United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PEACOCK ENGINEERING, INC., Respondent.	OSHRC Docket No. 11-2780-A

ON BRIEFS:

Amy S. Tryon, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

James A. D'Ambrosio, Esq.; Chase M. Stern, Esq.; Stark & D'Ambrosio, LLP, San Diego, CA
For the Respondent

DECISION

Before: MACDOUGALL, Acting Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

Peacock Engineering installs burial crypts at Miramar National Cemetery in San Diego, California.[1] Prior to installation, the company moves each crypt from the cemetery's delivery area to a staging area, using a forklift equipped with a custom-designed lifting accessory that suspends the crypt from the boom in wire rope slings that fit in pre-cut grooves running along the sides of the crypt. To attach the lifting accessory to the forklift, Peacock removed the forks from the boom and fabricated a custom attachment point.

OSHA alleges that Peacock's forklift modification violated a provision of the material handling equipment standard, providing that "[n]o modifications or additions which affect the

[1] Although California has a state plan approved by the Occupational Safety and Health Administration, it does not cover "national memorials." 29 C.F.R. § 1952.7 (explaining California plan coverage).

capacity or safe operation of the equipment shall be made without the manufacturer's written approval." 29 C.F.R. § 1926.602(c)(1)(ii). Administrative Law Judge Patrick B. Augustine vacated this citation item, concluding that the Secretary failed to establish that the modification, which Peacock conceded was not approved by the manufacturer, affected the capacity or safe operation of the forklift.[2]

On review, the Secretary claims that the forklift modification affected the "safe operation of the equipment."[3] 29 C.F.R. § 1926.602(c)(1)(ii). The two Commission members are divided on this issue. To resolve this impasse, the members agree to vacate the direction for review, thereby allowing the judge's decision to become the final appealable order of the Commission, with the precedential value of an unreviewed administrative law judge's decision. *See, e.g., Action Elec. Co.*, 25 BNA OSHC 2120, 2121 (No. 12-1496, 2016), *appeal docketed*, No. 16-15792 (11th Cir. Sept. 1, 2016); *Cranesville Aggregate Cos.*, 25 BNA OSHC 2001, 2002 (No. 09-2011, 2016), *appeal docketed*, No. 16-2055 (2d Cir. June 17, 2016); *Texaco, Inc.*, 8 BNA OSHC 1758, 1760 (No. 77-3040, 1980) (consolidated); *Rust Eng'g Co.*, 11 BNA OSHC 2203, 2205 (No. 79-2090, 1984); *Safeway, Inc.*, 20 BNA OSHC 1021, 1023 (No. 99-0316, 2003), *aff'd*, 382 F.3d 1189 (10th Cir. 2004); *Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003). *See also* 29 U.S.C. §§ 659(c), 660(a)-(b), 661(i). Accordingly, the direction for review is vacated. The separate opinions of the two participating Commission members follow.

SO ORDERED.

/s/
Heather L. MacDougall
Acting Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 27, 2017

[2] The judge's decision was issued in Docket No. 11-2780, from which the citation item at issue here was severed in an order issued today. *See* Commission Rule 10, 29 C.F.R. § 2200.10. A decision in Docket No. 11-2780 has also issued today.

[3] The Secretary does not dispute the judge's conclusion that the forklift modification did not affect the forklift's capacity.

Separate Opinion of Acting Chairman MacDougall

MACDOUGALL, Acting Chairman.

My colleague and I agree that the only issue presented in this case is whether the Secretary has proven that the employer's modification of a forklift "affect[ed] the . . . safe operation of the [forklift]."[1] 29 C.F.R. § 1926.602(c)(1)(ii). We disagree on whether the Secretary has met his burden to prove the alleged violation. Like the judge, I would find the Secretary failed to present credible evidence that the modification of the forklift affected its safe operation. Further, I would not find, as would my colleague, a violation based on a theory not raised by the Secretary *at any point* in this case (and sua sponte by her). In my view, to do so would not be in accordance with Commission and court precedent or Commission rules, and would deprive Peacock Engineering, Inc. of due process.

Background

On May 6, 2011, Peacock was installing burial crypts at Miramar National Cemetery in San Diego, California. The Miramar job for Peacock began in September 2010. By the time of OSHA's inspection, Peacock had installed approximately 11,000 crypts, each weighing 8,472 pounds, using a modified SkyTrak 10054 rough terrain forklift. To hoist the crypts, Peacock removed the forks that were originally on the end of the forklift's boom and replaced them with an anchorage that the company fabricated. The anchorage consisted of two steel plates and a steel "block" welded together, with an eye-bolt welded to the block.

