



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5100
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
BUSH & BURCHETT, INC.,
Respondent.

OSHRC DOCKET
NOS. 92-0408
92-1169

**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 September 21, 1995. The decision of the Judge will become a final order of the Commission on October 23, 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 October 11, 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.
Ray H. Darling, Jr.
Executive Secretary

Date: September 21, 1995

DOCKET NOS. 92-0408 & 92-1169

NOTICE IS GIVEN TO THE FOLLOWING:

Deborah Pierce-Shields
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Albert Burchett, Esq.
Attorney for Bush & Burchett, Inc.
P.O. Box 0346
1428 East Sugarload Road
Prestonburg, KY 41653

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00100782127:03

Labor pursuant to the Occupational Safety and Health Act (the "Act"). The citations were issued as the result of separate inspections of a worksite located on Route 10, one mile north of Harts, West Virginia; each inspection prompted by a different set of events.

Respondent Bush & Burchett, Inc., was engaged in construction of a bridge spanning the Guyandotte River at that worksite. Construction began in the Fall of 1990 and was completed in October, 1991. The first inspection, on June 20, 1991, was prompted by the accidental deaths of two of Respondent's employees. The second inspection, on September 4, 1991, was in response to a complaint by the United Steel Workers Union, Local 14-614, the union representing the employees on the site. The Secretary seeks penalties totaling \$ 343,500 in both dockets.

Respondent contests every item¹ of both citations, charging the Secretary's enforcement mechanism with tardiness, Due Process violations, lack of witness credibility, and use of hearsay evidence. Respondent must carry the burden of proof with respect to these affirmative defenses.² Respondent also contends that the Secretary did not carry his burden of proof with regard to establishing any of

¹ "Legal contentions, like the currency, depreciate through over-issue....[Our] receptiveness declines as the number of assigned errors increases.", *Jones v. Barnes* 103 S.Ct. at 3313, quoting, Jackson, *Advocacy before The United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)

² See, Secretary v. Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1227 (Rev. Comm. 1991).

the violations. I have dealt first with the affirmative defenses. The discussion of the specific violations alleged by the Secretary in each docket follows the discussion of the affirmative defenses.

II Respondent's Argument that the Citations were Time Barred.

Respondent alleges that several of the citations issued by the Secretary on December 17, 1991 and March 2, 1992 were barred through the operation of § 9 (c) of the Act, 29 U.S.C. 652 (5).

Section 9(c) of the Act is unambiguous: a citation may be issued only within six months of the occurrence of the violation.³

"Occurrence" was defined by the Commission in *Secretary v. Central of Georgia Railroad Corp.*⁴, where it stated that for purposes of § 5(a)(2) a violation "occurs whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger."

In the present case, the Secretary issued citations on December 17, 1991 for the June 19 and July 16 inspections, and on March 2, 1992 for the September 4, 1991 inspection. The citations facially comply with Section 9 (c) as no violations are dated prior to July 18 or September 3, respectively. However, Respondent alleges that several

³This section states: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

⁴ 5 BNA OSHA 1209, 1211 (Rev. Comm. 1977), aff'd, 576 F.2d 620 (5th Cir. 1978).

of the items actually occurred outside of the six month limitation period and that they were cited merely on the strength of employee hearsay. Specifically, Respondent offers testimony as evidence that Citation 1, Items 10, 23 and 24 (Docket No. 92-0408) occurred prior to June 18, and Citation 2, Items 1a, 1c, 2a and 2b (Docket No. 92-1169) occurred prior to September 3, 1991. (Respondent's Brief pp. 8-10.) A review of the record reveals that all citations were issued within the six-month limitation period.

Citation 1, Item 10 (Docket No. 92-0408):

Item 10 alleges a serious violation of 29 C.F.R. § 1926.550 (a)(12) for the failure to correct the cracked windshield on the Koehring 665 crane. The crack allegedly would have impeded the operator's ability to safely operate the crane. (Complainant's Brief pp. 96-97; GX-22.) However, Mr. Johnson and Harry Boyd, a Bush & Burchett employee, placed the date on which the Koehring 665 crane was last used at a week before June 19, 1991. (Tr. pp. 202, 729.) There is no evidence in the record that the Koehring 665 had been used within the limitations period. Still, a positive act need not occur during the six month limitation period. The presence of the non-complying crane and its accessibility to the employees constitute an "occurrence" under the definition set forth by the Commission in *Central Georgia R.R. Corp, supra*, as further refined in *Secretary v.*

*General Dynamics, Electric Div.*⁵ The latter decision stated that "the Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only 'act' that the Secretary must show to prove a violation."

The Koehring 665 crane was accessible to employees and the record does not reflect any effort on Respondent's part to prevent its use. The record does show that the crack on the windshield was in plain view. The obvious nature of the windshield's condition should have been noticed by Respondent. The hazard was accessible to employees on June 19.

Citation 1, Items 23 & 24 (Docket No. 92-0408):

Items 23 and 24 arise from the use of a job made ladder which did not comply with 29 C.F.R. §1926.1053 (a)(1)(ii) and §1053 (a)(3)(1). Respondent alleges that the ladder was last used weeks before the June 18 limitation date. Citing page 1196 of the transcript, Respondent places the last use of the ladder during the building of the piers and culverts, a job completed several weeks before the inspection, and attributes this to Harry Boyd. However, page 1196 of the transcript is not the testimony of Harry Boyd, but that of John K. Ward who comments on the date when the piers were completed and not the use of the ladder. Harry Boyd did testify that the ladder was used to get on

⁵ 15 BNA OSHC 2122, 2127-28 (Rev. Comm. 1993).

the piers and culverts, but he also stated that the ladder was used every day. (Tr. p. 198.) Mr. Johnson's testimony offered an admission from Roger Neal that Ralph Snyder had used the ladder on the day prior to the accident, placing the use of the ladder within the limitation period. (Tr. pp. 549-56.)

Citation 2 Items 1a & 1c (Docket No. 92-1169):

Item 1a alleges a willful violation of 29 C.F.R. § 1926.105(a) which was discovered during the September 6, 1991, inspection. Item 1c flows from a similar set of circumstances and cites a violation of the general duty clause, § 5 (a)(1) of the Act, for the practice of stripping the cement off the side of the piers without fall protection at a height of 17 feet.

Respondent offered the testimony of Fred Dunlap who stated that the acts which led to these citations had occurred on September 1, 1991. (Tr. p. 334.) Since the citations were issued on March 2, 1992, actions taking place on September 1 could not be cited.

Mr. Dunlap's testimony does not, however, speak to the actions which were taking place on the date of the actual inspection. During the September 4 inspection, Mr. Johnson personally observed violations of the general duty clause of the Act: Bush & Burchett employees working without fall protection while they were wrecking the forms. (Tr. p. 656; GX 10, GX 64.) Freddie Dunlap testified that after Mr. Johnson's inspection, employees returned to work without fall protection. (Tr. pp. 345-46.) Employees were not supplied with

safety belts or any other type of fall prevention. The supervisors were aware of fall protection requirements and of their ongoing violations. This testimony shows that the events leading to these citations occurred within the limitation period.

Citation 2 - Items 2a & 2b (Docket No. 92-1169):

Items 2a and 2b allege the willful violation of 29 C.F.R. § 1926.451(a)(13) and § 1926.550(g)(2), respectively. The citations relate to the use of a crane boom to hoist employees onto their work area underneath the bridge. The citations were issued on March 2, 1992; however, Respondent alleges that the crane was last used to hoist employees on September 1, 1991. Respondent cites the testimony of Freddie Dunlap, who stated that the last occurrence of the crane boom lifting was September 1 and that all lifts after that date were performed with an OSHA approved manlift. (Tr. p. 334.)

The testimony surrounding these willful violations is ambiguous. Nevertheless, a look at the entire record of events shows that the occurrence of these violations was within the limitation period. In his testimony, Mr. Dunlap stated that he was lifted on the crane boom on the same day that he complained to union officials about this practice. Mr. Dunlap testified that he was present on that same day as Mr. Overby, the Union chief, called OSHA. Furthermore, Mr. Dunlap recalled Mr. Johnson's visit to the site on the subsequent day. (Tr. pp. 335-38.)

The testimony of Mr. Dunlap is corroborated by the actual

sequence of events. The complaint was received and dated on September 3, 1991, and the inspection was conducted on September 4. This places the last documented occurrence on September 3, 1991, which is within the limitation period. The sequence of events as chronicled on OSHA documents and as testified to by several witnesses carries more weight than the conjectures made by Freddie Dunlap about the exact date of the events. When asked for the exact date, Dunlap stated "September 1st, I believe;" however, the events to which he testified were documented by Mr. Johnson as occurring on September 3 and 4. (Tr. p. 334.) Therefore, these citation items are within the limitations period.

III Respondent's Argument on "Reasonable Promptness."

Section 9(a) of the Act requires that citations be given with "reasonable promptness" from the date of the inspection. Respondent alleges that the 178-day delay that followed the June 19, 1991, inspection constituted a violation of Section 9(a). To show that the citations were not issued with "reasonable promptness," Respondent must demonstrate that the delay was prejudicial. Under *Secretary v. Coughlan Construction, Co.*⁶, citations issued within the six-month limitation period prescribed in 9(c) of the Act are presumed prompt, unless the delay impaired the respondent's ability to prepare and

⁶ 3 BNA OSHC 1636, 1638 (1975).

present a defense.⁷ The Secretary having established that the first inspection occurred on June 19 and the citations were issued on December 17, and that the second inspection occurred on September 4 and those citations were issued on March 3, the "reasonable promptness" rule is facially satisfied. Thus, Respondent has the burden of showing that this time period resulted in prejudice.

Respondent alleges that the delay was prejudicial because it allowed the Secretary to cite violations of a specific standard a second time without having accorded Respondent the benefit of a closing conference advising Respondent of the first violation. In this way, Respondent urges that the Secretary prevented its abatement of the violation. Moreover, the second violations were classified as willful and carried enhanced penalties.⁸ (GX-15.)

The second citations were not without warning. Mr. Johnson

⁷ See, *Secretary v. Stripe-A-Zone*, 10 BNA OSHC 1695 (Rev. Comm. 1982); *Secretary v. Bland Construction, Co.*, 15 BNA OSHC 1041 (Rev. Comm. 1991); *Todd Shipyards v. Secretary of Labor*, 566 F.2d 1327, 1330 (9th Cir. 1977); *Bethlehem Steel Corp. v. Occ. Saf. H. & R. Comm.*, 607 F.2d 871, 876 (3d Cir. 1979); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 828 (9th Cir. 1981).

⁸It appears that only two citations involved a second violation of the same standard. Citation 1, item 15, and Citation 2, item 5, both arose in Docket 92-0408 and involved the alleged failure to utilize an anti-two blocking device or a two block damage prevention feature. These items have been combined as discussed *infra*. Citation 2, Item 1A (Docket 92-1169) (29 C.F.R. § 1925.105 (a) - failure to provide safety nets) had been previously cited in Citation 2, Item 1 (Docket 92-0408). These items are treated as separate violations and are discussed *infra*.

informed Project Manager John Ward about the violations, supplied Mr. Ward with a copy of OSHA standards, and explained the specific standards, violations, and remedies. (Tr. pp. 563-64, 626-27.) Nevertheless, Mr. Johnson encountered the same violations that had been previously explained. Respondent's claim that the Complainant employed delay in order to permit him to cite the same violations a second time does not square with this testimony. Respondent was given actual notice of the existence of the violations and failed to correct them.

Respondent further alleges that the 178-day time period constituted an unconscionable delay as set forth by the Commission in *Jack Conie & Sons, supra*. However, the unconscionability test relied on by the Commission in *Jack Conie* was explicitly rejected in *Secretary v. Stearns-Rogers, Inc.*⁹ Consequently, citations can only be vacated on a showing that prejudice resulted from the delay.

In conclusion, Respondent has not establish prejudice. Respondent's brief makes little more than generalized allegations in what amounts to an unsupported conspiracy claim against the Complainant. There is no evidence that prejudice resulted from the delay.

⁹ 8 BNA OSHC 2180 (1980). See, *Secretary v. National Industrial Constructors, Inc.*, 10 BNA OSHC 1081, 1083-85 (1981).

IV Respondent's Argument on Due Process.

Respondent alleges that the Secretary violated OSHA's internal regulations in the course of the inspections and, as a result, denied Bush & Burchett due process under the Fifth Amendment of the United States Constitution. The June 20, 1991, inspection was a fatality/catastrophe ("fat-cat") inspection brought on by the deaths of Greg Pridemore and Ralph Snyder. Respondent contends that the Compliance Officer went beyond the scope of a fat-cat inspection and conducted a "wall to wall" inspection. Bush & Burchett contends that the Secretary purposely allowed several violations of the Field Operations Manual so that larger penalties could be assessed against the Respondent. The Respondent also believes that the Secretary acted contrary to the Act's purpose since the regulations were used as a tool for punishment and not for the prevention of hazards in the workplace. (Respondent's Brief pp. 10-13.)

Bush & Burchett's general allegations of wrongdoing by the Secretary are not supported by the evidence. Specifically, Respondent charges the Secretary with violating OSHA's internal guidelines for inspection as they are found in the Field Operations Manual ("FOM"). However, the FOM is not a source of rights which are enforceable by the Respondent. The Commission in *Secretary v. Caterpillar, Inc.*¹⁰, stated: "the Commission has consistently held that the FOM is an

¹⁰ 15 BNA OSHC 2153, 2173 n.24 (Rev. Com. 1994).

internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer procedural or substantive rights or duties on individuals."

Respondent repeats its allegation that it was prejudiced by the length of the first inspection and the delay in the issuance of the citations resulting from it. This allegation was disposed of contrary to Respondent's interest in connection with its argument that the first citations were not issued with reasonable promptness.

Respondent also argues that the inspection was too broad in scope under the provisions of the F.O.M. The F.O.M. (Ch.- VII B(2) (a)) states: "Scope- Fatality/catastrophe investigations should include a complete inspection of the establishment in addition to the accident investigation...." The FOM does have guidelines for deviating from a full investigation, but these do not apply to the instant case. The Compliance Officer's full investigation of the worksite was in accordance with the Field Operations Manual. Thus, even if the F.O.M. bestowed procedural rights on Respondent, those rights were not compromised by the inspection.

V Respondent's Argument that the Secretary Erred in the Calculation of the Penalties.

Respondent alleges that the Secretary erred in the calculation of the penalties. According to § 17(j) of the Act , 29 U.S.C. 666(j), several factors should be considered when calculating penalties:

gravity, size, good faith, and history. Respondent contends that: (1) the Secretary considered only gravity in calculating the penalties, violating § 17 of the Act, and (2) an equitable calculation of the factors would require a reduction of 95% or more. (Respondent's Brief p. 24.)

Bush & Burchett alleges that the Secretary miscalculated the reduction for size. The Secretary calculated a 40% reduction for size based on the 80 persons employed by Bush & Burchett at the time; however, Respondent calculates a 60% reduction for size because there were only 16 employees at the site. Respondent relies on par. 254 of the FOM. However, the correct paragraph for reduction purposes is 286 (now ¶ 7970.175) which states:

Size - A maximum of 60% is permitted for small businesses. 'Size of business' shall be measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous twelve months. Information on the total of an employer's employee can generally be obtained at the inspected worksite.

