

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	OSHRC
CONTOUR ERECTION & SIDING	:	Docket No. 96-0063
SYSTEMS, INC.,	:	
	:	
Respondent.	:	
	:	

Appearances:

Nancee Adams-Taylor, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
For Complainant

David T. Lashgari, Esq.  
Law Offices of David T. Lashgari  
Atlanta, Georgia  
For Respondent

Before Administrative Law Judge Robert A. Yetman

**DECISION AND ORDER**

This is a proceeding arising under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, (“the Act”) to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed penalty thereon issued pursuant to § 10(a) of the Act.

On December 14, 1995, Contour Erection and Siding Systems, Inc. (Contour) was issued one Serious citation alleging one violation with two itemized subparts as a result of an inspection of Respondent’s worksite during the period June 16, 1995 to December 13, 1995. A penalty in the amount of \$5,000 has been proposed by the Secretary for the alleged violations. A timely notice of contest was filed by Contour and a complaint and answer have been filed with this Commission. The Respondent admits the jurisdictional allegations of the complaint, including the allegation that it is engaged in a business affecting commerce, and generally denies the remaining allegations contained in the complaint (pretrial order dated July 11, 1995, p.2).

Respondent is engaged in the business of steel erection for construction projects and is one

of the largest firms engaged in that business in the State of New York (Tr. 701). Respondent has extensive experience in the industry dating back to 1978 (Tr. 700). During June, 1995, Respondent was engaged as a subcontractor to erect the steel roof support members for the crossroads Sports Arena being constructed at Buffalo, New York. On June 16, 1995, a major lift of a roof radial truss member was in progress when the boom of the crane lifting the truss crashed to the floor of the arena. Fortunately, no injuries or deaths resulted from the collapse of the crane boom and load. Upon completion of its investigation, the Occupational Safety and Health Administration issued a Serious citation to Contour listing the following alleged violations:<sup>1</sup>

Citation 1 Item 1a Type of Violation: **Serious**

29 CFR 1926.550(a)(1): The employer did not comply with the manufacturer's specifications and limitations applicable to the operation of crane(s) or derrick(s):

a.) Crossroads Arena Project. On 6/16/95 a Manitowoc 4100W Series 2 Crawler Crane was operated outside its safe operating limits as prescribed by the manufacturer's load chart for its configuration immediately prior to failure.

Citation 1 Item 1b Type of Violation: **Serious**

29 CFR 1926.550(b)(2), Section 5-3.2.1(a) American National Standards Institute, B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes as adopted by 1926.550(b)(2): A crane was loaded beyond the rated load:

a.) Crossroads Arena Project. On 6/16/95 a Manitowoc 4100W Serious 2 Crawler crane was loaded beyond the manufacturer's maximum rated load for its configuration immediately prior to failure.

At the hearing conducted in this matter the Secretary called two witnesses. The first witness, Colin Sargent, was the OSHA Compliance Officer who conducted the inspection of the worksite. Mr. Sargent testified that he arrived at the worksite at approximately 3:30 p.m., June 16, 1995, the day of the accident, interviewed the project superintendent and took photographs of the crane.

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<sup>1</sup>The Secretary acknowledges that the two allegations are duplicative; that is, both items alleged that the crane was overloaded and the same abatement procedure would be applicable for both items. Since a single penalty has been proposed and Respondent's defense is identical for both items, Respondent has not been prejudiced by the duplicative pleading. Although pleading violations of multiple standards for the same condition could result in confusion and unnecessary trial preparation and should not be encouraged, the Commission is not required to vacate duplicative pleadings where, as here, no prejudice attaches to respondent *see H.H. Hall Construction, Co.* 10 BNA OSHC 1042, 1046 and cases cited therein.