The Secretary alleged that Peacock "removed the manufacturer forks, and added an employer crafted, custom attachment on the end of the [forklift's] boom without the approval of the manufacturer," in violation of § 1926.602(c)(1)(ii). The judge found that § 1926.602(c)(1)(ii) applies, but he vacated the item based on the Secretary's failure to establish noncompliance with the cited provision, which the judge viewed as requiring proof of three elements: "(1) there was an addition or modification to the forklift, (2) that affected [either] the forklift's capacity or [its] safe operation, and (3) [Peacock] failed to procure the manufacturer's

[1] Section 1926.602 ("Material handling equipment") is contained in Subpart O—"Motor Vehicles, Mechanized Equipment, and Marine Operations"—of the Construction Standards. Section 1926.602(c) covers "[l]ifting and hauling equipment" not otherwise excluded.

written approval." The parties stipulated to the facts underlying the first and third elements,[2] but the judge concluded that the second element was not shown because the Secretary failed to "present credible[,] objective[,] and verifiable evidence that either the capacity or the safe operation of the forklift was affected."

Discussion

On review, the Secretary argues that the judge erred in finding that Peacock's modification of the forklift did not affect its safe operation. According to the Secretary, the relevant modification "need not be demonstrably defective in order for the safe operation of the forklift to be 'affected' within the meaning of" § 1926.602(c)(1)(ii).[3] He claims that the cited provision requires manufacturer approval of equipment modifications "that *could*, knowingly or unknowingly, compromise safety." I disagree with the Secretary's construction of § 1926.602(c)(1)(ii).

"When determining the meaning of a standard, the Commission first looks to its text and structure." *JESCO, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013) (citing *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003)). "If the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation." *Id.* (citing *Superior Masonry*, 20 BNA OSHC at 1184; *Blount Int'l Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992)). "Both the courts and the Commission have rejected the Secretary's interpretation of a standard when it strains the plain meaning of the regulatory text." *Id.* (citing *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1418-19 (No. 89-1206, 1993)). In making this determination, "[a] standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect." *Id.* (citing *Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986); *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1202-03 (No. 05-0839, 2010), *aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished)).

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[2] The Joint Stipulation filed by the parties states, in pertinent part, that Peacock "did not obtain written approval from the Forklift manufacturer for the modifications to the Forklift and its custom lifting accessory."

[3] The judge dedicated a portion of his decision to the issue of whether "the *load capacity of the forklift* has been affected by virtue of the modification or addition," concluding that the Secretary "was unable to show that [the capacity] was, *in fact*, affected." On review, the Secretary relies only on a "safe operation of the equipment," 29 C.F.R. § 1926.602(c)(1)(ii), theory of violation.

The plain language of the cited provision prohibits, in the absence of manufacturer approval, equipment modifications "which *affect* the . . . safe operation of the equipment." 29 C.F.R. § 1926.602(c)(1)(ii) (emphasis added). "Affect" is defined as "to act on; to produce an effect or change in," *Random House Dictionary of the English Language* 24 (1971); it is not, as the Secretary would read it, the *potential* for such an effect or change. As such, to prove a violation, the Secretary must show that the equipment's safe operation was *in fact* affected by the modification at issue. This is consistent with the second part of § 1926.602(c)(1)(ii), which states that "[i]f such modifications or changes are made, the capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly," and "[i]n no case shall the original safety factor of the equipment be reduced." Because this part of the standard requires the employer to make labeling changes *reflecting* the modification's effects, and to ensure that the altered capacity/operation labels and instructions maintain the original safety factor, the standard contemplates manufacturer approval of modifications that *actually affect* safe operation. Indeed, this second part of the standard does not condition the requirement to alter the capacity/labels, etc., *if necessary*—it directs that they be made "accordingly." In short, given the text of the standard and its context, I would find that the Secretary's position that the standard requires manufacturer approval for modifications that *could,* but do not in fact, affect safety is inconsistent with the standard's plain meaning and should therefore be rejected. *See JESCO*, 24 BNA OSHC at 1078.

Thus, the Secretary must establish that Peacock's forklift modification affected its safe operation. I agree with the judge that the Secretary's "arguments with respect to the safe operation of the forklift are speculative at best" and limited to "unexamined or untested assumptions about the integrity of the weld." The testimony of the Secretary's expert, James Nelson, was devoted to the speculative risk that the weld attaching the eye bolt to the forklift could fail while supporting a dynamic load. Nelson reached this opinion after reviewing a photograph of the anchorage and a video of the forklift transporting a crypt, but he did not physically examine the forklift or the anchorage. Addressing the welded connection of the eye-bolt to the block, he testified that "in 90 percent of the cases where any load transferring member is designed, the most concerning feature of that design is always the connection" of that member, particularly where, as here, the load is dynamic rather than just static. Specifically, Nelson testified that "[t]he nature of the area," the "large inconsistencies in the surface terrain," and the

fact that "[t]he load . . . was swinging" can "put very large stresses on the welded attachment," and that the weld used to connect the eye-bolt "has a number of ways in which it can fail. And when it fails . . . very small inclusions in the weld can very quickly turn into linear flaws, cracks, and propagate through the weld in a single use." He also stated that the geometry, configuration, and metallurgy of the weld are "key factors."