At the time of the citations, Bush & Burchett employed 80 workers at all workplaces and was entitled to a 40% reduction. The Secretary correctly computed the reduction for size under the F.O.M. (Tr. pp. 428-29, 677-78, 680-86.)

Respondent further contends that the Secretary erred in not reducing the penalties for good faith and voluntary abatement. Citing the purchase of a new, OSHA approved manlift as a showing of good faith and voluntary abatement, Respondent demands a good faith

reduction. A showing of good faith could lead to a 25 % reduction in penalty, but, in accordance with OSHA Instruction CPL 2.45 B Ch.-2 Chapter VI Sec. 2(3)(b) "No reduction shall be given to an employer who has no safety and health program." The Respondent had no safety or health programs in place at the Harts Creek worksite. (Tr. pp. 709-10.) Furthermore, the willful items contained in both citations preclude such reductions. (Tr. pp. 707-708.) The Secretary followed the procedures prescribed in § 17(j) and Ch. VI of the FOM. The proposed penalties are appropriate.

VI Respondent's Argument on the Credibility of the Witnesses.

Bush & Burchett challenges the credibility of several of the Secretary's witnesses. The challenges stem from allegedly inconsistent sworn statements and from alleged bias against the Respondent. Specifically, Respondent impugns the testimony of Harts Creek employees Van Keaton, Stephen Cochran, Harry Boyd, and Roger Neal, as well as OSHA employees John Johnson, Stephen Stock, and Stanley Elliot.

The Harts Creek employees are challenged on the basis of their union membership and prior inconsistencies in their sworn statements. Respondent sees their affiliation to the same union as Messrs. Snyder and Pridemore, the victims of the accident, as a source of bias and entanglement that creates a personal interest in the outcome of the case. Furthermore, Respondent cites various occasions in which the

witnesses made allegedly inconsistent sworn statements. This combination suggests to Respondent that the testimony of these witnesses is not credible. (Respondent's Brief p. 29-30.)

The witnesses and the deceased belonged to the United Steel Workers Union, Local 14-614. Their affiliation to this Union is characterized as a source of bias and human emotions that may have tainted their testimony. (Respondent's Brief p. 29.) Nevertheless, Respondent put forward no specific evidence that their membership in the union led to any bias, or that their testimony was so influenced by emotion as to be untrustworthy. The mere fact that they are members of a union to which the deceased employees also belonged is not sufficient to call their credibility into question. Respondent refers to only one concrete event: a pre-deposition meeting with union attorneys. The witnesses testified that there were no discussions regarding the contents of their testimony, that the object of the meeting was to discuss what was expected of them at the deposition, not to "fix their stories." (Tr. pp. 76-78.)

Respondent further challenges the credibility of its employees by alleging inconsistencies in their testimony. The testimony of the Bush & Burchett employees supported the conclusion that the June 19 accident was the result of the overloading of the cranes. Respondent alleges that this testimony is contradicted by earlier sworn statements. Respondent offers the testimony of two disinterested witnesses: State Trooper Howell and state inspector Charlie Cook. The

testimony of these disinterested witnesses agrees with Respondent's theory that the accident was a result of operator error and not overloading.¹¹

The testimony of Mr. Cook and Trooper Howell does not weaken the credibility of the Bush & Burchett employees. The testimony of Mr. Cook is a lay opinion regarding the cause of the accident which is contradicted by the great weight of the evidence. Trooper Howell's testimony is based on short statements given by Boyd and Keaton. These statements are extremely ambiguous, referring merely to the identities of the flag men and to general characteristics of the accident such as "concrete dust" and "the ground giving way" which do not aid in identifying the cause. (Tr. pp. 237, 321.) Both statements conclude with the witnesses admitting they did not know what had caused the accident.

The ambiguous nature of the original statements allowed for their expansion upon further inquiry. The testimony given during the hearing is not contradictory but merely explanatory. The original statements given to Trooper Howell do not purport to be conclusive or prove that the manner of operation was the cause of the accident as

¹¹It must be pointed out that, although the parties devoted some proof to the question of the cause of the accident, causation is not an issue in this proceeding. Here, Respondent must answer to charges that it violated specific OSHA standards. While it well may be that failure to comply with some of those standards contributed to the accident, in no case is the occurrence of the accident a necessary element in demonstrating a violation of a standard.

Respondent suggests. (Respondent's Brief pp. 32-33.)

The challenge to the credibility of the OSHA employees flows from their relationship with OSHA. Respondent alleges that their employment with OSHA creates a personal stake in the outcome of the case. Again, Respondent also alleges inconsistencies in the sworn statements made by the witnesses and offers these as a basis for a negative credibility finding.

In the course of proving violations, the most important witness will usually be the Compliance Officer. The Compliance Officer performs the inspections, may witness violations, and conducts the employer and employee interviews. Without the Compliance Officer it is nearly impossible to prosecute citations.¹² In the course of conducting an inspection, the Compliance Officer may well discover violations of the Act and conduct on the part of the Respondent which may create a bias against Respondent on his or her part. The existence of such a bias is not legally objectionable, provided the Compliance Officer conducts the inspection in a fair manner and testifies objectively.

To impugn a CO's credibility on the basis of bias, the Respondent must show that the bias arose from occurrences which took place or from attitudes which were formed outside of the CO's official duties in connection with the inspection. Bias which arises as a result of

¹² See Mark Rothstein, Occupational Safety and Health Law § 415 (3d ed. 1990).

facts concerning a respondent's compliance with OSHA requirements revealed in the conduct of an inspection is not objectionable. Further, Respondent should show that the CO's actions in conducting the inspection were unduly prejudicial to the Respondent.¹³ Otherwise, OSHA would find it difficult to prove any violations that are contested by respondents.

In the instant case, Bush and Burchett did not show that any undue prejudice stemmed from the compliance officer's conduct of the inspection. Moreover, his testimony was objective and not marked by personal animosity. None of the OSHA officials violated any procedures, or acted in any way which may be construed as prejudicial. Furthermore, based on the OSHA employees' candid testimony and demeanor at trial, their credibility can not be impugned.

VII Respondent's Argument on Hearsay Evidence.

On June 20, 1991, Mr. Johnson performed the fatality-catastrophe inspection which was prompted by the deaths of Greg Pridemore and Ralph Snyder on June 19. In light of the fatalities, work at the site had been stopped and the site closed. The fat-cat inspection was conducted as specified by the FOM and took place on the closed worksite. Since no employees were exposed to hazards on the closed worksite, no violations could have occurred on the date of the

¹³ *cf Secretary v. Hamilton Fixture*, 16 BNA OSHC 1073, 1078-82 (Rev. Comm. 1993)

inspection. In the present case, the Compliance Officer cited violations which occurred on June 19, the date of the accident. Since he was not present when many of the violations occurred, Mr. Johnson depended on employee and employer interviews to establish the violations. Respondent contends that the use of employee interviews to establish the violations was contrary to the hearsay rule, and preserved a timely objection to the admissibility of this evidence (Tr. pp. 725-31).

The Review Commission has consistently held that the statements of employees made within the scope of employment and while employed by a respondent are an admission by the adverse party pursuant to Fed. R. Evid. 801(d)(2)(D) and are not hearsay.¹⁴ Fed. R. Evid. 801(d)(2)(D) does not state an exception to the hearsay rule. Rather, under that Rule, employee statements are not regarded as hearsay at all. In the instant case, Respondent's employees made statements regarding the existence and dates of the violations to the Compliance Officer while within the course and scope of their employment. Thus, Respondent's argument that the admissions were hearsay is unfounded, and the

¹⁴ See, *Secretary v. Stanbest, Inc.*, 11 BNA OSHC 1222, 1227 (Rev. Comm. 1983) (finding that employee statements made to the adverse party are not hearsay); *Secretary v. Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2131 n. 19 (Rev. Comm. 1981) (stating that employee admissions to the Secretary's representatives while in the context of their employment are not considered hearsay); *Secretary v. Regina Construction Co.*, 15 BNA OSHC 1044, 1047 (Rev. Comm. 1991) (stating that employee admissions to the adverse party are not hearsay and need not be considered under the hearsay exception.).

precedent it cites unavailing because it concerns hearsay and its exceptions, not employee admissions under 801 (d) (2) (D).

VIII Respondent's Argument on Willfulness.

Respondent alleges that the Secretary did not establish the necessary mental state required for a willful classification. Mainly, it argues that the Secretary did not put himself in the employer's shoes and determine the employer's state of mind. In its brief (pp. 70-71), Respondent cites numerous actions as proof demonstrating "... an overall pattern of responsive behavior and meaningful good faith steps to reduce hazards." Respondent alleges that in the face of this 'good faith belief' the Secretary could not establish willfulness without the required state of mind.

However, the actions cited by the Respondent are either unsupported by the evidence or unrelated to the citations. The unrelated items chronicle actions which Respondent claims show a pattern of good faith efforts to ensure safety. But these efforts need not have been motivated by safety concerns, and regardless of the motivation, they do not contravene that facts established by the Secretary.

The citations classified as willful were so egregious that subjective mental state could be assumed and in several instances were violations which Respondent repeated after having been advised of their existence. Given the egregious nature of the violations,

Respondent's "good faith belief" that it was acting in ways which were consistent with employee safety was not reasonable. These citations were correctly classified as willful.

IX Respondent's Defenses to the Merits of the Citations.

To establish violations of the standards and regulations promulgated under the Occupation Safety and Health Act, the Secretary must show by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) its employees were exposed or had access to the violative conditions; and (4) the employer had actual or constructive knowledge of the violation. *Secretary v. Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1610-11 (Rev. Comm. 1992).

The elements of a willful violation are well established under Review Commission precedent:

A willful violation is one committed with intentional, knowing or voluntary disregard for the Act's requirements, or with plain indifference to employee safety. To uphold a willful violation, the Secretary must show that the employer was aware of the particular duty at issue in the case, if not the particular standard embodying the duty. Willful conduct by an employee in a supervisory capacity constitutes a prima facie case of willfulness against his or her employer unless the supervisory employee's conduct was unpreventable.

Secretary v. V.I.P. Structures Inc., 16 BNA OSHC 1873, 1875 (Rev. Comm. 1994).

A. DOCKET NR. 92-0408 - Fatality-Catastrophe Inspection

The events leading up to the accident which prompted the first inspection may be summarized as follows. The accident took place on June 19, 1991, in the course of the bridge construction. The accident resulted in the deaths of Bush & Burchett employees Greg Pridemore and Ralph Snyder. The accident occurred in the course of an attempt to place one of the bridge's beams that span the Guyandotte River on the caps of two bridge piers. Placement of the beam was planned by Joe Burchett, owner of Bush & Burchett, and John Ward, the project manager. The beam in question was of precast concrete and weighed approximately 108,800 pounds. The beam was to be placed on top of the pier caps by two cranes lifting it simultaneously from either side of the Guyandotte River.

Pridemore and Snyder were stationed on the cap of pier three on the highway side of the Guyandotte River,¹⁵ and two other employees, Steve Cochran and Roger Neal, were stationed on the cap of pier 2 on the railroad side to assist in setting the beam in place. Pridemore and Snyder were killed when the boom of one crane collapsed on top of pier 3.

Respondent used two cranes: a Link-Belt 318 ("LS 318") crane and

¹⁵For ease of reference, the river banks were identified by a highway and a railroad.

a Link-Belt 338 ("LS 338") crane.¹⁶ Both were crawler cranes, capable of moving along the ground while holding a suspended load. The LS 318 was positioned on the railroad side of the river, and was operated by Harry Boyd. The LS 338 was on the highway side, and was operated by Van Keaton. Two of the signal men directing the operators were: Jack Cochran, the foreman on the worksite, who signaled to Harry Boyd in the LS 318 and Fred Smith, the supervisor, who signaled to Van Keaton in the LS 338. (Tr. pp. 46-48, 172, 177, 271-72, 274.) All were Bush & Burchett employees.

The beam had been delivered by truck to the worksite. The truck was parked on a temporary bridge spanning the Guyandotte and the beam removed from it by the cranes and set on two temporary pads prepared for it. In this position, it spanned the Guyandotte. Once the cranes had set it down, they took up positions on solid wooden mats previously prepared for them to travel on, lifted the beam from the pads, and commenced walking it upriver while holding it suspended a few feet over the water. Each crane lifted half of the beam's weight: approximately 54,400 pounds. When the two cranes reached the piers, they stopped and simultaneously hoisted the beam above the pier caps. The LS 318, which carried the load over the side, came off the ground slightly. (Tr. pp. 45-48, 172, 398.)

After successfully transporting the beam to the pier caps, the

¹⁶ The LS 338, known as a "100 ton" crane has greater lifting capacity than the LS 318 which is known as an "85 ton" crane.

cranes remained stationary on the mats and swung their booms to move the beam closer to its intended destination. However, the LS 318 had continued to come off the ground.¹⁷ Mr. Burchett's plan relied on the cranes "tipping up" as a sign that they had swung the beam as far as they could. (Tr. pp. 366-67) The beam was twice temporarily placed on the middle of the piers while the LS 318 crane was repositioned to complete the transfer. However, the timber mat did not extend as far as needed.

Standing by the LS 318, Mr. Burchett, Fred Smith and Jack Cochran discussed the possibility of extending the timber mats in front of the LS 318 to ensure a stable foundation for the crane. Nevertheless, they decided to allow the LS 318 to sit on the ground. Thus, Fred Smith, the site supervisor, directed Garland LeMaster in a Kobelco backhoe to level and compact the ground in front of the LS 318 crane. (Tr. pp. 179-80, 380, 1008.) This was done to allow the LS 318 to move forward. By moving forward, it was hoped that the LS 318 could maintain a boom angle which would prevent tipping.¹⁸

Mr. Smith instructed Mr. LeMaster to position the 50,000 pound

¹⁷Steve Cochran testified to seeing the LS 318 go "light in the back" and begin tipping up (Tr. pp. 49-50). As well, crane operator Harry Boyd admitted that at the higher boom position the crane was "bobbing" and "felt like it wanted to lift up" (Tr. p. 189).

¹⁸A crane boom is a lever arm, and the weight suspended from it must be counterbalanced on the opposite side of the crane. As a boom approaches vertical, the amount of weight needed to counterbalance the suspended weight decreases. The danger of tipping is thus reduced.

backhoe behind the LS 318 and place the backhoe bucket either on or slightly above the crane's counterweight.¹⁹ Joe Burchett, Jack Cochran, John Ward and Fred Smith stood close by the LS 318 while the ground was compacted and the backhoe was placed behind the crane.²⁰ (Tr. pp. 396, 1357, 1362-63, 1407.) John Ward suggested that the crane be turned around so that it would lift over the front where the lifting capacity was greater. Mr. Burchett and Fred Smith were both present when Mr. Ward suggested the change, but the advice was not heeded. (Tr. pp. 398-99, 1302.)

