



UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.
METRIC CONSTRUCTORS, INC.
Respondent.

OSHRC DOCKET
NO. 92-1983

**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 September 10, 1993. The decision of the Judge will become a final order of the Commission on October 12, 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 September 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:

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Petitioning parties shall also mail a copy to:

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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 10, 1993

DOCKET NO. 92-1983

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SECRETARY OF LABOR,
Complainant,

v.

METRIC CONSTRUCTORS,
Respondent.

OSHRC Docket No.: 92-1983

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

J. Larry Stine, Esquire
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Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Metric Constructors (Metric) contests a serious citation issued by the Occupational Safety and Health Administration (OSHA) for alleged violations of 29 C.F.R. § 1926.105(a), (failure to provide safety nets if other means of fall protection were impractical) and of 29 C.F.R. § 1926.550(g)(2), (use of a crane to hoist employees in a personnel basket). Metric asserts that the occurrences did not constitute violations of the Occupational Safety and Health Act of 1970 (Act), that any violations that did occur were caused by the isolated misconduct of its employees, and that compliance would create a greater hazard.

Background

Metric is a construction contractor; its parent company is J.A. Jones. Metric was prime contractor for construction of an extensive "grass roots" 300-megawatt power generation facility in Bowling Green, Florida (Exh. C-1; Tr. 254). From April 1 to April 13,

1992, OSHA compliance officer Richard Tracy inspected the site. The Secretary issued the citation on May 28, 1992.

Alleged Serious Citation

Item 1: 29 C.F.R. § 1926.105(a)

The Secretary charges that Metric violated 29 C.F.R. § 1926.105(a) when Tracy observed employees “walking the steel” without fall protection. The standard requires:

- (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground . . . where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The Secretary presented no evidence concerning use of safety nets. Metric asserted, without contradiction, that nets were infeasible and could not be utilized safely (Tr. 290). Since the parties agreed that other means of fall protection were practical, the Secretary correctly contends that it is unnecessary to reach the issue of whether nets could be used. *See State Sheet Metal Co.* 16 BNA OSHC 1161, 1993 CCH OSHD ¶__ (Nos. 90-1620 and 90-2894, 1993). (“A prima facie violation of § 1926.105(a) is established if the Secretary can show that employees were subject to falls of 25 feet or more and none of the safety devices listed in the standard were utilized.”); *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1165 (5th Cir. Unit B 1981); *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1993 CCH OSHD ¶__ (No. 90-2304, 1993).

Employees were subject to falls of 35 feet. Metric primarily argues that fall protection was provided, its use enforced, and the instance of noncompliance observed by Tracy was employee misconduct.

The incident occurred as compliance officer Tracy, accompanied by Metric’s safety director, Curtis Jolly, began the second day of the inspection. They observed employees overhead on a pipe rack 35 feet above ground level (Tr. 189, 193). Two employees were stationary and tied off with safety belts and lanyards. A third was walking along a 12-inch steel beam without fall protection (Tr. 190, 193, 194). That individual was later identified as Metric’s pipefitter foreman, William Holbrook (Tr.190-191). Tracy and Jolly moved to get a better view of the employees’ location. Tracy testified that he was still looking at the three workers, attempting to identify Holbrook, when Tracy saw the remaining employees

disconnect their lanyards and walk along the steel beams in the direction Holbrook was going (Tr. 190). Jolly disputes Tracy's recollection, stating that he never saw the other two men disconnect their lanyards. In support of Tracy's recollection, the Secretary offered the photograph Tracy took of the men as they allegedly walked along the steel (Exhs. C-5, C-10).¹ A comparison of the photographs demonstrates movement by the three employees. Tracy asked Jolly to "find out who those guys are so I can talk to them" (Tr. 190). A short time later, Holbrook approached Tracy and identified himself as the man who walked the steel without fall protection. When Tracy asked, Holbrook identified the men working with him as "his crew" which "followed him off the steel" (Tr. 191, 240). Since no other names were provided to him, Tracy relied on Holbrook's identification of "his crew" to establish that they were Metric employees (Tr. 241).