Although Nelson's testimony appears to be that the design of the anchorage was such that it was essential for the weld to have been done properly, he never identified any specific design or fabrication flaws in the eye-bolt weld or other parts of the anchorage; in other words, he offered no opinion on whether the weld was in fact deficient. As noted by the judge, "Mr. Nelson's testimony was, for the most part, couched in hypotheticals about what *could* happen *if* the weld were to break in a certain way; however, none of those hypotheticals actually addressed identifiable deficiencies in the welded portion of the custom attachment." As such, the judge gave "little weight" to Nelson's testimony on the issue of whether the modification of the forklift affected its safe operation. I agree; therefore, I would find the Secretary has failed to meet his burden to prove a violation of the cited standard.

This should end the discussion in this case as it does not appear that my colleague disagrees that the record is insufficient to establish that either the design of the attachment or the weld itself were in fact deficient. However, in an effort to salvage the Secretary's case, she advances a theory not even raised by the Secretary. My colleague contends that the Secretary nonetheless established that the modification of the forklift "affect[ed] the . . . safe operation of the equipment" on the theory that it changed the equipment "to essentially that of a crane"—a term not found once in the Secretary's argument, either before the judge or upon review. My colleague would find that because Peacock "transformed the forklift into a crane," it was not operating as intended and was therefore not safe.[4]

[4] My colleague references provisions in the crane standard as a basis for finding that the forklift modification—which she concludes made the forklift into a crane—affected its safe operation. I fail to see how the existence of the crane standard can serve as a substitute for the Secretary establishing, as a *factual* matter, that the modification of the forklift *in this case* affected its safe operation. My colleague's contention that the forklift modification made it a crane "subject to the requirements of the crane standard" also begs the question of whether the Secretary should have cited the employer for a violation of the more specifically applicable crane standard (thus preempting the cited material handling equipment standard). *See* 29 C.F.R. § 1926.20(d)(1) ("If a particular standard is specifically applicable to a condition, practice, means, method, operation,

In support of her position, my colleague cites testimony by Nelson that, upon watching a video of the operating forklift, he observed a swaying motion of the crypt. However, Nelson's testimony regarding the swinging of the crypt was, as the judge found, limited to how such swinging could impart "dynamic, lateral stress on the weld, *which, if it failed*, could strike employees in the vicinity of the load, including the operator of the forklift." (Emphasis added.) As such, even under the Secretary's own theory, any hazard presented by the swinging was limited to *if the weld failed*—a claim, as already discussed, the judge found to be speculative.

In addition, the judge credited the testimony of Peacock's expert, James Robert Harrell, on the issue of whether there was any sway that affected the safe operation of the forklift. Harrell noted that the forklift, although it is depicted in the video as operating on uneven ground while hauling a crypt, was able to remain stable with all wheels firmly on the ground. Harrell also noted that the design of the forklift, including its front tires and outriggers, accounted for operating in rough terrain and for uneven and dynamic loads, and concluded that the

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or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process."); *Brand Energy Sols. LLC*, 25 BNA OSHC 1386, 1389 (No. 09-1048, 2015) (finding preemption of cited provision by more specifically applicable standard). It appears that my colleague tries to avoid the preemption issue by claiming that the crane standard's modification provision applies only to the modification of cranes and that even if it's true that the modification of the forklift turned what had been a forklift into a crane, the machine that was modified was (originally) a forklift, not a crane. However, the crane standard, as my colleague notes, includes within its coverage forklifts that are "configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load." 29 C.F.R. § 1926.1400(9). If a forklift is configured such that it is covered by the crane standard, presumably the modification requirements of that standard would be more specifically applicable than the modification requirements of the material handling equipment standard. *See* 29 C.F.R. § 1926.1434(a) ("[m]odifications or additions which affect the capacity or safe operation of the equipment are [with certain exceptions] prohibited"). In theory, the Secretary could have then also cited the crane operation provisions, such as the rotational speed provision. *See* 29 C.F.R. 1926.1417(v) ("[r]otational speed of the equipment must be such that the load does not swing out beyond the radius at which it can be controlled"). However, in my view, the Secretary cannot (even if he had made this argument) use one standard for proof of a hazard for another cited standard while conveniently ducking the question of whether the standard he chose to cite is the more specifically applicable one. Moreover, this is yet another theory that the Secretary has not raised and the company has had no opportunity to address. Thus, since neither of the parties thought of the forklift as a crane, it is unreasonable for my colleague to suggest that Peacock waived any affirmative defense of preemption by not raising it.

modification did not affect its safe operation. I find no basis to disrupt the credibility determinations and factual findings of the judge.[5]

I am particularly unwilling to upset the judge's sound ruling pursuant to my colleague's theory, raised sua sponte on review, and not raised, tried, or argued by the parties.[6] In general, an appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552 (1941), the Supreme Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556. Applying this general rule, in *Singleton v. Wulff,* 428 U.S. 106 (1976), the Court reversed an appellate court holding on an issue not passed on below. The Court noted it had "no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute." *Id.* at 120.