The LS 318 was halfway off the timber mats when it lifted the beam the last time. In the attempt to move the beam to its intended location, both cranes were overloaded and at times working against each other. A number of signals were given to each crane operator which it appears may not have been coordinated with the actions of the

¹⁹ Crane operator Harry Boyd testified that the bucket was placed on the counterweights, Steve Cochran also testified to seeing the bucket being placed on the counterweights. As well, Fred Smith testified at an OSHA deposition and later admitted at the hearing that the bucket was placed on the counterweights. Still, backhoe operator Garland LeMaster testified that the bucket was placed slightly above the counterweights. Nevertheless, the weight of the evidence makes it clear that the purpose was to stabilizing the LS 318 crane. (Tr. pp. 181, 55, 1010, 382-384).

²⁰ During testimony, Mr. Joe Burchett agreed that extra weight should never be added to the counterweight of a crane, since this may cause structural damage to the boom. However, Respondent maintained that the backhoe bucket was not used as a counterweight. This contradicts Respondent's brief in which it states that the placing of the bucket over the crane counterweights was a safety precaution (Respondent's Brief p. 27).

other crane. At least one of these, a signal to boom down, was refused by the LS 318 operator in view of the precarious state in which he found his crane.

The backhoe bucket scraped against the counterweight of the LS 318 because the rear of the crane was off the ground. The smaller crane's boom collapsed against the cap of pier 2; that end of the beam fell into the river. (Tr. pp. 111-12, 186, 229.) Next, the boom of the LS 338 crane collapsed onto the cap of pier 3, pinning Ralph Snyder and knocking Greg Pridemore into the river

On June 20, 1991, Compliance Officer John A. Johnson of the Occupational Safety and Health Administration began a fatality-catastrophe inspection at the site in compliance with Chapter VIII of the Field Operations Manual. On June 21, Mr. Johnson conducted the opening conference with Joe Burchett and Albert Burchett, Respondent's counsel. During the inspection, Mr. Johnson visited the worksite on June 20, 21, 25, and 26, and July 5, 12 and 18, 1991. The closing conference for the inspection was conducted on September 6, 1991, and the citations were issued on December 17, 1991. Mr. Johnson found numerous violations of OSHA standards. The classifications and recommended penalties resulting from this inspection were as follows:

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 1	§ 1903.2 (a) 1	OSHA poster	Serious	600

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit.1 Items 2a & 2b	§ 1926.20 (b) (1) & 20 (b) (2)	Safety programs and inspections	Serious	3,000
Cit. 1 Item 3	§ 1926. 21 (b) (2)	Employee instruction in recognition and avoidance of hazards	Serious	3,000
Cit. 1 Items 4a & 4b	§ 1926.50 (c) & 50(f)	First aid provider; posting of ambulance telephone number	Serious	1,200
Cit. 1 Item 5a	§ 1926.59 (e) (4)	Vacated at trial - Tr. 155-56.		
Cit. 1 Item 5b & 5c	§ 1926.59 (g) (10) & (h)	MSDS availability and hazardous chemical training	Serious	1,200
Cit. 1 Item 6	§ 1926.106 (d)	Lifesaving skiff	Serious	1,200
Cit. 1 Item 7	§ 1926.251 (c) (5)	U-Bolt clips	Serious	2,100
Cit.1 Item 8	§ 1926 500 (d) (2)	Guardrails	Serious	2,100
Cit. 1 Item 9	§ 1926.550 (a) (1)	One signal man on tandem lifts	Serious	3,000
Cit. 1 Item 10	§ 1926.550 (a) (12)	Cracked windshield	Serious	900
Cit. 1 Item 11	§ 1926.550 (b) (2) ANSI Code § 5-2.1.3 ²¹	Periodic inspections	Serious	3,000

²¹ ANSI Code B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 12	§ 1926.550 (b) (2) ANSI Code § 5-3.4.9	Fire extinguisher	Serious	1,200
Cit. 1 Item 13	§ 1926.550 (b) (2) ANSI Code § 5-2.3.1	Preventive maintenance program	Serious	2,100
Cit. 1 Item 14	§ 1926.550 (b) (2) ANSI Code § 5-3.2.3	Designated person on tandem lifts	Serious	3,000
Cit. 1 Item 15	§ 1926.550 (g) (3) (ii) (C)	Anti-two blocking device	Serious	3,000
Cit. 1 Item 16	§ 1926.550 (g) (4) (I) (A)	Item vacated by the Secretary by motion of Feb. 3, 1995.		
Cit.1 Item 17	§ 1926.550 (g) (4) (ii) (A)	Guardrails on manbaskets	Serious	2,100
Cit. 1 Item 18	§ 1926.550 (g) (4) (ii) (B)	Grabrails on manbaskets	Serious	900
Cit.1 Item 19	§ 1926.550 (g) (4) (ii) (I)	Posting rated load capacity	Serious	900
Cit. 1 Item 20	§ 1926.550 (g) (4) (iv) (D)	Thimbles for eyes in wire rope slings	Serious	1,200
Cit. 1 Item 21	§ 1926.550 (g) (5) (I)	Trial lifts	Serious	1,200
Cit. 1 Item 22	§ 1926.550 (g) (8) (I)	Pre-lift meeting	Serious	1,200
Cit. 1 Item 23	§ 19256.1053 (a) (1) (ii)	Filler blocks on ladder	Serious	1,200
Cit. 1 Item 24	§ 1926.1053 (a) (3) (I)	Rung spacing on ladder	Serious	1,200

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 25	§ 1926.550 (b) (2)	Item not briefed by the Secretary, therefore; it is vacated		
Cit. 2 Item 1	§ 1926.105 (a)	Fall protection	Willful	21,000
Cit. 2 Item 2	§ 1926.550 (b) (2) ANSI Code § 5-2.4.1	Rope inspection	Willful	21,000
Cit. 2 Item 3	§ 1926.550 (b) (2) ANSI Code § 5-3.2.1	Crane overloading	Willful	70,000
Cit. 2 Item 4	§ 1926.550 (b) (2) ANSI Code § 5-3.4.2	Exceeding the counterweight	Willful	70,000
Cit. 2 Item 5	§ 1926.550 (g) (3) (ii) (C)	Anti-two blocking device	Willful	21,000
Cit. 2 Item 6	§ 1926.550 (g) (4) (I) (A)	Vacated by post- hearing motion dated Feb. 3, 1995		
Cit. 2 Item 7	§ 1926.550 (g) (4) (ii) (A)	Vacated by post- hearing motion dated Feb. 3, 1995		
Cit. 2 Item 8	§ 1926.550 (g) (4) (ii) (B)	Vacated by post- hearing motion dated Feb. 3, 1995		
Cit. 2 Item 9	§ 1926.550 (g) (4) (iv) (D)	Vacated by post- hearing motion dated Feb. 3, 1995		
Cit. 2 Item 10	§ 1926.550 (g) (4) (ii) (I)	Vacated by post- hearing motion dated Feb. 3, 1995		

Citation 1, Item 1 **Alleged Serious Violation of 29 C.F.R. § 1903.2
(a) (1).**

This standard requires an employer post an OSHA notice in each establishment in "a conspicuous place or places where notices to employees are customarily posted." The purpose of this regulation is to assure that employees are apprised of their rights under the Act. The Secretary alleges that the Respondent's worksite in Harts, West Virginia was in violation of this standard.

During the course of the inspection, Mr. Johnson observed that the area referred to as the office did not have an OSHA notice posted. (Tr. pp. 426, 727-28.) Upon inquiry, he learned that a notice was posted at Bush & Burchett's headquarters in Kentucky.

Respondent does not contest the fact that an OSHA notice was not posted at the Harts worksite, but alleges that the notice was never furnished by the Secretary, and thus Respondent was not required to post it. Citing *Secretary v. Anderson Excavating and Wrecking*²², Respondent contends that the Secretary has the burden of proving that an OSHA notice was provided for the Harts worksite. Respondent further asserts that the Secretary offered no evidence that a notice had been furnished for the Harts site prior to the inspection. Consequently, Respondent believes the citation should be vacated because the Secretary has not met his burden of proof.

Respondent's assertion that the Secretary is responsible for

²² 11 BNA OSHC 1837 (Rev. Comm. 1984).

furnishing a notice for each worksite is not persuasive. In *Anderson*, the Secretary could not prove that any OSHA posters had been issued for any of respondent's sites. This is not the issue here. Bush & Burchett, a multi-site employer, had been issued a poster for its headquarters, but not for the Harts site. The issue is different: Must the Secretary furnish an employer a notice for every worksite?

Bush & Burchett is a construction company with multiple worksites. At the Harts site, it hired local union employees, many of whom would not have the opportunity to visit Respondent's Kentucky offices and therefore have access to the OSHA notice. Given the provision in the standard which permits employers to meet their posting obligation with xeroxed copies of the notice, it is reasonable to require an employer to post copies of the notice furnished by OSHA at its worksites. It is unreasonable to require OSHA to furnish a poster for each different construction site. In the present case, Respondent was aware of the posting requirement, but did not comply. The Secretary met his burden by proving that a notice had been furnished for Respondent's headquarters and that no such notice was posted at the Harts worksite.

In recommending a \$600.00 penalty, Mr. Johnson took into consideration all of the appropriate factors required by § 17 (j) of the Act. The Secretary has established a violation of § 1903.2 (a) (1) and recommended an appropriate penalty.

Citation 1, Item 2a & 2b Alleged Serious Violation of 29 C.F.R. § 1926.20 (b) (1) & (b) (2).

Section 1926.20 (b) (1) requires an employer initiate and maintain such programs as may be necessary to comply with the Section 1926 construction standards. Section 1926.20 (b) (2) requires an employer have a competent person conduct "frequent and regular" safety and health inspections of the materials and machinery on the site.

During the course of his inspection, Mr. Johnson questioned Mr. Burchett regarding the safety programs in place at the worksite. Mr. Burchett replied by stating that no written safety program was in place at the Harts worksite. As well, when asked about the frequency of safety and health inspections at the Harts worksite, Mr. Burchett stated that no inspections had taken place. At trial, the Secretary offered evidence to establish that Respondent had no safety program and that no safety or health inspections were conducted at the worksite. (Tr. pp. 72,121, 196, 358-59, 373, 430, 434.) Respondent offered no evidence contrary.

Respondent alleges that the violations under sections 20(b) (1) and 20(b) (2) should be vacated pursuant to the Review Commission's holding in *Secretary v. Granite-Seabro Corp.*²³ According to Respondent, *Granite-Seabro* stands for the proposition that sections 1926.20(b) (1) and 20(b) (2) are void for vagueness. However, the rationale in *Granite-Seabro* was overruled by the Commission in

²³ 2 BNA OSHC 1163 (Rev. Comm. 1974).

*Secretary v. J.A. Jones Construction Co.*²⁴

In *Jones*, the Commission recognized the vagueness of the standards set forth in § 1926.20. Nevertheless, it affirmed the citation, believing that employers should know what safety requirements are required and necessary for their particular industry. Citing *R&R Builders, Inc.*,²⁵ the Commission stated:

[G]eneralized standards ...are not vague and unenforceable if 'a reasonable person,' examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it. An employer can reasonably be expected to conform a safety program to any known duties.

The testimony of Mr. Burchett and his employees supports the conclusion that there was no safety program whatsoever at the Harts worksite and that no safety and health inspections had been performed. Mr. Burchett has over 22-years of experience in the construction business, has erected approximately 150 bridges and authored safety plans and standards for other construction ventures. (Tr. pp.1264-65, 1267-68.) He was very aware of the hazards of the trade and the correct procedure for their abatement. Nevertheless, no safety programs were in place at the Harts work site.

In recommending a \$3,000.00 penalty, Mr. Johnson took into consideration the factors outlined in Section 17 (j) of the Act. The

²⁴ 15 BNA OSHC 2201, 2205-06 (Rev. Comm. 1993).

²⁵ 15 BNA OSHC 1383, 1387 (Rev. Comm. 1991).

Secretary has established violations of § 1926.20 (b) (1) and 1926.20 (b) (2) and recommended the appropriate penalty.

Citation 1, Item 3 Alleged Serious Violation of 29 C.F.R. § 1926.21 (b) (2) .

This standard requires that employers

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

The Secretary alleges that Bush & Burchett did not implement any safety programs and as a result, its employees were imperiled through their ignorance of possible hazards.

The Secretary relies on the testimony of Bush & Burchett employees Steve Cochran, Roger Neal and Harry Boyd who testified that their employer did not provide any safety training regarding the recognition and avoidance of hazards in the workplace. (Tr. pp. 72, 121, 195-96.) As a result of their lack of training, employees were exposed to the many and diverse hazards that accompany bridge building.

Respondent does not contest the lack of a safety program, but does alleges that no program was supplied by the Secretary in compliance with 29 C.F.R. § 1926.21(b) (1). According to Respondent, part (b) (1) of the standard creates a positive duty on the Secretary to supply safety programs which become the object of part (b) (2) violations. However, no such reading of the regulation is evident in

Review Commission precedent. Moreover, a proper reading of the statute, which states: "(b) *Employer Responsibility*. (1) The employer should avail himself of the safety and health programs the Secretary provides," does not require the Secretary to furnish safety programs.

Evidence in the record shows that the employees were not instructed on the recognition and avoidance of possible hazards on the worksite. Mr. Burchett and his employees testified that no safety training was provided at the Harts worksite. (Tr. p. 438.) The failure to provide the training was attributed to the owner's belief that the men were well acquainted with the hazards of the job. Nevertheless, no attempt was made to assess whether this conjecture was correct. The Secretary has shown the lack of a program by the Respondent and the hazards which the employees were exposed to on a daily basis. Furthermore, the evidence is overwhelming that Respondent was aware of the hazards on the site.

In assessing a \$3,000.00 penalty, Mr. Johnson took into consideration the guidelines set out section 17 (j) of the Act. The Secretary has established a violation of § 1926.21 (b)(2) and recommended an appropriate penalty.

Citation 1, Items 4a & 4b Alleged Serious Violations of 29 C.F.R. § 1926.50(c) and § 1926.59(f).

Section 1926.50(c) requires that, in the absence of a reasonably accessible medical facility or physician, a person with a valid first aid training certificate must be available at the worksite. Mr.

Johnson learned through interviews with Mr. Burchett and other employees at the worksite that there was no such person at this jobsite. (Tr. 441-43.) However, as Respondent points out, the Secretary made no showing with regard to the accessibility of a medical facility or physician. The standard clearly requires the presence of an individual qualified in first aid in the absence of such a facility or physician. The Secretary failed to carry his burden of proof on this item. It is vacated.

Section 1926.50(f) requires that the employer conspicuously post at the worksite telephone numbers of the nearest physician, hospital, or ambulance or rescue service. Mr. Johnson testified that no such telephone numbers were posted in or around the job trailer where a telephone was located. (Tr. 449, 1510-11.) However, Mr. Ward testified that an appropriate number was posted (Tr. 1201), and Mr. Burchett appears to have had no difficulty in summoning the rescue squad by telephone following the June 19 accident (Tr. 1312). The Secretary has failed to meet his burden of proof with respect to this item. It is vacated.