Although Jolly did not recall seeing any employee but Holbrook untie his lanyard or walk on the steel beam, when he looked at Tracy's photograph Exhibit C-5 during the hearing, Jolly noted that the employees appeared "to be walking" (Tr. 106). Both Tracy and Jolly were credible witnesses. Since the occurrence happened so quickly, it is possible that Jolly was not looking at the same area as Tracy when the employees left the structure. Jolly understood that Tracy sought the identity of only one man. Certainly Tracy focused only on Holbrook's identity, as is reflected by his internal report (Exh. R-6, OSHA-1B). Tracy is a trained investigator with eleven years of law enforcement experience with the Air Force and four years with OSHA. There was nothing in Tracy's demeanor at the hearing or reports of his conduct during the investigation which casts doubt on his actions or motives. Considering the timing of the incidents, the photographs where employees appear to be walking, and the full testimony of the witnesses, the Secretary has established that Holbrook and two other Metric employees walked the steel 35 feet above the ground level without fall protection.

¹ Photographs Exhs. C-5 and C-10 show four men. Three are close together in the center of the photographs wearing hard hats. A fourth is wearing a welding helmet and is in another location in the photograph. Tracy described the photographs as a sequence of three men "walking the steel" (Tr. 112). It is not alleged that the "welder" is moving or is without fall protection.

Violation of a specific standard is shown if the Secretary proves that the standard applies, the terms of the standard were not met, employees had access to the condition, and the employer either knew of the condition or could have known with the exercise of reasonable diligence. *E.g., Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). In this case only knowledge remains at issue. A supervisor's knowledge of his own actions or inactions may be imputed to his employer. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992); *Western Waterproofing Co. of America*, 15 BNA OSHC 1491, 1992 CCH OSHD ¶ ___ (No. 90-1135, 1992) (since foreman was among those seen without fall protection, employer had actual, if not constructive knowledge of violation).

Was Holbrook a supervisory employee? Citing *Daniel International Corp. v. OSHRC*, 683 F.2d 361 (11th Cir. 1982), Metric contends that the Secretary failed to establish the type of supervisory relationship which would warrant imputing knowledge to Metric. Holbrook was identified as a "foreman," a title which implies supervisory authority to direct work. The title alone may not be dispositive of the issue. Here, unlike *Daniel*, there is direct evidence of Holbrook's authority. When its safety director Jolly issued a reprimand to Holbrook, Jolly "asked him, you know, why he wouldn't be tied off or why didn't he make some means for his employees, since he was the supervisor, to get from one point to another" (Tr. 108). Holbrook's authority is also illustrated by his earlier issuance of a reprimand to an employee for failing to tie off (Exh. R-5; Tr. 96). Holbrook had been delegated authority over other employees and had responsibility for his crew's safety. His knowledge of the safety violation is imputed to Metric. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537, 1992 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992). The violation is established, and the burden shifts to Metric to prove its defense.

Metric's Employee Misconduct Defense

Metric claims that Holbrook's failure to use fall protection was the result of employee misconduct.² The "employee misconduct" defense recognizes that it is unfair to require an employer to take into account the idiosyncratic conduct of an employee in carrying out its safety procedures. *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). In order to establish the defense, an employer must show that (1) it has established work rules designed to prevent the violation, (2) it has taken adequate steps to communicate the established work rules to its employees, (3) it has taken steps to discover violations, and (4) it effectively enforced the rules when violations have been discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (No. 76-1538, 1979).

Tracy's investigation, conducted over seven days, indicated to him that Metric's employees were tying off when they were in a stationary position (Tr. 209). The investigation also supported that other employees were accessing work while being properly protected from fall hazards (Tr. 192). Did Metric have an adequate work rule which applied to the condition observed by Tracy? Metric asserted that its fall protection work rule was "100% tie off."³ The rule is not written in these terms.⁴ The written rule is reflected on page 5 of its "Safe Practices" booklet, which states "[s]afety belts, properly tied off, must be worn when scaffolding or other safety work platforms are not available" (Exh. R-1). The rule is also stated in a "safety orientation" sheet which provides:

Fall protection is a must when working near the edge of a building, a platform, an open shaft or any area that poses a possibility of falling 10 or

² Although Metric did not accept that two additional employees followed Holbrook off the steel, the same arguments apply to those employees as well.

³ The Secretary answered an interrogatory that he "[made] no contention as to respondent's safety program." This answer did not concede that Metric's safety program satisfied the employee misconduct defense. The Secretary did not allege a safety program violation. The burden of production on all elements of the defense continues to rest with Metric.

⁴ Jolly thought the "100% tie-off rule" might have been stated in the "accident prevention plan," but the document was never produced and the evidence does not support that the rule existed in such terms (Tr. 112, 113).

more feet. Remember to wear your safety belt and tie off at all times.
(Exh. R-2).

