UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. DANITE SIGN CO., Respondent.	OSHRC Docket No. 91-2123

DECISION

Before: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

Commission Administrative Law Judge Paul L. Brady found two serious violations of Occupational Safety and Health Administration ("OSHA") standards by DaNite Sign Co. ("DaNite"), with respect to DaNite's aerial lifts for employees. The company petitioned for discretionary review, and review was directed on whether the judge erred in affirming a serious violation of 29 C.F.R. § 1926.556(b)(2)(ix).[1] That standard relates to lift controls that are required on platforms attached to booms of truck-mounted cranes. It provides:

> Articulating boom and extensible boom *platforms, primarily designed as personnel carriers, shall have both platform (upper) and lower controls.* Upper controls shall be in or beside the platform within easy reach of the operator. *Lower controls shall provide for overriding the upper controls.* Controls shall be plainly marked as to their function. Lower level controls shall not be operated unless permission has been obtained from the employee in the lift, except in case of emergency.

[1] We will exercise our discretion to decide this issue based on the parties' extensive arguments to the judge and DaNite's petition for discretionary review.

(Emphasis added). DaNite manufactures and installs signs, including elevated signs for interstate highways. To lift personnel to work on elevated signs, it uses platforms attached to the booms of truck-mounted cranes. The crane booms extend like a telescope. Thus, they are "extensible" booms under the standard. *See* American National Standards Institute, Inc., ANSI A92.2-1969, *Vehicle-Mounted Elevating and Rotating Work Platforms*, section 2 (incorporated by reference in the cited OSHA standard by section 1926.556(a)(1)).[2] DaNite's workplace in Newark, Ohio, was inspected by OSHA in response to an employee complaint regarding a crane boom that dropped at least 40-45 feet, while two employees were working from its platform. (There is no indication that any employee was seriously injured. DaNite contends that the employees created the problem by overextending the boom.)

It is undisputed that the work platforms attached to three of DaNite's truck cranes had no controls at the platform level. It also is undisputed that a fourth truck crane of similar design, which had controls at the platform level, did not have the override feature on the lower controls called for by the standard. DaNite contends that the standard is inapplicable to its truck cranes because they are not primarily designed as personnel carriers, and because complying with the standard would create greater hazards for its employees than its current procedures.

As to DaNite's applicability argument, the judge correctly noted Commission precedent, which makes clear that the cited standard "does not speak in terms of whether a *crane* is designed as a personnel carrier" but instead "refers to the design of *platforms*[.]" *Arizona Public Serv. Co.*, 4 BNA OSHC 1936, 1938, 1976-77 CCH OSHD ¶ 21,427, p. 25,725 (No. 8501, 1977) (emphasis added). DaNite's representative and only witness, company president Calvin Lutz, acknowledged in his sworn testimony that the sole use of the boom platforms is to carry personnel to and from elevated worksites and to provide a convenient place for them to stand while working.

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[2]The Secretary's compliance officer testified without contradiction that each boom also was "articulating," in that it "rotates about an axis."

DaNite submitted in evidence a letter from the manufacturer of certain of the cranes, which states that those cranes were not designed primarily as personnel carriers. That letter also states that the platforms that it sells as accessories to those cranes are designed for only "occasional personnel positioning," not primarily for carrying personnel. On the other hand, the manufacturer made clear that "it is the responsibility of the individual crane owner/operator to see that his particular use of the crane complies with the OSHA standards . . . regardless of any statements from the manufacturer or their distributors." The manufacturer quoted the key language contained in the cited standard and added: "[T]his aerial control issue is rather complex and subject to interpretation based on how the crane is used. More importantly your local OSHA inspector will need to make the interpretation as to compliance *as he sees the crane being used.*" (Emphasis in original).

Thus, DaNite was advised that its responsibility to comply with the cited standard depended on how it used the cranes. Indeed, the cited standard is reasonably clear that platforms which are attached to extensible or articulating booms must have upper controls as well as lower controls, if the platforms, as used by the employer, are primarily designed to be personnel carriers. Certainly, as used by DaNite, the platforms were solely designed to be personnel carriers. Thus, the standard applies to the platforms on DaNite's truck cranes. We also note that, based on the photographs in evidence, the platforms seem much better suited for carrying personnel than for carrying materials, because the platforms appear narrow and essentially open-sided except for a thin horizontal guardrail and midrail.

We find no error in the judge's holding that the Secretary showed all the elements of a violation here. The cited standard applies to the boom platforms at issue, and it is undisputed that DaNite failed to comply with the standard's terms. Also, DaNite's employees had access to the hazards addressed by the standard, and DaNite had the requisite actual or constructive knowledge of the noncomplying conditions. *See, e.g., Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1872, 1992 CCH OSHD ¶ 29,829, p. 40,687 (No. 88-1167, 1992); *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823, 1992 CCH OSHD ¶ 29,808, p. 40,593 (No. 88-2572, 1992).