Citation 1, Items 5b & 5c Alleged Serious Violations of 29 C.F.R. § 1926.59(g)(10) and § 1926.59(h).

Citation 1, Item 5 is the grouped violation of two interrelated standards. Section 1926.59 (g)(10) requires that employers make the Material Safety Data Sheets ("MSDS") readily accessible to employees

in all shifts. An MSDS is a sheet which contains the components of a chemical, as well as any safety or health hazards known to be related to the use of that chemical. On the other hand, Section 1926.59 (h) requires that employers inform and train employees with regards to the use of hazardous materials at their initial assignment and at the introduction of a new hazard. The Secretary alleges that Bush & Burchett violated both standards with regards to its use of Crete-Lease 80²⁶ on the worksite, a substance with several possible side effects.²⁷ The testimony of Bush & Burchett employees Roger Neal and Steve Cochran shows that Crete-Lease 80 was a commonly used material on the site. (Tr. pp. 120-121, 455-456.)

During the inspection of the worksite, Mr. Johnson requested that Mr. Burchett produce the MSDS for the Crete-Lease 80. Although Mr. Burchett stated that these were not immediately available, it appears that, in fact, the MSDS was affixed to the Crete-Lease container. (GX-9; Tr. 1199.) Consequently, item 5b is vacated.²⁸

With respect to item 5c, the Secretary again offers the testimony of Steve Cochran and Roger Neal, the employees who were exposed to

²⁶ Crete-Lease 80 is applied to metal concrete forms to keep concrete from bonding to them.

²⁷ See Government Exhibit 17 (Crete-Lease can cause eye and skin irritation, dizziness or other central nervous system disorders).

²⁸The Secretary's motion to amend this item is moot because, either as it was originally stated or as sought to be amended, the item must be vacated.

Crete-Lease 80. These employees testified that they were never instructed on the possible hazards related to the use of the product. (Tr. pp. 72, 120.) Moreover, the Secretary offers the admission by Joe Burchett that the employees were not trained or instructed with regards to hazards on the worksite. (Tr. pp. 455, 462.)

Meanwhile, Respondent, not contesting the testimony, alleges that the citations should be vacated because the Secretary failed to prove that the violation occurred within the limitations period of § 9(c) of the Act. The wording of the regulation specifies that the employer should instruct the employees about hazardous situations at the start of a job or when a new hazard is introduced into their work area. Respondent alleges that the hazard created by the Crete-Lease was introduced more than six months prior to the issuance of the citations and as such, the violation occurred outside of the limitation period.

Once again, Respondent attempts to construe a standard in a way that would make its enforcement impossible. If the standard were read in this manner, the ongoing exposure to hazardous materials would be statutorily excused six months after its introduction. This interpretation of the standard is inconsistent with the goals of employee safety and health. While the language of the standard does place a premium on early compliance, it does not excuse the continued exposure without instruction and training simply because the hazard was first introduced outside of the limitation period.

This section creates an affirmative duty on the employer to keep

employees abreast and instructed on the hazards of the worksite. The act which the standard penalizes is not the introduction of a new hazard, but the failure to instruct. In *Secretary v. General Dynamics, Electric Boat Div.*²⁹ the Commission found that a positive act was not necessary to prove an occurrence date. When a standard creates an affirmative duty upon employers, the violation occurs whenever the employer does not carry out its duty and the employees have access to the source of the hazard. In the present case, Respondent was in violation of § 1926.59(h) as long as the hazards were accessible to the employees and the duty to instruct had not been fulfilled. Such was the case here.

In recommending a penalty of \$1,200.00, Mr. Johnson took into consideration the elements set forth in § 17 (j) of the Act. The Secretary has established a violation of § 1926.59 (h), and has recommended an appropriate penalty.

Citation 1, item 6 Alleged Serious Violation of 29 C.F.R. § 1926.106 (d).

This standard requires that a lifesaving skiff be immediately available at locations where employees are working adjacent to water. The Secretary alleges that Bush & Burchett did not have a skiff on the Guyandotte River on the date of the inspection or the date of the accident.

²⁹ 15 BNA at 2131.

The Secretary offers the testimony of Mr. Johnson, who did not find a life-saving skiff on the site during the June 20, 1991 inspection. Furthermore, there was no skiff on the site on June 19, 1991 when employees were working above the River (Tr. pp. 71, 116, 172, 464-65, 1296.) The hazard created by the water was obvious. Bush & Burchett employees Roger Neal and Van Keaton testified that the water was normally six feet deep. (Tr. pp. 138, 283.)

Respondent contends that it did not know of the standard nor the hazard created by the lack of a life saving skiff. Nevertheless, the Commission has held that an employer "is charged with notice (constructive knowledge) of the terms of the cited standard."³⁰ Moreover, since employer was represented on the site daily through its supervisors and the River was obvious, actual notice of the hazard may be imputed.

In recommending a penalty of \$1,200.00, Mr. Johnson took into consideration all of the appropriate elements set forth in section 17 (j) of the Act. The Secretary has established a violation of § 1926.106 (d) and has recommended an appropriate penalty.

Citation 1, Item 7 Alleged Serious Violation of 29 C.F.R. § 1926.251(c) (5).

This standard requires that U-Bolt clips be used to form the wire rope eyes as prescribed by an appended table, H-20. While inspecting

³⁰ *Secretary v. CapForm, Corp.*, 13 BNA OSHC 2219, 2224 (Rev. Comm. 1986).

the Harts worksite, Mr. Johnson observed that one of the manbaskets was supported by wire rope eyes constructed with only one U-bolt clip. (Tr. pp. 466-67; GX 18.) Although there was no evidence regarding the size of the rope, the statutorily required minimum according to table H-20 is three clips spaced three inches apart.³¹ The manbasket had been used on June 19, 1991, to lift Steve Cochran and Roger Neil onto pier 2. (Tr. pp. 41, 43, 106-08, 469-70.) Without the required number of U-bolt clips, the eyes in the wire rope could have slipped causing the manbasket to fall, resulting in severe injury or death.

Respondent notes that this standard does not apply to this situation. According to Respondent, 29 C.F.R. § 1926.251 applies when materials are lifted, not employees. Consequently, the Secretary's evidence with respect to the lifting of employees does not prove a violation of the cited standard. In the alternative, Respondent asserts that the braided wire used for these lifts was stronger than that cited in the standard and that this stronger, safer wire did not require the added protection of the U-Bolt clips.

Respondent is correct in asserting that this standard applies to materials handling. Because the evidence concerns the hoisting of personnel, not material, the Secretary did not establish a violation of this standard. This situation should have been cited under § 1926.550(g)(4)(iv). Citation 1, Item 7, is vacated.

³¹ See 29 C.F.R. § 1926.251 table H-20

Citation 1, Item 8 Alleged Serious Violation of 29 C.F.R. § 1926.500
(d) (2).

This standard requires that runways four or more feet above ground or other surface be guarded by standard railings or the equivalent. The Secretary alleges that the temporary bridge across the Guyandotte was in violation of this standard.

On June 20, 1991, Mr. Johnson observed that the temporary bridge, which stood approximately twenty feet above water level, was not equipped with railings or an equivalent. Employees had access to the bridge and used it often. (Tr. p.172, 1296.) The unguarded bridge presented a serious fall hazard, as employees could have fallen approximately twenty feet into the river below.

Respondent offered no evidence that railings were ever in place, but does assert that it would have been impracticable to place railings on the bridge. The bridge was often used by heavy equipment and to receive supplies. According to Respondent, since the bridge was commonly used in this manner, the railings would be removed and replaced constantly, creating a greater fall hazard since the employees would have to get closer to the edge to do these procedures. As it stood, the bridge was twenty feet wide, giving employees a safe pathway across the middle. Respondent cites *Secretary v. Luterbach Construction Co.*³² to support these contentions.

³² 13 BNA OSHC 1552 (ALJ 1987).

Luterbach held that it was more hazardous to use railings because the employees were safer staying away from the edge rather than having to approach it periodically in order to remove or replace railings. In *Luterbach*, Respondent offered testimony in support of this conclusion,³³ while in the instant case, Respondent offered no such evidence. Moreover, there is no evidence regarding the frequency with which the bridge was used by heavy equipment or to receive supplies. In contrast, the Secretary introduced evidence regarding the frequency of pedestrian use, the possibility that great harm could follow a fall from the bridge, and the open and obvious condition of the violation.

In recommending a \$2,100.00 penalty, Mr. Johnson took into consideration the appropriate statutory and regulatory guidelines. The Secretary has established a violation of § 1926.500 (d) (2) and recommended an appropriate penalty.

Citation 1, Item 9 Alleged Serious Violation of 29 C.F.R. § 1926.550(a)(1).

This standard requires that employers "comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks." The Secretary alleges that Respondent violated this standard by its use of more than one signal man in the tandem lift attempted on June 19, 1991. The *Operator's & Maintenance Manual* and *The Operating Safety Manual for*

³³ *Id.* 13 BNA OSHC at 1553.

Cranes and Excavators for the Link-Belt cranes specify that only one signal-man should be used when attempting a tandem lift.

The Link-Belt 318 and 338 cranes participated in the tandem lift of the 108,800 pound beam on June 19, 1991. The Secretary relies on the testimony of crane operators Harry Boyd and Van Keaton who stated that five employees were involved as signal-men during the tandem lift. The employees involved were: Jack Cochran, Fred Smith, Steve Cochran, Greg Pridemore and Dale Cabell.

As the lift began, two signal-men directed the cranes. Jack Cochran, standing on the temporary bridge, signaled the LS 318 on the railroad side; Fred Smith signaled the LS 338 on the highway side. When the beam was lifted above the pier caps Steve Cochran took over as signal-man for the LS 318, while Greg Pridemore, standing on pier 3, directed the LS 338. Dale Cabell began relaying the signals when the cab obscured Harry Boyd's view of Steve Cochran. At this time, Jack Cochran and Fred Smith were standing by the LS 318. (Tr. pp. 38, 172, 179, 216, 274-75, .)

Respondent alleges that only one signal-man was used during the tandem lift: Jack Cochran. (Respondent's Brief p. 46-47.) Mr. Burchett testified that any other signal-man was merely relaying Jack Cochran's signals. Although relaying signals from a single signal man is an acceptable procedure under this standard, the testimony of the individuals involved suggests that more than one signal man was involved. Fred Smith and Van Keaton both testified that Fred Smith

had been one of the signal-man at the start of the operation. (Tr. pp. 274-75, 387.) The lift was directed by more than one signal man.

The confusion that surrounded the moments preceding the accident indicates that several independent signal men were at work, trying unsuccessfully to maintain control of the beam. Greg Pridemore signaled Van Keaton in the LS 338 to swing upriver and boom down. (Tr. pp. 281-82, 309.) On the other side, Steve Cochran signaled Harry Boyd to boom down. (Tr. pp. 61, 110-11, 282, 303, 319.) However, Harry Boyd did not boom down since he felt he was at maximum capacity and booming down would have further decreased the crane's ability to support the load. Greg Pridemore signaled Van Keaton in the LS 338 to boom up. (Tr. pp. 282, 110-11, 984, 990.) Then the overloaded cranes collapsed.

There is no evidence that Jack Cochran was the only signal-man during the June 19 lift. In effect, the testimony of all those involved shows that several men were involved in signaling the two cranes.

In recommending a \$3,000.00 penalty, Mr. Johnson considered all of the appropriate factors set forth in the statutory and regulatory guidelines. The Secretary has established a violation of § 1926.550 (a) (1) and recommended an appropriate penalty.

Citation 1, Item 10 Alleged Serious Violation of 29 C.F.R. § 1926.550 (a) (12) .

This standard requires that all windows in the cabs of cranes be made of safety glass and that there be no visible distortions which could interfere with the operator's vision. The Secretary alleges that Respondent's Koehring 665 crane was in violation of this standard.

On June 26, 1991, Mr. Johnson observed two cracked window panels on Respondent's Koehring 665 crane.³⁴ The crane was on the site and accessible to employees. Furthermore, the cracks, one on the windshield and one on the right/operator's side, impaired the operator's vision and created a hazard.

Respondent contends that under *Secretary v. Paterno & Sons, Inc.*³⁵ The Secretary must prove by a preponderance of the evidence that the crack in the windshield actually distorted the operator's view. In *Paterno & Sons*, the respondent elicited testimony from the crane operator who stated that the crack did not impair vision. Similarly, in *Secretary v. L.G. Defelice, Inc.*³⁶, the respondent offered the testimony of the crane operator to establish that the crack did not impair vision. In the instant case, Respondent offers no such testimony.

The only testimony on the record is that of Mr. Johnson, who stated that the cracks impaired the operator's vision. Van Keaton,

³⁴ See Government Exhibit 22.

³⁵ 9 BNA OSHC 2156 (Rev. Comm. 1981).

³⁶ 16 BNA OSHC 1743, 1747 (OSHRC Docket No. 92-3349 1994).

who had operated the crane, did not state whether the crack impaired his vision; he only corroborated the fact that the windows were cracked. However, the picture moved into evidence by the Secretary shows a visible distortion going left to right across the windshield of the Koehring 665 crane. (GX-22.) The crack transverses the windshield in a manner that would hamper the operator's vision regardless of height, experience, boom angle or chore.

In recommending a \$900.00 penalty, Mr. Johnson took into consideration the appropriate guidelines set forth in section 17 (j) of the Act. The Secretary has established a violation of § 1926.550 (a) (12) and recommended an appropriate penalty.

Citation 1, Item 11 Alleged Serious Violation of 29 C.F.R. § 1926.550 (b) (2) Incorporating by Reference ANSI Code § 5-2.1.³⁷

This standard requires the periodic inspections of cranes as specified by the ANSI code or by manufacturer's specification contained in the Operator's Manual. The Secretary alleges that none of the four cranes on the site were inspected in conformance with the provisions of the ANSI Code.

At the beginning of work on June 19, 1991, four cranes were available for use on the site: a Link-Belt 318, a Link-Belt 338, a Link-Belt 118, and a Koehring 665. During the inspection,

³⁷ ANSI Code references are contained in B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Respondent's owner admitted to Mr. Johnson that these cranes had not been inspected. (Tr. p. 496.) Although Mr. Burchett attempted to refute his own admission at trial, the evidence on the record shows that no inspections which would fulfill the requirements of the ANSI Code had been performed. The only evidence of any inspections was the testimony of Harry Boyd, who recalled checking the hoist lines and booms "every once in a while." (Tr. p. 232.) However, Mr. Boyd's inspections only referred to the Koehring 665, were done out of his own concerns for safety, and were not carried out as specified by the Code.

The evidence is conclusive: no safety inspections of note were performed under the direction of Bush & Burchett. Mr. Burchett's admission to Mr. Johnson and his subsequent change of mind do not address the sufficiency of the inspections or defeat the evidence which supports the conclusion that there were no safety and health inspections.