During Holbrook's conversation with Tracy, he noted that he had 28 years of experience walking steel and felt perfectly safe walking a 12-inch beam (Tr. 197). Holbrook had been employed by Metric for six months (Tr. 191). While they were engaged in this conversation, another Metric employee, general pipefitter foreman Barnes, approached. Both foremen told Tracy that they were aware of the company's requirement that fall protection must be used when working from heights. Both agreed, however, that they had not received any specific guidance from Metric concerning "walking along steel elevated above the ground." Neither had asked to have a static line strung for accessing the work area in the piperack (Tr. 193). Significantly, these statements fall short of a concession that Metric's procedures *did not require* employees to use fall protection while moving on the steel.

Metric asserts that its safety rules required employees to use fall protection while accessing elevated work. Project manager Griffiths testified that, typically, arrangements were made to provide fall protection in planning sessions before the work began. Scaffolding, platforms and static lines were used to provide fall protection at different times on the job (Tr. 280-282). Static lines had been strung at the top elevation of a pipe rack to enable employees to tie off while stationary (Tr. 209). However, no static line was strung to permit employees to access the work area. In Griffiths' opinion, if there was no static line in place, the employees should have climbed down 35 feet to ground level, walked along the ground, and then climbed back up to the new work area. Metric also argues that if Holbrook had followed company procedure, he should have requested scaffolding, aerial lifts (which were available at the jobsite) or static lines to assure that he and his men could safely access the work area.

The Secretary argues that Metric's rule was insufficiently specific to address fall protection while moving on the steel from place to place or while gaining access to and from the work area. He contends that even if the rule was adequate, it was insufficiently communicated or enforced. It was unnecessary for Metric to prescribe a work rule aimed specifically at moving along the steel in order to meet its defense. By its terms, Metric's

work rule satisfies the requirements of the cited standard. Still, Metric must exercise reasonable diligence in communicating and enforcing that rule so that employees understood it covered times when it was necessary or practical to walk the steel. *See Hamilton Fixture, _ BNA OSHC __*, 93 CCH OSHD ¶ 30,034 (No. 88-172, 1993). (While the existence and enforcement of an adequate *general* work rule was not disputed, the *specific* rule was not adequately enforced, and the defense failed.)

In assessing the communication and enforcement of the rule, Metric's safety program was evaluated. Employees attended weekly toolbox meetings at which safety was discussed. Its full-time site safety director, Curtis Jolly, conducted all-craft safety meetings once a month. Metric used promotional items to reward employee safety (Tr. 271-272). It had a program in place to reprimand employees for safety violations. It also required subcontractors to abide by its safety rules (Exhs. R-4, R-5, R-9; Tr. 100-101, 275-278). Tracy found Metric's safety program at the worksite to be "superior" and the "best that [he] had ever seen" (Tr. 204). The worksite won the "president's prize" as the safest project in the J. A. Jones organization, and as of the date of the hearing, the project had logged 600,000 man hours without a lost-time accident (Tr. 93, 272-273).

In his position as safety director, Jolly walked the job an average of 4 to 6 times a day and did not see another instance of employees working in the pipe rack without fall protection (Tr. 90). This is not a case of widespread noncompliance by numbers of employees or by any employee for a prolonged period. Three employees moved along the steel for approximately 30 seconds. Some static lines had been installed in the pipe rack and were used while the workers were stationary. Means were available to provide safe access as well. Metric's work rule was sufficient to put Holbrook on notice that the company required him to tie off while moving on the steel. Holbrook was issued a written reprimand because of the incident (Tr. 85). Since Jolly had not realized that anyone but Holbrook was exposed, he did not reprimand any other person.

Although a foreman and his subordinates were involved in prohibited conduct, "[t]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277

(6th Cir. 1987). Employees, including supervisors, must be properly trained and supervised. Metric has carried its burden and to establish that they were. Holbrook's action in walking the steel with two of his men was an isolated incident of employee misconduct. The violation is vacated.

