

Secretary of Labor,
Complainant,

v.

Sofco Erectors, Inc.,
Respondent.

OSHRC Docket No. **98-710**

APPEARANCES

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U. S. Department of Labor
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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Sofco Erectors, Inc., (Sofco) is a steel erector contractor in southern Ohio. On December 11, 1997, a Sofco employee was slightly injured while attempting to connect a horizontal beam suspended from a crane's load line to a column at a construction site in Mason, Ohio. Occupational Safety and Health Administration (OSHA) compliance officer Dale Henderson conducted an accident referral inspection from December 11 to December 18, 1997.

As a result of Henderson's inspection, the Secretary issued a citation to Sofco on April 1, 1998, alleging a serious violation of § 1926.550(b)(2), for permitting an employee to be on the load of a crane while the crane was hoisting the load upward. The Secretary proposed a penalty of \$2,250.00¹. Sofco contests the citation and proposed penalty.

Sofco admits jurisdiction and coverage. A hearing was held in this matter on August 31, 1998, in Cincinnati, Ohio. The parties have filed post-hearing briefs. Sofco contends the cited standard is inapplicable because the crane was not hoisting the steel beam at the time the employee was on it. Sofco also asserts the affirmative defenses of greater hazard and

¹ The court granted the Secretary's two motions to amend the citation prior to the hearing, amending the cited standard from § 1926.552(b)(2) and the proposed penalty from \$1,250.00.

infeasibility. For the reasons set out below, the court finds that the crane was not hoisting the beam at any time while the employee was on it. The citation is, therefore, vacated.

Background

On December 11, 1997, Sofco employees were performing steel erection work at a job site in Mason, Ohio, where a multi-story structural steel building was being erected (Tr. 61-62, 103). Sofco employee Tony Sturgeon, working as a connector on the job site, was connecting a horizontal steel beam (beam 14C) to two columns while the beam was supported by the crane's load line (Tr. 46). The crane was operated by Ralph Chilelli, an employee of Carlisle Crane Company (Tr. 114). The beam was approximately 12½ feet above the ground (Tr. 107).

Sturgeon first connected the right end of the beam to one column with two bolts. While he made this connection, Sturgeon was not on beam 14C (Tr. 122-123). The left end of beam 14C was wedged against the second column, approximately 4 or 5 inches below the location where the bolt holes would align with those in the column (Tr. 119). Sturgeon went out onto the beam to position it and connect it to the column. Sturgeon used a pry bar or a spud wrench to attempt to align the bolt holes, while another Sofco employee loosened the anchor bolts at the bottom of the column (Tr. 66-67, 115, 119). Most beams that are connected in steel erection need to be adjusted to align the bolt holes properly. Sturgeon's actions with the pry bar or spud wrench are standard in the steel erection industry (Tr. 129-130).

After Sturgeon went out on the beam to position and connect it, the crane operator exerted no additional pressure on the load line connected to the beam. Chilelli did not attempt to raise or lower the beam while Sturgeon was on it (Tr. 116-118). As Sturgeon attempted to position the beam, it sprang upward about 4 or 5 inches, pinning Sturgeon's leg (Tr. 121). Sturgeon's leg was bruised as a result. He was treated at a local hospital and released the same day (Tr. 289).

Stipulations

The Secretary and Sofco filed a set of stipulations at the beginning of the hearing. The stipulations state, in pertinent part (Exh. J-1):

1. May 11, 1994, OSHA announced that it had established the Steel Erection Negotiated Rulemaking Advisory Committee (SENAC) (59 Fed. Reg. 24389) in

accordance with the Federal Advisory Committee Act (FCA) (5 U.S.C. 561, *et seq.*) and section 7(b) of the Occupational Safety and Health Act (29 U.S.C. 656(b)) to resolve issues associated with the development of a Notice of Proposed Rulemaking on Steel Erection. 63 Fed. Reg. 43452, 43453 (August 13, 1998).

2. Appointees to the Committee included representatives from labor, industry, public interests and government agencies, including OSHA. 63 Fed. Reg. 43452, 43453 (August 13, 1998).

3. The proposed rule developed by the SENRAC Committee is located at 63 Fed. Reg. 43452 (August 13, 1998).

4. The proposed rule developed by the SENRAC Committee and located at 63 Fed. Reg. 43452 (August 13, 1998) is not a final rule.

5. The proposed rule developed by the SENRAC Committee proposes to revise the construction industry safeguards addressing steel erection. 63 Fed. Reg. 43452 (August 13, 1998).

6. The principal hazards addressed by the proposed rule developed by the SENRAC Committee and located at 63 Fed. Reg. 43452-43513 (August 13, 1998) are those associated with working under loads; hoisting, landing and placing decking; column stability; double connections; hoisting, landing and placing steel joists; and falls to lower levels. 63 Fed. Reg. 43452 (August 13, 1998).

7. The proposed rule developed by the SENRAC Committee and located at 63 Fed. Reg. 43452-43513 (August 13, 1998) does not address the situation for which the Respondent, Sofco Erectors, Inc., has been cited.

Discussion

The Secretary alleges that Sofco committed a serious violation of § 1926.550(b)(2), which provides in pertinent part:

All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

Section 5-3.2.3(e) of ANSI B30.5-1968 (hereafter referred to as "Section (e)") provides:

The operator shall not hoist, lower, swing, or travel while anyone is on the load or hook.

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Sofco stipulated that, if a violation were found, its employee was exposed to the hazard and that Sofco had knowledge of the violative condition. Sofco argues that the cited standard is inapplicable to the cited condition, and that consequently Sofco was not in noncompliance with the terms of the standard.

