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SECRETARY OF LABOR, Complainant, v. A.L. BAUMGARTNER CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 92-1022

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case involves procedural and substantive issues surrounding Administrative Law Judge Nancy J. Spies' affirmance of three citation items -- two dealing with damaged electrical cords and a third involving a forklift operator. We find that the judge properly affirmed each of the three items on review.

A. L. Baumgartner Construction, Inc. was engaged as a subcontractor in erecting the exterior shell of a single-story, pre-engineered metal building in West Chester, Ohio. After an inspection of the job site by OSHA compliance officer Steve Medlock on January 29, 1992, the company was issued a four-item serious citation. Items 1, 2, and 4 are at issue here.

I. Item 1: Damaged Electrical Extension Cord

The Secretary originally alleged that Baumgartner violated 29 C.F.R. § 1926.403(i)(2)(i)[1] in that one of its employees used a damaged extension cord with both its primary and secondary insulation cut or torn away to expose live energized conductors. The Secretary alleged that the violation was serious and proposed a $1,500 penalty. In her decision, the judge *sua sponte* amended the citation to allege a violation of 29 C.F.R. § 1926.416(e)(1).[2] She found a serious violation of the latter standard and assessed a $200 penalty. The standard to which the judge amended with respect to the damaged extension cord of Item 1 is the same standard cited by the Secretary in Item 2 below regarding a damaged power cord on an electric drill.

Facts

Compliance officer ("CO") Medlock observed two orange extension cords stretched in series across the concrete slab floor of the building. The cords were being used on a line with a functioning ground fault circuit interrupter ("GFCI"). They ran from a temporary power plug at the north end of the building to the south end, where Baumgartner employees were using hand tools powered by the cords. One of the cords had a deep cut or tear and was laying in a wet area. The cut went through the cord's outer insulation and also the inner insulation of one of the three wires within the cord. The CO tested the cord and found it

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[1] Section 1926.403(i)(2)(i) provides:

> **§ 1926.403 General requirements.**
> . . . .
> (i) *600 Volts, nominal, or less.*
> . . . .
> (2) *Guarding of live parts.* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by cabinets or other forms of enclosures . . . .

[2] Section 1926.416(e)(1) provides:

> **§ 1926.416 General requirements.**
> . . . .
> (e) *Cords and cables.* (1) Worn or frayed electric cords or cables shall not be used.

to be energized at 110 volts. The three wires were a hot wire (colored black), a neutral wire (colored white) and a ground wire (colored green). The CO testified that he could not recall whether it was the inner insulation of the hot or neutral wire that was cut, but he knew it was not the ground wire's insulation that was cut. Based on discoloration of the "white cloth"-like material that formed the inner part of the cord's primary insulation, the CO concluded that the cut had not been a recent one. The cut was easily seen by Medlock as he walked through the area.

The CO testified that he showed company foreman Mike Helmle the cut cord and that no suggestion was made by Helmle that the cord had been damaged that morning; company management did not know how long the cord had been damaged. Foreman Helmle testified that a circuit-breaker had tripped that morning and that he had directed an unspecified company employee to inspect the cord. Helmle did not testify about the results of that inspection.

Judge's Decision

The judge found that since section 1926.416(e)(1) more specifically described the alleged hazard, it should have been the standard cited, and she *sua sponte* amended the citation to allege a violation of that standard. She stated that "[a]mendment is appropriate where the facts which establish the violation were known and tried by the parties."

The judge affirmed a serious violation of section 1926.416(e)(1). She noted that the use of a GFCI does not nullify compliance with other electrical standards, except where the standards themselves provide it as an alternative protection. The judge also rejected Baumgartner's argument that the GFCI protected its employees from potential injury. She found that a person "may still be shocked" with a properly working GFCI before the GFCI interrupts power. She also found that the wetness around the copper wire increased the likelihood of injury. The judge noted that the damaged cord was in plain sight and concluded that the Secretary had shown Baumgartner "could have known of the deep cut in the cord." She also stated that reasonable diligence requires an employer to have an inspection program designed to discover safety-related defects and that the company's program was deficient.

Discussion on Sua Sponte Amendment

Amendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation. *Coastal Pile Driving, Inc.*, 6 BNA OSHC 1133, 1977-78 CCH OSHD ¶ 22,375, p. 26,969 (No. 15043, 1977). *See also Safeway Store No. 914*, 16 BNA OSHC 1504, 1517, 1994 CCH OSHD ¶ 30,300, p. 41,750 (No. 91-373, 1993)(amendment proper because it does not alter citation's factual allegations). The section 1926.403(i)(2)(i) citation alleged that "there was an energized orange extension cord observed in use that had both the primary and secondary insulation cut or torn away exposing the live energized conductors." These are the facts that the parties tried. Section 1926.416(e)(1), to which the judge amended, provides that "[w]orn or frayed electric cords or cables shall not be used." Thus, the amended standard clearly describes the factual situation that was tried by the parties. Baumgartner correctly argued throughout that the amended standard was the more applicable standard; it also unequivocally tried the amended standard.

Baumgartner contends that the amendment is prohibited by Fed.R.Civ.P. Rule 15(b),[3] although it acknowledges that it did not find any Commission decisions on similar facts supporting this argument. The company argues that the last two sentences of subsection (b), which deals with instances where evidence is objected to at trial on the

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[3] Rule 15(b) provides:

> **Rule 15. Amended and Supplemental Pleadings.**
>
> . . . .
>
> **(b) Amendments to Conform to the Evidence.** [1] When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. [2] If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

ground that it is not within the issues raised by the pleadings, are applicable here. However, it contends that this part of the subsection does not permit post hearing *sua sponte* amendments by a judge -- only the inapplicable first part of subsection (b) does that. The first part of subsection (b) deals with instances where issues not raised by the pleadings are tried by express or implied consent of the parties. We disagree.