Indeed, our own Commission Rules follow this principle. Commission Rule 92(c), 29 C.F.R. § 2200.92(c), provides as follows:

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[5] My colleague suggests that she need not defer to the judge's findings because he did not state his credibility determinations as demeanor-based. However, demeanor is but one of the factors in assessing the credibility of a witness, and despite her attempts to side-step the issue, it remains true that the longstanding Commission precedent is to normally defer to a judge's credibility evaluations. *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978) (Commission's policy is to ordinarily accept a judge's credibility evaluation of witnesses because he has lived with the case, heard the witnesses, and observed their demeanor); *P. Gioioso & Sons, Inc.*, 6 BNA OSHC 1617, 1618 (No. 16215, 1978) (adopting judge's findings and conclusions where they were reached "after observing the demeanor of the witnesses, evaluating their credibility[,] and weighing the evidence accordingly"). While the Commission does have ultimate responsibility for the findings entered, I see no basis here to stray from the deference typically provided, as the judge made careful and impartial credibility findings in light of the entire record and explained his reasons for crediting one witness over another. *Compare Kaufman*, 6 BNA OSHC at 1297 (declining to defer to judge's credibility determinations where he did not comply with Administrative Procedure Act's requirements of mentioning and resolving conflicting witness testimony); *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1954 (No. 16162, 1978) (remand where judge failed to mention relevant witness testimony and did not make credibility determinations).

[6] The Secretary's testimony and briefs, both before the judge and upon review, limit the issue of the safe operation of the *forklift* to the possibility for the *weld failure*.

> (c) *Issues not raised before Judge*. The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

The Commission's application of the rule also bears this out.[7] *See J.L. Manta Plant Servs. Co.*, 10 BNA OSHC 2162, 2163-64 (No. 78-4923, 1982) (amendment sought by the Secretary for the first time on review is untimely because the Secretary could have moved to amend before the judge); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1285-86 (No. 91-0862, 1993) (declining to address certain arguments where the "Secretary has neither made nor sought to make any showing of good cause for not raising these arguments below, [or] . . . advised us of any grounds on which we can conclude that consideration of his arguments is warranted under . . . Rule 92(c)"); *Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001, at *2 n.2 (OSHRC Mar. 2, 2012) (declining to consider, in section 5(a)(1) case, additional method of hazard abatement proposed by the Secretary, "as it was not raised before the judge") (citing 29 C.F.R. § 2200.92(c)). Here, my colleague has constructed out of whole cloth and without addressing any of these factors a theory that is not supported by the record or the judge's credibility determinations and factual findings. Without fair notice, consideration of such a theory would deprive Peacock of due process as the company had no opportunity to litigate the issue.

[7] In the limited cases where the Commission has considered issues outside the four corners of the record, for the sake of fairness, it has typically directed the new issue for review or sought supplemental briefing. *See Dravo Corp.*, 10 BNA OSHC 1651, 1652-53 n.2 (No. 14818, 1982) (after review directed, supplemental briefing order issued specifying additional issues); *Farmers Coop. Grain & Supply Co.*, 10 BNA OSHC 2086, 2087 (No. 79-1177, 1981) (issue directed for review was whether judge erred in vacating section 5(a)(1) citation; Commission raised issue of potential applicability of certain standards and later amended citation to allege violation of standard); *Tidewater Pac., Inc.*, 17 BNA OSHC 1920, 1921 (No. 93-2529, 1997) (Commission requested supplemental briefing on legal issue not raised by parties), *rev'd in part on other grounds*, 160 F.3d 1239 (9th Cir. 1998). *Cf. John T. Brady & Co.*, 10 BNA OSHC 1385, 1386 (No. 76-2894, 1982) (deciding case on grounds other than those included in direction for review, but only because controlling precedent was issued after direction for review).

For all these reasons, I would vacate the citation.

/s/
Heather L. MacDougall
Acting Chairman

Dated: April 27, 2017

Separate Opinion of Commissioner Attwood

ATTWOOD, Commissioner.