In recommending a penalty of \$3,000.00, Mr. Johnson took into consideration the appropriate factors set forth in regulatory and statutory guidelines. The Secretary has established a violation of § 1926.550 (b) (2) and recommended an appropriate penalty.

Citation 1, Item 12 Alleged Serious Violation of 29 C.F.R. § 1926.550(b) (2) Incorporating by Reference ANSI Code § 5-3.4.9.

This standard requires in part that a carbon dioxide, dry

chemical or equivalent fire extinguisher be kept in the cab or the vicinity of a crane. The Secretary alleges that the LS 318 and 338 cranes were not equipped with fire extinguishers nor were there any in their vicinity.³⁸

When the two cranes were photographed by Mr. Richard Jeffreys on June 19, 1991, no fire extinguishers were present on the cranes or in the vicinity. Nor were there any fire extinguishers in the vicinity of the cranes when Mr. Johnson began the OSHA inspection on the following day. Furthermore the operators of these cranes, Harry Boyd and Van Keaton, testified that they had never seen fire extinguishers for these cranes. (Tr. pp. 194, 499.)

Respondent alleges that the Secretary has no proof that fire extinguishers were not in the vicinity of the two cranes. However, pictures from the site together with the testimony of the employees and Compliance Officers is sufficient proof that no fire extinguishers were in the vicinity of the LS 318 and 338 cranes. Respondent offers no rebuttal to these allegations.

In recommending a \$ 1,200.00 penalty, Mr. Johnson took into consideration all of the required regulatory and statutory standards. The Secretary has established a violation of § 1926.550 (b) (2) and recommended an appropriate penalty.

³⁸ Respondent had been previously cited for the same violation of a similar standard by the Kentucky Department of Labor in 1984 and 1985. See Government Exhibit 16.

Citation 1, Item 13 Alleged Serious Violation of 29 C.F.R. § 1926.550(b)(2) Incorporating by Reference ANSI Code § 5-2.3.1.

This standard requires the employer establish a preventive maintenance program based on the manufacturer's recommendations and that dated and detailed maintenance records be readily available. Preventive maintenance is an economical and simple way of abating possible hazards before accidents occur. The Secretary alleges that, as evidenced by the lack of written records, no preventive maintenance program was in effect at the Harts, West Virginia worksite.

In the course of his inspection, Mr. Johnson learned that no preventive maintenance program had been established by Bush & Burchett at the worksite. At trial, the crane operators testified that no preventive maintenance had been done on the cranes since they had been in use at Harts. (Tr. p. 504.)

Respondent offers the testimony of Harry Boyd, who stated that he had done some inspections on the Koehring 665 crane. However, as stated before, Mr. Boyd's inspections were done out of his own volition and without directions from Bush & Burchett. Respondent alleges that \$ 350,000.00 were spent for the maintenance of the cranes. Nevertheless, no records were kept of any inspections or maintenance. Record keeping is required by the standard and cannot be overlooked. A lack of records not only violates the standard but creates a presumption that no regular maintenance has been carried out.

In calculating the \$2,100.00 penalty, Mr. Johnson took into consideration all of the elements set forth in regulatory and statutory guidelines. The Secretary has established a violation of § 1926.550 (b) (2) and recommended an appropriate penalty.

Citation 1, Item 14 Alleged Serious Violation of 29 C.F.R. § 1926.550 (b) (2) Incorporating by Reference ANSI Code § 5-3.2.3.

This standard requires that one designated person be responsible for all aspects of a lift involving two or more cranes. The designated person is required to analyze the operation and instruct all parties involved about the proper positioning, rigging of the load, and the movements that will be made during the lift. The Secretary alleges that no individual was designated to carry out the tasks required by the standard for the June 19 lift.

Respondent contends that Fred Smith, the site supervisor, was the designated individual to carry out the lift. Steve Cochran stated that Mr. Smith was in charge of the June 19 lift, and according to Respondent, the preponderance of the evidence confirms this assertion. However, the Secretary offers evidence that Mr. Smith was not in charge and if so, he did not perform the tasks required by the standard.

According to the Secretary, Fred Smith was not involved in the formulation of the plan, did not inform employees as to how the lift would proceed and did not carry out the lift as planned. Mr. Burchett

testified that the plan had been drawn up by himself, John Ward, Sam Hale, and Everett Moreland, but he could not say with certainty that Fred Smith was involved. (Tr. pp. 1281-84.) Roger Neal testified that he was not approached by Fred Smith with any instructions or matters relating to the beam erection, even though Mr. Neal was a signal man and had never worked on a beam erection. (Tr. pp. 108, 114.) Finally, Mr. Johnson testified that through depositions and oral admissions of the employees he was informed that no one was in charge of the tandem lift. (Tr. p. 507.)

When undertaking a complex procedure such as a tandem lift there is a great premium placed on continuity. One individual is given charge of all aspects of the lift to ensure proper coordination and continuity. Fred Smith was not the designated person in charge of the lift. In his role as the site supervisor, he was in charge of the entire operation. Nevertheless, the flaws alluded to by the Secretary show that either the lift was not directed by Smith, or, if it was, Smith did not fulfill his duties under the standard.

In recommending a penalty of \$3,000.00, Mr. Johnson took into consideration the appropriate factors set forth in § 17 (j) of the Act. The Secretary has established a violation of 29 C.F.R. § 1926.550 (b) (2) and recommended an appropriate penalty.

Citation 1, Item 15 Alleged Serious Violation of 29 C.F.R. § 1926.550 (g) (3) (ii) (c).

This standard requires the use of an anti-two blocking device, which would prevent contact between the load block or overhaul ball and the boom tip. Since this item cites the same hazard as Citation 2, Item 5b and both were discovered during the same inspection, the two items will be combined and discussed as instances of the same violation. See Citation 2, Item 5b for a discussion of this item and the penalty assessed.

Citation 1, Items 17 - 22 Alleged Violations Relating to Manbaskets.

These six items relate to the condition of two manbaskets used by the Respondent at the worksite. The citations derive from a common nucleus of facts and should be considered together for the sake of brevity and clarity.

During the course of his inspection, Mr. Johnson found two manbaskets on the worksite which did not comply with several OSHA standards. Upon further inquiry, Mr. Johnson discovered that these manbaskets had been used on the previous two days. On June 18 and 19, 1991, four Bush & Burchett employees (Steve Cochran, Roger Neal, Greg Pridemore and Ralph Snyder) were hoisted onto their workstations atop piers 2 and 3 which stood fifty to seventy feet above ground level. At trial, Roger Neal identified the two manbaskets as those photographed in Government's exhibits 4 and 26 ("the photographs"). (Tr. pp. 106, 116, 526.) The manbaskets were constructed by Bush & Burchett employees under the direction of Mr. Burchett, who supplied the

design. (Tr. pp. 1341-43.)

**Item 17 Alleged Serious Violation of 29 C.F.R. § 1926.550
(g) (4) (ii) (A) .**

This standard requires that personnel platforms or manbaskets be equipped with a guard rail, be enclosed from toeboard to mid-rail with either solid metal or expanded metal having openings no greater than ½ inch and meet the additional requirements found in subpart M. The Secretary alleges that the manbaskets used by Bush & Burchett violated this standard.

Mr. Johnson observed that the manbaskets did not have mid-rails nor were they enclosed from toeboard to mid-rail. The condition was open and notorious as seen in the photographs presented by the Secretary of the two manbaskets identified by employees as those used on June 18 and 19.³⁹

The hazards were similarly obvious. The lack of mid-rails exposed employees to fall hazards which could result in severe injury or death; while the failure to enclose the toeboard to mid-rail section created not only a fall hazard for employees, but imperiled the employees on the ground who could be struck by falling tools.

**Item 18 Alleged Serious Violation of 29 C.F.R. §
1926.550 (g) (4) (ii) (B) .**

³⁹ See Government Exhibits 4, 26.

This standard requires that manbaskets be equipped with grab rails. A grab rail is a separate railing running around the inside of the manbasket that allows employees to tie off or hold on while being hoisted. During his inspection of the manbaskets, Mr. Johnson noted that they were not equipped with grab rails. This condition was open and obvious, and can again be noticed in the photographs offered by the Secretary. The lack of grabrails constitutes a violation of this standard.

**Item 19 Alleged Serious Violation of 29 C.F.R. §
1926.550 (g) (4) (ii) (I) .**

This standard requires that each personnel platform be posted with a plate or other permanent marking indicating the weight of the platform and its rated load capacity or maximum intended load. The purpose of this standard is to avoid the overloading of platforms due to employee ignorance of the maximum capacity of the platform.

The Secretary alleges that the manbaskets used for the June 18 and 19 lifts were not posted with the weight of the platform or its maximum intended load. Mr. Johnson observed no plates or permanent markings on the manbaskets that referred to weight or capacity. The lack of any markings that would comply with the standard can be seen on the photographs offered by the Secretary.

Non-compliance with this standard could lead to the overloading of personnel platforms. Overloaded platforms may collapse causing

severe injury or death. The lack of plates or other permanent markings constitutes a violation of this standard.

Item 20 Alleged Serious Violation of 29 C.F.R. § 1926.550(g) (4) (ii) (D).

This standard requires that all eyes in wire rope slings be fabricated with thimbles. Eyes are the connection points between the slings and the four corners of the manbasket. The thimbles are metal pieces which reinforce the connection points and prevent damage to the wire. Mr. Johnson observed that the eyes of the manbaskets used for the June 18 and 19 lifts were not fabricated with thimbles. (Tr. pp. 538-40.) The lack of thimbles exposed the employees riding the manbaskets to severe injury as the weaker connection points increased the probability of damage to the wire. The condition was in plain view and can be seen on the photographs.

Item 21 Alleged serious Violation of 29 C.F.R. § 1926.550(g) (5) (I).

This standard requires that a trial lift with the unoccupied personnel platform loaded at least to the anticipated lift weight be made from ground level to each location at which the platform is to be hoisted. The trial lift shall be performed immediately prior to lifting the employees to their positions. Mr. Johnson testified that during the inspection he was told by Bush & Burchett employees Roger Neal and Steve Cochran that trial lifts had not been conducted. (Tr.

pp. 541, 543.) Roger Neal verified the admissions at the hearings by stating that he had never witnessed a trial lift between April and October 1991.

Item 22 Alleged serious Violation of 29 C.F.R. § 1926.550(g) (8) (I).

This standard requires that a meeting be held, prior to the lift, between the crane or derrick operators, signal person(s), employee(s) to be lifted, and the person responsible for the task to discuss the appropriate requirements as contained in 29 C.F.R. § 1926.550(g) and the procedures to be followed during the lift. In the course of the inspection, Mr. Johnson was told by Bush & Burchett employees Roger Neal, Steve Cochran, Harry Boyd, and Van Keaton that they all participated in the June 18 and 19 lifts, but did not participate in any pre-lift meetings on those days. These admissions were corroborated at trial by Van Keaton and Roger Neal who acknowledged that they had not participated in any pre-lift meetings on June 18 or 19. (Tr. pp. 114, 5444-45, 270 & 285.) Respondent did not contest this evidence.

As a result of the failure to conduct pre-lift meetings, employees were exposed to falls which could have resulted in serious injury or death.

Respondent's Arguments.

Respondent has offered the same challenge to all of the items relating to the condition and use of the manbaskets: the Secretary did not prove that Respondent knew of the hazard. Citing *Secretary v. Miami Industries, Inc.*⁴⁰, Respondent alleges that the manbasket had been made as specified by an OSHA Compliance Officer. In *Miami Industries*, the Commission vacated a citation because the respondent had relied to its detriment on a Compliance Officer's unofficial statement regarding the status of a necessary safety feature. Miami Industries had been cited for a safety violation, and in an effort to abate the condition it consulted with the Compliance Officer. The Compliance Officer stated that the abatement method chosen by Miami Industries was enough to comply with the standard, but upon a subsequent inspection, OSHA cited Miami for a repeat violation of the standard. Bush & Burchett alleges that *Miami Industries* is a complete defense to these citation items. However, the present case is not analogous to *Miami Industries*.

In the present case, Respondent alleges in its brief that the sketch for the manbaskets had been supplied by an OSHA Compliance Officer. However, no evidence supporting this assertion was found in the record. In fact, Mr. Burchett testified that he provided the sketch to the welders who constructed the manbaskets. (Tr. pp. 1341-43.) There is no evidence in the record that OSHA officials approved

⁴⁰ 15 BNA OSHC 1258 (Rev. Comm. 1991).

the use of the manbaskets that are the objects of these citations. Without such evidence, Respondent cannot claim detrimental reliance on OSHA representations.

Moreover, the rationale of the Commission in *Miami Industries* does not apply to the instant case. In *Miami Industries*, the standard in question was very general.⁴¹ Acceptable methods of complying with a general standard may not be readily apparent to the employer, who thus may need to rely on the representations of compliance officers as experts in enforcement. Under such circumstances, the Commission believed it reasonable to rely on the unofficial statements of a Compliance Officer. This is not the case here.

The standards cited in Items 17 - 22 are specific and unequivocal in their language and scope. There is no doubt regarding the applicability of the standard to this particular industry and machinery. Respondent cannot claim lack of notice when it was possession of the Section 1926 construction standards. This alone imputes constructive knowledge of the standard.⁴² Respondent also had knowledge of the condition since its supervisors and company officials were on the site daily and the flaws in the manbaskets were open and obvious.

In recommending the penalties, Mr. Johnson took into

⁴¹ The standard cited in *Miami Industries*, 29 C.F.R. § 1910.212(a)(1), prescribes general requirements for all machines.

⁴² *CapForm*, *supra* at 1224.

consideration the elements prescribed by the statutory and regulatory guidelines. The Secretary established all of the citation items. Therefore, Citation 1, Items 17 through 22 are affirmed. Penalties of \$2,100 (item 17), \$900 (item 18), \$900 (item 19), \$1,200 (item 20), \$1,200 (item 21), and \$1,200 (item 22) are assessed.

Citation 1, Item 23 Alleged Serious Violation of 29 C.F.R. § 1926.1053(a)(1)(ii).

This standard requires in part that a non-self supporting ladder sustain at least four times the maximum intended load. The capacity of the ladder is to be determined by applying or transmitting the requisite load to the ladder in a downward vertical direction.

The Secretary alleges that a job-made wooden ladder available on the site violated this standard. Mr. Johnson observed the ladder on the worksite and determined that the lack of filler blocks between the rungs were an indication that the ladder was in violation of the standard. Filler blocks are placed in between the rungs along the railings and support the rungs. The ladder was held together by a couple of nails. (Tr. p. 549; GX 12 & 19.)

Mr. Johnson testified that the ladder was used daily on the worksite and that Greg Pridemore had used it on June 18, 1991. (Tr. pp. 551, 158-59.) These employees were exposed to fall hazards that could have resulted in injuries such as bone fractures.

Bush & Burchett contends that the Secretary did not perform the

test specified in the standard to prove non-compliance. There is no evidence that Mr. Johnson applied the weight to the ladder in order to prove non-compliance. However, it is not clear that such a test must be performed by the Compliance Officer to prove non-compliance.