We find that the judge's post-hearing *sua sponte* amendment was proper under *Morrison-Knudsen Co./Yonkers Contrac.*, 16 BNA OSHC 1105, 1993 CCH OSHD ¶ 30,048 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C.Cir. June 15, 1993). There, the Commission upheld a judge's post-hearing sua sponte amendment under the second part of Rule 15(b). The Commission stated:

> [W]hen an employer argues that a citation item must be vacated because there is an uncited, more specifically applicable standard, the employer does not consent to affirm the citation on the basis of the uncited provision. Nor does such an employer consent to have the evidence used to establish a violation of the uncited provision.

Id. at 1113, 1993 CCH OSHD at p. 41,269. The Commission stated that in such situations, under the second part of Rule 15(b), an inquiry must follow as to whether the employer is prejudiced by the amendment.

Baumgartner contends that if the Secretary had moved for an amendment to section 1926.416(e)(1), it would have argued that such amendment would make Item 1 of the citation duplicative of Item 2 and have cross-examined the compliance officer accordingly. We reject this argument. Under Commission precedent, there is no prejudice from this lost opportunity because the Commission is not required to vacate duplicative items. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981).[4]

We also note that although Baumgartner objected to the cited standard because it was not the more specific standard, Baumgartner did not object to the compliance officer's testimony about the substance of the issue -- the existence of cuts in the extension cord. It

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[4] Although, under *H.H. Hall*, the Commission may combine this item with Item 2 and assess a single penalty for both items, it may also assess separate penalties for separate violations of a single standard. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993).

is that evidence which bears on whether a violation of the amended standard has been established in the record. Baumgartner failed to object to the introduction of that evidence apparently because it could not properly do so -- the evidence follows from the allegation in the original citation that the extension cord had cuts in it. Consequently, it was the amended-to standard that was actually tried by the parties in this case, not the originally-cited standard dealing with enclosures and personnel-exclusion. Baumgartner knew the amended standard was the proper standard here and had argued it all along. The originally-cited standard refers to "enclosures," "partitions," "elevation," and exclusion of unqualified persons. Issues concerning those guarding methods were not tried, and we do not decide this item based on the Secretary's section 1926.403(i)(2)(i) allegation. We do however find that the judge's *sua sponte* amendment to section 1926.416(e)(1) was proper.[5]

Was Section 1926.416(e)(1) Violated?

To establish a failure to comply with the standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. E.g., *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The parties do not dispute the applicability of the amended standard. On the issue of noncompliance, the standard plainly prohibits the use of a worn or frayed cord. The cord that was indisputably in use here was cut. The existence of a GFCI has no bearing on whether the terms of this standard were violated. Baumgartner does not argue that its employees did not have access to the cut cord and we find that at least the employee who rolled out the cord that morning had access to the violative condition. Separate proof of a hazard is not required by the standard despite Baumgartner's arguments that assume the contrary.

On the matter of whether Baumgartner knew or should have known of the existence of the violative condition, there is no dispute that actual knowledge was not shown. We agree with the judge, however, that the Secretary established Baumgartner could have known

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[5] The better practice would have been for the judge to have made the amendment either during, at the close of, or even after the hearing but before the judge issued her decision so that the parties would have an opportunity to submit briefs on this issue.

of the deep cut in this cord, which was in plain view. Foreman Helmle worked next to an employee using a power drill plugged into the cut cord. The cut cord was in the plain view of the compliance officer during the inspection. Furthermore, one of Baumgartner's employees had inspected the cord on the morning of the inspection in response to foreman Helmle's request to do so following the tripping of the GFCI. That employee should have discovered the existence of the cut cord during his inspection and reported it back to Helmle -- if he did not, it confirms the judge's finding that Baumgartner's cord inspection program was deficient. Where a cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *Hamilton Fixture*, 16 BNA OSHC 1073, 1091, 1993 CCH OSHD ¶ 30,034, p. 41,182 (No. 88-1720, 1993), *aff'd on other grounds*, No. 93-3615 (6th Cir. July 1, 1994).

Although Baumgartner argues -- on the basis of the CO's testimony that it was "possible" that the cut "could have occurred five minutes before . . . [he] got there" -- that the cord might have been cut too recently for it to have detected it, we are not convinced by this argument. The CO testified that he did not believe that the cut had occurred recently because there was discoloration on the inner lining of the cord and the cut did not otherwise look like one that had happened recently. He also testified that when he first showed foreman Helmle the cut cord, Helmle did not suggest that the cord had been damaged that morning. Accordingly, we find that the Secretary has established that Baumgartner had constructive knowledge of the cut in the cord.

Whether Alleged Violation Is Serious

Judge's Decision

The judge found that the violation was serious because an employee picking up the exposed area of the damaged cord could receive a burn or shock,[6] even with the operable GFCI. In support, the judge quoted the following from the U.S. Consumer Product Safety Commission's ("CPSC")"Ground-Fault Circuit-Interrupter (GFCI) Technical Report" (Feb. 28, 1992) introduced into evidence by Baumgartner:

> The first sensation of electricity can be felt by most people at currents considerably less than 0.5 mA, 60 Hz (frequency in Hertz). Current near 0.5

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[6] The judge made a credibility finding in behalf of the CO over foreman Helmle, a finding that we accept, that a current-carrying wire was exposed by the cut.

