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Secretary of Labor,
Complainant,

v.

VP Buildings, Inc.,
Respondent.
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OSHRC Docket No. **98-0183**

Appearances:

Jamison Poindexter Milford, Esquire
Kayden B. Howard, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mark D. Katz, Esquire
Ulmer & Berne, LLP
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On December 18, 1997, the Secretary issued a citation to VP Buildings, Inc. (VP), alleging two serious violations of the Occupational Safety and Health Act of 1970 (Act). The Secretary issued the citations following an investigation, conducted by the Occupational Safety and Health Administration (OSHA), of an employee fatality at VP's facility on October 13, 1997. VP employee Frederick Garton was killed when a steel coil he was transporting fell, causing another steel coil to fall on Garton.

Item 1, which was subsequently withdrawn by the Secretary, alleged a serious violation of ' 1910.179(n)(3)(i). Item 2, which is the sole item at issue in this case, alleges a serious violation of ' 1910.179(n)(3)(iii)(b) for failing to take care during hoisting that the hoisted load did not contact any obstructions.

VP filed a motion for partial summary judgment with regard to item 2 on April 20, 1998. The Secretary responded and subsequent replies were filed by both parties. On June 2, 1998, the undersigned issued an order denying VP's motion for partial summary judgment.

On July 20, 1998, the parties filed a joint stipulations of fact, wherein they stated the

relevant facts in this case and agreed, in lieu of filing briefs, to rely on their arguments set forth in VP's motion for partial summary judgment and the subsequent responses and replies thereto. VP stipulated that the Review Commission has jurisdiction over this case and that, if a violation is found, the Secretary's proposed penalty of \$4,500.00 is appropriate. The parties also filed supplemental memoranda following the July 20 filing of the joint stipulations of fact.

For the following reasons, item 2 is vacated.

The Cited Standard

Section ' 1910.179(n)(3)(iii)(b) provides:

Moving the load (iii) -- During hoisting care shall be taken that:

...

(b) The load does not contact any obstructions.

The parties agree that the central issue is whether the cited standard applies to the cited conditions. Specifically, the applicability issues are:

- (a) Whether the horizontal and/or downward movement of the load on the overhead crane constitutes *hoisting* as the term is used in 29 C.F.R. ' 1910.179(n)(3)(iii)(b).
- (b) Whether the stored steel coils constitute *obstructions* as the term is used in ' 1910.179(n)(3)(iii)(b).

Background

The following narrative is taken from the stipulated facts and the summary judgment pleadings submitted by the parties.

VP manufactures metal buildings in its facility located at 2250 Lower Lake Road, St. Joseph, Missouri. As part of its operations, VP receives coils of steel by truck.

On October 13, 1997, VP's production leader Frederick Garton was unloading steel coils from a flat bed trailer and transporting the coils to a coil storage area approximately 60 feet away. VP was aware that Garton was doing this.

Garton was using a 10-ton capacity overhead crane equipped with a 72-ton capacity coil hook. He unloaded the coils using a radio remote controller. The hook is also known as a C-hook due to its shape. The coil that Garton was attempting to transport weighed approximately 9,245 pounds. Garton was trying to place this coil in a storage rack in a space between two other coils that

were already in the rack. The coils in the storage rack stood on end, similar to tires. The coils were 45 to 58 inches tall, with the smallest one weighing 5,365 pounds and the largest one weighing approximately 9,000 pounds.

There were no witnesses to the accident. The parties agree that the accident most likely occurred when the coil on the C-hook made contact with one or both of the coils already in the storage rack, causing the C-hook to tip forward and the coil on the C-hook to fall off.

At the time of the contact between the coil on the C-hook and the stored coils in the storage rack, the direction of the load on the crane was either downward, horizontal, or a combination of downward and horizontal (moving horizontally while also being lowered). The coil which fell off the C-hook then contacted another coil at the end of the storage rack. The latter coil fell over on Garton, and the load coil came to rest against the coil pinning his lower torso under two coils. The two coils weighed a total of almost 15,000 pounds. Garton died as a result of the accident.

The Issue

The Secretary argues that the crane, which was moving either downward or horizontally, or a combination of both, was hoisting the load at the time of the accident, and that the coil or coils in the storage rack that came in contact with the coil on the C-hook were obstructions. If the Secretary's interpretation is correct, then VP was in violation of ' 1910.179(n)(3)(iii)(b).

VP argues that what the crane was doing at the time of the accident was lowering or traveling horizontally, separate and distinct functions from hoisting. VP also contends that the steel coils stored in the storage rack were not obstructions within the meaning of ' 1910.179(n)(3)(iii)(b). If VP is correct on either one of these points, the standard does not apply.

Analysis

The Secretary asserts that in the context of the ' 1910.179 standard, the term hoisting means lifting only when it appears in the company of lowering, or lowering or traveling (Secretary's brief p. 23). All other times, the Secretary contends, the term hoisting logically means any movement of the load while it is off the ground

VP posits that hoisting, as used in ' 1910.179(n)(3)(iii)(b), has a specific meaning. That meaning does not include what VP's crane was doing at the time of the accident. In support of its

argument, VP points to the use of the word **hoisting** in the ' 1910.179 standard as a whole. The standard uses the terms **hoisting**, **lowering**, and/or **traveling** in the same sentence in several locations.

