

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

Secretary of Labor,

Complainant,

v.

Winesburg Builders, LLC,

Respondent.

OSHRC Docket No. **10-2122**

Appearances:

Paul Spanos, Esq., U. S. Department of Labor, Office of the Solicitor,, Cleveland, Ohio  
For Complainant

Tom Henry, Representative, Bolivar, Ohio,  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

Winesburg Builders, LLC, contests a one-item citation issued to it by the Secretary on September 23, 2010. The citation alleges a serious violation of 29 C. F. R. § 1926.251(a)(1), for failing to remove defective rigging equipment from service. The Secretary proposed a penalty of \$1,785.00 for this item. Occupational Safety and Health Administration (OSHA) compliance officer Richard Burns recommended the citation based on his inspection of a construction site where Winesburg was working on September 17, 2010, in Hilliard, Ohio.

Winesburg timely contested the citation. This case was designated for Simplified Proceedings under Subpart M (§§ 2200.200-211) of the Commission's Rules of Procedure. The undersigned held a hearing in this matter on Wednesday, January 19, 2011, in Columbus, Ohio. The parties stipulated to jurisdiction and coverage (Tr. 8). The parties have filed post-hearing briefs. Winesburg argues the Secretary failed to establish the rigging equipment was defective.

For the reasons discussed below, the undersigned affirms Item 1 of Citation No. 1, and assesses a penalty of \$600.00.

## **Background**

On September 17, 2010, compliance officer Richard Burns inspected a construction site on Mill Run Drive in Hilliard, Ohio. Burns's inspection was in accordance with the University of Tennessee's Dodge Report. The construction project consisted of approximately 26 multi-family homes, along with a club house and a swimming pool. Burns held an opening conference with the project's general contractor, and then proceeded to conduct a walk-around inspection of the site (Tr. 14-15).

Winesburg is a framing contractor that had been hired to work on the project. At the time of Burns's inspection, Winesburg was in the process of framing the clubhouse. Winesburg owner Reuben Schlabach and foreman Wes Hershberger were on the site. Burns noticed a nylon sling lying on the ground. The sling was cut and frayed, and the manufacturer's safety thread was showing in places. Hershberger told Burns he had used the sling to make a lift the day before (Exhs. C-1A, C-1B, and C-2; Tr. 15-18). Winesburg had used the sling to make at least two other lifts on the site (Tr. 49).

Hershberger agreed with Burns that the sling should be removed from service. An employee removed the sling and threw it into a dumpster on site. At some point, Schlabach called one of his employees and asked him to retrieve the sling. The employee brought the sling to Schlabach's house. Schlabach then gave the sling to Tom Henry, who represented Winesburg in this proceeding (Tr. 81-82). Henry mailed the sling to American Testing Services, Ltd., in January 2011, for tensile strength testing (Exh. R-1).

## **The Citation**

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

*JPC Group Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

**Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.251(a)(1)**

The citation alleges, “On the site where a defective nylon sling was used to lift beams, the rigging equipment was not removed from service.”

Section 1926.251(a)(1) provides:

Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

*(1) Applicability of the Cited Standard*

Section 1926.251 addresses “Rigging equipment for material handling.” Winesburg attached two nylon slings, including the one at issue, to an extendable forklift and used them to lift a porch beam on September 16, 2010 (Tr. 47-50). The nylon sling is rigging equipment and was used to handle the porch beam. The cited standard applies to the cited condition.

*(2) Compliance with the Terms of the Standard*

The Secretary contends the nylon sling was visibly damaged, with the manufacturer’s safety thread showing in several places. Thus, she argues, the sling was defective and should have been removed from service.

Winesburg contends the Secretary failed to establish the sling was defective. The company states that the sling was rated to lift 6,000 pounds, and the porch beam weighed approximately 300 pounds. The heaviest lift made with the sling was approximately 1,000 pounds. Winesburg contends there is no evidence the sling was at risk to fail.

Winesburg takes the position that a sling is not defective until it creates a hazard that could cause serious physical harm. Winesburg claims this occurs when a sling actually reaches its breaking point. The company contends the sling at issue had not reached its breaking point, based on testing conducted by American Testing Services, Ltd. (ATS).