However, all of Respondent's employees had left the site and were not available to be interviewed. Accordingly, Mr. Sargent returned to the site the following Monday and interviewed Respondent's President, Christopher Eberlee and superintendent Dan Szvoren. He was told that Bird Air Systems had the contract to place the roof on the arena and subcontracted the erection of the steel support members to Respondent. Mr. Sargent returned to the site on four separate days during the following two weeks to obtain interview statements. He also returned to the site during October 1995 to obtain additional interviews (Tr. 25). Mr. Sargent testified that he was unable to determine the actual weight of the load at the time of the crane collapse. He stated, however, that the approximate weight of the load was 88,000 pounds plus or minus 4,000 pounds (Tr. 43, 44). He relied upon the findings of Mr. Michael Marshall, also employed by Complainant, to conclude that the Respondent violated the standards alleged (Tr. 74). A report compiled by Mr. Marshall which formed the basis for the issuance of the citation, was entered into evidence on that ground (Exh. C-3). Twelve employee interview statements which Mr. Sargent had recorded during the course of his investigation were also entered into evidence without objection.<sup>2</sup>

The second and final witness called by the Secretary was Mr. Michael Marshall. Mr. Marshall, at the time of the inspection, was employed in the office of Construction and Engineering at OSHA's Washington, D.C. office. He was assigned to assist in the investigation of the crane collapse. By education, Mr. Marshall is a civil engineer and his primary job duties include providing technical support to "all OSHA entities" as well as accident investigations (Tr. 102). Although he

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<sup>2</sup>The following employee statements were entered into evidence pursuant to FRE 801(d)(2)(D):

Exh. C-5	Robert Barrett - crane operator
Exh. C-6	Cliff Meadows- iron worker
Exh. C-7	Seth Halftown - iron worker
Exh. C-8	Ed John - iron worker
Exh. C-9	Dan Szvoren - foreman
Exh. C-10	Ed John (and Seth Halftown) (second interview)
Exh. C-11	Steve John - iron worker
Exh. C-12	Lee Halfown - iron worker
Exh. C-13	Robert Barrett (second interview)
Exh. C-14	Dan Szvoren (second interview)
Exh. C-15	James Lockwood - iron worker
Exh. C-16	Cliff Meadows (second interview)

is not an expert in the design or operation of cranes and is not qualified to render an expert opinion regarding any mechanical failure of the crane, his testimony was accepted as it related to the factors which led him to conclude that the crane was overloaded (Tr. 134).

Mr. Marshall visited the job site during June 1995 and was briefed by Compliance Office Sargent (Tr. 136). He took photographs and obtained measurements which he believed were relevant to his investigation. In addition, on July 11, 1995, Mr. Marshall observed mechanical tests which were performed on the crane by the cranes' manufacturer. These tests were not performed under the same conditions as existed at the worksite on the day of the accident. Most significantly, the crane did not have a boom nor was any weight lifted by the crane. Moreover, the boom control circuitry and components were not disassembled and analyzed.

Mr. Marshall provided the following testimony which was conveyed to him by the written employee statements obtained by Compliance Office Sargent. In order to secure the steel support members in place, it was necessary to erect a center radial truss member. This consisted of two prefabricated steel members, each shaped in a semi circle. Three temporary support towers approximately 130 feet high were placed in the middle of the floor of the arena in a triangular pattern. The two sections of the truss were to be placed on top of the support towers with a crane.

Respondent did not own a crane large enough for the lift. Accordingly, a Manitowoc 4100W Series 2 Crawler Crane with a 200 foot boom was rented for the job. The manufacturer's specifications for the crane, including the load limit chart, were placed in the cab of the crane. The maximum weight that may be lifted by the crane is dependent upon two factors: the weight of the load and the "radius" at which the load is lifted; that is, the distance out from the center point where the boom is attached to the crane body. The radius may be determined by the angle of the boom. For example, a load weighing 100,000 pounds may not be lifted with a radius exceeding 50 feet and a boom angle of 76.7 degrees (a boom angle indicator was located inside the cab of the crane). At a 45 foot radius, the maximum load that may be lifted is 115,900 pounds with a boom angle of 78.2 degrees. The "tipping load;" that is, the weight of the load which will cause the crane to tip over is 133 percent of the maximum load for the radius at which the load is lifted. Therefore, a load weighing in excess of 133,000 pounds at a 50 foot radius will cause the crane to tip over (Tr. 154).

