UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD, ROOM 250
DENVER, COLORADO 80204-3582

SECRETARY OF LABOR, Complainant, v. SEMA CONSTRUCTION, INC., Respondent.	OSHRC DOCKET NO. 01-0084

APPEARANCES:

For the Complainant:
Andrea Christensen Luby, Esq., Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
David L. Zwisler, Esq., John L. Reiter, Esq., Mountain States Employers Council, Inc., Denver, Colorado

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

At all times relevant to this action, Respondent, SEMA Construction, Inc. (SEMA), maintained a place of business at I-25 and Uinta, Colorado Springs, Colorado, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 15, 2000, one of SEMA's employees was injured in an accident at its Colorado Springs work site. Following that accident, on September 18, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the work site. As a result of the inspection, OSHA issued a serious citation to SEMA, alleging one violation of the Act together with a proposed penalty. By filing a timely notice of contest SEMA brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 8, 2001, a hearing was held in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation

Serious citation 1, item 1 alleges:

> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:
>
> (a) At the I-25 and Uintah Bridge job site, Colorado Springs, Colorado: SEMA Construction did not ensure that employees were adequately instructed in the recognition and avoidance of hazards associated with working near a hydraulic excavator (Caterpillar Model 315BL). On September 15, 2000 an employee engaged in clearing debris from the job side was struck and seriously injured by a load being moved by the excavator.

Facts

On September 15, 2000, Keith Segura, a heavy equipment operator for SEMA, was acting as lead man for a crew loading an iron dumpster on the Colorado Springs work site (Tr. 25-26, 128-30). Segura testified that, using a 315 Caterpillar track hoe, he nearly filled the dumpster full of scrap iron from a bridge demolition (Tr. 130-31). A crew of laborers was then assigned to help him manually "top off" the dumpster before it was hauled off to a scrap yard (Tr. 40, 42, 131-32). Segura used the bucket of the track hoe to scratch up the ground and expose buried rebar, which the laborers stacked by hand in the dumpster (Tr. 37-38, 132-33). Segura testified that the ground crew consisted of three laborers, Dave Bustillos, Dave Long and Juan Peinado (Tr. 39, 133). At some point, he used the bucket and "thumb" of the track hoe to pick up a long section (approximately 24-40 feet) of 4" x 4" hollow sheet metal box tubing, which had been a bridge guard rail (Tr. 19-20, 23, 49, 141, 153; Exh. C-4, C-5, C-9). He intended to move the tubing out of the way in a direction away from the laborers and continue to scrape the ground for small pieces of metal (Tr. 154-55). Segura testified that, before making the pick, he turned to see where the laborers were (Tr. 143). All three were approximately 40 feet from the excavator, and 10-15 feet from the dumpster which was located behind and to the right of the track hoe (Tr. 140, 143; Exh. C-10). Segura drew the box tubing towards the track hoe, lifting it approximately 15-20 feet in the air. He was about to swing the load to a staging area away from the dumpster area and the laborers, when the load broke free and "sprung" from the bucket, striking and injuring Juan Peinado (Tr. 35, 43, 81, 142-43, 154). Segura testified that the load did not fall straight down. He had never known an item to kick out of the bucket as it did on that day (Tr. 156-57).

Segura testified that he had been instructed during training sessions that employees should stand a safe distance from the excavator, but was never told exactly how many feet from the excavator

was considered safe (Tr. 145-46). Moreover, he had been instructed during Respondent's weekly safety meetings that employees should stay clear of the swing radius of the track hoe [approximately 25 feet](Tr. 136, 144-47, 151). As lead man, Segura instructed employees to stay clear of the excavator's swing radius when they were on his blind side (Tr. 149). He never told the laborers to keep a specific distance from the track hoe (Tr. 148). Segura stated that immediately prior to the accident he told the laborers to move over near the dumpster until he moved the last piece of tubing (Tr. 154-55).

David Bustillos, through an interpreter, confirmed that Juan Peinado was not standing directly under the excavator's load when the accident occurred. He estimated that he and Peinado were standing approximately 40-45 feet from the excavator bucket when he saw the beam began to fall. Bustillos ran, but Peinado was struck by the falling load (Tr. 108, 115-18). Bustillos testified that Mark Grife told him, during a regular Monday safety meeting, to be careful around the equipment, and not to stand beneath suspended loads (Tr. 110, 124). Bustillos's could not recall when he received this instruction, though he stated it had been some time ago (Tr. 122, 124-25). On cross-examination, Bustillos recalled that he had been instructed about the excavator during an earlier phase of the project, when the bucket was being used to move boulders (Tr. 125-26). Bustillos believed that the distance he was to maintain from the excavator depended upon the height of the load being moved (Tr. 126).