The Secretary offers the testimony of the Compliance Officer who observed the ladder and without hesitation concluded that it would not comply with the standard. At first sight, Mr. Johnson knew after years of experience that a ladder held together by a couple of nails could not hold four times the intended load. Respondent offered no evidence to the contrary. Therefore, Mr. Johnson's testimony is accepted.

In recommending a \$1,200.00 penalty, Mr. Johnson took into consideration all of the appropriate statutory and regulatory guidelines. The Secretary has established a violation of § 1926.1053 (a) (1) (I) and recommended an appropriate penalty.

Citation 1, Item 24 Alleged Serious Violation of 29 C.F.R. § 1926.1053 (a) (3) (I).

This item also concerns the job-made ladder which was the object of the violation in Item 23. This standard requires that the distance between the rungs, measured center line to center line, shall be no less than ten inches, nor more than fourteen inches. Mr. Johnson measured the top to top distance between the rungs using a steel tape measure and concluded that they were fifteen inches apart. (Tr. pp. 553.) The distance between the rungs increased the probability of

slips and created a fall hazard that could have resulted in serious injuries such as fractures.

Respondent alleges that the measurement was not as prescribed by the standard and that absent a showing of the uniformity in the width of the rungs, the Secretary could not prove non-compliance. Respondent's argument is not persuasive. The Secretary met his burden by establishing that the area between the rungs did not comply with the standard's requirements. It is the Respondent's responsibility to prove that the measurement was incorrect. Respondent offers no evidence that the distance between the rungs was less than the reported fifteen inches. The top to top measurement should not produce different results from the center line measurement when the rungs are similar in size. Had the rungs been substantially different in width, visual examination of the ladder would have suggested an alternative method of measurement. However, the photographs in evidence suggest that the rungs were uniform in width. (GX 12, GX 19.) Absent a showing that the rungs varied in thickness and thus the measurement was incorrect, Mr. Johnson's finding will be accepted.

In recommending a \$1,200.00 penalty, Mr. Johnson took into consideration all of the appropriate factors set forth in the statutory and regulatory guidelines. The Secretary has established a violation of § 1926.1053 (a)(3)(1) and proposed an appropriate penalty.

Willful Citation No. 2.

Citation 2, Item 1 Alleged Willful Violation of 29 C.F.R. § 1926.105 (a).

This standard requires that safety nets be provided when workplaces are higher than 25 feet above ground or water level, and the use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts is impractical. The Court in *Brock v. L.R. Willson and Sons, Inc.*⁴³ stated:

The Secretary ... makes out his *prima facie* case as to the violation of § 1926.105(a) by showing that no means of protection listed in the standard was used to protect employees exposed to a fall in excess of 25 feet.

In the instant case, the Secretary alleges two instances of non-compliance.

The first instance occurred on June 19, 1991, when Greg Pridemore, Roger Neal, Ralph Snyder and Steve Cochran stood on the piers without any fall protection. Mr. Johnson documented that the workstations were higher than 25 feet above ground or water surface and the employees testified that no fall protection was in use. (Tr. pp. 70, 112, 115, 559-560, 1329, 1347-48) As such, the Secretary establishes a *prima facie* case with regard to that instance.

The second instance occurred on July 18, 1991. On that day, Mr. Johnson was continuing the inspection of the Harts worksite when he

⁴³ 733 F.2d 1377, 1383 (D.C. Cir 1985). See also, *Secretary v. Williams Enters, Inc.*, 11 OSHC BNA 1419 (Rev. Comm. 1982).

personally witnessed four employees and foreman Fred Smith working on the concrete beams between abutment 1 and pier 1. These employees had no fall protection. The fall distance was greater than twenty-five feet. The conditions were documented on photographs which were accepted into evidence. (GX 5, GX 6, GX 7, GX 27, GX 28) Therefore, the Secretary has established a *prima facie* case on the second instance.

Respondent argues that the Secretary failed to prove that the use of safety lines or lanyards was impractical as required by the standard, or that the violation merited a willful classification, citing *Century Steel Erectors, Inc., v. Dole*, 888 F2d. 1399 (D.C. Cir. 1989.) However, under *L.R. Willson, supra*, which the court cited favorably in *Century Steel* (888 F.2d at 1402), the Secretary need only show that no safety protection was in use to establish a *prima facie* case.

Respondent offers no evidence to rebut the Secretary's *prima facie* case or willful classification. Only the testimony of William Spears supports Respondent's case, but Respondent did not rely on any part of it in its post-hearing brief. The Secretary attacks Mr. Spear's credibility at length in his brief (pp. 119-21), but Respondent makes no mention of it. I must conclude that Respondent had no reliable evidence to support its contentions.

Because the citation has been classified as willful, the Secretary must show "intentional, knowing, or voluntary disregard for

the Act's requirements ... or plain indifference to employee safety." The Secretary also must show that the employer was "aware of the particular duty at issue in the case."⁴⁴ The Secretary offers several reasons for classifying this citation as willful:

1. Joe Burchett, Fred Smith, and John Ward were all present during the June 19 instance. (Tr. pp. 172, 361, 377, 393, 1263-64.)

2. Respondent possessed a copy of the construction standards.

3. Respondent had been previously cited for a violation of the equivalent standard at another worksite by the Kentucky Department of Labor on July 23, 1985. (GX 16)

4. Respondent was responsible for an "Accident Prevention Plan" used at another worksite, where it stressed the use of safety nets and other types of fall protection. The plan's section on fall protection closely resembled the provisions found in § 1926.105(a), suggesting that this section served as a point of reference. (Tr. p. 168; RX 21.)

5. Mr. Johnson had previously spoken with John Ward on June 25, 1991 and provided the § 1926 construction standards for the Harts worksite. (Tr. pp. 563-64)

Respondent argues that the state of mind of its representatives did not entail "plain indifference" or "intentional disregard" towards safety. Respondent notes that employees disliked being tied down while working on the piers. Respondent's evidence is not responsive.

⁴⁴ *V.I.P. Structures, Inc.*, *Supra.*

to the Secretary's allegations. Although the employees may have preferred to be free from encumbrances, Respondent's representatives were aware of the standard's requirements that safety nets be utilized when other means of fall protection were impractical. It is abundantly clear that Respondent acted with plain indifference to the safety of the employees. Despite the occurrence of an accident which produced two deaths, and the warning proffered by Mr. Johnson, and Respondent's implementation of the fall protection standard at another site, Respondent allowed the violations to go unabated.

In recommending a penalty of \$21,000.00, Mr. Johnson took into consideration the elements set forth in Section 17(j) of the Act. The Secretary has established a violation of § 1926.105 (a) and proposed an appropriate penalty.

**Citation 2, Item 2 Alleged Willful Violation of 29 C.F.R. § 1926.550
(b) (2) Incorporating by Reference ANSI Code § 5-
2.4.1.**

This standard requires in part that a thorough inspection of all crane ropes be made once a month by an authorized person and that a full, written, dated and signed report be kept on file. The Secretary alleges that Respondent did not conduct rope inspections as specified in this standard.

While conducting the inspection of the Harts worksite, Mr. Johnson learned that the cranes which had been used on June 19 were not inspected as required by the standard. Mr. Johnson testified that,

during interviews and at OSHA depositions, the crane operators and Joe Burchett stated that rope inspections were not conducted and that no written records were kept at the worksite. (Tr. p. 567) At trial, Mr. Burchett confirmed that no written records of rope inspections were kept at the Harts worksite. (Tr. p. 359.) The failure to inspect the ropes used daily on the worksite exposed the crane operators and other employees to serious physical injury or death.

Respondent contends that Harry Boyd conducted inspections of the ropes. (Tr. pp. 233-35). Similarly, John Ward testified that ropes were inspected by the Respondent. (Tr. p. 1199). Furthermore, Respondent asserts that the Secretary failed to prove: (1) a date of occurrence; (2) that further use of the ropes constituted a hazard; (3) that an abatement method would have improved working conditions; (4) that the previous citations were relevant to present knowledge; (5) that the Secretary requested and was denied inspection reports; (6) the requisite state of mind existed to prove a willful violation. (Respondent's Brief p.55)

Respondent's arguments are not persuasive. First, Respondent did not establish that Mr. Boyd's inspections would comply with the standard. Mr. Boyd inspected ropes once in his three months at the worksite and did not inspect all of the ropes. Furthermore, any inspection carried out by Mr. Boyd was done out of his own volition and not under the direction of Bush & Burchett management, who kept no written records of any inspections. (Tr. pp. 158, 232-33, 247)

Second, the violation occurred on June 19, 1991. There is no doubt that the cranes were operated on June 19. Because the requirements contained in this standard are an ongoing obligation, Respondent violated the standard on June 19.⁴⁵

Third, Respondent misreads the standard. The Secretary need not prove that the further use of the rope created a hazard, only that the standard had not been followed. The standard requires the designated individual determine whether the ropes create a hazard, not the Secretary.⁴⁶ It was the Respondent's responsibility to make note of rope conditions and the hazards their use might entail.

Fourth, the previous citations help establish awareness of the standard for purposes of willfulness. Having been previously cited for a similar violations by the state of Kentucky in 1977 and OSHA in 1987, Respondent was aware of the standard and its compliance requirements. (GX 16; GX 29)

Fifth, the Secretary was not required to request the records. The Secretary presented un rebutted evidence that records were not kept. Mr. Burchett admitted that no written records of rope conditions were kept at the worksite. Employees of Bush & Burchett

⁴⁵ See *Secretary v. General Dynamics, Electric Boat Div., Supra.*

⁴⁶ ANSI Code B30-68 § 5-2.4.1 states in pertinent part: "... [A]ny deterioration, resulting in appreciable loss of original strength such as described below, shall be carefully noted and determination made as to whether further use would constitute a safety hazard..."

admitted that no rope inspections were conducted at Harts. These admissions are sufficient evidence to establish the lack of records.

Finally, Respondent alleges that the Secretary did not establish the requisite mental state to establish willfulness. However, as stated before, Respondent is charged with specific knowledge of the standard dating to the prior violations of similar standards. Moreover, Mr. Burchett authored the "Accident Prevention Plan" which was drafted for another project and stressed the importance of daily rope inspections. (RX 21). This evidence clearly establishes Respondent's awareness of the particular duty required by the standard, and the failure to comply in the face of this knowledge.

In recommending a \$21,000.00 penalty, Mr. Johnson took into consideration all of the elements set forth in Section 17 (j) of the Act. The Secretary has established a violation of ANSI Code § 5-2.4.1 incorporated by reference into § 1926.550 (b) (2) and recommended and appropriate penalty.

**Citation 2, Item 3 Alleged Willful Violation of 29 C.F.R. § 1926.550
(b) (2) Incorporating by Reference ANSI Code § 5-
3.2.1 - Overloading the Crane.⁴⁷**

ANSI Code § 5-3.2.1 states: "No crane shall be loaded beyond the rated load, except for test purposes as provided in 5-2.2." The Secretary alleges that on June 19, 1991, Respondent loaded the cranes

⁴⁷The Secretary's motion to amend this item is granted.

above their rated load as specified by the manufacturer's load charts.

Load charts are designed by manufacturers to inform crane users of the maximum allowable capacity of a crane under certain specific circumstances. Maximum allowable capacities are determined in load charts by several factors, including the radius, the boom angle, the boom length, the number of counterweights, and, for some cranes,⁴⁸ whether the load is lifted over the front or side of the crane. The radius of the crane is the horizontal distance from the center of the rotation of the crane's upper works to the center of the gravity of the load, and it is inversely proportional to the boom angle. (Tr. p. 878) Hence, the larger the radius, the smaller the boom angle. The rated load capacity is proportional to the boom angle: as the boom is lowered, the boom angle decreases, and the maximum capacity decreases. Conversely, if the boom is lifted, the boom angle increases, and the lifting capacity increases.

Several facts relating to the June 19 lift are undisputed:

(1) Both cranes operated with two counterweights. (Tr. p. 175; GX 33, GX 42, GX 45, GX 46, GX 47, GX 55, GX 56.)

(2) The LS 318 was equipped with an 80 foot boom, and the LS 338 with a 100 foot boom. (Tr. pp. 175, 263, 599; GX 53.)

⁴⁸The LS 318 is such a crane, while the LS 338 is not. Because the width and length of the latter are equal, its lifting capacity is the same over both the front and the side.

(3) The concrete beam they attempted to place on the piers was 110 feet long and weight 108,800 pounds. (Tr. pp. 34, 392-93; GX 14)

(4) Each crane lifted approximately 54,400 pounds, half of the beam's weight.⁴⁹ (Tr. pp. 177, 598, 1365.)

(5) The LS 318 crane lifted the load over the side. (Tr. pp. 48-49, 172, 398.)

The Secretary offered the testimony of Ronald Kohner, an expert in crane operations, and Compliance Officers John Johnson and Steve Stock in support of the citation. The testimony of Respondent's own expert, Dr. Staley Adams, also established the violation. Dr. Adams not only testified that the cranes were working above the rated load capacity as specified by the load chart, but that Mr. Burchett was aware of the condition. Dr. Adams stated:

... he [Joe Burchett] told me that he normally stayed within the limits of the chart, but in this particular case and this particular thing, it was necessary for him to go above that.

(Tr. pp. 1426-27). The testimony of Dr. Adams is in agreement with the conclusions of Secretary's expert, Ronald Kohner, and Mr. Johnson: the cranes were loaded above the rated load capacity.⁵⁰

⁴⁹ The actual load was around 56,350 pounds, since the weight of the crane's load block and sling (1,950 pounds) must be calculated into the load weight. (Tr. p. 897).

⁵⁰ The Secretary's expert, Mr. Kohner, calculated that the LS 318 was lifting 52 % more than the maximum capacity and the LS 338 was lifting 19 % more than maximum capacity as specified by the load charts. Working with slightly different numbers, Respondent's expert, Dr. Adams, found that the LS 318 was lifting 11,650 pounds more than its maximum capacity, while the LS 338 lifted 2,570 pound more than

Respondent attempts to avoid the impact of this testimony by arguing that, under the ANSI standard, stability rather than structural competence governed lifting performance. It argues that, when stability is used as the governing criterion, the manufacturer's load chart is not applicable. Respondent furnishes no rationale for its position that stability governs performance. (Respondent's brief, pp. 56-57.) In any event, § 5-0.2.2.29 states load ratings are "[c]rane ratings in pounds established by the manufacturer in accordance with § 5-1.1," and § 5-1.1.1 clearly shows that, when stability is the governing criterion, the load ratings (the figures given in the manufacturer's load chart) are to be reduced. Thus Respondent's argument is defeated by the provisions of the ANSI standard: the manufacturer's load chart applies under either stability or structural competence criteria. Moreover, Dr. Adams unequivocally testified that the loading of the cranes violated the ANSI standard. (Tr. p.1456.)

The evidence overwhelmingly supports the conclusion that the cranes were loaded over the maximum allowable capacity and that Mr. Burchett was aware of the condition. As stated before, Mr. Burchett told Dr. Adams that it was necessary to operate the cranes out of chart. Also, Mr. Burchett's lift plan relied on the cranes tipping as a danger sign. The cranes would only tip if working well above the

its maximum capacity. Regardless of whose estimates are used, the cranes were lifting above the rated load. (Tr. pp. 910.)

maximum allowable capacity. Mr. Burchett knew the hazards that attended such an unsafe practice.