> mA may produce an involuntary startled reaction such as to cause a person to drop a skillet of hot grease or cause a workman to fall from a ladder. As the current increases, involuntary muscular contractions increase accompanied by a current-generated heat."

Discussion

Section 17(k), 29 U.S.C § 666(k), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"), provides that a violation is serious if there is a substantial probability that death or serious physical harm could result from the violation. In the particular circumstances of this case, we find that the violation was serious. Although GFCI's will trip before an employee is electrocuted, they do not prevent electric shock. An employee experiencing a shock may suffer a serious, even fatal, secondary injury as a result of the recoil from the shock. 41 Fed. Reg. 55,701 (1976). The CPSC Technical Report specifically states that an "involuntary startled reaction" could "cause a workman to fall from a ladder." Here, two employees were working from an eight foot high platform with open sides on either end. If either employee received a shock from the cut cord while using the power drill, the recoil from that shock could have caused them to fall through the open sides,[7] or other openings, in the platform and suffer serious injury.[8] Thus, even though a GFCI is designed to protect against serious injury, the fact that the employees were subject

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[7] Particularly because of these open sides, we disagree with Baumgartner that the railings of the platform made it "extremely unlikely" that an employee would fall through the platform.

[8] Because the harm that this standard is intended to protect against is electrical shock, and because the facts in this record indicate that death or serious physical harm is *not* substantially likely from the type of injury that would result under the conditions present, Commissioner Foulke would characterize this violation, and the violation alleged in Item 2, as other than serious. Commissioner Foulke would, however, assess the same penalties assessed by the administrative law judge for these items since an independent review of the facts as they relate to the criteria under Section 17(j) of the Act supports these penalties.

to an eight foot fall here is the dispositive factor in our finding of a serious violation.[9] The fact that the cut cord was resting in a wet area is an aggravating circumstance.

Penalty

The Secretary proposed a $1,500 penalty for this item. Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). The judge assessed a $200 penalty after finding that Baumgartner employs an average of nine employees, has no history of prior violations, and that the gravity of the violation was lessened by the GFCI protection on the cord. The parties do not dispute the amount of the assessed penalty. Accordingly, we affirm the $200 penalty assessed by the judge.

II. Item 2: Damaged Drill Cord

Facts

Item 2 alleges that the company violated 29 CFR 1926.416(e)(1)[10] when an employee operated a Makita power drill/screw gun with a power cord that had four cuts (or tears) in its outer insulation exposing secondary insulated conductors. The employee was working eight feet above the ground on a platform attached to the forks of a forklift truck. The drill was being used on the same GFCI circuit as the extension cord at issue in citation

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[9] In her finding of a serious violation, the judge relied, in part, on the CO's testimony that an employee could receive a 15- to 20-amp shock before a GFCI took effect. We do not rely on this testimony of the CO in our finding of a serious violation. The CPSC's Technical Report suggests that the CO's testimony might have been inaccurate and that 5 or 6 milliamps of shock are the more likely figures, as Baumgartner argues before us. It is also possible however that the CO's testimony is correct but that the *duration* of the 15- to 20-amp shock would be so short before the GFCI took effect that an employee would not suffer serious injury as a result.

[10] Serious Citation 1, Item 2 alleges:

> 29 CFR 1926.416(e)(1): Worn or frayed electric cords or cables were used:
>
> (a) Along the south end of the structure there was an employee observed using a Makita Drill which had 4 locations on the drill's power cord where the outer insulation was cut or torn away exposing the secondary insulated conductors.

item 1 above. Company foreman Helmle was on the forklift's work platform where the drill was being used.

Judge's Decision

The judge found a serious violation of section 1926.416(e)(1), rejecting arguments by Baumgartner that its employees were not exposed to a hazard because the extension cord into which the drill was plugged had GFCI protection and that it lacked knowledge of the cuts in the power cord.

Discussion

It is undisputed that the cited standard applies, that Baumgartner did not comply with the terms of the standard, and that its employees were exposed to the condition. We also find that Baumgartner should have known of the multiple cuts on the drill's power cord because the company foreman was himself working on the platform with the employee using the drill with the damaged cord. Furthermore, we find that the exhibit introduced into evidence picturing the cord shows a dirty cord with no fresh cut marks on it suggesting that the cuts were of recent origin. We therefore find that Baumgartner has violated cited section 1926.416(e)(1).

Seriousness

Our consideration of the issue is essentially governed by the considerations outlined above under Item 1. We find that the violation was serious because the employee using the drill could suffer a shock before the GFCI became effective and the recoil from the shock could cause him to fall off the work platform eight feet to the ground.[11]

Penalty

The Secretary proposed a $1,500 penalty. The judge assessed a penalty of $200. She found that the "fact that the tools had GFCI protection and may have been double-insulated lessens the gravity of the violation," whereas the "fact that employees were working at heights increases it." The parties do not dispute the amount of the assessed penalty. After a consideration of the penalty factors in Section 17(j) of the Act, we assess a penalty of $200.

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[11] See n.8, *supra*.

III. *Item 4: Whether the Forklift Truck Was "Unattended"*

Item 4, as amended, alleges in the alternative[12] that Baumgartner violated subsection E[13] of section 603 of ANSI B56.1-1969, as adopted by 29 C.F.R. § 1926.602(c)(1)(vi).[14] Subsection E requires that when a powered industrial truck is left "unattended," its load engaging means shall be fully lowered. The citation item alleges that "two employees [were] observed working from a platform raised on the forks of a . . . [forklift] without an operator at the controls and no controls on the platform potentially exposing the employees to a fall of approximately 8'." Foreman Helmle and employee Danny Sullivan were working 8 feet above the ground on the platform attached to the forklift installing metal trim on the side of the building. When the foreman asked the

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[12] Item 4 of Serious Citation 1 originally alleged that the company violated subsection C of section 603 of ANSI B56.1-1969, as adopted by 29 CFR 1926.602(c)(1)(vi), by not providing two employees working on a raised forklift platform with a safe place to ride in that the operator of the forklift was not at its controls. Subsection 603C provides that "[u]nauthorized personnel shall not be permitted to ride on powered industrial trucks" and that a "safe place to ride shall be provided where riding of trucks is authorized."