Item 2: 29 C.F.R. § 1926.550(g)(2)

The Secretary charges that Metric violated 29 C.F.R. § 1926.550(g)(2) by using a crane-suspended man basket as an elevated work platform for its employees. The standard specifies:

(2) *General requirements.* The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

The parties do not dispute the facts. Early in the project, Energy Erectors (Energy), an electrical contractor, strung industrial electrical conductors to a dead-end structure (Exh R-8; Tr. 21). This process required Energy to string a total of ten wires and to attach them to the dead-end at the 35 feet, 42 feet, 57 feet and 75 feet levels above ground (Exh. R-8; Tr. 24, 25, 256, 340). To perform the work at these heights, Energy used a "bucket truck" (Tr. 26).⁵ Energy cut the wires to the correct lengths and attached the wires to the dead-end structure (thus placing the predetermined tension on each line). By agreement with Metric, which needed access under the wires for its machinery, Energy immediately removed the lines. Metric agreed to re-attach the lines when the plant was nearer completion and their placement would not disrupt construction (Tr. 25). Approximately one year later, Metric began the re-attachment process. Assigned to the job were employees

⁵ The record distinguishes between a "bucket truck" (a piece of equipment mounted on a truck designed to hoist personnel with an articulating arm and to be driven on roadways); an "aerial lift" or "manlift" (a piece of equipment with an articulating arm which supports a personnel platform, similar to the bucket truck, but without the motorized capacity), and a "man basket" (a personnel platform attached to a wire and hoisted by the crane) (Tr. 32, 33). The Secretary's expert witness Timothy Jewel considered both the aerial lift and bucket truck to be "aerial lift devices." He noted that these devices came with two different capacities. One elevated men and tools, the other had a material handling capability and could lift the men and tools as well as lift conductors and equipment (Tr. 130).

Curtis Gregory and his partner, Dan Smith. The men were millwright/riggers on the jobsite, each with eight to ten years of experience (Tr. 322). The decision as to the type of equipment to use for this task was left primarily to Gregory, Smith and the operator superintendent Ken Rose (Tr. 336). Metric's assistant superintendent Joseph Johnson also had "some minor input into it" (Tr. 29). The men initially tried a "dry run," using a 35-foot aerial lift. They decided the articulating arm of this lift was "too short" to allow them to safely perform the work. They then brought up an aerial lift which could reach only 65 feet, still 10 feet from the top of the insulators (Tr. 329, 332, 334). They tried to use the aerial lift at its highest level (Tr. 332, 338), which was still "too short" (Tr. 332, 334). The employees "simply felt unstable" and believed that the higher they were the more wobbly the lift became (Tr. 335). Johnson noted this was true, "especially when you get it all the way out" (Tr. 31). A longer articulating arm would have allowed the employees to be closer to their work (Tr. 333). It would not require the full extension of the articulating arm, as their dry run would have demanded. However, the idea of securing a larger aerial lift or a large bucket truck was not considered (Tr. 333). Gregory had experience working with crane man baskets at heights of up to 100 feet, but he had never worked with an aerial lift or bucket trucks at a height beyond 50 feet (Tr. 336). The employees did not try to re-attach any wire during either "dry run," but simply assessed the height and feel of the aerial lifts (Tr. 338, 339). The employees, along with Rose, made the decision not to use the aerial lift, but to perform the work from a crane-suspended man basket (Tr. 336, 337).

At the time of the inspection, Tracy and Metric's assistant superintendent Johnson observed the wire re-attachment process. A Grove 28-ton crane was lifting the two employees in a man basket. The basket was suspended from a wire rope. The basket was raised by the crane to provide access to the top of the pole (Tr. 163). Tracy asked Johnson, "Can you think of any other way to do that besides this man basket?" Johnson responded, "A manlift. It's not a lift but it's a bucket" (Tr. 40).

Was use of conventional means more hazardous than use of a crane?

The standard, which is written as a general prohibition, allows an exception to that rule. The Review Commission has consistently held, "that when a standard contains an exception to its general requirement, the burden of proving the exception lies with the party

claiming the benefit of the exception” (citations omitted). *Finnegan Construction Co.*, 6 BNA OSHC 1496, 1497, 1978 CCH OSHD ¶ 22,675, p. 27,371 (No. 14536, 1978), (burden of showing that splices fell within exception was on employer). Since the standard presumes the existence of a hazard, to hold otherwise would improperly shift the burden of proof. See *Austin Bridge Co.*, 7 BNA OSHC 1761, 1765, 1979 CCH OSHD ¶ 23,935, p. 29,021 (No. 76-93, 1979) (Secretary not required to prove noncompliance creates a hazard).

Metric has the burden to establish that use of conventional means is more hazardous than its chosen use of a crane. It is a heightened burden here in light of the fact that another contractor (Energy) earlier performed the work utilizing “conventional means”-- a bucket truck. There was no showing that Energy’s use of the lift presented any difficulties for its employees.

