SECRETARY OF LABOR, Complainant, v. CROMAN CORPORATION, and its successors, Respondent.	OSHRC DOCKET NO. 99-0239

APPEARANCES:

For the Complainant:
Jeannie Gorman, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington

For the Respondent:
George W. Goodman, Esq., Cummins, Goodman, Fish & Platt, PC , McMinnville, Oregon

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Croman Corporation, and its successors (Croman), at all times relevant to this action maintained a place of business at Hoodoo Timber Sale, Idaho City, Idaho, where it was engaged in logging. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 19, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Croman's Hoodoo work site. As a result of that inspection, Croman was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Croman brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 29, 1999, a hearing was held in Coeur D'Alene, Idaho. At hearing, the parties stated that they had settled Citation 1, item 2. Respondent withdraws its notice of contest to that citation in a partial settlement agreement which is adopted and made part of this order. Citation

1, item 1, alleging violation of §1910.184(f)(5)(i) remains at issue. The parties orally briefed the remaining issue on the record, and this matter is ready for disposition.

Alleged Violation

Citation 1, item 1 alleges:

29 CFR 1910.184(f)(5)(i): Wire rope sling(s) that had ten or more randomly distributed broken wires in one rope lay, or five or more broken wires in one strand in one rope lay, were not immediately removed from service.

(a) Hoodoo Timber Sale, Idaho City, ID: Wire rope slings used to transport logs beneath helicopters were not taken out of service before a full strand consisting of 26 wires were broken.

The cited standard provides:

> Wire rope slings shall be immediately removed from service if any of the following conditions are present: (i) Ten randomly distributed broken wires in one rope lay, or five broken wires in one strand in one rope lay.. . .

Facts

Virgle Howell, the OSHA Compliance Officer (CO), testified that on November 19, 1998, he and a second CO, March Hatch, conducted an inspection of Croman's work site after OSHA's receipt of a referral for the site (Tr. 26, C-2). Howell testified that once on the site, he noted violations of the cited standard, which he subsequently videotaped (Tr. 37; Exh. C-3). Mr. Howell testified that as he toured Croman's work site with Mike Rickstead, Croman's project manager, he observed the logging operation, which consisted of helicopters dropping bundles of wire rope slings or chokers to the choker setter (Tr. 40, 47-48). The choker setter then attaches the choker to the tree and signals the next helicopter; he attaches the choker to the long line from the helicopter, and the helicopter takes the tree from the woods to the landing site (Tr. 47-49; Exh. C-3).

Howell testified that he noted a wire rope sling which had been placed around a downed tree in preparation to being hoisted out of the cutting area (Tr. 85, 87-89). Howell believed the rope was defective, and asked Rickstead to remove the wire sling from the tree for his closer inspection (Tr. 85, 87). Howell testified that, inches from the bell, or nubbin, described as the male end of the wire rope (Tr. 45, 51; Exh. C-3), the plastic coating around the wire rope had

worn through, and that he could count in excess of 10 broken wires within one lay[1] of a single strand of a six strand wire rope (Tr. 42, 84). Howell noted that the strand next to that one was in about the same condition (Tr. 43). Howell testified that the bell fits into a female fixture further down the sling, which slides until it forms a noose, or choke on the tree (Tr. 45-46). Howell testified that the pressure from the female portion of the choke puts constant flex on the nubbin, causing fatigue at that point on the wire rope (Tr. 98-99). Howell stated that the fatigued rope was more likely to fail when stressed or flexed (Tr. 99). As Rickstead bent the wire sling, he noted that he was causing even more of the strands to break (Tr. 44).

Howell testified that Rickstead told him that it was the company's policy to take a sling out of service only when an entire strand of 26 wires were broken within one lay (Tr. 42, 68).

Howell interviewed a choker setter, Sonny Rickstead, who believed that a sling should be removed from service if five wires within a single strand were broken (Tr. 68). Howell and Sonny Rickstead examined other slings which had been dropped for use, and found that a number had more than five broken wires within a single strand; those slings were taken out of service at that time (Tr. 53-54, 67, 102; Exh. C-5).

Larry Dietz, a 16 year employee of West Coast Wire Rope, testified that he had been involved in pull testing of wire ropes since 1983 (Tr. 124, 167). Dietz admitted, however, that he is not trained as an engineer (Tr. 186).