Notwithstanding these showings by the Secretary, the alleged violation would be vacated if DaNite established an affirmative defense, such as the greater hazard defense.

The judge correctly noted the requirements for proving that defense. The employer must show that: (1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting employees from the hazards are not available; and (3) a variance as provided by section 6(d) of the Act, 29 U.S.C. § 655(d), was not available or a variance application would have been inappropriate. *E.g., Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225, 1991 CCH OSHD ¶ 29,442, p. 39,681 (No. 88-821, 1991). The courts of appeals that have ruled on the issue have generally required the same showings by the employer. *E.g., Modern Drop Forge Co. v. Secretary of Labor*, 683 F.2d 1105, 1116 (7th Cir. 1982); *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1080-81 (3d Cir. 1980). *See Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1023 n.3, 1991 CCH OSHD ¶ 29,313, p. 39,357 n.3 (No. 86-521, 1991) (collecting cases).

Mr. Lutz testified that compliance with the standard would create greater hazards because, among other things, controls at the platform level may be erratic and there may be a "violent reaction on a work platform 120 feet off the ground," with the platform (or "bucket") moving 3 to 4 feet when it is used. Lutz considered lower controls better and safer for positioning the platform into a tight position.

We appreciate the concerns that DaNite has raised, especially its claim that certain hazards may occur if it complies with the standard. We imply no opinion about whether DaNite proved the first two elements of the greater hazard defense. However, DaNite's defense must fail because it has offered no evidence that the variance procedure was unavailable or inappropriate, as is required to prove this affirmative defense. *Spancrete Northeast*, 15 BNA OSHC at 1021-22, 1991 CCH OSHD at p. 39,356-57. The fact that the use of aerial lifts was regular and recurring indicates that a variance application would have been appropriate here. *See, e.g., Seibel.* Thus, we find that DaNite has not established a greater hazard defense to the violation.

The judge classified the violation as serious and assessed a penalty of $500. Our assessment of the classification and the appropriateness of the penalty focuses on the impact of the fact that one of the cranes at issue had upper controls but lacked the required override feature on the lower controls. We find that there is a substantial probability that

the inability of the operator of that crane to override the upper controls in case of an emergency could lead to electrical shock or other serious injury of an employee on the platform. Thus, we hold that the item was properly affirmed as serious. 29 U.S.C. § 666(k).

In assessing penalties, the Commission must consider the gravity of the violation, the employer's size, its history of violations, and its good faith. 29 U.S.C. § 666(j). We find the violation was of high gravity, based solely on the lack of an override feature on one crane, as discussed above. DaNite had about 47 employees. The Secretary submitted no evidence of prior violations found against DaNite. There is no claim that DaNite has not acted in good faith. Indeed, its defense to the charge in question is based largely on its safety concerns about the requirement of upper controls for platforms that extend above 55 feet. Neither party petitioned for assessment of a different penalty than that assessed by the judge or even addressed the various penalty factors in their briefs to the judge. Accordingly, the assessed $500 penalty is appropriate in the particular circumstances of this case.

Thus, the judge's decision finding a serious violation of section 1926.556(b)(2)(ix) is affirmed, and a penalty of $500 is assessed.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 23, 1993

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2123
DANITE SIGN COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on September 23, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 23, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2123

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
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DANITE SIGN COMPANY
Respondent.

OSHRC DOCKET
NO. 91-2123

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 July 16, 1992. The decision of the Judge will become a final order of the Commission on August 17, 1992 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 August 5, 1992 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. /skw

Date: July 16, 1992

Ray H. Darling, Jr.
Executive Secretary

ES-8

'KET NO. 91-2123

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-2123
DA NITE SIGN COMPANY,	:	
Respondent.	:	

Appearances:

Elizabeth R. Ashley, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mr. Calvin Lutz, President
Mr. Loy Wilson, Vice-President
Da Nite Sign Company
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

DaNite Sign Company ("DaNite") contests a citation issued to it by the Secretary. The citation contains two items, one alleging the serious violation of 29 C.F.R. § 1926.556(b)(2)(i) for failure to inspect daily the lift controls on the Company's boom trucks; and the other alleging a serious violation of 29 C.F.R. § 1926.556(b)(2)(ix) for failure to ensure that its articulating booms and extensible booms had both platform (upper) and lower controls and for failure to ensure that lower controls provided for overriding the upper controls.