Mr. Marshall also testified as to the events which occurred during the crane collapse. This

information was obtained from the interview statements which were entered into evidence through Compliance Officer Sargent (see footnote 2) and photographs taken at the time of the event. However, Marshall only relied upon selected statements to arrive at his conclusion that the weight being lifted by the crane exceeded the load limits. The statements were obtained from employees, Cliff Meadows (Exh. C-16), Ed John and Seth Halftown (Exh. C-10) and Lee Halftown (Exh. C-12) (Tr. 273-274). The statements were used to determine the distance that the load was positioned from one leg of the false tower prior to the boom collapse. Mr. John was standing on top of the false tower leg nearest to the load. He stated that the load was approximately four feet past that leg prior to the boom collapse (Exh. C-10). Mr. Seth Halftown, who was standing on top of another leg of the false tower agreed with this estimate (Exh. C-10). Mr. Meadows, standing on the third false tower leg, stated that he observed the load to be “about 10 feet past the tower leg that Ed John was on” (Exh. C-16). Mr. Lee Halftown was standing on the ground handling a tag line and he estimated that the load was “approximately 10 to 15 feet past the leg of the tower that Ed John was on...” (Exh. C-12). Mr. Meadows also stated that another 10 to 15 feet of elevation was needed to lift the load over the tower legs. Messrs John and Halftown stated that another 10 feet of elevation was needed for the load to clear the top of the tower.

Mr. Marshall also testified as to the approximate weight of the load<sup>3</sup> and the so called ‘add ons’ such as the load block, gas bottles and headache ball. The weight of the load block and headache ball were given to Mr. Marshall by an unknown person who, according to Marshall, was employed by the crane manufacturer. According to Marshall the load block weighed 4,229 pounds and the headache ball weighed 850 pounds. The total add on weight was 6,773 pounds (Exh. C-3 pg. 52). All of these weights were obtained from unknown sources (Tr. 151-152) and represents gross hearsay. Indeed, there is no direct evidence that the add ons listed by Mr. Marshall were actually attached to the crane boom.

From the information listed above, Mr. Marshall devised a complex mathematical formulation from which he concluded that it was impossible to place the load on the false towers as the crane was configured and, therefor, the crane had to be lowered to accomplish that task to a point where the

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<sup>3</sup>Mr. Marshall stated that Respondent’s foreman, Dan Szvoren, told him that the weight lifted by the crane was 88,000 pounds.

radius exceeded the tipping point of the crane for the weight being lifted. Mr. Marshall disregarded all of the other statements obtained from witnesses including the crane operator and the person in charge of the work activity, Dan Szvoren. Moreover, the Secretary failed to call any percipient witnesses to corroborate Mr. Marshall's testimony or to verify the factual basis for his conclusions.

Respondent, on the other hand, called the crane operator, Robert Barrett, the job foreman, Dan Szvoren, and iron worker, Cliff Meadows as witnesses. Based upon their direct and cross-examination, the following facts have been established. On June 16, 1995, Respondent intended to perform a major lift at the crossroads Sports Arena. Mr. Dan Szvoren, Respondent's job superintendent, an individual with thirty years experience in the business, recognized that the lift was complicated and required precise planning (Tr. 616). He constructed a three dimensional scale model of the entire roof system. Because of the many complications associated with the job, it was necessary to preplan the assembly of the various roof components, the construction of the false towers, the equipment required to perform the various tasks as well as the placement of the structural components of the false towers (Tr. 616-618). Mr. Szvoren also drafted a two dimensional model of the truss lifts (Tr. 622). Although Respondent owns cranes, they did not have a crane large enough to lift the trusses in place. Accordingly, a crawler crane with a 200 foot boom was rented to perform the truss lifts. A three dimensional model of the crane was also constructed to simulate the actual lift as part of the preplanning process (Tr. 619). All of the preplanning performed by Szvoren was discussed with and approved by Respondent's President, Christopher Eberlee (Tr. 627).

According to Mr. Szvoren, the total weight of the lift was 88,000 pounds (Tr. 624). Based upon the load chart for the crane, the crane was capable of lifting 100,000 pounds at a 50 foot radius. Mr. Szvoren checked the ground where he intended to place the crane and load and found that it was solid and level. He also knew that the false towers were 129 feet high and he calculated that he would need a radius of no more than 50 feet to place the truss on the false tower (Tr. 624, 629). He also knew that the truss was nineteen feet six inches in height (Tr. 624). He told the crane operator, Robert Barrett, an individual with twenty years experience, (Tr. 573) that it was not necessary to go beyond a fifty foot radius to complete the task (Tr. 629). On the morning of the lift, Mr. Szvoren held a safety meeting to discuss the lift with his crew (Tr. 631, 632). He "explained to them in detail what we were going to do. Personal safety was the No. 1 topic because, as the pick was engineered,

