos’s testimony regarding Item 1a concerned S&R’s failure to measure the thickness of the girder components and to ascertain the structural integrity of the girders to ensure they could sustain the weight of the grappler:

Q.: [W]hat ultimately led you to determine that there was a violation of . . . [section] 1926.752(d)? . . . [F]actually what happened that made you think this?

...

CSHO Vos: The padeye on the west side of the west side bridge gave way, allowing the grappler and cables and everything to fall to the ground.

Q.: Now, I think that 1926.752(d) involves preplanning, right?

CSHO Vos: Correct.

Q.: So, what facts did you find that made you feel there was an issue with preplanning?

CSHO Vos: The fact that nobody took any measurements of the steel to determine whether or not it would support lifting of the grappler.

...

Q.: And did you mention earlier whether there had been any metallurgical testing or anything done on this girder?

CSHO Vos: There was no testing on the girder at all.

Q.: And as we mentioned earlier, I think it was Exhibit C-3, the calculations page that I think was done by [the Assistant Superintendent] do I have that right?

CSHO Vos: Correct.

Q.: Did you see any calculations regarding what kind of load would be placed on or what kind of load could be supported by the girder?

CSHO Vos: No, I did not.

(Tr. 70-71)

The focus of CSHO Vos's testimony is the failure of the west girder to support the weight of the grappler, i.e., the cause of the accident. The cause of the accident is not, however, at issue. "The Commission has long held that "[d]etermining whether the standard was violated is not dependent on the cause of the accident." *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003)." *Ceco Concrete*, No. 17-0843, 2021 WL 2311867, at *5, n.4 (OSHRC Feb. 26, 2021). It is the burden of the Secretary on this issue to establish S&R did not comply with § 1926.752(d) by failing to meet the requirements § 1926.753(d)(1), in that it did not preplan the route for the suspended load to ensure employees were not required to work directly under it.

Although § 1926.752(d) does not require the preplan of the hoisting operation to be in writing, S&R developed a written activity hazard analysis (AHA) to plan the lift of the grappler (Exh. R-1; Tr. 204). Yerke said of the AHA, "[T]his identifies the job steps and the hazards and the controls. So, the hazard we identified was a falling object, and the part of the control was that, during this operation, no employee would be allowed underneath the suspended load at any point, as a safety measure." (Tr. 207) Under the section labeled *Controls*, numbered instructions are listed setting the guidelines of the operation. Instruction 5b states, "No employee shall be under the suspended load at any point." (Exh. R-1, p. 2) Yerke testified the AHA was provided to the Assistant Superintendent, who was to review it with the employees present at the worksite during the lift (Tr. 213-14).¹³

The Secretary contends employees worked under the suspended load during the lift, contrary to the AHA's instruction. CSHO Vos testified an S&R employee can be seen in the video kneeling near the grappler after it has been rigged but before the lift began (Exhibit C-12 at 38 seconds; Tr. 48). "[H]e is right by the grappler and[,] . . . the grappler's got a lean to it, to the right. If the grappler were to fall . . . it potentially could roll over on top of him." (Tr. 48) CSHO Vos stated he did not know what the employee was doing (Tr. 50, 93, 96). He acknowledged the

¹³ In S&R's *Incident Investigation Report* regarding the failure of the lift operation, one of the statements under a section labeled *Management System/Job Procedure* is "Job Safety Analysis (JSA) not performed to identify hazards of the task." The word "not" is crossed out in pen (so the statement reads "Job Safety Analysis (JSA) performed to identify hazards of the task") and next to the statement, the words "Not communicated adequately" are handwritten (Exh. R-14, p. 18). Yerke stated he thought Steven Burkholder, the president of S&R (Tr. 63), was responsible for the handwritten remarks, but he did not know why Burkholder made them (Tr. 215-16). This testimony was not further developed and Burkholder did not appear as a witness. The handwritten remarks indicate the JSA was performed to identify the hazards of the lift, but some problem arose with its communication. The Secretary has not cited S&R for failure to communicate its preplan for the lift to its employees.

video shows the employee next to the grappler “prior to the lifting of the grappler.” (Tr. 94)¹⁴ The Secretary also argues the Assistant supervisor and the two employees in the personnel basket of the aerial lift were under the suspended load when the padeye tore away from the west girder, causing the wire rope to strike the basket and the Assistant Supervisor’s arm.