The only issue here is whether Peacock's modification of a forklift—replacing the forks with a company-crafted, custom hook attachment on the end of the boom to hoist the crypts—"affect[ed] the . . . safe operation of the [forklift]." 29 C.F.R. § 1926.602(c)(1)(ii). The judge found that it did not, noting that the Secretary's expert, who "was most concerned about the stability of the weld" of an eye-bolt to which the custom attachment was affixed, failed to cite "identifiable deficiencies in the welded portion." The cited standard, however, does not require proof of defective construction, and the evidence here, despite my colleague's protestations to the contrary, addresses more than just the physical integrity of this weld. Indeed, the record shows that Peacock's modification changed the nature of the equipment from that of a forklift—which lifts static loads from below—to essentially that of a crane—which hoists swinging loads from above—and expert testimony in the record shows that such swinging loads are hazardous. As such, I would conclude that Peacock's modification "affect[ed] the . . . safe operation" of its forklift.

Here we have a modification that changed the very nature of the forklift. As the OSHA compliance officer explained, a forklift is designed to move a static load, "lift a stationary object [from below], . . . move it forward, and place it down somewhere." Peacock's modification enabled the forklift to lift and carry suspended, dynamic loads: heavy "objects that are going to sway underneath a boom." In other words, Peacock transformed the forklift into a crane—the forklift was no longer operating in the manner intended, let alone in the manner contemplated and blessed by its manufacturer. This is evident by simply watching a video of the modified forklift in operation. After viewing the forklift hoist a crypt and travel with it swinging from the boom for about 200 feet,[1] the Secretary's expert stated that the fact that "[t]he load itself . . . was swinging," coupled with what "appeared to be large inconsistencies in the surface terrain," posed a danger to "not just employees that might be in the area of the load, but the way that was swinging[,] the [forklift] operator himself."[2]

[1] The OSHA compliance officer estimated this as the distance between where the crypts were delivered and where they were being installed.

[2] Peacock's expert testified that the forklift operator was not endangered because the swinging load "would actually hit the front part—the tires and where the front outriggers are and would

My colleague accuses me of constructing this theory—that Peacock's transformation of the forklift into a crane, which handles hazardous swinging loads, affected the equipment's safe operation—"out of whole cloth," asserting that it was not raised by the Secretary "at any point" in this litigation and is not supported by the record. This accusation is unfounded. The Secretary stated in his post-hearing brief to the judge that the OSHA compliance officer "testified that the . . . safe operation of the forklift [was] affected because the forklift's anchorage point was altered, *and* the forklift was now lifting from above the load, rather than below it." (Emphasis added.) And the record shows that Peacock was well aware that the "safe operation" issue encompassed more than simply the physical integrity of the weld. At the hearing, Peacock's own counsel specifically asked the company's expert about testimony the Secretary had elicited regarding the hazards of a swinging load:[3]

> Q. The [Secretary's] expert . . . was critical of the use of the forklift over the terrain and noted that there was a sway in a video . . . [D]oes that video raise any concerns with you with respect to safety?
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> A. Not the way that that was being operated. No.
>
> Q. And is there anything about the sway of the burial crypt that was suspended as a load – did that in any way present a recognized hazard to you as you're sitting here and looking at it?
>
> A. No.

In short, the hazards posed by a swinging load suspended from a forklift that was not designed to handle it, and the notion that these hazards "affect[ed] . . . safe operation," were plainly at issue in this case, and so my colleague's concern about the deprivation of Peacock's due process rights is unwarranted.

Indeed, that the forklift's modification affected its safe operation is further confirmed by specific requirements in OSHA's cranes and derricks in construction standard. *See* 29 C.F.R. Subpart CC. The scope provision of that standard renders forklifts, once modified in the manner

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not enter the cab or cause any damage to the cab or the operator." Being directly struck by the swinging load, however, is not the only way the operator could be injured.

[3] As to my colleague's purported deference to the judge's supposed "credibility determinations and factual findings" related to the experts, I note that the judge made no demeanor-based credibility finding to which the Commission need defer. Unlike the cases my colleague cites, which deal with credibility determinations involving fact witnesses, the judge here simply weighed the opinions of the competing experts, and "we are in as good a position as the judge to evaluate the qualifications of the experts and weigh their testimony in light of the other evidence of record." *All Purpose Crane, Inc.*, 13 BNA OSHC 1236, 1239 (No. 82-0284, 1987).

at issue here, subject to the requirements of Subpart CC. The crane standard "applies to power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load." 29 C.F.R. § 1926.1400(a). The standard generally excludes forklifts. 29 C.F.R. §1926.1400(c)(8). However, the standard covers forklifts "when configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load." Because of its inclusion within the scope of the crane standard, a forklift once modified in this manner would be subject to the stringent requirements for traveling with a load. 29 C.F.R. § 1926.1417(u) ("Traveling with a load"). And another requirement relates specifically to the hazards posed by load swing. *See* 29 C.F.R. § 1926.1417(v) ("Rotational speed of the equipment must be such that the load does not swing out beyond the radius at which it can be controlled."). These requirements establish that there are known hazards associated with modifying a forklift in the manner at issue here.[4]

In these circumstances, I would conclude that the Secretary has shown that the forklift modification affected its safe operation. And there is no dispute that Peacock did not obtain the forklift manufacturer's approval of the modification prior to operating the forklift. Accordingly, I would affirm Item 5.