DaNite manufactures and installs electronic signs. The Occupational Safety and Health Administration ("OSHA") received a formal complaint regarding an accident that occurred on May 6, 1991, at DaNite's worksite in Newark, Ohio. OSHA Compliance Officer Bruce Bigham was dispatched to DaNite's facility on June 13, 1991, to investigate the complaint. There he was told that the two employees involved in the accident were working in the bucket of an aerial lift when the lift malfunctioned and the bucket fell approximately 60 feet (Tr. 13).

At the time of the inspection, DaNite was using four International Crane Boom Trucks. The boom trucks are capable of reaching maximum heights of either 65, 75, 85 or 95 feet. The number assigned to a particular truck corresponds with the maximum height the boom is capable of reaching. The boom on each of these trucks is capable of being extended (extensible) as well as being flexed at its joints (articulating). Attached to the end of these booms are aerial devices, referred to as "buckets" or "platforms," which DaNite uses as personnel carriers. Employees climb into the bucket, which is then raised to the necessary height to perform the work required (Tr. 17-18).

Item 1: 29 C.F.R. § 1926.556(b)(2)(i)

The Secretary alleges that DaNite violated § 1926.556(b)(2)(i) which provides:

> Lift controls shall be tested each day prior to use to determine that such controls are in safe working condition.

Bigham testified that he was told by the two employees who were involved in the accident that DaNite required weekly, not daily, inspections of the lift controls (Tr. 14). Calvin Lutz, President, represented DaNite at the hearing. Lutz admitted that at the time of Bigham's inspection, the lift controls were tested on a weekly basis. Daily checks were not required (Tr. 14, 33-34). Lutz's admission constitutes *prima facie* evidence that DaNite was in violation of § 1926.556(b)(2)(i). The hazards presented by the failure to comply with the cited standard are that the bucket could contact a stationary object or an electrical hazard causing serious injuries to employees in the bucket (Tr. 12).

The Secretary has established that DaNite was in serious violation of § 1926.556(b)(2)(i).

Item 2: 29 C.F.R. § 1926.556(b)(2)(ix)

The Secretary alleged that DaNite was in serious violation of § 1926.556(b)(2)(ix) which provides:

> Articulating boom and extensible boom platforms, primarily designed as personnel carriers, shall have both platform (upper) and lower controls. Upper controls shall be in or beside the platform within easy reach of the operator. Lower controls shall provide for overriding the upper controls. Controls shall be plainly marked as to their function. Lower level controls shall not be operated unless permission has been obtained from the employee in the lift, except in case of emergency.

Bigham testified that trucks 75, 85 and 95 lacked controls in the bucket, and that truck 65 had inadequate controls in that its lower controls could not override the controls in its bucket (Tr. 17).

DaNite argues that the cited standard does not apply to its booms because its booms are not "primarily designed personnel carriers." The Secretary argues that DaNite is misinterpreting the standard. The question has been previously addressed by the Review Commission, in *Arizona Public Service Co.*, 4 BNA OSHC 1936, 1976-1977 CCH OSHD ¶21,427, pp. 25,721, 25,725 (No. 8501, 1977):

> The standard, however, does not speak in terms of whether a crane is designed as a personnel carrier. It refers to the design of platforms and does not mention the vehicle on which the platform is mounted. By its terms, the standard applies to, "Articulating boom and extensible boom *platforms*, primarily designed as personnel carriers. . . We conclude, therefore, that the 'primarily designed' determination must be made on the basis of whether the platform itself was so designed, without regard to the vehicle it was mounted on. (Emphasis added)

Under *Arizona*, § 1926.556(b)(2)(ix) applies to the aerial platforms, or buckets, that DaNite used to lift employees to enable them to install signs.

DaNite also argues that it would create a greater hazard for its employees if it complied with § 1926.556(b)(2)(ix) (Tr. 35). "To prove a greater hazard defense, an employer must show that (l) the hazards of compliance with a standard are greater than the hazards of noncompliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate." *Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1088, 1987 CCH OSHD ¶27,814 (No. 81-984, 1987). DaNite offered no proof regarding the

unavailability or inappropriateness of a variance. Therefore, DaNite's defense must fail. The Secretary has established that DaNite was in serious violation of § 1926.556(b)(2)(ix).

Penalty Determination

Under 17(j) of the Act, the Commission is required to find and give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of the appropriate penalty. Upon due consideration of these factors, it is determined that a penalty of $1,000 is appropriate for Item 1, and $500 for Item 2.

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 the citation, alleging a serious violation of 29 C.F.R. § 1926.556(b)(2)(i) is affirmed, and a penalty of $1,000 is assessed.

2. Item 2 of the citation, alleging a serious violation of 29 C.F.R. § 1926.556(b)(2)(ix) is affirmed, and a penalty of $500 is assessed.

Paul L. Brady

PAUL L. BRADY
Judge