



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ARC ERECTING, INCORPORATED,

Respondent,

and

IRON WORKERS DISTRICT COUNSEL
OF NEW ENGLAND, LMCT SAFETY
DEPT.,

Authorized Employee
Representative.

OSHRC DOCKET No. 12-1592

APPEARANCES:

James L. Polianitis, Jr., Esquire, U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Jeff Mitchell
Brewer, Maine
For the Respondent, *pro se*.

Patrick McDermott
South Boston, Massachusetts
For the Authorized Employee Representative.

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

Background

This matter arose following the programmed inspection on April 5, 2012, in Bangor, Maine, of the Bangor City Arena construction project. The Respondent, Arc Erecting Incorporated, was on site at the time performing work as the structural steel subcontractor.

A compliance safety and health officer (CO) from the Bangor area office of the Occupational Safety and Health Administration (OSHA) conducted the inspection. During the inspection, the CO observed a crane that was controlled by the Respondent operating in close proximity to an overhead power line. The CO also observed Respondent's employees preparing to offload two steel joists from a flatbed trailer by accessing the top surface of the joists without the use of a ladder or stairway. In addition, the CO observed one of the Respondent's employees engaged in arc welding without using a protective screen, and also without having a fire extinguisher within his immediate reach.

After the inspection, on June 19, 2012, OSHA issued a citation (Citation) to the Respondent alleging two "serious" and two "other than serious" ("other") violations of certain OSHA construction standards contained in 29 C.F.R. Part 1926, which were promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act).¹

Citation 1, Item 1, alleged a serious violation of 29 C.F.R. § 1926.1051(a), which requires that a "stairway or ladder ... be provided at all personnel points of access where

¹ As a result of the inspection, OSHA also issued a single-item citation to the project's general contractor. (Ex. D).

there is a break in elevation of 19 inches.” The alleged violation occurred when the Respondent’s employees accessed the top surface of the steel joists without the use of a ladder or stairway. The Citation proposed a penalty of \$2,200 for this item.

Citation 1, Item 2, alleged a serious violation of 29 C.F.R. § 1926.1408(a)(2), which requires an employer to take certain measures if crane equipment (or its load) could get closer than 20 feet to a power line while operating up to its maximum working radius in the defined work zone. The alleged violation occurred because no elevated warning line had been erected and maintained during crane hoisting operations. The Citation proposed a penalty of \$2,200 for this item.

Citation 2, Item 1, alleged an “other” violation of 29 C.F.R. § 1926.351(e), which states as follows: “*Shielding*. Whenever practicable, all arc welding and cutting operations shall be shielded by noncombustible or flameproof screens which will protect employees and other persons working in the vicinity from the direct rays of the arc.” The alleged violation occurred when the Respondent’s employee was engaged in arc welding activity at the site without using any protective screen.

Citation 2, Item 2, alleged a violation of 29 C.F.R. § 1926.352(d), which states as follows: “Suitable fire extinguishing equipment shall be immediately available in the work area and shall be maintained in a state of readiness for instant use.” The alleged violation occurred when the Respondent’s employee was engaged in arc welding and the nearest fire extinguisher was about 60 feet away from him.

The Citation proposed no penalty for either of the alleged “other” violations.

The Respondent timely contested the Citation. Thereafter, the Iron Workers District Counsel of New England (Union) elected party status as the authorized employee representative.

The hearing was conducted in Boston, Massachusetts, on January 15, 2013. Post-hearing briefs were filed on April 5, 2013.²

This matter having been designated for Simplified Proceedings pursuant to Commission Rule 203, 29 C.F.R. § 2200.203, the issues for hearing were defined by the parties' joint prehearing statement. The Respondent denies all the alleged violations and asserts affirmative defenses. It also seeks dismissal of the Citation on the ground that the selection of the project for the programmed inspection was contrary to OSHA's general administrative plan for random programmed inspections of construction sites, as set out in OSHA Instruction CPL-02-00-141, *Inspection Scheduling for Construction* (July 14, 2006). (Ex. B).

As set out below, a preponderance of the evidence establishes that the Respondent violated the cited standards in the manners alleged. Moreover, the Respondent's affirmative defenses and the matter asserted in avoidance are not meritorious. All the citation items are affirmed, and an aggregated penalty of \$2,750 is assessed.

Jurisdiction

The Respondent timely filed a notice of intent to contest the Citation. The Commission has jurisdiction over the matter pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c).

The Respondent is a Maine corporation with an office and place of business in Brewer, Maine, and at any given time employs between five and twenty employees. (Ex. 1; Tr. 161, 174). On April 5, 2012, the Respondent was working as the steel erection subcontractor on the Bangor City Arena project in Bangor, Maine. At all times relevant

² The Union has advocated in support of the Respondent's positions throughout the proceedings, to include filing a post-hearing brief. The Respondent relies on the Union's brief and has chosen not to file a brief in its own right.

to this matter, the Respondent was engaged in construction work, which is a class of activity that as a whole affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The Respondent therefore was an “employer” engaged in a business affecting commerce with employees as defined in § 3(5) of the Act, 29 U.S.C. § 652(5).