I didn't feel there was (sic) any problems" (Tr. 631). At no time was it intended or anticipated by Szvoren that the radius of the lift would exceed 50 feet (Tr. 628-630). Prior to the lift Szvoren measured a 45 foot distance from the point where the crane was to be located and placed a painted rock at that point to designate the location from which the load was to be lifted (Tr. 633). This distance represented the radius of the lift (45 feet). He also checked the condition of the site to ensure that the soil was compact and that the crane was level (Tr. 634). The load (truss) had to be transported to the point where the painted rock had been placed. Prior to moving the load, a test lift was performed to check the crane's brakes. The load was attached to the crane and lifted one or two feet off the ground (Tr. 637). At this point the load was at a radius of 62 feet (Tr. 634). The load and the boom were manipulated up and down to test the brakes and other components of the crane (Tr. 635). Everything appeared to be in order. Mr. Szvoren decided to move the load to the spot he had previously marked for the lift. He directed the crane operator to "boom back" so that the load was positioned at a 45 foot radius (Tr. 635). Szvoren measured the 45 foot distance and placed a mark in the gravel to designate that point. Szvoren checked with the crane operator and "the operator was happy with it" (Tr. 635). The load was then lifted slightly above the ground and the crane and load were moved back approximately twenty feet (Tr. 638). When the load was placed near the spot previously marked, the operator raised the load. The radius at this point remained at 45 feet.

Prior to lifting the load, Szvoren directed three iron workers to climb to the top of each leg of the false tower. The iron worker on the leg closest to the load was equipped with a two way radio and maintained communication with the crane operator and Szvoren. The iron worker were directed by Szvoren to "watch for clearances, to make sure we got up high enough over the tower before we walked back further, to make sure that nothing hit the boom, make sure there was (sic) no obstructions, safety hazards..." (Tr. 640).

As the load was being raised and approached the top of the false tower an iron worker on the false tower told Szvoren that the load "was starting to get close to the boom" (Tr. 641). At this point the load was approximately 130 feet in the air and along side one of the tower legs. Szvoren directed the operator to stop the lift and to increase the radius from 45 feet to 47 feet in order to move the load away from the boom (Tr. 642). Both Szvoren and operator Barrett testified that the boom was

lowered to increase the radius to 47 feet. Szvoren asked the iron worker at the top of the false tower “how does it look” (Tr. 645). He was told that the boom would hit the tower leg if the boom was moved toward the tower. Szvoren decided to move the crane back in order to obtain sufficient clearance to swing the load onto the tower legs (Tr. 645). He directed operator Barrett to move the crane back; however, Szvoren reconsidered his decision and after the crane had been backed approximately 6 inches. He told Barrett to stop the crane and raise the boom to place the load at a 45 foot radius (Tr. 646-647). Barrett attempted to raise the boom; however, the crane would not respond (Tr. 581, 648). Barrett testified as follows:

“I grabbed the boom hoist lever, engaged it to boom up, hit the throttle simultaneously. Nothing. I had nothing. She would not move.

**JUDGE YETMAN:** So the machine was moving forward prior to the time that you started to boom back?

**THE WITNESS:** I think so, your Honor. Something had to happen to create that tipping mode.” (Tr. 581)

Barrett also stated that the load radius at this time was 47 feet (Tr. 582, 592). Despite Barrett’s efforts to control the crane, the boom and load crashed to the stadium floor (Tr. 584-585). Barrett stayed with the crane as it was collapsing and swung the boom to the right to avoid striking employees who were standing on the towers (Tr. 658).

Respondent called Mr. Paul Zorich as an expert witness. Mr. Zorich is recognized by the Secretary as an expert in all aspects of cranes and has been contacted by OSHA on several occasions regarding cranes.<sup>4</sup> Mr. Marshall testified that he has consulted with Mr. Zorich on several occasions and considers him to be a crane expert. In fact Mr. Marshall consulted Mr. Zorich regarding the issues in this case. Mr. Marshall testified on cross-examination as follows:

**Q BY MR. LASHGARI:** And is it correct, that according to your testimony in your deposition, main theories of this case that you came up with in your report, you testified that allegedly you heard those theories, you learned from those theories, based on the conversation that you had with our expert, Mr. Paul Zorich?

**A** Which theories are you talking about?

**Q** I refer you to Page 129, Line 8 through 15.

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<sup>4</sup>Mr. Zorich is the chairman of the ANSI Committee which drafts ANSI crane standards including the ANSI standard cited by the Secretary in this case.

