

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

SECRETARY OF LABOR,

Complainant,

v.

AGRA ERECTORS, INC. AND ITS  
SUCCESSORS,

Respondent.

OSHRC DOCKET NO. 98-0866

BEFORE: G. Marvin Bober  
Administrative Law Judge

**DECISION AND ORDER ON REMAND**

***Background***

On October 30, 1997, Agra Erectors, Inc. ("Agra") was erecting an 85-foot grain elevator tower at the facility of Webb Super Gro ("Webb") in Mill Hall, Pennsylvania. Donald Johnson, an Agra employee, fell from the grain elevator tower when it collapsed while he was working on top of it. As a result of the fatality, James Jury, an OSHA compliance officer ("CO"), inspected the work site on October 31, 1997. On April 29, 1998, Agra was issued one serious and one willful citation proposing penalties totaling \$45,000. After an administrative trial held in Harrisburg, Pennsylvania, and based upon the testimony at the trial and the documentary evidence admitted into the record, the undersigned issued his Decision and Order on June 1, 1999, affirming the alleged willful violation of 29 C.F.R. 1926.501(a)(2) and assessing a penalty of \$42,000.<sup>1</sup>

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<sup>1</sup>At the trial, Agra withdrew its notice of contest with respect to Item 1 of Serious  
(continued...)

### ***The Commission's Decision***

The Commission issued its decision in this matter, *Agra Erectors, Inc.*, 19 BNA OSHC 1063 (No. 98-0866, 2000), on August 31, 2000, and remanded this matter to the undersigned. At pages 1065-66 of its decision, the Commission stated as follows:

The judge did not determine whether the Secretary had carried her burden of proving that Agra violated section 1926.501(a)(2) by permitting its employees to work on the top of the grain elevator tower when it lacked the requisite strength and structural integrity. \*\*\* We address whether the Secretary carried her burden now. In order to prove a violation, the Secretary must establish that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. (Citation omitted). We find that the standard does apply. \*\*\* Agra did not comply with the terms of the standard because at the time Johnson worked at the top of the tower with the crane disconnected, the tower lacked the requisite strength and structural integrity. The same facts demonstrate employee access to the violative condition. Determining whether Agra had knowledge of the violative condition is not so straightforward. To make that determination, the conflicting testimony regarding whether foreman Johnston participated in the decision to detach the crane from the elevator tower must be resolved. Because the judge who heard the case is best qualified to make specific credibility findings, we remand the case to him to make that finding. (Citation omitted). \*\*\* If the judge determines that Agra violated 29 U.S.C. § 1926.501(a)(2), he should then determine whether the Secretary has established a willful violation based on his evaluation of the testimony and other evidence. (Citation omitted).

### ***DISCUSSION AND CONCLUSION***

#### ***Credibility***

As set out above, the Commission remanded this case to resolve the conflicting testimony as to “whether foreman Johnston participated in the decision to detach the crane from the elevator tower.” Findings in regard to witness credibility must be sufficiently detailed to give the reviewing body a clear understanding of the analytical process used to reach those findings. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297-98 (No. 14249, 1978). *See also Anderson v. Bessemer City*, 470 U.S. 564,

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<sup>1</sup>(...continued)

Citation 1, except for the proposed penalty of \$3,000. (Tr. 11-13.). The undersigned found the penalty as proposed to be appropriate, and the Commission, in its decision dated August 31, 2000, agreed.

578 (1985); *Atlantic Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477,1479 (Fed. Cir. 1993). In order to make appropriate findings in this matter, I have reviewed once again the relevant testimony and exhibits. The evidence on which I base my findings follows.