The Union is a proper party to these proceedings pursuant to § 10(c) of the Act and Commission Rule 20(a), 29 C.F.R. § 2200.20(a).

Discussion

Respondent’s Challenge to Scheduling of the Inspection

The Respondent’s threshold contention is that the Citation should be dismissed because OSHA scheduled the inspection contrary to the protocol set forth in OSHA Instruction CPL-02-00-141, *Inspection Scheduling for Construction* (July 14, 2006) (Ex. B) (hereinafter “Scheduling Instruction”).³ This argument is treated as a contention that the inspection violated the Respondent’s Fourth Amendment protection against unreasonable searches on the ground that the inspection was not supported by “administrative probable cause.” Evidence obtained in violation of an employer’s Fourth Amendment protections is subject to potential exclusion from evidence. *See Sanders Lead Co.*, 15 BNA OSHC 1640, 1650-51 (No. 87-260, 1992).

Section 8(a) of the Act authorizes OSHA to enter “without delay and at reasonable times any factory, plant, establishment, construction site, or other area” for the purposes of inspection and investigation. 29 U.S.C. § 657(a). If an employer refuses to consent to an inspection, the inspection may be compelled by issuance of a judicial

³ The Respondent also relies on OSHA Instruction CPL-02-00-148, *Field Operations Manual* Chap. 2.VI.B. (Nov. 9, 2009), which expressly references the Scheduling Instruction. (Ex. A).

warrant. A judicial warrant may be issued upon a showing of administrative probable cause, which may be established by “showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources.” *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978).

The Scheduling Instruction constitutes OSHA’s “general administrative plan” for conducting random programmed inspections of construction sites. *See* Ex. B, ¶ VII.B (indicating that the selection system was designed “to comply with court decisions on OSHA’s process of selecting worksites for inspection”). In accordance with the Scheduling Instruction protocol, each month OSHA area offices are provided with “a randomly selected list of construction projects from all known covered active projects” that the area office must inspect the following month. (Ex. B, ¶ VII.A.). These monthly lists of projects to be inspected were referred to at the hearing as “Dodge reports.”⁴

The Dodge report for the month of April 2012 identified the Bangor City Arena project for inspection. (Tr. 147). Subject to limited exceptions not applicable here, the Scheduling Instruction required the Bangor area office to inspect the construction site sometime during the month of April 2012. (Ex. B, ¶ X.C.1; Tr. 143, 147). The director of the Bangor area office determined to dispatch a CO to inspect the site early in the month, on April 5, rather than later, because of the relatively large size of the project, and also because of the swift progress of the construction since the time of OSHA’s previous

⁴ The universe of active construction projects is derived from a commercially published list that is compiled by an organization known as F. W. Dodge. (Ex. B, ¶ VII.) The monthly list of construction projects to be inspected by a particular area office is generated by a computerized system that is administered by the University of Tennessee under contract with OSHA. (Exs. A & B; Tr. 128, 153).

programmed inspection of the site, which had been conducted on December 13, 2011. (Tr. 131, 144-51).

The Respondent contends that the Scheduling Instruction prohibits OSHA from conducting randomized inspections of any particular construction project at intervals of less than four months between inspections. The Respondent bases this contention on paragraph X.D. of the Scheduling Instruction (Ex. B), which provides as follows:

Limitation on Frequency of Selection. Normally, no site will be selected for inspection more frequently than once per trimester. Therefore, any project selected for an inspection will be removed from the master file for a period of four months and reentered in the fifth month if it is still active.

As noted above, the Bangor City Arena project had been previously identified for inspection by the Dodge report for December 2011, and consequently the Bangor area office had inspected the site on December 13, 2011. (Ex. E; Tr. 145). The inspection on April 5, 2012, was conducted slightly less than four months after the inspection on December 13, 2011. (Tr. 132). The Respondent argues that this contravened the provision quoted above and that as a consequence the Citation should be dismissed.

This contention fails for at least two reasons. First, the CO had consent to conduct the inspection. The Commission ruled in *Cody-Zeigler, Inc.*, 19 BNA OSHC 1410, 1412 (No. 99-0912, 2001) (consolidated), that consent to an inspection precludes a challenge under § 8(a) to OSHA's selection of a particular worksite for inspection:

Cody-Zeigler argues that a challenge to OSHA's selection of a particular worksite for inspection is cognizable under section 8(a), but its consent to the inspections in each of these cases makes it unnecessary to address that issue here. For as the Commission held in *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079 ... (No. 77-3804, 1987), "section 8(a) of the Act does not require the Secretary to obtain evidence of any particular sort to support his decision to seek a consensual inspection." Cody-Zeigler's

consent extinguishes any challenge it might otherwise have been able to make here.