**A** Yes.

**Q** Okay. Were you present during the deposition of Mr. Paul Zorich that was taken in the afternoon of July 25, 1996?

**A** Yes.

**Q** Did Mr. Paul Zorich state that you had misunderstood the statement that he had given you?

**A** I don't know if he said I misunderstood it. He - he didn't corroborate what I believe he told me in our meeting in October.

**Q** Or more precisely, what you had thought he had told you, correct?

**A** What I believe he had told me, yes.

**Q** Is it correct that anytime you have questions about cranes in your office, that one of the experts that you consult for informal discussions is Mr. Paul Zorich?

**A** Mr. Zorich, I know, has been contacted several times by our office, yes.

**JUDGE YETMAN:** Contacted for what?

**THE WITNESS:** Just to confirm or run questions by him, related to cranes, whatever the issue might be.

**JUDGE YETMAN:** Well, do you consider Mr. Zorich to be an expert on cranes?

**THE WITNESS:** Yes, I do. (Tr. 348-349)

Mr. Zorich reviewed Mr. Marshall's report (Exh. C-3) and was present in the courtroom during the testimony of Mr. Marshall. Based upon the information contained in Exh. C-3 and Mr. Marshall's testimony, Zorich was of the opinion that the crane was operated within the load limits set forth on the crane load limit chart (Tr. 407-408). Mr. Zorich stated that the actions of the operator were appropriate and, although he could not be certain without disassembling and inspecting the control circuitry,<sup>5</sup> it was his opinion that the boom went down rather than up when the operator attempted to "boom back" because of a malfunction of the computer in the crane control circuitry which caused the boom to continue obeying its last command; that is, when the boom was lowered to increase the radius from 45 to 47 feet (Tr. 409-412, 423, 426). Mr. Zorich testified that it was not necessary to manipulate the load beyond the load limit radius in order to place the load on the false towers (Tr. 412-413). Moreover, he does not understand the methodology used by Mr. Marshall to arrive at the conclusions set forth in his report (Exh. C-3; Tr. 418-419, 423, 429).

In order to establish that Respondent failed to comply with the cited standard, the Secretary

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<sup>5</sup>The control circuitry of the crane was not inspected after the accident.

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; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHC ¶ 25,578, aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344 (1991). The burden of establishing these elements rests with the Secretary of Labor. Moreover, the elements must be established by a preponderance of the evidence *Armor Elevator Co.* 1 OSHC 1409, 1973-74 OSHD ¶ 16,958 (1973). The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false" *Ultimate Distrib Systems, Inc.*, 10 OSHC 1569, 1570 (1982). To carry that burden, the Secretary relied exclusively upon written reports compiled by the Compliance Officer of interviews he conducted of respondent's employees. These statements were admitted pursuant to FRE Rule 801(d)(2)(D). Admissibility, however, does not establish the trustworthiness or reliability of those statements *see Regina Construction Co.* 15 BNA OSHC 1044 (1991). In *Regina* the Commission stated:

Although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, *Federal Evidence* §426 (1980 & Supp. 1990).

*Id* at 1048

Based upon the record in this case as a whole, certain inferences can be made regarding the statements obtained by the Compliance Officer. First there is no basis to conclude that the employees were concerned about their own self interest or felt pressure from the employer or that they were uninformed of the events. Moreover, it is clear that Respondent had an ample opportunity to rebut the information contained in the statements. However, an out of court employee statement "inherently has less probative value than would the employee's own testimony and is not necessarily

entitled to dispositive weight” *Continental Electric Co.*, 13 BNA OSHC 2153, 2155, N.6 (1989). The reason is obvious; credibility findings are critical in evaluating conflicting or inconsistent statements. In this instance the court had no opportunity to assess the credibility of the declarants and Respondent had no opportunity for cross-examination. In *Morrison-Knudsen, Inc.*, 13 BNA OSHC at 1124, the Commission stated:

“When an out-of-court statement is introduced, the trier of fact has no opportunity to assess the credibility of the person who made the statement and must therefore allow for the possibility that the statement is exaggerated, incomplete, taken out of context, or even false. Also, neither the other party nor the judge has an opportunity to cross-examine the person who made the statement. The only person able to evaluate the statement’s credibility is the person who heard the statement and is testifying to its contents. These considerations suggest that out-of-court statements cannot always be taken at face value.”