William Johnston, Agra's foreman at the site, testified he was responsible for overseeing the job and that he had supervisory authority not only over his own crew but also over David Ludwig, the crane operator.<sup>2</sup> (Tr. 454). Mr. Johnston further testified that when he became aware that the crane was disconnected from the head section, he told crew member Alfonso Coria to re-rig the crane to the head section. (Tr. 444). However, Mr. Johnston conceded at the hearing that he had not included this information in GX-181, the written statement he provided OSHA on October 31, 1997, the day after the accident, and he had no explanation as to why this information was not in his statement. (Tr. 447-49). Moreover, Mr. Coria testified that he recalled no discussions with Mr. Johnston about the fact that the crane was unhooked after the head section had been put on and that if Mr. Johnston had told him to re-hook the crane he would have done so. (Tr. 412-13). In addition, Mr. Ludwig testified that he slackened the line so that the crane could be disconnected from the head section on which Donald Johnson was working only after Mr. Johnston had twice told him to do so.<sup>3</sup> Mr. Ludwig also testified that while Donald Johnson had previously radioed him twice and requested that he let off on his line so that he (Johnson) could disconnect the crane, he had ignored the requests as he had thought that the elevator tower should be secured with guy cables first. (Tr. 104-06).

It is clear from the foregoing that Mr. Johnston's testimony is directly contrary to that of Messrs. Coria and Ludwig. I observed the demeanors of these three witnesses on the stand, and I found the testimony of Messrs. Coria and Ludwig to be credible and convincing. On the other hand, I found Mr. Johnston to be less than forthright in his testimony. Based on my observations, I conclude that the testimony of Messrs. Coria and Ludwig is the more reliable evidence, and their testimony is credited over that of Mr. Johnston. I therefore find as fact that Mr. Johnston, Agra's

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<sup>2</sup>Webb had contracted with Susquehanna Crane Service ("Susquehanna") to provide a crane for the job, and Mr. Ludwig, the crane operator, was an employee of the company that owned Susquehanna. (Tr. 87-90, 439).

<sup>3</sup>Mr. Johnston denied that he had directed the crane to be disconnected, and he also denied that he had had a conversation with Mr. Ludwig in this regard. (Tr. 443-44).

foreman, knew the crane had been disconnected from the head section of the elevator tower because he himself had ordered it to be disconnected. I further find that Mr. Johnston allowed this condition to exist up until the time of the accident without making an attempt to correct the condition.

GX-181, Mr. Johnston's written statement, contains the following:

The crane was unrigged for 15 or 20 minutes before it fell.\*\*\* They were using the crane to pull last cable up to Don on head section of leg. \*\*\* I came around and see them send cables up with crane. Say why Don undid crane. \*\*\* I was [thinking] about putting cables in place and how to get over top of bins [for] last [two] tie ins. The reason I did not have crane rehook up.

However, Mr. Ludwig testified that the crane was disconnected from the head section for about an hour and a half prior to the accident and that during that period of time he spoke with Mr. Johnston and they "discussed the stability of that piece (head section) hanging there." (Tr. 128-29). In view of my credibility findings set out *supra*, Mr. Ludwig's testimony is credited over that of Mr. Johnston, and I conclude that Mr. Johnston allowed the elevator tower to remain in this unsecured position for over an hour before the accident. I also conclude that the elevator tower was not secured as required earlier in the day and that Mr. Johnston was aware of this fact. Michael Leupold, a Webb maintenance foreman, spoke with Mr. Johnston shortly after lunch on October 30, 1997, about four hours before the accident. In particular, Mr. Leupold testified that he was having a "chit-chat" with Mr. Johnston and "the crane guy" and that he asked Mr. Johnston whether the elevator, which was about two-thirds up at that time, would "stand there" in that there were no guy cables on it to hold it up. (Tr. 43-44, 53, 61). Randy Leupold, another Webb employee who was engaged in installing ladders on the elevator sections on the ground that day, also testified that the elevator tower was not secured with guy cables as it should have been. He identified GX-172 as the installation manual of Reilly Equipment, the manufacturer of the elevator, and noted that the manual required the elevator tower to remain attached to the crane until the necessary guy cables were in place. (Tr. 65-76).

Based on the foregoing, I conclude that Agra had knowledge of the violative condition as follows: (1) Mr. Ludwig testified that he slackened his line so that the crane could be disconnected from the head section after Mr. Johnston instructed him to do so; (2) Mr. Coria testified that Mr. Johnston did not tell him to re-hook the crane to the head section after it was disconnected; (3) Mr. Johnston admitted in his statement that he knew that the head section was disconnected from the

crane 15 to 20 minutes before the accident; (4) Mr. Ludwig testified that the crane was disconnected from the head section for over an hour before the accident and that he and Mr. Johnston discussed this fact during this period; and (5) Mr. Leupold testified that he questioned Mr. Johnston shortly after lunch about the elevator tower's stability without guy cables.