The CO here conducted the inspection with the consent of the project's general contractor, which had authority and control over the site, and whose representative accompanied the CO throughout the inspection. (Ex. 1, p. 2; Tr. 26-27). There is no evidence or contention that the Respondent sought to refuse consent at any time during the inspection. (Tr. 176; Ex. 1, p. 2). But even if the Respondent had attempted to do so, such an effort would not have negated the consent given by the general contractor. "If there has been valid consent [to inspect] by a third party with common authority over the premises, that consent is not negated by the objections of an employer against whom evidence is found." *Laforge & Budd Const. Co., Inc.*, 16 BNA OSHC 2002, 2005 (No. 91-2264, 1994) (finding that consent given by two parties having joint access to or control of multi-employer worksite rendered warrantless inspection consensual as to subcontractor who had refused consent); *see also Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1078 (No. 77-3804, 1987) (finding subcontractor consented to warrantless inspection at multi-employer construction site where its foreman had joined the inspection party and there was no evidence that subcontractor objected to the warrantless inspection or requested that OSHA obtain an inspection warrant).

Secondly, the overwhelming evidence establishes that the selection of the Bangor City Arena site for inspection on April 5, 2012, was consistent with the Scheduling Instruction and was thus supported by administrative probable cause. In stating that "[n]ormally, no site will be selected for inspection more frequently than once per trimester" (emphasis supplied), the Scheduling Instruction does not establish an unyielding standard but rather simply describes the *norm* for inspection frequency. (Tr.

145-47). The area director's testimony regarding his decision to send a CO to inspect the site on April 5, 2012 was cogent, convincing, and uncontroverted. (Tr. 144-54). The selection of the Bangor Arena site for inspection slightly less than four months after the previous programmed inspection of that site was reasonable and consistent with the protocol set out in the Scheduling Instruction. The selection of the site was thus supported by administrative probable cause that would have supported the issuance of a judicial warrant if consent to the inspection had been refused.

The Secretary's Burden of Proof

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) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violation. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A violation is "serious" if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Constr.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2077 (No. 88-0523, 1993). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31, (No. 97-0469, 2003) (consolidated) (citation omitted).

An “other” violation “is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm.” *Crescent Wharf & Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973).

Citation 1, Item 1 – 29 C.F.R. § 1926.1051(a)

The Respondent’s employees were engaged in offloading two steel joists that had been delivered to the site on a flatbed trailer. The trailer’s flatbed was about four feet high. The joists were about six feet wide, and were resting on the trailer on their sides, so that the top horizontal surface of the joists was about six feet higher than the bed of the trailer and about ten feet above ground level. The CO observed employees of the Respondent climb to the top surface of the joists without the use of a ladder or stairway. The CO brought this activity to the attention of the Respondent’s foreman, who then had an extension ladder placed on the ground for access to the top surface of the joists. (Tr. 45-49; Ex. 3, photos 3 through 12).

This item alleges a serious violation of 29 C.F.R. § 1926.1051(a). The citation describes the alleged violation, as set out below:

29 CFR 1926.1051(a): (a) A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Bangor City Arena – A stairway or ladder was not utilized by employees to access the load of steel joists 10 feet above ground.

The cited standard “applies to all stairways and ladders used in construction ... covered under 29 CFR part 1926, and also sets forth, in specified circumstances, when ladders and stairways are required to be provided.” 29 C.F.R. § 1926.1050(a). The Respondent contends that a standard contained in Subpart R of Part 1926, which is

specific to the protection of employees engaged in steel erection, preempts the more generally applicable cited standard. Section 1926.760(a)(1) of Subpart R does not require the use of fall protection measures for unprotected sides and edges that are no more than 15 feet higher than the next lower level.⁵

This argument is rejected. The provisions of 29 C.F.R. § 1910.5(c) address the circumstances in which a specifically applicable standard is deemed to preempt a generally applicable standard, and provides as follows:

(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process....

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies....

The Commission has articulated the following test for determining when a specific standard preempts a general standard under § 1910.5(c)(1): “[W]hen application of the general standard would defeat a rulemaking decision made by the Secretary in promulgating the specific standard, ... the general standard is preempted under the terms of section 1910.5(c)(1).” *Lowé Constr. Co.*, 13 BNA OSHC 2182, 2183 (No. 85–1388, 1989). The Commission has also stated that a “general standard is not preempted by a specific standard when it provides meaningful protection to employees beyond that

⁵ Section 1926.760(a)(1) provides as follows:

Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

afforded by the more specific standard.” *Cincinnati Gas & Elec. Co.*, 21 BNA OSHC 1057, 1058 (No. 01-0711, 2005).