Moreover, there is no indication that the employees who gave the statements were unavailable to testify. Indeed, one of the three statements relied upon by Mr. Marshall was obtained from Cliff Meadows (Exh. C-16). Mr. Meadows testified on behalf of respondent.

In order to establish the alleged violation, the Secretary had to establish (1) the weight lifted by the crane and (2) the distance from the crane that the load was lifted. Of the twelve statements obtained by the Compliance Officer, Mr. Marshall disregarded nine statements and relied upon three statements; two from employees standing on the false towers and one employee standing on the ground. Marshall ignored the statements of the crane operator and job foreman. Furthermore, the statements considered by Mr. Marshall contain conflicting and inconsistent estimates of the distance that the load was positioned from the false tower leg prior to the collapse (Tr. 294). Moreover, the Secretary has failed to establish the weight being lifted by the crane. The parties stipulated at the hearing that the weight of the load was 86,912 pounds (Tr. 258, 259); nevertheless, in her post hearing brief, the Secretary claims that the weight of the load was 93,686 pounds. This total weight is based upon the components of the truss (86,912) plus “add ons.” The weight of the “add ons” (6,774 pounds) has not been established by the Secretary by credible, probative evidence. The information regarding the so called “add ons” was obtained from unknown sources and is clearly hearsay.

It is undisputed by the parties that the crane boom and load collapsed. The Secretary, by utilizing selected employee statements and a complex mathematical formulation, has attempted to establish an overloaded condition as the cause of the collapse. Based upon this record however, and in the absence of a collapse, the Secretary has failed to establish that the weight and radius of the load exceeded the load chart for the crane. The issue is whether the fact of a collapse alone is sufficient, “to convince the trier of fact that the facts asserted by a proponent (the Secretary) are more probably true than false” *Ultimate Distrib Systems, Inc. Surpa*. Although the cause of the crane collapse is not an essential element to establish the violation alleged here, it must be considered in the context of the Secretary’s burden of proof.

Respondent called the crane operator, Robert Barrett, the foreman, Dan Szvoren and iron worker, Cliff Meadows as witnesses. I found these individuals to be well qualified and competent. Each witness had over twenty years experience in the steel erection business and, by their demeanor and testimony, I find the evidence they gave to be trustworthy and believable. Moreover, cross-examination failed to establish any basis to doubt the reliability of their testimony. All of these witnesses verified that the weight of the load lifted by the crane was 88,000 pounds and the radius never exceeded 47 feet. Thus the crane was never in an overloaded condition. They were unable, however, to give any explanation for the collapse of the crane.

Compelling and persuasive evidence was elicited, however, from Respondent’s expert witness, Paul Zorich. Mr. Zorich is a highly qualified individual in the design, operation and maintenance of cranes. He also has extensive experience investigating accidents involving cranes. He is recognized by the Secretary as a leading crane expert and is often consulted by OSHA in their work activities involving cranes. He is also chairman of the ANSI Committee responsible for drafting safety standards for cranes. I found his testimony to be highly reliable and trustworthy.

Mr. Zorich stated, based upon his review of Marshall’s report (Exh. C-3) and the testimony which he heard at trial, that the crane was not overloaded. Moreover, he stated the most likely cause for the accident was a computer malfunction in the crane’s control circuitry. Thus, a plausible explanation for the crane collapse other than an overloaded condition, has been offered. While it is true that Zorich’s explanation is based upon speculation, it is no less speculative than the theory offered by Marshall. Although there is insufficient evidence on the record of this matter from which

a conclusion may be reached regarding the cause of the crane collapse, two plausible theories have been offered. However, since the Secretary has failed to establish by credible evidence that the crane was overloaded, as alleged, the citation and penalty proposed thereto, must be vacated.

#### **FINDINGS OF FACT**

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* rule 52(a) of the federal Rules of civil Procedure. Proposed Findings of fact that are inconsistent with this decision are denied.

#### **CONCLUSIONS OF LAW**

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not in violation of the standards alleged in the Secretary's citation and complaint.

#### **ORDER**

Serious Citation No. 1 and the penalty proposed thereto are **vacated**.

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ROBERT A. YETMAN  
Judge, OSHRC

Dated: \_\_\_\_\_  
Boston, MA