Metric suggests that Energy’s use of the aerial lift device was under significantly different circumstances, *i.e.*, the cables had not been pre-cut and Energy had more maneuvering room since construction had not been completed. These distinctions are not meaningful. There is no evidence that stringing and attaching a previously cut conductor presented any greater difficulty than stringing and attaching one before it was cut. Hoisting equipment would be necessary in either circumstance (Tr. 265). Nor was it shown that Metric’s employees lacked maneuvering room. Based upon his perception of how utility employees operate, Metric’s project manager, John Griffiths, believed construction of the building restricted Metric’s employees to a greater degree than Energy’s. This is mere speculation. There is no proof of where Energy positioned its lifting device. The Secretary’s expert witness Timothy Jewel⁶ reviewed photographs and a video recording of Metric’s use

⁶ Metric served interrogatories on the Secretary which asked, among other things, whether he would use an expert witness. The parties pursued settlement discussions and apparently suspended formal discovery. Nine days before the hearing, the Secretary responded to the interrogatory, stating that he may call an expert witness to testify. The name of the person was not identified at that time. The Secretary was later able to locate an expert witness, Mr. Renaldi, an electric utility employee. Renaldi’s name was immediately provided to Metric. Metric’s attorney interviewed Renaldi; however, for undisclosed reasons, Renaldi decided he could not serve as an expert witness for the Secretary. For “several days” the Secretary sought a new expert. Based upon counsel’s representation, the search was diligent. It was not until 3:00 p.m. of the day before the hearing that he secured a new expert witness. The Secretary could not contact Metric’s counsel by that time because he knew he would be out of his office. The morning of the hearing, the name of the new expert witness Timothy
(continued...)

of the crane man basket. He saw no reason why Metric could not have used an aerial lift or bucket truck to perform the work. He observed “ample space for [employees] to set up and do the maneuvering they need to do” (Tr 132).

Although Griffiths had a strong background in construction, Jewel was substantially more experienced with the specific type of work at issue. Jewel had 32 years experience as an employee of a utility company, working as a lineman, in management, and as a safety specialist (Tr. 118-120). Jewel noted that since the work could not be performed by climbing the structure, generally employees could use either scaffolding or aerial lift devices (Tr. 130). Jewel’s opinion is considered the more reliable. Jewel was an unbiased and forthright witness, as was evident by his demeanor and the tenor of his testimony. It was only *after* Griffiths’ receipt of the citation that he “started crystallizing my thoughts about the pros and cons” of using the different lifting devices (Tr. 314). Justification of his company’s actions may have colored his views concerning the relative strengths and dangers of the equipment. Contrary to Griffiths statement that aerial lift devices were “never seriously considered,” his workers had initially attempted to use two relatively small aerial lifts (Tr. 313-314). Assistant superintendent Johnson did not try to secure a bucket truck although he knew that Energy had used one. He mistakenly believed that a bucket truck could not accommodate two men, a fact which Jewel disputed from his personal knowledge (Tr. 132). Bucket trucks were available from rental companies as were aerial lifts with the necessary boom heights and material handling capabilities (Exh. C-7, C-8; Tr. 131, 132). Metric did not sufficiently

⁶(...continued)

Jewel was provided to Metric. Metric objected at the hearing (and renewed its objection in its brief) to taking any testimony from this witness. Metric’s objection was overruled. Metric argues that Rule 26, Fed. R. Civ. P., imposed a continuing duty to update answers to interrogatories. The potential prejudice to Metric was carefully weighed against the relevance and significance of the testimony. Because its first expert witness withdrew and because of difficulties in securing a replacement, the Secretary’s counsel did not act in bad faith in providing the new name at his earliest opportunity. Metric was aware of the tenor of Jewel’s expected testimony. Jewel, like Renaldi, was a utility employee. Neither the area of their expertise nor their expected testimony differed. The Secretary asserted that the testimony of both witnesses would be “identical.” Notably, the anticipated testimony of the expert was of a general rather than technical nature. The subject matter of the testimony, “use of cranes and aerial trucks to string overhead wires,” was properly identified. Metric’s argument that its expert in heavy construction should be accorded more weight remained the same regardless of which expert testified. A review of these circumstances does not lead to a different ruling upon reconsideration.

consider those options. Its safety director Jolly was unaware that employees attempted to use an aerial lift, and he did not know that the crane supported basket was used until after the fact (Tr. 76, 78). Thus, his expertise in the relative safety of these options was not considered prior to making the decision. Jolly knew there was no aerial equipment on the jobsite of a sufficient height to accommodate the work, but he also knew that such could have been secured (Tr. 77).