/s/
Cynthia L. Attwood
Commissioner

Dated: April 27, 2017

[4] I disagree with my colleague's suggestion that the crane standard may be more specifically applicable and thus preempts the forklift modification provision. Apart from the fact that preemption is an affirmative defense that was not raised by Peacock, *see Spirit Aerosystems, Inc.*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) ("Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer."), the crane standard does not apply to the process of modifying a forklift. The provisions I reference in the crane standard are reflective of the fact that there are hazards associated with traveling with a suspended load, but those provisions do not apply *until* a machine is a crane within the meaning of that standard. *See* 29 C.F.R. § 1926.1400. In situations where the cited standard requires the forklift manufacturer's approval of the modification, that approval is required as a *precondition* to the forklift's modification—that is (as in this case), *before* it is used as a crane.

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PEACOCK ENGINEERING, INC., Respondent.	OSHRC DOCKET NO. 11-2780

Appearances:

Grace Kim, Esq. and Natalie Nardecchia, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California
For Complainant

James A. D'Ambrosio, Esq., Stark & D'Ambrosio, LLP, San Diego, California
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Peacock Engineering, Inc. ("Respondent") worksite in Miramar, California on May 20–24, 2011. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging seven serious violations of the Act.[1] Respondent timely contested the Citation, and a trial was held on November 13–15, 2012 in San Diego, CA. Both parties filed post-trial briefs.

1. Citation 1, Item 2 includes sub-items 2a and 2b, which explains the discrepancy between the parties' Stipulation No. 23 and the Court's count of the number of alleged violations. On the first day of trial, the parties were able to settle Citation 1, Item 2a, Item 2b, and Item 4. That agreement was read into the record and is discussed below in Section IV.

II. Jurisdiction

The parties have stipulated that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Jt. Ex. 1). Further, Respondent also stipulated that, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Stipulations

The parties submitted Joint Stipulations to the Court, which are set forth below:

1. Jurisdiction over this action is conferred on the Court pursuant to Section 10(c) of the Occupational Safety and Health Act of 1980 (29 U.S.C. § 651 *et seq.*) ("Act").

2. Respondent and its employees are engaged in receiving, handling and otherwise working on and with goods and materials that are moving or have moved in interstate commerce within the meaning of the Act such that, by virtue of its activities, Respondent has at all times material been an "employer" engaged in a business affecting commerce within the meaning of the Act, § 3(5), 29 U.S.C. § 652(5).

3. On or about May 6, 2011, Respondent was acting as a subcontractor at Miramar National Cemetery ("Site") and was providing crypt installation services at the Site.

4. The work method used by Respondent to install crypts at the Site included use of one SkyTrak 10054 rough terrain forklift, with a custom lifting accessory ("Forklift"), to move crypts from one location to another at the Site.

5. The Forklift's custom lifting accessory was designed by Respondent's President, Larry Peacock.

6. The work method used by Respondent to install crypts at the Site included use of one LBX Link-Belt 225 excavator, with a custom lifting accessory ("Excavator"), to move crypts to their final resting place at the Site.

7. The Excavator's custom lifting accessory was designed by Respondent's President, Larry Peacock.

8. The work method used by Respondent to install crypts at the Site involved one employee operating the Excavator to move the suspended burial crypt to its final resting place, with a second employee standing approximately two (2) feet from the suspended burial crypt to help maneuver the crypt into place with his hands.

9. The work method used by Respondent to move the suspended burial crypt did not involve the use of tag lines.

10. On May 6, 2011, an accident occurred at the Site where an employee of Respondent, [redacted], suffered a thumb amputation injury ("Accident").

11. The Accident occurred when a wire rope sling that was being used to help move a suspended burial crypt slipped out of a groove of the burial crypt and amputated [redacted]'s left thumb.

12. At the time of the accident, [redacted]'s hands were positioned above the wire rope sling suspending the burial crypt.

13. The photograph attached [to the parties' stipulations] as Exhibit A, and taken later on the same date of the Accident, is a true and accurate depiction of the burial crypt, wire rope sling, and Excavator involved in the Accident.

14. Larry Peacock is, and all relevant times has been, Respondent's President.

15. Jonathan Olivares is, and at all relevant times has been, Respondent's General Office Manager.

16. [redacted] was an employee of Respondent and worked as a crypt installer at the Site.

17. Tyler Felton was an employee of Respondent and worked as a foreman at the Site.

18. At the time of the Accident, Mr. Felton was operating the Excavator.

19. At the time of the Accident, [redacted] was on the ground next to the suspended burial crypt, helping to maneuver the load into place with his hands.