[13] Subsection E of section 603 of ANSI B56.1-1969 provides:

> Section 6
> OPERATING SAFETY RULES AND PRACTICES
> . . . .
> 603 GENERAL
> . . . .
> E. When leaving a powered industrial truck unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shut off, brakes set, key or connector plug removed. Block wheels if truck is parked on an incline.

[14] Section 1926.602(c)(1)(vi) provides:

> **§ 1926.602 Material handling equipment.**
> . . . .
> (c) *Lifting and hauling equipment (other than equipment covered under Subpart N of this part).* (1) Industrial trucks shall meet the requirements of § 1926.600 and the following:
> . . . .
> (vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks.

forklift's operator to get him another piece of trim, the operator stepped down from the controls of the forklift and walked with his back to the forklift for a distance that was estimated by the compliance officer to be about 25 to 30 feet away from the forklift to get the trim. The two employees remained 8 feet above the ground on the work platform.

Judge's Decision

The judge affirmed a violation of section 1926.602(c)(1)(vi)[15] because the operator left the truck "unattended" and did not lower the load engaging means. The judge relied on the general industry standard at 29 C.F.R. § 1910.178(m)(5)[16] for a definition of "unattended." According to that provision, a powered industrial truck, or forklift, is "unattended" when "the operator is 25 feet or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view."

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[15] The judge also addressed the citation item's original allegation of a violation of the cited standard based on ANSI B56.1, section 603.C, "[u]nauthorized personnel shall not be permitted to ride on industrial trucks." She stated:

> The Secretary has apparently abandoned the ANSI 603.C allegation, which was not discussed in her brief. In any event, little discussion is needed to note that this is not a case where "unauthorized personnel" could be considered to have "ridden" on the truck within the meaning of ANSI 603.C.

[16] Section 1910.178(m)(5) provides:

> **§ 1910.178 Powered industrial trucks.**
> . . . .
> (m) *Truck operations.*
> . . . .
> (5)(i) When a powered industrial truck is left unattended, load engaging means shall be fully lowered, controls should be neutralized, power shall be shut off, and brakes set. Wheels shall be blocked if the truck is parked on an incline.
> (ii) A powered industrial truck is unattended when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.
> (iii) When the operator of an industrial truck is dismounted and within 25 ft. of the truck still in his view, the load engaging means shall be fully lowered, controls neutralized, and the brakes set to prevent movement.

Discussion

The threshold question here is the meaning of "unattended." Commission precedent provides that the Commission may look to another standard to give meaning to an undefined, broad term in a cited standard. *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1857-58, 1991-93 CCH OSHD ¶ 29,828, p. 40,670 (No. 89-1300, 1992), *aff'd on other grounds*, 3 F.3d 1 (1st Cir. 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1825, 1987-90 CCH OSHD ¶ 29,088, p. 38,887 (No. 86-247, 1990). *See also Gold-Kist, Inc.*, 7 BNA OSHC 1855, 1861, 1980 CCH OSHD ¶ 24,205, p. 29,443 (No. 76-2049, 1979)(Secretary may use NFPA Life Safety Code as an aid to interpreting a standard for which it is cited as a source). The judge therefore properly looked to the general industry standard at section 1910.178(m)(5) quoted above to provide meaning for "unattended." Under that definition, an operator who is over 25 feet away from his forklift truck has left that truck unattended.

Here, the CO estimated that the forklift operator was 25 to 30 feet away from the truck. Although Baumgartner disputes the accuracy of the estimate and points out that the CO never measured the distance, we find that the testimony is sufficient proof of the distance involved because it was based on the CO's observation. More importantly, the estimate was not specifically rebutted, even though foreman Helmle -- the man who ordered the operator away from the truck and testified during the hearing -- might easily have done so.[17] *See Well Solutions, Inc.*, 15 BNA OSHC 1718, 1721, 1991-93 CCH OSHD ¶ 29,743, p. 40,420 (No. 89-1559, 1992)(estimates of distance based on observation may be dispositive in absence of proof to the contrary), citing Fed.R.Evid. 701. We therefore agree with the judge that the forklift was "unattended" and that the terms of the cited standard were violated. There is no dispute about the applicability of the standard, the access of Baumgartner employees, or company knowledge through foreman Helmle.

We reject Baumgartner's claim that the Secretary has not established that leaving the forklift "unattended" presents a hazard. This standard does not require separate proof of a hazard. It gives notice of the proscribed conduct and contemplates the existence of a hazard when its terms are not met. *See Vecco Concrete Constr.*, 5 BNA OSHC 1960, 1961,

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[17] Helmle only testified in general terms that the operator was "near" the forklift.

1977-78 CCH OSHD ¶ 22,247, p. 26,777-78 (No. 15579, 1977). We therefore find that Baumgartner violated section 1926.602(c)(1)(vi).