The general standard (§ 1926.1051(a)) specifies the means by which construction workers traverse a break in elevation between work areas. The specific standard (§ 1926.760(a)(1)) prescribes when certain fall protection measures are required for steel erection workers – it does not specify the means by which those workers traverse a break in elevation between working surfaces. Because the specific standard does not apply to the means specified by the general standard, it does not preempt the general standard.⁶ 29 C.F.R. § 1910.5(c)(2). Moreover, the general standard is not preempted because it provides meaningful protection to employees beyond that afforded by the specific standard. *Cincinnati Gas*. Section 1926.1051(a) applies to the cited activity of the Respondent’s employees accessing the top surface of the steel joists.

The Respondent points to another interpretative letter in which OSHA concluded that § 1926.1051(a) was applicable to employee access to flatbed trailers, *but* which also announced that OSHA had “determined, as a matter of enforcement direction, that it will

⁶ OSHA reached the same conclusion in a 1992 interpretive letter wherein it stated, “all of Subpart X--Stairways and Ladders applies to steel erectors as well as to all other trades at construction sites.” The interpretative letter explained this view as follows:

The standard [29 C.F.R. § 1926.1051(a)] is intended to require a ladder or stairway between levels in at least one location between levels so that employees can change levels in an easy, safe, and convenient manner. The obvious reason is to allow access to different elevations in a way that minimizes the potential for fall injuries that can result when employees are otherwise required to climb on items (i.e. columns, cross-bracing on scaffolds) not properly designed for climbing.

This July 20, 1992, letter of interpretation can be found at the following URL: www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20753

not apply the standard to that situation.”⁷ The Respondent contends the citation for violation of § 1926.1051(a) contravenes this enforcement policy because its employees were climbing four feet onto the flatbed trailer (without the use of a stairway or ladder) before they climbed an additional six feet to the top surface of the joists. This argument fails because the Respondent was not cited for failing to provide a stairway or ladder for access to the flatbed trailer, but rather for failing to provide a stairway or ladder for access to the top surface of the steel joists that were resting on the trailer. The CO testified that the Respondent fully abated the violation when it placed an extension ladder on the ground to enable workers to access the top surface of the joists. (Tr. 45-47; Ex. 3, photo 11). The Respondent did not meet the requirements of the cited standard.

The Respondent’s employees had access to the violative condition. The CO observed the employees climbing up and down the steel joists without the use of a stairway or ladder. (Tr. 47-48; Ex. 3, photograph #9).

The Respondent’s foreman was assisting in the activity and knew employees were accessing and exiting the top surface of the joists without the use of a stairway or ladder. (Tr. 49; Ex. 2, p. 2). The actual knowledge of supervisors and foremen is generally imputable to the employer. *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080-81 (No. 99-0018, 2003); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991).

The Secretary has established the alleged violation. He has also established the violation was serious. The standard is intended to minimize the potential for fall injuries when employees are required to move from one level to another. *See* footnote 6. Serious injury or death could have resulted if an employee had fallen after losing his footing or

⁷ This interpretative letter dated August 12, 1997, was received in evidence as Respondent’s Exhibit O.

grip. (Tr. 48-49; Ex. 2, p. 2). This item was properly classified as serious because such a fall could result in death or serious injury. 29 U.S.C. § 666(k). Item 1 is affirmed.

Citation 1, Item 2 – 29 C.F.R. § 1926.1408(a)(2)

The Respondent controlled the operation of a Manitowoc 4000W crane that was set up on the north side of the site. This side of the site was bounded by a city street along which ran a 12.5 kV power line. (Tr. 28, 175-77). The utility poles supporting the power line were situated on the site itself, inside the temporary fencing that was erected on the boundary. (Ex. 3, photo 13). The crane's centerline was about 120 feet from the nearest point of the power line. (Ex. R). The crane was set up so that its maximum working radius was 160 feet, which would have enabled it to operate beyond the power line. (Tr. 56).

The Respondent's president, Jeff Mitchell, testified that during a "pre-meeting" with personnel involved in the crane operations, everyone understood the crane would not be operated beyond an existing "concrete knee wall" that ran on an axis parallel to, and about 27 feet distant from, the power line.⁸ (Tr. 164). The plan was for the crane to lift each joist off the trailer and then swing the joist 180 degrees with the load passing between the crane and the power line. (Ex. Q). No elevated warning line, barricade, or line of signs equipped with flags or similar high visibility markings had been erected and maintained 20 feet from the power line. (Tr. 31-32; Ex. 3, photo 13).

Item 2 of citation 1 alleges a serious violation of 29 C.F.R. § 1926.1408(a)(2). The citation describes the alleged violation as set out below:

29 CFR 1926.1408(a)(2): Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to

⁸ The concrete knee wall is referred to elsewhere in the record as "the loading dock foundation wall." (Exs. Q and R).

the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of this section, as follows:

Bangor City Arena – The maximum working radius of the Manitowoc crane equipment could get closer than 20 feet to a power line and the requirements of Option (1), Option (2), or Option (3) were not followed.