The Secretary’s argument conflates two separate time periods in the history of the lift—its preplanning and its actual attempt. It is undisputed the lift failed because the west girder could not sustain the weight of the load being hoisted. This eventuality was not considered and was not planned for by S&R. The failure to calculate the load capacity of the girders is a significant omission, but it is not one addressed by the cited standard, which requires the employer to preplan the route of the suspended load so that no employee is required to work directly under it.¹⁵

The record establishes S&R preplanned the route of the grappler to ensure no employees were required to work directly below it, as established by the uncontradicted testimony of Yerke and the AHA (“No employee shall be under the suspended load at any point.” (Exh. R-1, p. 2)). How the lift was preplanned and how the lift actually transpired are separate issues. The Court finds the Secretary has failed to establish S&R violated § 1926.752(d), as it relates to § 1926.753(d)(1).

Item 1b

Item 1b alleges S&R violated § 1926.753(d)(2)(i) (“When working under suspended loads, . . . [m]aterials being hoisted shall be rigged to prevent unintentional displacement.”) As with Item 1a, the AVD for Item 1b is framed in terms of S&R’s failure to ascertain the load

¹⁴ Section 1926.753 permits employees to work directly under the suspended load when they “are engaged in the initial connection of the steel” or they are “necessary for the hooking and unhooking of the load.” Sections 1926.753(d)(2)(i) and (ii).

¹⁵ At the hearing, the Secretary tendered Dr. Brian Ewing as an expert in “what caused the padeye to fall and . . . deficiencies in S&R’s lifting plan.” (Tr. 158) The Court qualified Dr. Ewing as an expert with respect to the cause of the lift’s failure. The Court found, however, that Dr. Ewing’s proposed testimony regarding alleged deficiencies in S&R’s lifting preplan “goes to the ultimate issue of whether or not this standard is violated” and did not allow him to testify on that issue (Tr.164). *See J. C. Watson Co.*, Nos. 05-0175 & 05-0176, 2008 WL 2045818, at * 3, n. 3 (OSHR May 6, 2008) (The Commission “determine[s] that, as Watson’s intended purpose for the testimony of this witness was regarding a conclusion of law, the judge properly refused to permit his testimony.”). The Secretary made an offer of proof, stating that Dr. Ewing’s testimony and the report he prepared would provide his expert opinion that a reasonable employer preplanning a lift would have taken steps to determine the strength of the girders, including measuring their thickness (Exh. C-13 (rejected); Tr. 183).

capacity of the east and west girders. It alleges S&R violated § 1926.753(d)(2)(i), in that “the employer did not adequately rig the grapples to prevent unintentional displacement. The girders where the padeyes were welded were not strong enough to support the load and stresses put on them while lifting the grapples, exposing employees to a struck[-]by hazard.”

Subpart R does not define *load*. Section 1926.753(a) of Subpart R provides, “All the provisions of subpart CC apply to hoisting and rigging with the exception of § 1926.1431(a).”¹⁶ Section 1926.1401 of Subpart CC (*Cranes and Derricks in Construction*) defines *load* as “object(s) being hoisted and/or the weight of the object(s); both uses refer to the object(s) and the load-attaching equipment, such as, the load block, ropes, slings, shackles, and any other ancillary attachment.”¹⁷ Dr. Ewing testified the load at issue here includes

the grapple, any pulleys and rigging and hoisting equipment that was used at the time, including, but not limited to, the wire rope, the padeyes, the blocks, the pulleys, all of the hoisting equipment [that] does contribute to the suspended load and the weight that . . . would be exerted on the structure.