The arguments of both parties have some merit, as well as notable defects. The difficulty with the Secretary's position is that interpreting **hoisting** to mean **raising** some of the time, and **raising** and **lowering** or **raising**, **lowering** and **traveling** at other times violates a basic tenet of statutory construction.

[W]here a term is carefully employed in one place and excluded in another, it should not be implied where excluded.

Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 648 (1976).

Applied to the instant case, a reasonable reader would conclude that where **lowering** or **traveling** are carefully employed in ' 1910.179(n)(3)(v) and excluded in ' 1910.179(n)(3)(iii)(b), **lowering** or **traveling** should not be implied in ' 1910.179(b)(3)(iii)(b). If the Secretary intended to apply ' 1910.179(b)(3)(iii)(b) to the functions of raising, lowering and traveling, nothing prevented the Secretary from using those terms in ' 1910.179(b)(3)(iii)(b).¹

[A] regulation cannot be construed to mean what the agency may have intended but did not adequately express.

Id., 528 F.2d at 649.

VP's position also has flaws. Using its theory that only the upward movement of the load constitute **hoisting** requires one to dissect the specific maneuvers of the movement of a load from one resting point to another. Lifting a load upward from its resting place and moving in a vertical direction alone would be considered **hoisting**. If the load arcs horizontally or is lowered during the

¹ Contrast the definitions found in ' 1910.179 with the definition section of Subpart N in the construction standards (**Cranes, Derricks, Hoists, Elevators, and Conveyors**) applicable to the hoisting of personnel platforms. Section 1926.550(g)(ii)(B) provides:

Hoist (or hoisting) means all crane or derrick functions such as lowering, lifting, swinging, booming in or out or up and down, or suspending a personnel platform.

same relocation, it is not hoisted. Thus, following VP's analysis, an employee moving the load often comes in and out of the protection of the standard during a single relocation of a load. It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result. *Unarco*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993), citing *Griffin v. Oceanic*, 458 U.S. 564 (1982). Transferring a load from one point to another by crane will often require many types of movements, including those that are downward or horizontal.

The parties seek to have the undersigned choose between alternate interpretations, neither of which is completely convincing. In any event, the terms of the standard itself provide the authoritative guidance to a proper interpretation of a standard.

[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.

Lake Cumberland Trust, Inc. v. U.S. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992), quoting from *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1431-1432 (9th Cir. 1991).

Section 1910.179(a)(44) defines *hoist motion* as *that motion of a crane which raises and lowers a load* (Emphasis added). Section 1910.179(a)(42) defines *hoist* as a mechanical apparatus: *An apparatus which may be a part of a crane, exerting a force for lifting or lowering* (Emphasis added). While *hoisting* the word at issue is not defined in ' 1910.179, it does appear in ' 1910.179(g)(5)(iv). This section requires that there be an overtravel limit in the *hoisting direction*, which indicates that there may be more than one *hoisting direction*. Giving proper weight to the above, the term *hoisting* in the subject standard must be defined as the movement of a load by an overhead crane in an upward or in a downward direction. *Hoisting*, however, is not defined as movement of the load in a horizontal direction.

While it would be to the Secretary's advantage to choose the most expansive definition that is arguably applicable, ' 1910.179 cannot accommodate the Secretary's suggested interpretation here.

It may be that the framers of the ANSI standard or those who adopted ' 1910.179 from the ANSI standard did not consider horizontal travel to present the same degree of hazard as did raising or lowering a load. It is unnecessary to speculate why a particular result was reached. The standard establishes the limits of our inquiry, and the definition section of ' 1910.179 controls the issue.

The Secretary cites *Martin v. OSHRC* (CF&I Steel Corp.), 449 U.S. 144(1991), which holds that the Review Commission must give deference to the Secretary's reasonable interpretation of an ambiguous standard. The Secretary contends that her interpretation of "hoisting" to include horizontal travel should be given deference under *CF&I Steel*. The Secretary's argument is rejected. "Hoisting" as used in ' 1910.179(n)(3)(iii)(b) is not ambiguous in light of the definitions applicable to the standard. As stated, "hoisting" does not include moving the load horizontally.

The Secretary stipulated that the crane moved the load in a downward *or* a horizontal direction at the time it contacted the roll. The Secretary has the burden to establish that the standard applies to the activity cited. Since VP may or may not have been performing an activity covered by the cited standard, it cannot be found that the standard has been violated.

Section 1910.179(h)(3)(iii)(b) does not apply to the cited conditions. Because of this determination, it is not necessary to address the parties' arguments regarding the interpretation of "obstructions."

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 upon the foregoing decision, it is hereby ORDERED that:

Item 2 of the citation, alleging a violation of ' 1910.179(n)(3)(iii)(b), is vacated.

NANCY J. SPIES
Judge

Date: December 10, 1998

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OSHRC Docket No. **98-0183**

ORDER SUPPLEMENTING DECISION AND ORDER

Upon the request of the respondent and pursuant to Commission's Rule 90(b)(3), the Notice of Decision and Order issued on December 1, 1998, in this case is hereby supplemented.

The paragraph entitled "Order" on page 6 of the December 1, 1998, Decision and Order, is supplemented to include the statement that: "Item 1 of the citation, alleging a violation of ' 1910.179(n)(3)(i), was withdrawn by the Secretary on July 15, 1998, and, accordingly, is vacated."

SO ORDERED.

Date: December 7, 1998

Judge Nancy J. Spies

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This order has been sent to:

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