Seriousness

In affirming a violation, the judge did not address the serious characterization alleged by the Secretary. The Commission did not ask the parties to brief the issue and the Secretary states in his review brief that he did not address the characterization of the citation because it was not listed as an issue in the briefing notice. The company has not briefed or raised the issue. Under these circumstances, we exercise our discretion not to decide the issue of seriousness. We conclude that in this instance none of the parties' rights will be adversely affected as a result of our not resolving the issue. *See General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2071-72, 1991-93 CCH OSHD ¶ 29,240, p. 39,171 (No. 82-630, 1991).

Penalty

The Secretary proposed a $1,050 penalty. The judge found that the duration of the violation was short and that the gravity was diminished by the fact that the forklift operator was close enough to the machine for the employees on the raised work platform to call for him in an emergency. She reduced the proposed penalty to $500. The parties do not dispute the amount of the assessed penalty. Under these circumstances, we affirm a penalty of $500 as assessed by the judge.

Order

For the reasons stated above, we affirm Serious Citation No. 1, item 1, alleging a violation of section 1926.416(e)(1), as a serious violation; we assess a $200 penalty. We also affirm Serious Citation No. 1, item 2, alleging a violation of section 1926.416(e)(1), as a serious violation; we assess a $200 penalty. Finally, we affirm Serious Citation No. 1, item 4,

alleging a violation of section 1926.602(c)(1)(vi), but do not decide how the violation should be characterized; we assess a $500 penalty.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: September 15, 1994

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SECRETARY OF LABOR, Complainant, v. A.L. BAUMGARTNER CONSTRUCTION, INC., Respondent.	Docket No. 92-1022

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 15, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 15, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-1022

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SECRETARY OF LABOR
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Respondent.

OSHRC DOCKET
NO. 92-1022

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 10, 1993. The decision of the Judge will become a final order of the Commission on April 9, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 30, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1022

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. A. L. BAUMGARTNER CONSTRUCTION, INC., Respondent.	:	OSHRC Docket No. 92-1022

Appearances:

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

Edward S. Dorsey, Esq.
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

A. L. Baumgartner Construction, Inc. (Baumgartner), contests one citation issued by the Secretary on February 19, 1992, alleging serious violations of § 1926.403(i)(2)(i), for failure to guard exposed wires of an electrical cord; of § 1926.416(e)(1), for use of a damaged electrical cord; of § 1926.556(b)(2)(v), for failure to use safety belts while in an

aerial lift; and of § 1926.602(c)(1)(vi), for failure to lower load engaging means of an industrial truck, used as a work platform, if the truck was "unattended."

Baumgartner was a subcontractor performing steel erection and sheet metal work on a single story, pre-engineered concrete slab building in East Chester, Ohio (Tr. 20). Steve Medlock, a compliance officer for the Occupational Safety and Health Administration (OSHA), investigated Baumgartner's construction worksite on January 29, 1992 (Tr. 20). Baumgartner contests application of the standards to the facts and disputes the facts alleged by the Secretary. Jurisdiction and coverage are admitted (Answer, ¶¶ 3, 4).

Citation No. 1: Alleged Serious Violations

Item 1: 29 C.F.R. § 1926.403(i)(2)(i)

The Secretary alleges a violation of § 1926.403(i)(2)(i) because Baumgartner did not guard the exposed copper wiring of a current carrying extension cord. The standard requires:

> (2) *Guarding of live parts* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by cabinets or other forms of enclosures . . . .

The worksite was in the early stages of construction. A concrete slab had been poured for the floor, but no roof had yet been constructed (Tr. 20-21, 31). The building measured approximately 80 feet by 150 feet (Tr. 123). As Compliance Officer Medlock walked from one end of the building to the other, he saw two orange extension cords stretched across the floor. The cords ran from a temporary power plug at the north end of the building to the south end, where Baumgartner's employees were using hand tools powered by the cords. Each of the cords had a three-wire plug (Tr. 26-28). Medlock initially noted that one of the cords had a deep cut or tear (Tr. 27). At the point of the tear, the cord was laying, if not in standing water, in a wet area (Tr. 32, 119). Medlock later located Baumgartner's foreman, Mike Helmle, and returned with him to point out the tear. Medlock noted that the tear exposed the cord's copper wire (Tr. 31, 32). Medlock tested

the cords with a tic tracer and found them to be energized. The current was operating at 110 volts (Tr. 28).

The Secretary asserts that the cord had become a part of the electric equipment at the point where the copper wires were exposed, and that the exposed area must be guarded from contact by employees. There were no guards around the energized copper wires.

Baumgartner makes three principal arguments: (1) that the violation presented no hazard of significance because there was a functioning ground fault circuit interrupter (GFCI) on the cord; (2) that the copper wire was exposed on only the "ground" (the non-current carrying) wire; and (3) that the Secretary cited the wrong standard. Baumgartner also relies on its "inspection program" and maintains that it had no knowledge of the alleged violation.

Proof of Hazard

Baumgartner argues that since the cord was plugged into a functioning GFCI, its employees were protected from potential injury caused by the cited condition. The argument is rejected. Even "[w]ith the GFCI working properly, [a person] may still be shocked. However, the GFCI acts quickly to limit the exposure to shock" (Exh. R-1, App. J). A hazard is presented by an initial shock or burn which an employee may receive before the GFCI senses a problem and disconnects the power. Medlock believed that before the GFCI interrupted power, a person could receive a 15- to 20-amperage shock or burn if contacting the energized portion of the cord before the GFCI interrupted power (Tr. 72, 88). The wetness around the copper wire increased the likelihood of injury.

Use of a GFCI does not nullify compliance with other electrical standards, except where the standards themselves provide it as an alternate protection. The GFCI did not eliminate the hazard.