Respondent challenges the classification of the item as willful on the grounds that the Secretary did not prove the required mental state for willfulness. Respondent cites Mr. Burchett's presence near the LS 318 as proof that he was not aware that the crane was overloaded.

Citing *Secretary v. Manter Co.*⁵¹, Respondent alleges that the owner's presence near the crane is enough to defeat a claim of willfulness. In *Manter*, the Commission refused to classify a violation as willful when the owner of the company had stepped into a trench which was later found to be unsafe. The owner's presence in the trench was construed as direct evidence that he believed the trench was safe and that shoring was not necessary. Although the company had been previously cited for a similar violation, the evidence of the owner's good faith belief in his operation did not allow for a willful classification. However, the present case does not offer the mitigating circumstances found in *Manter*.

In the present case, there is direct evidence that Mr. Burchett knew that the cranes would be operating outside of the chart, but he did not believe that the cranes were above tipping capacity. Tipping capacity for a crane is typically 33% above the maximum load allowed

⁵¹ 16 BNA OSHC 1477 (Docket No. 92-0260 1993).

by the manufacturer's chart. The danger of overloading is not only tipping or boom collapse, but structural damage to the cranes which may lead to a later collapse. Mr. Burchett was attempting a calculated gamble, while the owner in *Manter* was unaware of the danger. Mr. Burchett knowingly overloaded the cranes, but apparently was not in fear of an immediate danger. The evidence solidly supports the Secretary's case.

OSHA Compliance Officer John Johnson recommended a gravity based penalty of \$21,000.00, but Area Director Stanley Elliot raised this figure to \$70,000.00 to reflect the willfulness of the violation. The Secretary, in his post hearing brief, accurately and succinctly described the conduct which merits this penalty:

Mr. Ward was project manager at this work site as well as a registered engineer. Prior to the final lift when Mr. Ward witnessed the tracks of the 318 crane coming up in the back, he walked over to the crane and observed the boom angle to be seventy-three degrees. This clearly proved to Mr. Ward that this crane was significantly out of chart, yet Mr. Ward did nothing to stop an additional lift. ... The only effort Mr. Ward attempted to stop this crane from tipping completely was to tell Mr. Smith that the crane should lift over its end which Mr. Smith refused to do. [Tr. 1220-1221.]⁵²

* * *

In sum, Mr. Burchett's testimony shows an almost unbelievable, knowing disregard for safety. He is the president of Bush & Burchett, Inc., with almost thirty years in the bridge building business. He knew the maximum allowable capacities of the cranes before the June 19 attempted lift, and he intended the cranes to erect the beam in excess of those capacities. He knew during the lift that the LS 318 had reached its tipping capacity, he knew

⁵²See pages 151-52.

the crane could lift more over the end and could be maneuvered to lift over the end, he knew that timber mats were available and essential to ensure a proper foundation, and yet he allowed the LS 318 to perform the final lift, over the side with half the crane sitting on untested soil. If ever a violation cried out for a willful classification and the maximum penalty, this is that violation.⁵³

The Secretary has established a violation of § 1926.550 (b) (2) and recommended an appropriate penalty.

Citation 2, Item 4 Alleged Willful Violation of 29 C.F.R. § 1926.550 (b) (2) Incorporating by Reference ANSI Code § 5-3.4.2 - Adding Counterweight to the LS 318.

Section 5-3.4.2 of the ANSI Code, incorporated by reference into 29 C.F.R. § 550 (b) (2) , states:

Cranes shall not be operated without the full amount of any ballast or counterweight in place as specified by the maker, but truck cranes that have dropped the ballast or counterweight may be operated temporarily with special care and for only light loads without full ballast or counterweight in place. The ballast or counterweight shall not be exceeded.

The Secretary alleges that the Respondent violated this standard when it placed the bucket of the Kobelco backhoe on the counterweights of the LS 318 crane during the June 19 lift.

All of the testimony presented during trial is conclusive as to the presence of the Kobelco backhoe bucket on or over the counterweights of the LS 318 crane and the contact between these when the crane's tracks came off the ground. However, there is conflicting testimony regarding the bucket's position while the crane stood

⁵³See pages 147-48.

firmly on the ground. Respondent alleges that the bucket was placed approximately six inches above the counterweight as a precaution and not as a counterweight. The Secretary asserts that the bucket was placed on the counterweights.

The Secretary offers the testimony of Harry Boyd, Steve Cochran, Fred Smith, John Ward and Ronald Kohner as proof that the bucket was placed on the counterweight so that the crane could be overloaded. Mr. Boyd, the LS 318's operator, testified that he could hear the bucket being placed on the counterweights by Garland LeMaster. (Tr. p. 181.) Mr. Cochran testified that he watched the bucket being placed on the counterweights from his position atop pier 2. (Tr. p. 55.) Mr. Smith admitted that he instructed Mr. LeMaster to "lay it [the bucket] on there for caution." (Tr. p. 382.) Similarly, Mr. Ward testified that the bucket was used "to prevent the crane from tipping." (Tr. p. 1223.) The testimony of these witnesses would confirm a willful violation of this standard.

Respondent asserts that the backhoe bucket was not place on the counterweight. The bucket was placed over the counterweight as a precaution. Respondent offers the testimony of Mr. Johnson who believed the bucket was placed six inches over the counterweight. (Tr. pp. 776-779.) Respondent does concede that the bucket came into contact with the counterweights once the crane was tipping over. (Respondent's Brief p. 64.) Still, Respondent concludes that the bucket's contact with the crane does not establish a violation of this

standard since it offered little resistance. Respondent also argues that, if it were in violation of the standard, the motivation for the use of the bucket was to promote safety and the violation was, therefore, not willful.

Respondent's assertion that the backhoe was a safety measure is not an accurate assessment of the real reason for the use of the backhoe bucket. The evidence clearly supports the proposition that the backhoe was being used as a means to continue a perilous lift when it had become evident to management that the LS 318 crane was incapable of performing the lift without additional support. In this circumstance, it is clear that Respondent errs in assuming that the bucket must have actually been placed on the counterweights to violate this standard. The standard simply states: "[T]he ballast or counterweight shall not be exceeded." Mr. Kohner succinctly stated the consequences when

the purpose of adding counterweight is so you can overload the machine, so that the machine won't tip when you overload the machine. If you force it to stay stable, you're overloading the structural components of that crane, beyond the level that they are designed to operate at, so it's very likely that you are going to have some sort of a structural failure in the crane. Or at least do damage to the crane. (Tr. 882.)

This is a purpose which is clearly prohibited. Thus it is immaterial whether the bucket came into contact with the counterweight. The mere fact that the Respondent placed the bucket in a position so that it would do so in the event the crane was overloaded to the point of tipping violates the standard.

Respondent knew of the hazards involved in exceeding the counterweight. Mr. Burchett stated that adding counterweight to a crane was "not good policy." (Tr. p. 1307.) Clearly, Mr. Burchett intended for the LS 318 to proceed with the operation despite the fact that it was overloaded beyond its capacity to remain upright. Once again, this illustrates an almost unbelievable, conscious disregard for safety. The \$ 70,000.00 penalty recommended by OSHA Regional Director Stanley Elliot is appropriate.

Citation 2, Item 5b Alleged Willful Violation of 29 C.F.R. § 1926.550 (g) (3) (ii) (C).

Citation 2, Item 5b alleges a willful violation of the same standard cited in Citation 1, Item 15. Since the items arise from the same inspection and same hazard, they have been combined into one item with two instances of the violation. This standard requires that an anti-two blocking device be used on cranes to prevent contact between the load block and the boom tip, or a two blocking situation, when hoisting personnel in manbaskets. The Secretary alleges two instances of non-compliance by the Respondent.

The first instance alleges that neither the LS 318 nor the LS 338 were equipped with anti-two blocking devices when Mr. Johnson conducted the inspection on June 20. On June 19, these cranes hoisted Steve Cochran, Roger Neal, Greg Pridemore and Ralph Snyder onto piers 2 and 3 for the attempted placement of the beam. (Tr. pp. 192, 270,

510-11, 513-16; GX 24, GX 25, GX 40.) Respondent did not challenge these facts.

The second instance of non-compliance was observed by Mr. Johnson on July 18, 1991. Two Bush & Burchett employees, Archie Smith and Terry Brumfield, were hoisted to the top of the concrete beam which fell against pier three by a Manitowoc 3000 crane which was not equipped with an anti-two blocking device. (Tr. p. 626.) Respondent did not challenge these facts.

The willfulness of this violation is obvious. Following the first instance of non-compliance, Mr. Johnson alerted John Ward to the violation and reviewed the provision in the construction standards. Nevertheless, less than a month after the conversation, the same standard was violated in the presence of Mr. Johnson. Respondent was apprised of its obligations under the Act, but did not abate the hazard. As a result, employees were exposed to falls and which could have resulted in serious injury or death.

Mr. Johnson took into consideration the elements set forth in Section 17 (j) of the Act and recommended a gravity based penalty of \$21,000. The Secretary has established two violations of 29 C.F.R. § 1926.550 (g) (3) (ii) (C) and recommended an appropriate penalty for both.⁵⁴

⁵⁴A separate penalty for Citation 1, item 15, is not appropriate. The same hazard was involved in both that item and Citation 2, item 5b. See discussion of Citation 1, item 15, *supra*.

B. DOCKET NO. 92-1169

The second set of citations was in response to a complaint by local union president, Gerald Overby. Mr. Overby contacted OSHA's regional office on September 3, 1991, to report that employees were lifted to their work stations underneath the bridge on the tip of a crane boom. Furthermore, they were not provided with any fall protection while they wrecked the forms underneath the bridge at heights ranging from seventeen to sixty feet. Mr. Overby was given the complaint by union shop steward Fred Dunlap, who questioned the method of lifting the workers and was told by Junior Botner, a Bush & Burchett foreman, that the process was like "riding an elevator." (Tr. pp. 125, 328-29.)

Mr. Dunlap, Mr. Neal, Carmel Dunlap, and Rick Fox rode the crane boom on September 3, 1991. These employees were lifted two at a time on the tip of the crane boom. Bringing their tools, platforms and a small bucket of cement, the employees would signal the crane operator to stop when they reached their stations. When the crane reached their workstations, it bounced up and down while it settled. (Tr. pp. 127-28, 329-30.)

Once underneath the bridge, the employees placed two wooden platforms, approximately six feet long and two feet wide, inside the lip of the lower flange of the bridge and began their work. While sitting or standing on the platforms, the employees wrecked the wooden

forms underneath the bridge. To make their way across the bridge, the employees would stand on one platform, push the other one ahead, step onto that platform, and pull the other one up next to it. This work was done at heights of over forty feet. The employees were not provided with any fall protection. (Tr. pp. 127-31, 331-36, 652-53.)

After receiving the complaint, Mr. Johnson returned to the worksite on September 4, 1991 and conducted an inspection of the hazards related to the complaint. Upon his arrival, Mr. Johnson held an opening conference with William Spears , the supervisor in charge of the worksite. Mr. Spears and on occasion Mr. Botner accompanied Mr. Johnson on his walk around. Mr. Johnson interviewed several employees such as Fred Dunlap and Rick Fox.

During this inspection, Mr. Johnson observed Terry Brumfield and Freddie Dunlap stripping concrete forms from the sides of the bridge approximately seventeen feet from ground level. (Tr. pp. 657; GX 64.) Neither of the employees were afforded any fall protection. This work continued after Mr. Johnson left the worksite, however, Fred Dunlap refused to return to work in such unsafe conditions.

Fall protection had already been a topic for conversation between Mr. Johnson and Bush & Burchett employees. Twice before, on June 25 and July 18, 1991, Mr. Johnson discussed fall protection with supervisors at the Harts worksite and gave them a copy of Section 1926

construction standards.⁵⁵

The closing conference for the second inspection and set of citations was held on September 6, 1991, and the citations were issued on March 2, 1992. The citations were classified as willful, for they included standards which Mr. Johnson had discussed with Mr. Spears and Mr. Ward on the June 25, 1991 visit to the worksite. The citations and penalty recommendations which resulted from this inspection were:

Item	Standard	Description	Classification	Penalty
Cit. 2 Items 1a, 1b & 1c ⁵⁶	29 C.F.R. § 1926.105 (a), 28 (a) & 29 U.S.C. § 654 (a) (1)	Fall protection	Willful	50,000
Cit. 2 Items 2a & 2b	29 C.F.R. § 1926.451 (a) (13) & 550 (g) (2)	Use of crane or derrick as a personnel platform	Willful	50,000

⁵⁵ On June 25, Mr. Johnson spoke to Fred Spears, while on July 18 he spoke to John Ward. See. Tr. pp. 563-64, 658.

⁵⁶Originally, the Secretary issued two citations. The single item in Citation 1 alleged a serious violation of § 1926.28(a). In the complaint, the Secretary reclassified this as a willful violation and denoted it as Citation 2, item 1b. Old Citation 2, item 1b, became Citation 2, item 1c, alleging a violation of § 5(a)(1) of the Act based on the same facts as item 1b. In his brief, the Secretary contends that the facts proven at trial show a violation of § 5(a)(1) and has abandoned the position that § 1926.28(a) was also violated. (See footnotes 7 and 8 of the Secretary's brief.)

Citation 2, Item 1a Alleged Willful Violation of 29 C.F.R. 1926.105
(a).

This standard requires that safety nets be provided when workplaces are higher than 25 feet above ground or water level, and the use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts is impractical. The Secretary alleges that Respondent violated this standard when its employees were the wrecking of the forms underneath the bridge without any fall protection on September 3, 1991.

Mr. Johnson returned to the Harts worksite on September 4, 1991 in response to a complaint by the local union head, Gerald Overby. Mr. Overby had received the complaint from the union shop steward, Freddie Dunlap. Mr. Dunlap testified that on September 3, 1991, he and three other employees were lifted underneath the bridge to wreck the forms. These employees stood or sat on temporary platforms while they wrecked the concrete forms. Messrs. Neal and Dunlap testified that they were not provided with safety belts, lanyards or another type of fall protection while they performed this job at heights over forty feet above ground or water level. (Tr. pp. 129-31, 336.)

Respondent contends that during testimony the Compliance Officer proved that the use of catch platforms, a temporary floor or scaffold was practical in this instance and that consequently, the citation should be vacated. However, the lack of any fall protection at the

reported height makes out a *prima facie* violation of 105 (a).⁵⁷

Respondent offered no evidence which questions this showing.⁵⁸

Respondent alleges that this citation item should be combined with Citation 2, Item 1 of the first inspection, a citation for the violation of the same standard. However, combining only occurs when the duplicative citations are the result of the same inspection. Here, although the lack of fall protection had been brought to Respondent's attention in connection with the first inspection, Respondent continued in flagrant violation of its obligations. As a result, its employees properly caused a complaint to be filed, resulting in a second inspection and citation. In these circumstances, the Area Director was well within his discretion in treating these citations as arising from wholly separate inspections, and refusing combine the second citation with the first.