20. The Forklift was not marked to indicate its safe working load.

21. Respondent did not obtain written approval from the Forklift manufacturer for the modifications to the Forklift and its custom lifting accessory.

22. The Excavator was not marked to indicate its safe working load.

23. Following an inspection of the Site by a Compliance Safety and Health Officer (CSHO) for the Occupational Safety and Health Administration, the Secretary issued one citation with six (6) serious items to Respondent on or about October 7, 2011 ("Citation").

24. The Citation attached hereto as Exhibit B is a true and correct copy of the Citation at issue in the present matter.

25. The Citation gives Respondent adequate notice of the alleged violations.

26. The Citation was timely issued to Respondent.

IV. Settled Citations

On the first day of trial, the parties agreed to settle Citation 1, Items 2a and 2b, and Item 4. (Tr. 14–15). Citation 1, Items 2a and 2b were grouped together for penalty purposes and alleged serious violations of 29 C.F.R. § 1926.54(d) and 29 C.F.R. § 1926.54(e), respectively. The parties agreed to re-classify these violations as other-than-serious and reduce the penalty from $1,800 to $900. Citation 1, Item 4 alleged a serious violation of 29 C.F.R. § 1926.301(d) with a proposed penalty of $1,800. The parties agreed to re-classify this violation as other-than-serious and reduce the penalty to $900. No other changes were made as a part of this agreement. (Tr. 15).

V. Findings of Fact[2]

Respondent is a subcontractor that installs crypts at national cemeteries around the United States, including, as is relevant to the present matter, Miramar National Cemetery ("worksite"). (Jt. Ex. 1). Respondent was hired by a general contractor, KevCon, which was in charge of the worksite as a whole. (Tr. 449). KevCon, in turn, was hired by the Veteran's Administration ("VA"), which manages the cemetery. (Tr. 449). Respondent employs between 10 and 12 employees. (Tr. 440). At the time of the inspection, Respondent was working on two crypt installation projects—the project at Miramar National Cemetery and another project at Riverside National Cemetery. (Tr. 440). Since 1995, Respondent's President, Larry Peacock, stated that the Respondent had installed approximately 400,000 crypts. (Tr. 438–40). At the Miramar worksite, Respondent had installed approximately 11,000 crypts. (Tr. 440).

In order to install 11,000 crypts, 1.5 to 2 acres of land was excavated in order to place the crypts below ground level. (Tr. 48, Ex. C-1, C-4). Once the area was cleared, Respondent used

2. This section does not constitute the entirety of the Court's Findings of Fact. The facts contained in this section apply generally to each of the citations discussed in Section VII, Conclusions of Law. To the extent that additional facts are needed to address a particular citation, such facts will be discussed in Section VII.

a series of uncapped, reinforced steel bars ("rebar"), which were pounded into the ground and connected by a chalk line, to ensure that the crypts were properly aligned in even rows. (Tr. 56). The crypts were delivered by a flatbed truck to the worksite by the crypt manufacturer, Universal Precast. (Tr. 48–49, 449). Upon delivery, an engineer from the VA would inspect each crypt for defects. (Tr. 449). If the crypt passed inspection, the VA engineer would mark it with a red dot; however, if it did not pass inspection, the crypt would be marked with a green dot. (Tr. 465–68).

Once the crypts had been delivered and inspected, Respondent moved the crypts that passed inspection from the delivery area to a staging area, where the crypts were placed much closer to their final resting place. (Tr. 49). Respondent used a rough terrain forklift, SkyTrak Model 10054, to move the crypts to the staging area. (Tr. 49, Ex. J-1, C-12). Respondent then used an excavator, LBX Link-Belt 225, to move the crypts from the staging area to the spot where they would finally be installed. (Tr. 56, Jt. Ex. 1). Both the excavator and the forklift were fitted with lifting devices, which were custom-designed by Mr. Peacock to lift, transport, and install the crypts. (Jt. Ex. 1).

The crypts were manufactured with pre-cut grooves, which ran the length of both sides of the crypt and then angled upwards at the corners. (Tr. 463, Ex. C-3, C-5). When the crypts were lifted, the custom lifting devices were attached to the pre-cut grooves with two 7/16-inch wire slings—oriented in a basket hitch—which were attached to a spreader bar. (Ex. C-7, C-29). The primary difference between the forklift and the excavator was the manner in which the custom device was attached to the boom. The custom lifting device was attached to the boom of the excavator through a series of two shackles and a hook, which connected to a swiveling eye bolt that was attached to the spreader bar. (Ex. C-7). The custom device attached to the forklift had a similar series of connecting devices starting at the spreader bar; however, the manner in which it was attached to the boom was much different. (Ex. C-13). Whereas the lifting device

was attached to the excavator boom by attaching a shackle to a pre-existing anchorage point, Respondent connected to the forklift boom a U-shaped attachment that was composed of three metal plates that were welded together and held steady with two cotter pins. (Tr. 93, Ex. C-14). Respondent welded an eye bolt onto the outward facing metal plate, and the custom lifting device was connected to the forklift boom through the welded eye bolt. (Ex. C-14, C-15).