Dietz testified that, at Croman's direction, he conducted pull tests of 1/2" chokers similar to the type cited in this matter (Tr. 172, 208). Dietz found that an undamaged choker broke at 25,752 pounds pressure, at the point where the female portion of the choke caused the sling to bend (Tr. 172-73). Dietz also tested the breaking point of chokers with 5, 10 and 20 broken wires in one strand; Dietz stated that he broke the wires on the sling three or four feet from the nubbins (Tr. 177, 184-85). In each case the sling broke at the point where the female end of the choke met the cable (Tr. 177, 184-85). In no case was the strength of the sling substantially reduced, all breaking around 25,000 pounds pressure (Tr. 184-85).

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[1] The wire rope consisted of 6 strands of wire bundles, 26 wires per bundle, wrapped around a wire rope core (Tr. 42). Each 360° wrap of a strand is termed a "lay." (Tr. 42).

Despite his testimony regarding his test results, Dietz agreed with CO Howell that the slings in use by Croman frayed near the bell, or nubbin, because that was where the greatest stress is put upon the wire (Tr. 198).

Discussion

The Secretary's prima facie case clearly establishes that wire slings with more than five broken wires in one strand were not removed from service. Croman did not introduce any witnesses, or adduce any evidence contesting the Secretary's evidence. The literal terms of the standard were clearly violated.

Croman maintains that: 1) The language of the citation itself is inadequate, in that it failed to state with specificity the basis for the citation, *i.e.,* subsection (a) states only Croman's stated policy of not removing from service wire slings which had less than a full strand of 26 wires which were broken; 2) The citation should be vacated, in that the cited condition did not sufficiently weaken the cited wire slings so as to pose a hazard to employees; 3) If there was a technical violation of the cited standard, it should be classified as *de minimis.*

Specificity. Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b), post-trial amendment of the citation is proper when issues not raised by the citation are tried by the express or implied consent of the parties. *Peavey Co.*,16 BNA OCHS 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). Consent may be implied from the parties introduction of evidence relevant only to the specific issue in question. *McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984).

In this case, it is clear that Croman's conversations with CO Howell during the inspection, and the plain language of the cited standard itself put Croman on notice of the charges against which it would be called to defend. That Croman had actual knowledge of the issues is demonstrated by its introduction of pull testing relevant only to the strength of a wire sling with less than 26 broken wires per strand.

The citation, therefore, is amended, on this judge's own motion, to conform to the evidence.

Proof of a Hazard. Most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered.[2] These standards are predicated on the existence of a hazard when

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[2] Certain standards promulgated by the Secretary contain requirements or prohibitions that by their terms

(continued...)

their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761 (76-93, 1979); *i.e.*, when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978).

It is well established that the employer may not use the adjudicatory process to challenge the wisdom of a required safety measure. *See, Austin Engg. Co*., 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985). The employer may only challenge the standard through the rulemaking process, or through application for a variance. *Carabetta Enterprises, Inc.*15 BNA OSHC 1429, 1991-93 CCH OSHD ¶29,543 (No. 89-2007, 1992).

Croman's pull testing evidence, therefore, is relevant only to the gravity of the cited violation.

De minimis. A violation is *de minimus* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987).

This judge cannot find the cited violation was *de minimis.* Croman's pull testing evidence failed to duplicate the cited conditions as they were observed by CO Howell in the field. In Dietz' controlled tests the wire strands were broken several feet from the male bell fixture, or nubbin. In the field, all the wear CO Howell observed was located at the nubbin itself. Even Croman's expert admitted that the only explaination for the broken wires found by Howell was that all the stress on the wire slings must, in field use, be concentrated at the point where the fatigue was found. Croman's controlled tests, however, clearly stressed the slings at a different point, *i.e.*, where the sling met the female half of the choke. Because the controlled tests failed to duplicate the conditions in the field, they failed to establish that the damaged wire slings cited were sound, or that Croman's violation of the cited standard bore no relationship to employee safety.

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[2](...continued)
need only be observed when employees are exposed to a hazard described generally in the standard, §1910.184(f)(5)(i) does not contain any such restrictive terms.

Penalty

No evidence was adduced showing Croman's size; CO Howell stated that he had not inspected Croman before, however, indicating that they had no history of prior violations. Howell stated that Croman was given full credit for good faith.