Metric places much emphasis on the fact that an accident occurred while its employees were in the crane-suspended man basket restringing wire. In the process of tightening the last ground cable, the cable snapped, hitting the man basket and spinning it around (Tr. 326). Metric argues that had its employees been in an aerial lift, the force of the wire against an aerial device would have caused the lift to fail. Metric posits that this incident clearly demonstrated that the crane man basket was safer than the aerial device. This theory is not convincing.

In support of its argument, Metric offered the testimony of project manager Griffiths. Griffiths primarily believed that the man basket was superior because if it was hit it could swing and would not be as likely to overturn as would equipment with a fixed base (Tr. 260). He also considered a "likely scenario" to be that the insulators may have "tang[led] up in the work platform and flipped the work stage over" (Tr. 267). Griffiths was forthright concerning the amount of speculation which factored into his theories.

A. We went out there, and we took different guesses, a lot of them speculative, as to what the tension on the line is. I worked out . . . I did some figuring and that is for one foot of deflection, you need 40 tons; for ten feet of deflection, four tons, and it goes in that ratio. It's an exponential function of the . . .

Q. How much deflection was allowable in this operation?

A. I don't know. Again, . . . we had no reason to get into that, and that's why we insisted that Energy Erectors or General Electric do that work . . . We had no way of knowing what that tension was, although I'm sure the information was available (Tr. 263, 264).

The fact that Griffiths was qualified as an expert witness does not change the evaluation of his testimony. An expert's evidence is not necessarily controlling even if it is

unrebutted. *United States Steel Corp. v. OSHRC*, 537 F. 2d 780 (3rd Cir. 1976). *Con-Agra Flour Milling Co.*, 16 BNA OSHC 11374, 92 CCH OSHD ¶ 30,045 (No. 88-1250, 1993).

Metric's employees were inexperienced in the specific task. They may not have been as careful as necessary. They did not have access to the most specific material handling aerial device. They were unaware of the amount of tension they would put on the lines (Tr. 263). The mere occurrence of an accident in these circumstances is not sufficient to meet the "more hazardous" criteria of the standard. If anything, an inexperienced work force should have militated using conventional equipment.

The existence of a standard presumes that a hazard is present when the terms of the standard are not met. See *Wright & Lopez*, 10 BNA OSHC 1108, 1981 CCH OSHD ¶ 25,728 (No. 76-256, 1981). Here, the standard presumes that cranes are generally a more hazardous choice when hoisting personnel and providing elevated work platforms. Possible rationale for the standard's preference was discussed at the hearing. Aerial lift devices are operated by the person occupying the basket. The lift operator has full control. Dual controls at the ground are available in case of emergency. Aerial lift baskets are insulated, which is an advantage when working around energized lines. There is also an easier ability to expand tools and equipment. Crane man baskets, on the other hand, must rely solely on the operator on the ground. Communications depend upon hand signals or radios, if available. Jewel recommended use of aerial lift devices, considering them to be less hazardous (Tr. 133-136). Jewel acknowledged that there are instances where use of a crane is necessary, where there would be no room for articulation of a double boom, or where a "straight shot" would be the better way. He concluded "[B]ut, in most cases, something as open as this, the aerial basket would be far superior to work with" (Tr. 135).

Metric has not met its burden of establishing that the crane was less hazardous than conventional means.⁷ The standard applies, the terms of the standard were not met, and

⁷ It is unclear whether Metric also asserts a "greater hazard" defense. To the extent it is asserted, it must fail for reasons discussed. Metric has not shown that (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protection were unavailable; and (3) a variance was unavailable or inappropriate. See, e.g., *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA 1218, 1225, 1991 CCH ¶ 29,442, p. 39,681 (No. 88-821, 1991).

employees were exposed to a heightened hazard because of their choice of unconventional means. Metric's supervisor Rose was aware of this use of the crane, thus establishing employer knowledge. The violation is affirmed.

An accident involving a crane basket suspended from heights of up to 75 feet could result in serious injury or death. The violation is properly characterized as serious. The statutory factors have been considered, together with the gravity of the violation. A penalty of \$2,125.00 is appropriate and is assessed.

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 29 C.F.R. § 1926.105(a) is vacated.
2. That the violation of 29 C.F.R. § 1926.550(g)(2) is affirmed as serious and a penalty in the amount of \$2,125.00 is assessed.

/s/ Nancy J. Spies

NANCY J. SPIES

Judge

Date: August 31, 1993