Finally, Respondent challenges the willfulness of the violation, stating that the requisite state of mind for willful violations did not exist. However, as noted, Respondent ignored the warnings and advice of Mr. Johnson, who on two previous occasions discussed the lack of fall protection with Bush & Burchett supervisors and furnished

⁵⁷ *Brock v. L.R. Willson & Sons, Inc., supra.*

⁵⁸ While the testimony of Fred Spears calls the Secretary's case into question, Respondent does not rely on it and its credibility was substantially questioned by the Secretary. Consequently, I have not considered it. See discussion of Citation 2, item 1, Docket Nr. 92-0408.

a copy of Section 1926 construction standards. In spite of this advice and in spite of its recognition of the need for fall protection on another site, Respondent continued to conduct operations in flagrant violation of the fall protection standards. Regardless of the lack of a closing conference concerning the first violations, Respondent was given ample notice of the hazards its employees faced when working on the bridge without any fall protection. The repeated warnings warrant a willful classification.⁵⁹

The Secretary has established a willful violation of 29 C.F.R. § 1926.105 (a). See item 1c for the grouped penalty.

Citation 1, Item 1c Alleged Willful Violation of 29 U.S.C. § 654 (a) (1).

This standard requires the employer to furnish each employee a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm. In order to establish a violation of Section 5 (a) (1), the Secretary must prove that:

(1) a condition or activity in the workplace presented a hazard to an employee; (2) the hazard was recognized; (3) the hazard was likely to cause death or serious physical harm; (4) a feasible means existed to eliminate or materially reduce the hazard. ... [T]he Secretary must additionally show that [Regina] knew or, with the exercise of reasonable diligence, could have known of the violative condition.

⁵⁹ See *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984).

*Regina Construction Co.*⁶⁰ The Secretary alleges that Respondent violated this standard when it allowed employees without fall protection to wreck forms on the south side of the bridge while exposed to an approximately seventeen foot fall.

On September 4, 1991, Mr. Johnson observed Terry Brumfield wrecking forms on the side of the bridge without any fall protection at a height of seventeen feet. (Tr. pp. 657, 1507-08; GX 13.) On the same day, Carmel Dunlap, Rick Fox, Roger Neal and Joe McGill were wrecking forms on the outside edge of the bridge without any fall protection. These employees were also approximately seventeen feet above ground or water level. (Tr. pp. 338-42.) The violations were observed by Mr. Johnson and took place in the presence of two Bush & Burchett supervisors, Junior Botner and William Spears. (Tr. pp. 343-46.) Mr. Johnson testified that safety lines would have constituted a feasible means of abatement. (Tr. p. 1506) The hazard was recognized and there was a feasible means of abatement: the use of safety lines.

Respondent does not challenge the facts surrounding this violation. The evidence shows that the hazard was in plain view and should have been obvious to Respondent's supervisors who were on the site. The complete lack of fall protection was an obvious condition and safety lines were an economic and feasible means of abatement. As such, the Secretary has established the four elements of a general

⁶⁰ 15 BNA OSHC 1044, 1045-46 (Rev. Comm. 1991).

duty clause violation by a preponderance of the evidence.

In recommending a grouped penalty of \$50,000.00 for items 1a and 1c, Mr. Elliott took into consideration the elements set forth in Section 17 (j) of The Act, as well as the continuing violations of the fall protection standard. The Secretary has established a violation of the Act and recommended an appropriate penalty.

Citation 2, Item 2a Alleged Willful Violation of 29 C.F.R. 1 1926.451 (a) (13).

This standard requires that employers provide an access ladder or other safe method of access to scaffolds. The Secretary alleges that Respondent violated this standard when it used a crane boom to hoist employees onto their workstations underneath the bridge.

On September 3, 1991, Roger Neal and Freddie Dunlap rode the crane boom tip up to the platforms underneath the bridge. Messrs. Dunlap and Neal were not provided with any fall protection. As a result, Mr. Dunlap complained to Bush & Burchett supervisors about using the crane boom to hoist employees, but he was told the procedure was just like "riding an elevator." (Tr. pp. 346-47.)

The procedure was hardly like riding an elevator. The employees held onto the boom tip with their hands while carrying tools and their platforms. Once they reached their workstations, they would signal the crane operator to stop at which time the boom would bounce up and down until it settled. The employees would then move onto the

platforms and begin their work. (Tr. pp.127-28) This is hardly safe access. Mr. Johnson testified that the employees were exposed to severe injury or death as a result of this practice.

Respondent alleges that the cited standard for this item does not apply to temporary platforms such as those in use here, but to scaffolding, and that consequently the Secretary failed to meet his burden of proof. However, for purposes of this standard scaffold is defined as "any temporary elevated platform..."⁶¹ Thus, the platform in this citation item is under the purview of the cited standard.⁶²

Respondent alleges that the Secretary has not established the required mental state for a willful violation. Respondent states that the actions were undertaken in a good faith belief that they were not violations of employee safety. But, in cases of such egregious nature, the Secretary need not establish the subjective mental state of the Respondent. Judge Breyer, writing for the First Circuit in *Brock v. Morello Bros. Const., Inc.*⁶³, stated that:

⁶¹ See 29 C.F.R. § 1926.452 (b)(27).

⁶² Respondent again chooses to ignore the testimony of William Spears. Mr. Spears stated that the employees tied off as they rode the boom to their workstations. Mr. Spears' testimony is contradicted by all other witnesses who stated that no safety belts were used and that the employees held on to the boom with their hands. In the face of the contravening evidence and for the lack of candor mentioned before, Mr. Spears' testimony is not given any weight. However, even if credited, the fact that the employees tied off to the pendent lines of the crane would not have made this means of access safe.

⁶³ 809 F.2d 161, 164 (1st Cir. 1987).

there may be instances in which unsafe conduct is so egregious, so life threatening, that the agency might apply an 'objective' standard of willfulness, assuming its existence from the offender's knowledge of the conditions even without direct evidence of its subjective attitudes towards the law.

Such is the case here. Bush & Burchett supervisors were aware of the conditions in which employees were lifted to their work stations underneath the bridge. The use of the crane boom as an elevator was life threatening and in complete disregard of employee safety. Such egregious conduct at the request of and in the presence of Respondent's supervisors establishes willfulness. Respondent offered no evidence of a benevolent state of mind or of any "good faith" belief that its actions were in compliance with safety regulations.

The Secretary has established that Bush & Burchett employees were exposed to a hazard of which Respondent was aware, and for which a compliance method existed. See Item 2b for the grouped penalty.

Citation 2, Item 2b Alleged Willful Violation of 29 C.F.R. § 1926.550 (g) (2).

29 C.F.R. § 1926.550 (g) (2) states:

The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and dismantling of conventional means of reaching the worksite, such as personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold would be more hazardous, or is not possible because of structural design or worksite conditions.

The Secretary alleges that Respondent violated this standard during the procedure described in Citation 1, Item 2a: Respondent's use of a

crane boom to hoist employees onto the side of the bridge where they would climb onto temporary platforms and wreck the forms. (Tr. pp. 127-28, 329-30.)

The Secretary relies on the same facts and testimony that were discussed in Citation 1, Item 2a. In addition, the testimony of Roger Neal demonstrates that there were other methods of wrecking the forms that would have been safer and in compliance with the standard. Mr. Neal testified that, after Mr. Johnson's inspection, Respondent introduced a hanging platform used to wreck the forms. The new platform was equipped with handrails and did not require the use of the crane boom as a means of access. (Tr. p. 132.) The appearance of the hanging platform on the worksite is definitive proof that Respondent was aware of the availability of a safe and more convenient method of proceeding with the labor. Respondent again engaged in such egregious and life threatening conduct that the violation is clearly willful without regard to Respondent's subjective mental state.⁶⁴

In recommending a grouped penalty of \$50,000.00 for items 2a and 2c, Mr. Elliot took into consideration all of the elements set forth in Section 17 (j) of the Act, as well as the continued disregard for employee safety displayed by Respondent. The Secretary has established that Respondent violated the Act and recommended an appropriate penalty.

⁶⁴ See *Morello Bros Const, Inc.*, 809 F.2d at 164.

X Conclusions of Law

A. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

B. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c). (See Decision and Order dated July 13, 1994.)

C. In Docket Nr. 92-0408, Respondent violated the standards as indicated in the following table. The classification and appropriate penalty for each violation is also indicated.

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 1	§ 1903.2 (a) 1	OSHA poster	Serious	600
Cit.1 Items 2a & 2b	§ 1926.20 (b) (1) & 20 (b) (2)	Safety programs and inspections	Serious	3,000
Cit. 1 Item 3	§ 1926. 21 (b) (2)	Employee instruction in recognition and avoidance of hazards	Serious	3,000
Cit. 1 Item 5c	§ 1926.59 (h)	Hazardous chemical training	Serious	1,200
Cit. 1 Item 6	§ 1926.106 (d)	Lifesaving skiff	Serious	1,200
Cit.1 Item 8	§ 1926 500 (d) (2)	Guardrails	Serious	2,100

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 9	§ 1926.550 (a) (1)	One signal man on tandem lifts	Serious	3,000
Cit. 1 Item 10	§ 1926.550 (a) (12)	Cracked windshield	Serious	900
Cit. 1 Item 11	§ 1926.550 (b) (2) ANSI Code § 5-2.1.3 ⁶⁵	Periodic inspections	Serious	3,000
Cit. 1 Item 12	§ 1926.550 (b) (2) ANSI Code § 5-3.4.9	Fire extinguisher	Serious	1,200
Cit. 1 Item 13	§ 1926.550 (b) (2) ANSI Code § 5-2.3.1	Preventive maintenance program	Serious	2,100
Cit. 1 Item 14	§ 1926.550 (b) (2) ANSI Code § 5-3.2.3	Designated person on tandem lifts	Serious	3,000
Cit.1 Item 17	§ 1926.550 (g) (4) (ii) (A)	Guardrails on manbaskets	Serious	2,100
Cit. 1 Item 18	§ 1926.550 (g) (4) (ii) (B)	Grabrails on manbaskets	Serious	900
Cit.1 Item 19	§ 1926.550 (g) (4) (ii) (I)	Posting rated load capacity	Serious	900
Cit. 1 Item 20	§ 1926.550 (g) (4) (iv) (D)	Thimbles for eyes in wire rope slings	Serious	1,200
Cit. 1 Item 21	§ 1926.550 (g) (5) (I)	Trial lifts	Serious	1,200

⁶⁵ ANSI Code B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Item	Standard (29 C.F.R.)	Description	Classifica- tion	Penalty
Cit. 1 Item 22	§ 1926.550 (g) (8) (I)	Pre-lift meeting	Serious	1,200
Cit. 1 Item 23	§ 19256.1053 (a) (1) (ii)	Filler blocks on ladder	Serious	1,200
Cit. 1 Item 24	§ 1926.1053 (a) (3) (I)	Rung spacing on ladder	Serious	1,200
Cit. 2 Item 1	§ 1926.105 (a)	Fall protection	Willful	21,000
Cit. 2 Item 2	§ 1926.550 (b) (2) ANSI Code § 5-2.4.1	Rope inspection	Willful	21,000
Cit. 2 Item 3	§ 1926.550 (b) (2) ANSI Code § 5-3.2.1	Crane overloading	Willful	70,000
Cit. 2 Item 4	§ 1926.550 (b) (2) ANSI Code § 5-3.4.2	Exceeding the counterweight	Willful	70,000
Cit. 1 Item 15 Cit. 2 Item 5	§ 1926.550 (g) (3) (ii) (C)	Anti-two blocking device	Willful	21,000

D. In Docket Nr. 92-0408, Respondent did not violate the standards indicated in the following table.

Item	Standard (29 C.F.R.)	Description
Cit. 1 Items 4a & 4b	§ 1926.50 (c) & 50 (f)	Vacated by this decision.
Cit. 1 Item 5a	§ 1926.59 (e) (4)	Vacated at trial - Tr. 155-56.

Item	Standard (29 C.F.R.)	Description
Cit. 1 Item 5b	§ 1926.59 (g) (10)	Vacated by this decision.
Cit. 1 Item 7	§ 1926.251 (c) (5)	Vacated by this decision.
Cit. 1 Item 16	§ 1926.550 (g) (4) (I) (A)	Vacated by post-hearing motion dated Feb. 3, 1995.
Cit. 1 Item 25	§ 1926.550 (b) (2)	Item was not briefed by the Secretary. Therefore it is vacated.
Cit. 2 Item 6	§ 1926.550 (g) (4) (I) (A)	Vacated by post-hearing motion dated Feb. 3, 1995.
Cit. 2 Item 7	§ 1926.550 (g) (4) (ii) (A)	Vacated by post-hearing motion dated Feb. 3, 1995.
Cit. 2 Item 8	§ 1926.550 (g) (4) (ii) (B)	Vacated by post-hearing motion dated Feb. 3, 1995.
Cit. 2 Item 9	§ 1926.550 (g) (4) (iv) (D)	Vacated by post-hearing motion dated Feb. 3, 1995.
Cit. 2 Item 10	§ 1926.550 (g) (4) (ii) (I)	Vacated by post-hearing motion dated Feb. 3, 1995.

E. In Docket Nr. 92-1169, Respondent violated the standards as indicated in the following table. The classification and appropriate penalty for each violation is also indicated.

Item	Standard	Description	Classifica- tion	Penalty
Cit. 2 Items 1a & 1c	29 C.F.R. § 1926.105 (a) & 29 U.S.C. § 654 (a) (1)	Fall protection	Willful	50,000

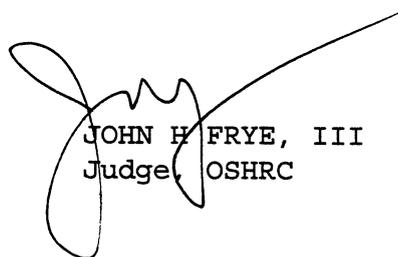
Cit. 2 Items 2a & 2b	29 C.F.R. § 1926.451 (a) (13) & 550 (g) (2)	Use of crane or derrick as a personnel platform	Willful	50,000
----------------------------	--	---	---------	--------

F. In Docket Nr. 92-1169, Respondent was not in violation of 29 C.F.R. § 1926.28(a) as set forth in Citation 2, item 1b. This item was withdrawn by the Secretary in his post-trial brief.

XI Order

A. In Docket Nr. 92-0408, Citation 1, items 1, 2a, 2b, 3, 5c, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, and 24 are affirmed as serious violations; and Citation 2, items 1, 2, 3, 4, and 5 are affirmed as willful violations of the Occupational Safety and Health Act. A total civil penalty of \$237,200 is assessed.

B. In Docket Nr. 92-1169, Citation 2, items 1a, 1c, 2a, and 2b are affirmed as willful violations of the Occupational Safety and Health Act. A total civil penalty of \$100,000 is assessed.


JOHN H. FRYE, III
Judge, OSHRC

Dated: **SEP 20 1995**
Washington, D.C.