Alternatively, Baumgartner argues that there was no hazard because only the non-current carrying copper wires were exposed. The extension cord had three color-coded conductors--the black (energized) conductor, the white (neutral) conductor, and the green (ground) conductor. Only the black and white conductors carried current (Tr. 65, 66). Foreman Helmle testified to a recollection that only the ground conductor was

exposed (Tr. 149). Medlock stated to the contrary that it was the black or white conductor which exposed the copper wires (Tr. 65, 66). There is a conflict in the testimony. In resolving the conflict, the demeanor of both witnesses was considered. There is no evidence that Helmle disputed Medlock's findings at the time of the inspection (Tr. 115). Medlock, a trained investigator, was the more persuasive witness concerning a matter which he actually observed. The Secretary has established that the exposed copper wires were energized.

Amendment of the Standard

Baumgartner disputes application of the cited standard to these facts. It asserts that § 1926.416(e)(1) is the applicable standard--one that specifically addresses damaged cords.[1] The Secretary cited the condition under § 1926.403 rather than § 1926.416 because, according to Medlock, the cord was "cut through to the energized conductors" (Tr. 92). No further rationale was offered.

The general scope provisions of Subpart K, the electrical standards, provide at § 1926.400(a) that § 1926.402 through § 1926.408 cover "installation safety requirements" including "electric equipment and installations used to provide electric power and light on jobsites." "Safety-related work practices" are covered by § 1926.416 and § 1926.417 and refer to hazards arising from use of electricity at jobsites. The general scope language, as well as the wording of the standards at issue, indicate that § 1926.416 more directly describes the conditions cited. A hazard of electrical shock or burn existed. It is the purpose of the Act to assure as far as possible that employees are provided a safe and healthful workplace. Whichever standard is applicable, the facts constituting the hazard are the same. The parties tried these facts with the understanding that one of the two standards applied. Baumgartner must have been aware that, while it could guard against contact with the energized portion of the cord, it alternatively could eliminate the hazard by removing or repairing the cord even under § 1926.403. Since § 1926.416(e)(1) more specifically describes the alleged hazard, it should have been the standard cited. Item No. 1 of the citation is

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[1] Section 1926.416(e)(1) provides:

Cords and cables. (1) Worn or frayed electric cords or cables shall not be used.

hereby amended *sua sponte* to § 1926.416(e)(1). Amendment is appropriate where the facts which establish the violation were known and tried by both parties.[2]

Knowledge

Relying on its "inspection program," Baumgartner argues that it was without knowledge that the violation existed. It posits that if the cut in the cord were there for more than a short period, its employees would have discovered it. If an employer could have ascertained the condition through the exercise of reasonable diligence, knowledge has been established. The Commission has explained that the "exercise of reasonable diligence requires [an employer] to inspect and perform tests in order to discover safety-related defects in materials and equipment." *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1865, 1981 CCH OSHD ¶ 25,358 (No. 1147, 1981). These are the tests Baumgartner claims it performed.

The extent of its inspection program is disputed. The tear on this cord was not detected at the time of the inspection although it was in plain sight. Foreman Helmle had been working with the employees who used a damaged power tool cord without requiring its repair (Tr. 23, 147). Helmle admitted to Compliance Officer Medlock that Baumgartner only inspected the cords once or twice a week and that the employees "glanced" at the cords in the mornings (Tr. 79, 80, 115). Helmle stated that he always sends someone to check the cords if a breaker is tripped (Tr. 145). Helmle knew that the cord at issue had tripped the GFCI earlier in the morning. He testified that he sent some unknown employee to check the cord. He did not report any result of the alleged check. He did not mention anything about having inspected the cord to Medlock at the time of the inspection and told him he

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[2] Although amending the item to reflect that the more specific standard applies, it is noted that violations of § 1926.403(i)(2)(i) have been upheld in like circumstances by Commission judges. *See National Engineering & Contracting Co.*, 14 BNA OSHC 1448, 1978-90 CCH OSHD ¶ 28,805 (No. 88-2059 & 88-2266, 1989), *aff'd*, 928 F.2d 762 (6th Cir. 1991); and *Cleveland Construction, Inc.*, 15 BNA OSHC 1548, 1992 CCH OSHD ¶ 29,594 (No. 90-2634, 1992). A violation is established if the cited standard applies to the facts and the requirements of the standard are not met. Here, the extension cord supplied electric power to hand tools. At the place where the wires were exposed, they became a "live part" of electric equipment, creating the hazard to which the standard is addressed. Thus, the more general standard would also apply to the cited conditions.

did not know how long the cord had been damaged (Tr. 115). The Secretary has shown that Baumgartner could have known of the deep cut in the cord, which was in plain view. The burden then shifts to Baumgartner to establish that it had insufficient time to discover the violation through a competent and effective inspection program. Here, the credible evidence establishes that Baumgartner has overstated the detail with which it inspected its electrical cords. Baumgartner has not rebutted the showing of knowledge. A violation of § 1926.416(e)(1) is affirmed.

Serious Violation

Under § 17(k) of the Act, 29 U.S.C. 666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This "substantial probability" language has been interpreted as referring to the severity of an injury if an accident occurs, rather than the likelihood of an accident. If an employee picked up the exposed area of the extension cord, even with the functioning GFCI, he could receive a shock or burn. The employee would not continue to be shocked and death would not be likely (Tr. 88). The condition could result in a 15- to 20-amperage shock, which is considered serious (Tr. 72).[3]

Penalty Determinations

The gravity of the violation is significantly lessened by the fact that there was GFCI protection on the cord. Employees exposed to this violation were not working at heights. Baumgartner employs an average of nine employees and has no prior history of violation (Tr. 123). Its financial condition is poor (Tr. 123, 136). A penalty of $200.00 is assessed.