Applicability

The crane Chilelli was operating at the time of the accident was a P&H Model C65 Crawler Crane (Tr. 114). Section 1926.550(b)(2) indisputably applies to the crane in use at the time of Sturgeon's accident. Sofco argues, however, that Section (e), as incorporated by § 1926.550(b)(2), does not apply to the operation that was in progress at the time Sturgeon was on beam 14C because the crane operator was not hoisting, lowering, swinging, or traveling during that time.

The Secretary agrees that, had the beam been simply suspended from the load line while Sturgeon was on it, no violation would occur (Tr. 177-178). It is undisputed that Chilelli did not operate the crane while Sturgeon was on beam 14C. Chilelli's uncontradicted testimony was, "I did not move it. After he went out there I did not touch the controls" (Tr. 118). The Secretary argues, however, that although Chilelli did not touch the controls once Sturgeon was on the beam, he had applied tension to the beam prior to Sturgeon's getting on it. Because there was tension on the line greater than what was needed to merely suspend the load, the crane operator was in the process of hoisting the beam the entire time Sturgeon was on it. Although Chilelli was not actively manipulating the controls in the crane's cab, the Secretary argues, the beam was still capable of making a sudden upward movement, as it did when Sofco's employees managed

to dislodge it.²

In applying a standard, its language must be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982). The words are to be viewed in context, not in isolation, and judged in light of their application to the facts of the case. *Orment Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). The Review Commission recognizes that another standard may be used to give meaning to an undefined, broad term in a cited standard. *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1857-1858 (No. 89-1300, 1992), *aff'd. on other grounds*, 3 F.3d 1 (1st Cir. 1993).

A safety standard is generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working conditions. The standard must, however, give an employer fair notice of the conduct it prohibits or requires. A standard is not impermissibly vague simply because it is broad in nature. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993). Instead, "a broad regulation must be interpreted in the light of the conduct to which it is being applied and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *J. A. Jones* at 2205-2206.

The word "hoist" is not defined in § 1926.550(b) or in the ANSI B30.5-1968 (Tr. 152-153). *The American Heritage Dictionary, Second College Edition* (1982), defines the verb "hoist" to mean "[t]o raise or haul up with or as if with the help of a mechanical apparatus." The definition denotes an action resulting in an upward movement. This accords with the use of "hoist" in Section (e), which states, "The operator shall not hoist . . . while anyone is on the load. . . ." Section (e) prohibits specific acts by the operator "while anyone is on the load." It does not prohibit acts by the operator before anyone gets on the load. The act of hoisting requires an active, intentional maneuver on the part of the crane operator. Tension that remains in the load line when the load is immovable because it has become stuck is not the equivalent of hoisting. The fact that the left side of the beam moved upward 4 or 5 inches when Sturgeon pried it loose

² In addition to arguing that the operation did not constitute a "hoist," Sofco also argues that beam 14C at the time Sturgeon was on it did not constitute a "load." Sturgeon had already connected the right end of 14C to the right-hand column at the time he went on the beam. Sofco argues that at this point, the beam ceased to be a load and became a part of the structure. Because the court has determined that the crane operator was not hoisting at the time Sturgeon was on beam 14C, it is not necessary to address this argument.

does not establish that the beam was being hoisted.

The Secretary's expert witness, OSHA compliance officer John Newquist, explained why he believes a load can be hoisted even when there is no movement of the load (Tr. 153-154):

The analogy I would use a lot of times, they lift precast slabs. The suction on the ground when they want to pull it up, there is force on the slab being pulled upwards, but the slab does not move to the suction. At some time there is a release of that force and then the load moves upward. So, they are still trying to hoist the slab, even though it may not be technically moving.

Newquist's example focuses on the movement of the load. He does not mention what the operator is doing to influence the movement. Section (e), however, focuses on the actions of the operator. It is what the operator does that determines whether any hoisting is taking place.

In Newquist's example the crane operator is necessarily applying continuous and increasing tension to the load line. The operator is engaging in an active process to raise the precast slab. When the slab is released from its suction, the operator will presumably hoist or swing it to its desired location. In the present case, Chilelli refused Sturgeon's request to increase the tension on the load line while Sturgeon was on the beam. There was no action on Chilelli's part to raise the beam. Section (e) clearly prohibits hoisting by *the operator*. If Chilelli did not engage the crane controls once Sturgeon was on the beam, the operator did not hoist the load while anyone was on it.

The current edition of the ANSI standard that is incorporated in § 1926.550(b)(2) does not contain language prohibiting hoisting, lowering, swinging or traveling while someone is on the load. The revised standard states, "Personnel shall not be permitted to ride the bare hook or a load of material suspended from the hook" (Exh. R-4). "Riding the load" is understood in the steel erection industry to mean using the load or hook for transportation from one point to another (Tr. 167-168, 215, 245, 261, 276).

The Secretary is correct in pointing out that Section (e) of the cited standard applies in the present case, and not the revised standard, which has no force and effect. It is instructive, however, in manifesting the purpose for which Section (e) was drafted. The intent of Section (e) appears to be to prohibit the crane operator from transporting personnel from one point of the job site to another. It does not appear to address the situation at issue, where a beam is suspended from a load line, with one end connected to a column, while a connector attempts to position the

other end to make that connection.

The Secretary has failed to establish that Section (e), as incorporated by § 1926.550(b)(2), applies to the cited condition. The crane operator was not hoisting beam 14C while Sturgeon was on it. The citation is vacated.

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:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.550(b)(2) for permitting an employee to be on a load while the crane operator was hoisting it, is vacated and no penalty is assessed.

KEN S. WELSCH
Judge

Date: June 9, 1999