(Tr. 189-90)

The Court agrees with the Secretary that the suspended load in this case includes the grapples as well as the rigging and hoisting materials. Section 1926.753(d)(1) requires that when employees are working under a suspended load, the materials being hoisted “shall be rigged to prevent unintentional displacement.” The two employees in the personnel basket of the aerial lift were positioned next to the grapples as it was hoisted, but they were working below the parts of the wire rope that were strung between the grapples and the girders (Exh. C-12). The Court finds the wire rope was part of the suspended load, and the employees in the personnel basket were working below the parts of the wire rope that attached to the padeyes welded to the girders.

When asked why he recommended the Secretary cite S&R for the violation of § 1926.753(d)(2)(i), CSHO Vos responded, “The fact that the rigging failed while lifting the grapples. . . . [T]he rigging was not designed to prevent an intentional displacement.” (Tr. 80) He considered the west girder to which the padeye was welded to be “part of the rigging” and that it “was not determined that it could support the load that was being put upon it. . . . [Y]ou’ve got to

¹⁶ Section 1926.1431(a) addresses hoisting personnel and is not at issue here.

¹⁷ At the hearing and in its brief, S&R argues the load at issue “could only be the grapple itself,” and not the attached rigging (S&R’s *Brief*, p. 2). The plain meaning of the definition of *load*, however, establishes the term includes both the grapples and “the load-attaching equipment,” i.e., the rigging. § 1926.1401.

look at what the padeye was welded to that would support the weight.” (Tr. 90) By including the west girder itself in his definition of rigging, CSHO Vos goes beyond Dr. Ewing’s definition and the definition of § 1926.1401.

The structure that supports the weight being hoisted cannot, by definition, be the load (“object(s) being hoisted and/or the weight of the object(s).” § 1926.1401). The west girder is not part of the “materials being hoisted.” Section 1926.753(d)(2)(i) requires that the materials being hoisted be “rigged to prevent unintentional displacement.” It is the Secretary’s burden to establish that some component of the materials being hoisted (the grapples or the rigging) was not rigged to prevent unintentional displacement. He has adduced no evidence supporting this element.

Q.: I understand that you contend that the system being used was not proper because it failed, correct?

CSHO Vos: Correct.

Q.: But the rigging of the grapple itself is a separate issue, true?

CSHO Vos: Okay.

Q.: Okay. And did you check to see whether there was anything connected to the grapple that caused the grapple to fall?

CSHO Vos: No.

Q.: And as far as you know, the rigging was perfectly intact when the grapple fell to the ground, correct?

CSHO Vos: If you're referring just to what was the grapples attached to or what was attached to the grapples, yes.

(Tr. 91)

The Secretary does not argue that any object, material, or device used in the attempted lift of the grapples failed, other than the west girder. The west girder was part of the structure supporting the load, not the load itself. CSHO Vos agreed that the rigging used by S&R for the materials being hoisted “was perfectly intact.” Even the weld of the padeye remained undamaged when it peeled the steel away from the girder to which it was attached (Exh. C-1, p. 10).

It is evident S&R failed to accurately assess the load capacity of the east and west girders at the Savannah worksite before attempting to lift the grapples on June 23, 2019. Three

employees were seriously injured. The failure of the lift is not enough, however, to establish S&R violated the standard the Secretary chose to cite. The Secretary is required to prove that S&R failed to rig the grappler and load-attaching equipment to prevent unintentional displacement. The record establishes the load was unintentionally displaced due to the overloading of the west girder, a structural element not covered by § 1926.753(d)(2)(i). No evidence was presented showing S&R rigged the load incorrectly or the equipment it used was faulty.

The Court finds the Secretary has failed to establish S&R was in noncompliance with the terms of § 1926.753(d)(2)(i). Item 1b is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Item 1a, alleging a serious violation of § 1926.752(d), as it applies to § 1926.753(d)(1), is **VACATED**, and no penalty is assessed; and

2. Item 1b, alleging a serious violation of § 1926.753(d)(2)(i), is **VACATED**, and no penalty is assessed.

SO ORDERED.

Dated: March 21, 2022
Atlanta, GA

/s/ _____
Sharon D. Calhoun
Administrative Law Judge, OSHRC