Abatement can be achieved by erecting and maintaining an elevated warning line.

The cited standard applies to the Respondent's operation of the crane. A provision in Subpart R of Part 1926 expressly provides that almost all the provisions of Subpart CC, "Cranes and Derricks in Construction," in which § 1926.1408 is contained, apply to hoisting and rigging in steel erection activities. 29 C.F.R. § 1926.753(a).

Section 1926.1408(a) establishes a two-step process for determining the necessary precautions to prevent contact with power lines. A summary of this two-step process is described in the preamble to the final rule as follows:

[T]he standard requires the implementation of a systematic approach to power line safety for crane/derrick operations. This approach consists of two basic steps. First, the employer must identify the work zone, assess it for power lines, and determine how close the crane could get to them. The employer has the option of doing this assessment for the area 360 degrees around the crane or for a more limited, demarcated area. Second, if the assessment shows that the crane could get closer than a trigger distance — 20 feet for lines rated up to 350 kV — then requirements for additional action are triggered.

Cranes and Derricks in Construction, 75 Fed. Reg. 47906, 47952 (Aug. 9, 2010)

(to be codified at 29 C.F.R. pt. 1926).

Section 1926.1408(a)(1) sets out step one (identify the work zone) of the two-step process as follows:

§ 1926.1408 Power line safety (up to 350 kV)—equipment operations.

(a) *Hazard assessments and precautions inside the work zone.*
Before beginning equipment operations, the employer must:

(1) *Identify the work zone by either:*

(i) Demarcating boundaries (such as with flags, or a device such as a range limit device or range control warning device) and prohibiting the operator from operating the equipment past those boundaries, or

(ii) Defining the work zone as the area 360 degrees around the equipment, up to the equipment's maximum working radius.

The Respondent suggests that the manner in which the company had identified the “work zone” in step one resulted in the 20-foot “trigger distance” not being encroached, so that no additional precautions were required.⁹ This contention fails because the Respondent did not employ the method described in subparagraph (a)(1)(i) of identifying the work zone by “[d]emarcating boundaries (such as with flags, or a device such as a range limit device or range control warning device).”

As noted above, in a safety meeting conducted before crane operations commenced on April 5, 2012, the Respondent identified the concrete knee wall as the boundary beyond which the crane or its load would not encroach. (Exs. Q and R; Tr. 164-65). The mere identification of an existing landmark is insufficient to meet the requirement to “demarcate” a work zone’s boundaries pursuant to subparagraph (a)(1)(i). Rather, demarcation requires an actual marking, “such as with flags,” as the preamble to the final rule explained:

Employers are not permitted to use existing landmarks to demarcate work zone boundaries unless they are marked. For example, a line of trees would be insufficient. Without anything more the trees would not signal a reminder to the operator of there being a boundary that must be

⁹ The Respondent relies on Exhibit P, which is an OSHA interpretative letter dated March 12, 2012, that states in part as follows:

If the demarcated boundary line is located at least the minimum clearance distance from the power line, the operator understands that no part of the equipment or load may go past the demarcated boundary line of flags, and the operator is able to judge the position of the equipment with respect to the demarcated boundary line, §1408(a)(2) is satisfied and no further precautions are needed.

maintained. However, adding flags to those trees would be sufficient because the flags would serve as a reminder that the trees are located along a boundary that the operator must not breach.

75 Fed. Reg. 47952 (Aug. 9, 2010).

Here, the Respondent employed none of the methods described in the standard for demarcating the work zone boundaries. No flags or similar markers were placed on the existing landmark of the concrete knee wall. Moreover, the crane was not equipped with either a “range limit control device” or a “range control warning device.”¹⁰ (Ex. 2, p. 4).

Because the Respondent failed to demarcate the work zone boundaries in the manner permitted under § 1926.1408(1)(a)(i), the work zone was necessarily defined by the method set out in § 1926.1408(a)(1)(ii), which defines “the work zone as the area 360 degrees around the equipment, up to the equipment’s maximum working radius.”

¹⁰ The term “range control limit device” is defined in § 1926.1401 as “a device that can be set by an equipment operator to limit movement of the boom or jib tip to a plane or multiple planes.” Such a device “physically limits how far a crane can boom out and the angle within which the boom can swing.” 75 Fed. Reg. 47952 (Aug. 10, 2010). There is no evidence that the crane here was equipped with such a device. Moreover, even assuming that the crane was equipped with such a device, there is no evidence that it had been activated and calibrated in such a manner to prevent the crane or its load from encroaching outside the work zone that the Respondent had intended to define by the existing landmark (the concrete knee wall). Rather, the crane operator had merely been instructed not to boom below 75 degrees. No range control limit device prevented the crane from booming lower than 75 degrees (whether intentionally or not). (Exs. Q & R).