Howell testified that a tree, falling from a helicopter sling onto ground personnel would cause crushing injuries to employees in the zone of danger, and that employees on the ground were exposed to the hazard (Tr. 67). The violation was, therefore, correctly classified as "serious." Karen Zimmer, Croman's human resource director, testified in mitigation of the gravity of the violation, stating that she was unaware of any injuries involving wire rope failure in a helicopter logging configuration (Tr. 121).

The record establishes that the Secretary took into account the statutory criteria in computing the proposed penalty of $1,875.00. Croman does not dispute the amount of the proposed penalty, and it will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1910.184(f)(5)(i) is AFFIRMED, and the proposed penalty of $1,875.00 is ASSESSED.

2. Citation 1, item 2 is AFFIRMED as set forth in the parties' partial settlement agreement, which is adopted and made part of this order.

Benjamin R. Loye
Judge, OSHRC

Dated:

Rochelle Kleinberg
Associate Regional Solicitor
Jeannie Gorman, Attorney
Office of the Solicitor
U.S. Department of Labor
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ALEXIS HERMAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, (Region 10) Complainant, v. CROMAN CORPORATION and its successors, Respondent.	OSHRC DOCKET NO. 99-0239 OSHA Inspection No. 300211687 SETTLEMENT AGREEMENT

COME NOW the Complainant and the Respondent, by and through their undersigned representatives of record, and in settlement of this proceeding arising under the Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 651 *et seq*.) hereinafter referred to as "the Act," do move, represent and agree as follows:

1. Respondent moves to withdraw its Notice of Contest to Item 2 of Citation and Notification of Penalty Number One, dated January 15, 1999.

2. Respondent represents that the alleged violation cited in the aforesaid Citation and Notification of Penalty and referenced in paragraph No.1 above, has been corrected and abated.

3. Respondent agrees that it will promptly post for the attention of the affected workers a copy of this Settlement Agreement at the same location that the Citation and Notification of Penalty in this matter was posted.

4. The parties further agree that the foregoing Settlement Agreement addresses and resolves all the issues presently in controversy between the parties regarding Item 2 of the Citation and Notification of Penalty Number One, dated January 15, 1999. An appropriate order reflecting same may be entered.

A judicial decision regarding Item 1 of Citation and Notification of Penalty Number One, dated January 15, 1999 is still pending.

5. Each party agrees to bear its own costs.

CROMAN CORPORATION

/S/
Karen Zimmer
DATED: 8/5/99

/S/
George Goodman
Attorney for Respondent

DATED: 8/3/99

Henry L. Solano
Solicitor of Labor

Daniel Teehan
Associate Regional Solicitor

Rochelle Kleinberg
Associate Regional Solicitor

Jeannie Gorman
Attorney

By: /S/
Jeannie Gorman

CERTIFICATE OF POSTING

I, /S/ Karen Zimmer, certify that on Aug. 6, 1999, a copy of the attached Settlement Agreement was posted for the attention of the affected employees at the following locations: Logging Division - White City, Oregon & Logging crew in Idaho

DATED: August 5, 1999.

CROMAN CORPORATION

By /S/ Karen Zimmer
Title: Human Res. Dir.

OSHA Inspection No. 300211687

CERTIFICATION OF SERVICE

Jeannie Gorman, Attorney for the Secretary of Labor, certifies that on August 6, 1999, she caused to be deposited for delivery via facsimile and via overnight mail, in a sealed envelope, the original of the parties' Settlement Agreement, which includes the Respondent's signed Certificate of Posting, and the original of this Certificate of Service to the following at each address noted:

Judge Benjamin Loye
Occupational Safety and Health Review Commission
1244 N. Speer Blvd., Room 250
Denver, CO 80204-3582

Jeannie Gorman, Attorney for the Secretary of Labor, certifies that on August 6, 1999, she caused to be deposited for delivery via regular mail, in a sealed envelope, a copy of the parties' Settlement Agreement and a copy of this Certificate of Service to the following at each address noted:

George W. Goodman
Cummins Goodman Fish & Platt
434 N. Evans St.
P.O. Box 17
McMinnville, OR 97128-0017

/S/
Jeannie Gorman

Docket No. 99-0239