### ***Willfulness***

Having found Agra in violation of the cited standard, the undersigned turns now, pursuant to the Commission's remand, to whether the Secretary has demonstrated a willful violation based upon the testimony and other evidence in this case.<sup>4</sup> Commission precedent defines a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-239, 1995). "[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation. \*\*\* A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

It is clear from the foregoing that Mr. Johnston, Agra's foreman at the site, was aware several hours before the accident that the elevator tower was not secured with the necessary guy cables to

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<sup>4</sup>Agra's contention that the unhooking of the crane and the subsequent accident was a result of unpreventable employee misconduct on the part of Donald Johnson was rejected for the reasons set out in my Decision and Order dated June 1, 1999. Further, while Agra has not asserted that the violative condition was caused by unpreventable employee misconduct on the part of its foreman, such a defense could not prevail on this record. To meet this defense, the employer must prove it had relevant work rules that were adequately communicated and effectively enforced. *Dover Elec. Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321 (No. 85-351, 1991). Further, the Commission has stated that a supervisor's knowledge of the violation is imputable to the employer unless the employer can show that it took all necessary precautions to prevent the violation, including adequate instruction and supervision of its supervisor. *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). *See also Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3d Cir. 1984). Agra made no such showing in this case.

give it the requisite strength and structural integrity. It is also clear that Mr. Johnston himself ordered the crane operator to slacken his line so the crane could be disconnected from the head section and that the elevator tower remained in this condition for over an hour until the accident. GX-172, the installation manual of Reilly Equipment, the manufacturer of the elevator, required the elevator to remain attached to the crane until the necessary guy cables were in place, and Randy and Michael Leupold both testified that Webb had a copy of the manual at the work site. (Tr. 39-41, 71-76). CO Jury testified that Mr. Johnston was knowledgeable in the manufacturer's recommended procedure to secure the elevator tower but that he chose not to follow it at the site. (Tr. 238-40). Mr. Johnston testified that he had put up a "couple hundred" grain elevators and that he had used Reilly equipment and looked at its manuals before. He further testified he did not see GX-172 until the CO got it from Webb and showed it to him, but he did not feel he needed the manual to erect the elevator tower. (Tr. 434, 451-53, 457). Finally, Gregory Swabb, Agra's president, testified that he and Mr. Johnston had both worked for Agra for about 24 years, that Mr. Johnston had been a foreman nine to ten years, and that Mr. Johnston had previously erected elevator towers like the one at the site. Mr. Swabb said it was not customary to unhook the crane from an 85-foot elevator tower that was being erected until the guy cables were attached and that he himself would not do so. (Tr. 477, 481, 492-94).

Based on the above evidence, I conclude that William Johnston, Agra's foreman, had a "heightened awareness of the illegality of the conduct or conditions" at the site and that he acted with plain indifference to employee safety. *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-239, 1995); *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). I further conclude that Johnston's actions at the site are imputable to Agra due to his supervisory position with the company. The Secretary has established that the violation was willful, and this citation item is therefore affirmed as a willful violation.

### ***Penalty***

The Act requires the Commission, when assessing penalties, to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(j).

CO Jury articulated the reasons he recommended a penalty of \$42,000. (Tr. 233-41). His reasons were cogent and succinct and based on the foregoing factors. I accordingly adopt the CO's reasoning in this regard, and I find the proposed penalty of \$42,000 to be appropriate.

***ORDER***

<b><i>Citation 2</i></b>	<b><i>Violation</i></b>	<b><i>Disposition</i></b>	<b><i>Classification</i></b>	<b><i>Penalty</i></b>
Item	1926.501(a)(2)	Affirmed	Willful	\$42,000

/s/

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G. Marvin Bober  
Administrative Law Judge

Dated: 30 OCT 2000  
Washington, D.C.