Winesburg representative Tom Henry sent the sling (retrieved from the dumpster) to ATS in Dayton, Ohio. On January 11, 2011, ATS conducted tensile strength testing on the strap. The “Metallurgical Laboratory Report” issued by ATS provides the following information (Exh. R-1, bolding and italics in original):

**Report on:** One (1) Lifting Strap submitted for Tensile Testing

**Sample Identification:** The strap is damaged in loop area.

**Test Procedure:** The strap was loaded in the tensile machine using a fixture that allowed applying a load through a horizontal 1.125 inch diameter bar.

**Test Results:** *The strap withstood an actual 6000 lb tensile load without failure. None of the strands appeared to break during testing. The test was stopped at the load limit of the fixture.<sup>1</sup>*

Winesburg's reliance on ATS's test results is misplaced. Winesburg's belief the probability of the sling breaking was slight is irrelevant to whether a hazard exists. "The proper inquiry is the probability that the resulting harm will be death or serious physical harm." *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1390 (No. 76-5089, 1980).

The standard at issue, § 1926.251(a)(1), presumes a hazard when its terms are not met. "Defective" is not defined in the standards. *Webster's Third New International Dictionary* defines the word as: "wanting in something essential; falling below an accepted standard or requirement in soundness of form or structure . . . or in adequacy of function."

A foreman overseeing a construction site must be able to inspect a piece of rigging equipment and determine whether or not it needs to be removed from service. The presence of cuts, frays, and a visible safety thread on a sling used to lift heavy loads informs a reasonable person that the sling has fallen below the accepted requirement for adequacy of function. Laboratory testing is not required to determine that a piece of rigging equipment is defective. Hershberger acknowledged the sling was defective and should have been removed from service (Exh. C-3).

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<sup>1</sup> Because this case was tried under Simplified Proceedings, the Federal Rules of Evidence do not apply, and the hearing was less formal than a conventional OSHRC proceeding. Even so, the undersigned gives no weight to the ATS lab report. No one from ATS testified, and the chain of custody of the sling and the methodology of the testing were not established. Winesburg provides additional information regarding ATS and its accreditation in its brief, but this information was not adduced at the hearing and cannot be considered as evidence. If the ATS report were given weight, it would help bolster the Secretary's case in one respect. The photograph attached to ATS's lab report shows the loop of the sling is cut almost halfway across its width (Exh. R-1).

Based upon Burns's testimony, Hershberger's written statement, and the photographs of the sling introduced into evidence, the Secretary established the sling was defective and Winesburg failed to remove it from service. Winesburg failed to comply with the terms of § 1926.251(a)(1).

*(3) Employee Access*

Hershberger testified the loads attached to the defective sling were raised to a height of 8 to 10 feet. When asked about the proximity of employees to the load, Hershberger responded, "During the lift, usually we try to stay 5 or 6 feet away" (Tr. 61). Once the load is lifted and moved to the area of its final location, however, employees must push the load into place and prop posts underneath it (Tr. 67). At this point, the load is supported by the defective sling, and the employees are close enough to have physical contact with the load. Winesburg did not use tag lines to help stabilize the load and prevent it from swinging during the lift (Tr. 65). The Secretary has established employee exposure.

*(4) Employer Knowledge*

Winesburg had actual knowledge the defective sling was being used. Hershberger was the foreman on the site. As foreman, his knowledge is imputed to Winesburg. "[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Hershberger knew the sling was being used to make lifts, and he was present on September 16, 2020, when the sling was used to lift the porch beam. In his written statement to Burns, Hershberger acknowledged, "Sling should have been thrown out. Several cuts on sling and safety thread showing" (Exh. C-3).

The Secretary has established Winesburg knew of the use of the defective sling, and she has proven each of the elements of the alleged violation. She classified Item 1 as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. If the defective sling had broken during a lift, the employees in the area could have been struck by the falling load. The record establishes one of the loads weighed approximately 300 pounds, and another weighed approximately 1,000 pounds. If