Similarly, there is no evidence that the crane was equipped with a “range control warning device,” which is defined in § 1926.1401 as “a device that can be set by an equipment operator to warn that the boom or jib tip is at a plane or multiple planes.” Further, even if the crane had been equipped with such a device, there is no evidence that the device had been activated and calibrated to prevent the crane or its load from extending outside the intended work zone (i.e., the area no further than the existing landmark of the concrete knee wall.)

The crane *was* equipped with a “load moment indicator” (Tr. 104, 108), but that equipment is neither a “range limit control device” nor a “range control warning device.” See § 1926.1401 (defining the term “*load moment (or rated capacity) indicator*”). The crane was also equipped with electronic and manual boom angle indicators (Ex. R), but that equipment is likewise neither a “range limit control device” nor a “range control warning device.”

The work zone boundaries having been so defined in step one, the Respondent was then required in step two to “[d]etermine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line,” and “[i]f so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of this section” 29 C.F.R. § 1926.1408(a)(2).

As described above, the crane or its load could come in contact with the power line if the crane were operated up to the its maximum working radius, and thus the Respondent was required to meet the requirements of one of the three options specified by § 1926.1408(a)(2). The Respondent contends that it complied with “Option 2,” which is set forth in section 1926.1408(a)(2)(ii) as follows:¹¹

(ii) *Option (2)--20 foot clearance.* Ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer than 20 feet to the power line by implementing the measures specified in paragraph (b) of this section.

Subparagraph (b) of § 1926.1408 describes the measures an employer must implement when utilizing “Option 2.”¹² Option 2 requires an employer to meet “all” of

¹¹ The Respondent does not contend, and there is no evidence to support, a finding that it complied with the standard by employing either Option 1 or Option 3.

¹² Section 1926.1408(b) provides as follows:

(b) *Preventing encroachment/electrocution.* Where encroachment precautions are required under Option (2) or Option (3) of this section, all of the following requirements must be met:

(1) Conduct a planning meeting with the operator and the other workers who will be in the area of the equipment or load to review the location of the power line(s), and the steps that will be implemented to prevent encroachment/electrocution.

(2) If tag lines are used, they must be non-conductive.

(3) Erect and maintain an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings, at 20 feet from the power line (if using Option (2) of this section)

the requirements set out in subparagraphs (b)(1) through (4). The Secretary contends only that the Respondent failed to meet the requirement of subparagraph (b)(3) to “[e]rect and maintain an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings, at 20 feet from the power line.” 29 C.F.R. § 1926.1408(b)(3).

It is undisputed that the Respondent did not erect or maintain a warning line as described by subparagraph (b)(3). The Respondent suggests, however, that because it used a “dedicated spotter” as described in the second sentence of subparagraph (b)(3), it met the requirements of the subparagraph. This argument is rejected. Subparagraph

or at the minimum approach distance under Table A (see § 1926.1408) (if using Option (3) of this section). If the operator is unable to see the elevated warning line, a dedicated spotter must be used as described in § 1926.1408(b)(4)(ii) in addition to implementing one of the measures described in §§ 1926.1408(b)(4)(i), (iii), (iv) and (v).

(4) Implement at least one of the following measures:

(i) A proximity alarm set to give the operator sufficient warning to prevent encroachment.

(ii) A dedicated spotter who is in continuous contact with the operator. Where this measure is selected, the dedicated spotter must:

(A) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: A clearly visible line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(B) Be positioned to effectively gauge the clearance distance.

(C) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(D) Give timely information to the operator so that the required clearance distance can be maintained.

(iii) A device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment.

(iv) A device that automatically limits range of movement, set to prevent encroachment.

(v) An insulating link/device, as defined in § 1926.1401, installed at a point between the end of the load line (or below) and the load.

(b)(3) does not make the use of a dedicated spotter an *alternative* to the use of an “elevated warning line” or similar visual marking, but rather makes it an *additional* requirement if the crane operator is “unable to see the elevated warning line.” See 75 Fed. Reg. 47955 (Aug. 9, 2010) (noting that where a crane operator is unable to see the elevated warning line, subparagraph (b)(3) provides “two layers of protection.”)

The Secretary has established that the Respondent violated the cited standard by not implementing all of the precautions required under Option 2, specifically for failing to erect and maintain an elevated warning line as required by § 1926.1408(b)(3).

The Respondent’s employees had access to the violative condition. The CO observed the employees using tag lines to guide a steel joist during a lift to prevent the joist from getting closer than 20 feet to the power line. (Tr. 56-57).

The Secretary has also shown knowledge of the violation. The Respondent’s foreman was serving as a spotter during the crane operations (Ex. Q), and he was aware that there was no elevated warning line. (Tr. 56-57). The foreman’s knowledge of the violation is imputable to the Respondent for the same reasons set out as to Item 1 above.

The Secretary proved the alleged violation. He has also proved the violation was properly classified as “serious,” in that if the crane or its load had contacted with the power line, death or serious injury from electrocution could have resulted. (Tr. 36-38).