Bill Wright, the OSHA Compliance Officer (CO) testified, based upon interviews with SEMA employees and on his September 18, 2000 examination of SEMA's work site, that he estimated Peinado, the injured employee, was standing "near" the area where the track hoe's load, *i.e.*, the box piping, was lifted overhead when the accident occurred (Tr. 29-30 ; Exh. C-2). However, employee David Long stated Peinado was not standing directly under the overhead load when it fell (Tr. 36-37, 82). Long told Wright that the box piping seemed to catch or snag on something, and then deflect about three feet to hit Peinado (Tr. 36). Wright did not measure either the distance between the excavator and the spot where Peinado was struck, or between that spot and the dumpster (Tr. 33).

Although CO Wright testified that, during an interview, Mark Grife, one of the SEMA project managers on the Colorado Springs site, stated that he never specifically instructed laborers about safety around excavators (Tr. 13, 51), a Weekly Hazard Awareness and Recognition Training sheet, dated June 19, 2000, indicates that moving equipment and overhead loads were addressed during at least one regular safety meeting (Exh. C-8, p. 117). CO Wright also testified that David Long told him he was trained by a previous employer to work around excavators, but did not received any training from SEMA (Tr. 52, 89). Long told CO Wright that no one in management showed him a safe area to stand while the excavator was making lifts (Tr. 60). Moreover, David Bustillos told the CO that he had

received no training with respect to working around the excavator (Tr. 88). Wright stated that he specifically asked Keith Segura whether he ever received, or was present while any laborers received training instructing them how far employees should stay from the excavator and its load; Segura told him he had not (Tr. 52, 86-87).

Discussion

The cited standard provides:

> The employer shall 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 Commission has held that:

> To prove a violation of §1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them,"and modeled on the applicable OSHA requirements. [citations omitted]

O'Brien Concrete Pumping Inc., 18 BNA OSHC 2059, 2061, 2000 CCH OSHD ¶32,026 (No. 98-0471, 2000). The employer must address those hazards a "reasonably prudent employer" would have been aware of, and provide the instructions a reasonable employer would provide under the same circumstances. *Pressure Concrete Constr. Co. (Pressure Concrete),* 15 BNA OSHC 2011, 1992 CCH OSHD ¶29,902 (No. 90-2668, 1992).

The standard's requirements. The Secretary does not maintain that SEMA failed to instruct its employees in regulations applicable to the hazardous conditions to which they were exposed. Rather, Complainant argues that SEMA failed to give site specific instructions to its employees in the means of avoiding the hazard posed by overhead loads which may fall from the Caterpillar track hoe. Specifically, the Secretary alleges that SEMA failed to train its employees to keep an undefined safe distance from the operation of the excavator. According to Complainant, adequate instructions should have included a warning to avoid the swing radius of the excavator's bucket and load (Secretary's Posthearing Brief, p. 10-11, 20). The Secretary's proposed instruction describes a zone of danger that includes the entire area over which the track hoe is physically capable of moving a given overhead load.

SEMA does not dispute that both overhead loads and the swinging boom of the track hoe pose a hazard to employees. SEMA's defense in this matter implicitly acknowledges that moving loads over

employees with a track hoe is hazardous, and maintains that it trained its employees to remain out of the swing radius of the excavator, and not to work under any suspended loads. In addition, SEMA asserts that its lead man, Keith Segura, specifically instructed laborers working with him to stand in an area away from the intended swing radius of his load. SEMA contends that its instruction was adequate, and argues that Complainant did not prove that enhanced training would have prevented the accident which triggered the citation (Respondent's Post-Hearing Brief, **Argument** ¶II, III).