Item 2: 29 C.F.R. § 1926.416(e)(1)

[3] The "Ground-Fault Circuit-Interrupter (GFCI) Technical Report," February 28, 1992, A. Albert Biss, U. S. Consumer Product Safety Commission, explains "The first sensation of electricity can be felt by most people at currents considerably less than 0.5mA, 60 Hz (frequency in Hertz). Current near 0.5mA may produce an involuntary startled reaction such as to cause a person to drop a skillet of hot grease or cause a workman to fall from a ladder. As the current increases, involuntary muscular contractions increase accompanied by a current-generated heat" (Exh. R-1, pp. 5, 6).

A power tool cord was damaged in four areas. The Secretary alleges a violation of § 1926.416(e)(1). The standard provides:

> (e) *Cords and cables.* (1) Worn or frayed electric cords or cables shall not be used.

Compliance Officer Medlock observed two employees using two Makita drills or screw guns while working from a Lull lift (Tr. 23, 34). The tools were plugged into the extension cords discussed above. One of the Makita cords was damaged in four places along its cord (Exh. C-2; Tr. 33, 35). Unlike the cord previously discussed, the damage was limited to a cut or tear of the primary insulation only.

Baumgartner argues that since the extension cord into which the hand tool was plugged had GFCI protection, employees were not exposed to a hazard. For the reasons already noted, this argument is rejected. The damaged cord presented a hazard of a shock or burn, since the GFCI does not protect from an initial shock. Cuts in the outer insulation make further damage to the wires more possible. In a preventative approach, the standard requires that cords of electrical equipment have both primary and secondary insulation. Baumgartner's employees were working at heights, and a shock or burn could precipitate a fall of 8 feet (Tr. 56).

Baumgartner argues that the Secretary failed to prove that it had knowledge of the violative conditions, suggesting that the damage may have occurred very recently. Baumgartner's foreman was on the Lull work platform where the tool was being used with the damaged cord (Tr. 147). Neither employee statements at the hearing nor information provided during the inspection indicated that the damage had only immediately occurred (Tr. 115, 116). Baumgartner had knowledge of the condition. A serious violation is affirmed.

Penalty Determinations

The fact that the tools had GFCI protection and may have been double-insulated lessens the gravity of the violation. The fact that employees were working at heights increases it. A penalty of $200.00 is considered appropriate.

Item 3: 29 C.F.R. § 1926.556(b)(2)(v)

The Secretary alleges that employees worked from an aerial lift without the required fall protection in violation of § 1926.556(b)(2)(v). The standard provides:

> Extensible and articulating platforms . . . (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

The Mark Lift 62C is an extensionable and articulating boom aerial lift. Baumgartner does not dispute the application of the standard, but rather disputes the Secretary's factual basis for the violation.

Medlock observed the Mark Lift on the jobsite and inquired of Helmle concerning its use. The Mark Lift was not in operation at the time (Tr. 42). Helmle related that the aerial lift was used on both of the two days preceding the inspection (Tr. 46).

Medlock testified that Helmle and later, employee Danny Sullivan, had the following conversations with him. Helmle explained that he had been on the ground level handing and holding the lower ends of the sheet metal panels while Sullivan, in the aerial lift, attached the sheet metal to the wall. Sullivan was 16 feet above ground level at that time (Tr. 47, 48). Sullivan was not wearing a safety belt or lanyard while he did this work (Tr. 46-50). Medlock later talked with Sullivan and testified that Sullivan verified that he had not used a safety belt or lanyard while working from the Mark Lift (Tr. 51). Medlock noted on his report that, "[b]oth Sullivan, who was in the lift, and Helmle, the foreman, stated they were aware of the need to wear a safety belt in lift," but both employees stated the belt was not utilized (Tr. 101, 102).

Both Helmle and Sullivan testified that when they used the aerial lift, each was tied off.[4] Helmle remembered talking to Medlock during the inspection but did not recall telling him anything about using or not using a lanyard (Tr. 151). Danny Sullivan recalled being tied off with the lanyard while he was up in the basket of the Mark Lift (Tr. 155). He stated that he had no reason to tell Medlock that he did not use the lanyard since he used

[4] Helmle and Sullivan were subpoenaed by the Secretary, who did not call them.

it (Tr. 155). Sullivan remembered speaking with Medlock at Helmle's direction, but did not recall anything about the conversation (Tr. 158).

Medlock observed that the safety belt or lanyard was available at the site and that employees were preparing to use it during the inspection (Tr. 99). Baumgartner argues that there may have been confusion in the employee's mind concerning which equipment Medlock was discussing. It thus accounts for the employees' possible miscommunications during the inspection.

In resolving this credibility dispute, the demeanor of the witnesses was observed. The employees' testimony was surprisingly absent of detail. A witness may often have a motive to disavow statements which carry a financial or legal penalty. This fact alone does not discredit the employees' testimony. The Secretary has introduced no contemporaneous notes or signed statements which would have supported the accuracy of the alleged admissions. Proof of the violation is based solely on a re-telling of events which were not observed by the investigator. The employees denied, under oath, exposure to the violative conditions. The means of complying with the standard, fall protection, had been available at the jobsite at the time of the alleged violation. The employees' testimony is considered credible in this instance. The Secretary has failed to meet her burden of proof. The violation and proposed penalty are vacated.