Citation 2, Item 1 – 29 C.F.R. § 1926.351(e)

The CO observed one of the Respondent’s employees on the second level of the structure welding metal decking with an arc welder. (Tr. 40; Ex. 3, photos 1, 2 and 3). The employee was spot welding the final deck attachments, which required him to frequently move from one place to another on the metal decking. (Tr. 109-110, 168).

The welder was not using a welding screen to prevent other persons from sustaining eye damage from direct exposure to the rays of the arc. (Tr. 41).

A worker of another employer on the site had been working for about three hours at a fixed position 20 to 25 feet from the welder. (Tr. 40-41, 59, 110). This worker was wearing safety glasses that blocked UV (ultraviolet) rays, as did all of the Respondent's employees. (Tr. 167-68; Exs. U and X). The worker knew eye damage could result from exposure to the rays of the arc, and he had been intentionally avoiding looking directly at the rays. (Tr. 44). Besides this worker, no other employees were present on the second level with direct exposure to the arc rays. (Tr. 110).

When the CO told the welder that a protective screen was required, the welder went to search for one but he did not find any on the site. (Tr. 41-42).

This item alleges an "other" violation of 29 C.F.R. § 1926.351(e), which states:

Shielding. Whenever practicable, all arc welding and cutting operations shall be shielded by noncombustible or flameproof screens which will protect employees and other persons working in the vicinity from the direct rays of the arc.

The cited standard applies to the Respondent's arc welding operation on April 5, 2012.

There is no dispute that the Respondent's employee was not using a protective screen while he did the spot welding. In order to prove that the Respondent did not meet the cited standard, however, the Secretary must also show that the use of a screen was "practicable" under the circumstances.

The American Heritage Dictionary 1377 (4th ed. 2000), defines "practicable" as follows: "1. Capable of being effected, done, or put into practice; feasible. See

synonyms at **possible**. 2. Usable for a specified purpose: *a practicable way of entry.*” (Boldface and italics in original.)

The Respondent argues that the use of a screen was not practicable because the welder would have had to reposition the screen on the uneven surface of the metal decking every time he changed positions while spot welding.

The CO believed that a screen could have been used to shield the other worker from exposure to the arc rays by placing a screen near that worker’s fixed location, thereby making it unnecessary to reposition the screen every time the welder changed his position. (Tr. 110). There was no evidence that use of a protective screen in this fashion was not capable of being done or put into practice. The Secretary has carried his burden of establishing that the use of a protective screen was practicable under the circumstances. The Respondent did not meet the standard’s terms.

The only worker exposed to the hazard worked for another employer. Exposure is established where an employer creates or controls a hazard and exposes its own employees or the employees of other employers on a multi-employer worksite. *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010), *petition for review denied*, No. 10-1329 (D.C. Cir. Dec. 14, 2011) (unpublished). The evidence demonstrates that an employee was exposed to the violative condition.

The Respondent knew of the violation. It did not have a protective screen at the site, and the Respondent’s president testified that he has never used a welding screen while welding metal decking. (Tr. 59, 167).

The violation is aptly characterized as “other.” The exposed worker and all of the Respondent’s employees were wearing safety glasses that blocked most UV rays; also,

the exposed worker was aware of the danger of eye damage and avoided looking directly at the rays. *Crescent Wharf & Warehouse Co.*, 1 BNA OSHC at 1222.

Citation 2, Item 2 – 29 C.F.R. § 1926.352(d)

The Respondent's welder had no fire extinguisher within 10 feet of where he was working. The nearest fire extinguisher to the welder was in a fixed location about 60 feet away from where he was working, and had been placed there by the general contractor. The welder told the CO that he was aware there was a fire extinguisher on the level where he was working, but that he did not know its exact location. (Tr. 121-124).

This item alleges an "other" violation of 29 C.F.R. § 1926.352(d), which provides that: "Suitable fire extinguishing equipment shall be immediately available in the work area and shall be maintained in a state of readiness for instant use."

The cited standard applies to welding and cutting operations in construction, and therefore applies to the Respondent's arc welding operation on April 5, 2012.

The CO testified that he interprets the cited standard to require that a fire extinguisher be available for instant use in the area where the welding is taking place. He believed that a fire extinguisher should be within 10 feet of the welder to meet the standard. (Tr. 42).

The standard evinces a clear intent to require that fire extinguishers be available to enable workers to put out fires at the site of the welding with little or no delay. Here, the fire extinguisher was located about 60 feet away from the welder and he did not know its precise location. The terms of the standard were not met.¹³

¹³ The Respondent notes that the fire extinguisher's location complied with the more generally applicable standard set forth at 29 C.F.R. § 1926.150(c)(1) and suggests that its location met the cited standard, which applies only to welding and cutting activity. The cited standard provides for greater protection than the more generally applicable standard.