Discussion

In order to establish that Respondent failed to comply with the aforesaid standard, the Secretary must prove that (1) the standard applied, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited conditions and (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative conditions, *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHC 25,578, aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶29,344 (No. 86-1087, 1991); *Carlisle Equip. Co. v. Secretary of Labor*, 24 F3.d 790 (6th Cir. 1994). The burden of establishing these elements rests with the Secretary of Labor. Moreover, the elements must be established by a preponderance of the evidence. *Armor Elevator Co.*, 1 BNA OSHC 1409, 1973-74 CCH OSHD ¶16,958 (Nos. 425 & 426, 1973). The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false" *Ultimate Distrib. Systems, Inc.*, 10 BNA OSHC 1568, 1570, 1982 CCH OSHD ¶20,011 (No. 79-1269, 1982). Complainant relies heavily upon out of court statements made to compliance officer Wright by Respondent's employees to carry its burden of proof. However, many of the out of court "admissions" of employees Segura and Bustillos were contradicted by those individuals during their testimony at the hearing in this matter. Only the statements of employee Long to compliance officer Wright remain unchallenged in this record. Mr. Long was not called as a witness by either party.

As acknowledged by Complainant in her post hearing memorandum, although out of court employee statements are admissible pursuant to Rule 801(d)(2)(g)(A) FRCP, such statements "inherently [have] less probative value than would the employees own testimony and [are] not necessarily entitled to dispositive weight" *Continental Electric Co.* 13 BNA OSHC 2153, 2155, No.6 (1989). In *Morrison-Knudsen, Inc.*, 13 BNA OSHC at 1124, the Commission stated:

> When an out-of-court statement is introduced, the trier of fact has no opportunity to assess the credibility of the person who made the statement and must therefore allow for

> the possibility that the statement is exaggerated, incomplete, taken out of context, or even false. Also, neither the other party nor the judge has a chance to cross-examine the person who made the statement. The only person able to evaluate the statement's credibility is the person who heard the statement and is testifying to its contents. These considerations suggest that out-of-court statements can not always be taken at face value."

The testimony of employees Segura and Bustillos at the hearing supports the conclusion that Respondent instructed its employees to refrain from working under suspended loads and to remain outside the swing radius of operating heavy equipment. The remaining issue is whether Respondent instructed its employees to avoid specific unsafe conditions present at the worksite; specifically, hazards presented by lifting box tubing with an excavator. The evidence establishes that lead man Segura instructed the laborers under his supervision to stand at a location that was 40-50 feet from the excavator (Tr.126, 140) while he attempted to remove the box tubing from the immediate work area. The swing radius of the machine, including the maximum extension of the boom was 25 feet (Tr.136, 137). It is clear that the laborers were instructed to stand at a distance beyond the swing radius of the machine. Moreover, since Segura picked up the load and brought it in toward the body of the excavator, the employees were not standing underneath the load (Tr.36-37, 82, 109, 143). For reasons which are not on the record, the load unexpectedly kicked out from the bucket of the excavator and, rather than falling straight down, was propelled in the direction of the employees.

As previously stated, the Commission has held that an employee must address those hazards that a reasonably prudent employer would have been aware of and provide reasonable instruction to employees to avoid those hazards. *Pressure Concrete, supra*. In this case, the Respondent was required to inform employees of the danger of being struck by loads falling from the excavator and how to avoid that hazard. It is reasonable to expect that a prudent employer, as in this case, would instruct employees to stay outside the swing radius of the machine and out from under the load. However, there is nothing in the record of this matter which supports the conclusion that a prudent employer would anticipate that a load could be unexpectedly catapulted outward from the machine and strike an employee located forty or more feet from the excavator.

In *Precision Concrete Construction,* 19 BNA OSHC 1404, 2001 CCH OSHD ¶32,035, (No. 99-0707, 2001), a case involving facts similar to the instant matter, the Commission concluded that the employer had reasonably instructed employees to stay out of the zone of danger created by an overhead concrete carrying bucket. However, the Respondent could not be held responsible for exposure to a hazard created by the unanticipated movement of the bucket. The Commission stated:

> As to the circumstances of the accident itself, we find the evidence insufficient to show that the foreman could have anticipated [the employee] would be exposed to the hazard . . . [i]t was not shown that [Respondent] could have anticipated the bucket's movement over the employees. Since the Secretary has the burden of proving that the manner in which Precision conducted its pouring operations constituted a failure to exercise reasonable diligence, her failure to do that here requires our finding that knowledge has not been shown" (citations omitted).

Similarly, in this case the Secretary failed to establish that Respondent, by instructing employees to stand forty or more feet from the excavator, failed to exercise reasonable diligence in protecting employees from known or reasonably anticipated hazards at the worksite. Accordingly, the citation is VACATED.

All findings of fact relevant and necessary to a determination of the contested issues have been made above. Fed R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are DENIED.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: August 14, 2001