Item 4: 29 C.F.R. § 1926.602(c)(1)(vi)

The Secretary charges that Baumgartner violated § 1926.602(c)(1)(vi) by leaving an industrial truck "unattended" with the load engaging means extended. The standard makes the provisions of American National Standards Institute (ANSI) B56.1-1969 applicable to industrial trucks.[5]

Section 603.E provides:

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[5] The citation alleged a violation of § 1926.602(c)(1)(vi) based on ANSI 603.C, "unauthorized personnel shall not be permitted to ride on industrial trucks." On August 18, 1992, Judge James D. Burroughs granted the Secretary's motion to plead, in the alternative, that the violation was based on ANSI 603.E. The Secretary has apparently abandoned the ANSI 603.C allegation, which was not discussed in her brief. In any event, little discussion is needed to note that this is not a case where "unauthorized personnel" could be considered to have "ridden" on the truck within the meaning of ANSI 603.C.

E. When leaving a powered industrial truck unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shut off, brakes set, key or connector plug removed. Block wheels if truck is parked on an incline.

The Lull forklift, which is primarily intended for material handling, was also used on the jobsite as a personnel lift. An approved employee work platform was fitted onto the forks of the forklift to lift employees into an elevated position (Tr. 54, 55). The platform was controlled from the cab of the Lull, since there were no controls on the platform itself (Tr. 57).[6] The platform was extended 8 feet in the air when observed by Medlock (Tr. 56). Two employees, including foreman Helmle, were working from the platform attaching the final metal trim to the door jam (Tr. 133). Helmle directed operator Shawn Ogle, who had been sitting in the Lull's cab, to get a piece of trim (Tr. 147). Ogle left the Lull and walked approximately 25 to 30 feet, turning and facing away from the vehicle. Ogle was within earshot of the men on the platform (Tr. 147). He returned to the Lull in an estimated five minutes (Tr. 59).

The Secretary alleges that Baumgartner, contrary to ANSI 603.E, left the vehicle "unattended" with load engaging means extended. The Secretary asserts that a vehicle is "unattended" whenever the operator is not at the controls of the vehicle. Baumgartner argues that the Lull was in no sense of the word "unattended," since "it was in use" with men on the platform (Respondent's Brief, p. 11). Both arguments are overly simplistic.

"Unattended" is not defined in this section of the ANSI standards. The word is used in other OSHA standards, most similarly in the general industry standard of § 1910.178(m)(5). The usage of the word in other standards sheds some light on its intended meaning. For example, the standard at § 1910.178(m)(5) states that a powered industrial truck is "unattended" when "the operator is 25 feet or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view." The standard further requires that even when an operator is within 25 feet of the controls with the truck in view, the load engaging means must be fully lowered.

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[6] The parties tried this case under the theory that the Lull was a powered industrial truck. There was no argument that by modifying the material handling capacity to make the truck a personnel lift, it changed the character of the vehicle.

The Review Commission has provided guidance in properly defining "unattended" as well as in determining whether the standard is applicable to the cited conditions. *Kingery Construction Co.*, 3 BNA OSHC 1070, 1974-75 CCH OSHD ¶ 19,537 (No. 2562, 1975), presented a similar fact situation: an employee was on the elevated platform on a forklift truck without controls and with the operator 80 feet away. Under these circumstances, the truck was "unattended." The Secretary cited the condition under the general duty provisions of § 5(a)(1). The Commission held that the specific standard, § 1926.602(c)(vi), referencing ANSI 603(E), should have been cited. The alleged violation was vacated on this and other grounds. *See also Betten Processing Corp.*, 2 BNA OSHC 1724, 1974-75 CCH OSHD ¶ 19,481 (No. 2648, 1975)(*citation vacated on other grounds*), where an operator left the crane "unattended" to perform other duties, and *Idaho Veneer Co.*, 1 BNA OSHC 3040, 1971-73 CCH OSHD ¶ 15, 519 (No. 1009, 1973), where a truck was not "unattended" under § 1910.178(m)(5), since the operator was within 10 to 25 feet of the truck.

Baumgartner regularly utilizes the Lull for a personnel work platform. It believes that using the Lull is a safer and more stable way to perform the elevated work (Tr. 135). The operator in this instance was 25 feet to 30 feet from the vehicle's controls, but was not out of earshot (Tr. 247). Although the Lull could be seen from all over the worksite, the operator turned and walked away from it (Tr. 58, 116). It is Baumgartner's general policy for the Lull operator to "stay near the forklift or on the forklift." Helmle considered that he had complied with Baumgartner's general procedures in this instance (Tr. 150).

The ANSI standard applies to situations where employees, like materials, are on the elevated platform of an industrial truck. Many of the hazards to which the standard is addressed apply perhaps in greater measure to personnel on an unattended truck. Since there were no controls at the platform, the anticipated hazard is failure of the rig or problems with the platform, causing employees to fall or causing the rig to drop without control (Tr. 60). In the circumstances of this case, when the operator left the truck to 25 to 30 feet to get materials, he left the truck "unattended." Since the load engaging means was not lowered, the violation is affirmed.

Penalty Determinations

The duration of the violation was short. The gravity is lessened by the fact that the employees could call the operator in an emergency, although he would have to come from the noted distance. A penalty of $500.00 is considered appropriate.

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 foregoing decision, it is ORDERED:

(1) That the violation of amended 29 C.F.R. § 1926.416(e)(1) is affirmed and a penalty in the amount of $200.00 is assessed (Item No. 1).

(2) That the violation of 29 C.F.R. § 1926.416(e)(1) is affirmed and a penalty in the amount of $200.00 is assessed (Item No. 2).

(3) That the violation of 29 C.F.R. § 1926.556(b)(2)(v) and proposed penalty are vacated.

(4) That the violation of 29 C.F.R. § 1926.602(c)(1)(vi) is affirmed and a penalty of $500.00 is assessed.

NANCY J. SPIES
Judge