The Respondent suggests that there was no fire hazard to be protected against because the welder's work area had been cleared of combustibles before welding operations began. (Tr. 168). The presence of combustible material in the vicinity of the welding is not an element of the cited standard and thus has no bearing on determining whether an employer has met the terms of the standard.

The nearest employee with access to the violative condition was the welder. The Respondent knew or should have known of the condition, as the welder had been welding for about three hours in an open and exposed area. (Ex. 2, p. 8; Tr. 61).

The evidence supports the classification of an "other" violation. The Respondent cleared the immediate vicinity of the work area of combustibles before the welding began.¹⁴ Also, the welder kept a "fire blanket" that was immediately accessible to him while welding. (Tr. 171-72). Serious physical harm was not likely to result from the violation. *Crescent Wharf & Warehouse Co.*, 1 BNA OSHC at 1222.

Affirmative Defenses

The Respondent raised the affirmative defense of infeasibility as to all four citation items. It also raised the affirmative defense of unpreventable employee misconduct as to the item respecting crane safety. (Joint Prehearing Statement, p. 8).

Insufficient evidence was presented to support even a *prima facie* case on any element of either defense as to any of the citation items. See *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994) (describing elements of infeasibility); *Am.*

Cf. Cincinnati Gas & Elec. Co., 21 BNA OSHC at 1058 (a "general standard is not preempted by a specific standard when it provides meaningful protection to employees beyond that afforded by the more specific standard"). The cited standard is applicable here, notwithstanding compliance with another more generally applicable fire protection and prevention standard.

¹⁴ No evidence was presented as to whether the welder's clothing was combustible.

Eng'g & Dev. Corp., 23 BNA OSHC 2093, 2096-97 (No. 10-0359, 2012) (describing elements of unpreventable employee misconduct). Also, neither defense was argued in the post-hearing brief. Issues not briefed are treated as waived or abandoned. *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

Penalty Assessment

The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). The permissible range of penalties for both “serious” and “other” violations is from no penalty to \$7,000. 29 U.S.C. §§ 666(b) & (c).

The Secretary proposed a penalty of \$2,200.00 for each of the two serious violations and no penalty for the two “other” violations.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give “due consideration” to four criteria: the size of the employer’s business, the gravity of the violation, the employer’s good faith, and its prior history of violations. Gravity is the primary consideration among these four statutory criteria, and is determined by “such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2200, 2214 (No. 87-2059, 1993).

The Respondent is a small employer that variably employs between five and 20 employees. (Tr. 174). The record supports the Secretary’s reduction of the proposed penalty to account for the size of the Respondent’s business.

The record does not demonstrate circumstances supporting any penalty adjustment for the statutory “good faith” factor.

The proposed penalty for the two serious violations included an enhancement of 10% upon the determination that the Respondent had committed a willful violation in 2009. (Ex. 1; Tr. 55). The evidence does not support the Secretary’s stated basis for this 10% enhancement. Although OSHA had originally cited the Respondent in 2009 for two alleged willful violations, those allegations were withdrawn as the result of an informal settlement agreement. (Ex. F, p. 4; Tr. 170).

The Secretary determined the two serious violations were both of high severity in that the standards violated could potentially result in death or serious injury, as discussed above. (Ex. 1). He considered the probability for injury for the violation of 29 C.F.R. § 1926.1051(a) to be “lesser” due to the brief duration of exposure. He considered the probability for injury for the violation of 29 C.F.R. § 1926.1408(a)(2) to be “lesser” because of other precautions that had been implemented. (Ex. 1; Tr. 57-58).

The evidence supports the proposed penalty for the violation of the crane standard, 29 C.F.R. 1926.1408(a)(2), except for the 10% enhancement for history. Accordingly, a penalty of \$2,000 is assessed for this violation.

The Secretary fairly determined there was a “lesser” probability of injury for the violation of 29 C.F.R. § 1926.1051(a), but accorded this factor insufficient weight. Also, as discussed above, the record does not support the 10% enhancement for history. A penalty of \$750 is assessed for this violation.

The Secretary determined the “other” violations to be of “minimal” severity and “lesser” probability. As to the violation of 29 C.F.R. § 1926.351(e), the only exposed

worker wore safety glasses. As to the violation of 29 C.F.R. § 1926.352(d), there were no combustibles in the immediate work area. (Ex. 1; Tr. 59-60).

The decision to propose no penalties for the two “other” violations was proper.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.1051(a), is AFFIRMED, and a penalty of \$750.00 is assessed.
2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.1408(a)(2), is AFFIRMED, and a penalty of \$2,000.00 is assessed.
3. Citation 2, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1926.351(e), is AFFIRMED, and no penalty is assessed.
4. Citation 2, Item 2, alleging an other-than-serious violation of 29 C.F.R. § 1926.352(d), is AFFIRMED, and no penalty is assessed

/s/

WILLIAM S. COLEMAN
U.S. OSHRC JUDGE

Date: September 9, 2013
Washington, D.C.