Each burial crypt weighs 8,472 pounds. (Tr. 58, Ex. C-28). Both the excavator and the forklift have plates affixed to them that indicate their load capacities at the time of manufacture. (Tr. 373, Ex. C-10, C-19). In the case of the excavator, a chart is provided to illustrate the maximum capacity based on certain variables, such as bucket size, arm length, load radius, and load height. (Ex. C-10). In the case of the forklift, the plate indicates a maximum capacity of 10,000 pounds. (Ex. C-19). Neither of the custom accessories has been labeled to indicate their load capacities; rather, the only information regarding the capacity of the custom accessories is the Certex sling chart, which indicates the load capacity of the 7/16-inch slings used by Respondent when placed in specific configurations. (Ex. C-29). The parties dispute which configuration was being used—Respondent contends that the slings were oriented in a vertical basket, which has a load capacity of 3.9 tons per sling, whereas Complainant argues that the slings were oriented at an angle, which can reduce the load capacity to as little as 1.9 tons per sling. (Ex. C-29). As regards the sling configuration, the Court credits the testimony of Complainant's expert and professional engineer, James Nelson, who testified that the orientation of the sling legs in Exhibit C-24 were at an angle relative to the horizontal point of engagement on the crypt. (Tr. 348–349). Mr. Nelson's understanding is confirmed by the diagrams contained in the Certex sling chart, which show the orientation of the sling legs relative to the load. (Ex. C-29). This understanding also comports with the definition provided for "angle of

loading" provided in 29 C.F.R. § 1910.184(d).[3] Mr. Nelson also credibly testified as to the impact the angled orientation of the slings would have on their tensile strength, which explains the reduction in load capacity at different angles.[4] (Tr. 351–52). The Court, however, is not as convinced by Mr. Nelson's assessment of the sling angle. Mr. Nelson attempted to guess at the angle of the slings based upon Exhibit C-24, which shows the slings attached to the crypt but not under full load. (Tr. 350).[5] Mr. Nelson testified that the slings, not under full load, appeared to be at 30 degrees; however, he also testified that under a full load, it could be more than that. (Tr. 349, Ex. C-24). Ultimately, Mr. Nelson testified that trade practice dictates that if the angle of the slings falls between two angles, it is proper to choose the lesser angle to determine load capacity. (Tr. 350). That said, Mr. Nelson's assessment of the sling angle is not based upon actual measurement, nor on actual operating conditions. For the above stated reasons, the Court finds the testimony of Mr. Nelson, as it relates to the sling angle, should be accorded little weight. Accordingly, the Court finds that, at worst, the combined sling capacity is 3.8 tons (7,600 pounds); however, given Mr. Nelson's testimony that the angle would be greater under full load, the combined capacity of the slings is likely greater.

Each of the crypts has to be aligned within a quarter-inch of the parallel chalk line and set next to one another in evenly spaced 8-foot increments. (Tr. 474–75, Ex. C-4, C-7). In order to achieve this, the final step in the installation process involves two employees—an employee to operate the excavator and another ground employee to guide the crypt. (Tr. 234). The excavator

3. "*Angle of loading* is the inclination of a leg or branch of a sling measured from the horizontal or vertical plane as shown in Fig. N-184-5; provided that the angle of loading of five degrees or less from the vertical may be considered a vertical angle of loading. 29 C.F.R. § 1910.184(b).

4. Respondent's expert, Robert Harrell, who is a safety and health consultant but conceded he is not a professional engineer, testified that you only have a reduction in capacity "when you incline the two ends of a single sling in towards the center [of the load] and you get them off of vertical." (Tr. 647). Further, Mr. Harrell stated that if you did not have a spreader bar and hooked the slings directly to the hook on the attachment, such an angle would impact the capacity of the slings. (Tr. 648). The Court fails to see a meaningful distinction—in either case the slings would be oriented at an angle, which, as testified to by Mr. Nelson, impacts the tensile strength of the sling.

5. The accident occurred when the sling was under full load. While a latent defect in the crypt cement caused the sling's anchor point on the corner to crumble, the crypt never crashed to the ground but was held above the ground in a suspended fashion. (Tr. 604).

operator affixes the sling legs to the pre-cut grooves on the crypt by hand, returns to the excavator, and swings the crypt into position for final placement. (Tr. 236, 239). As the crypt is being moved into position, the ground employee stands clear of the load. (Tr. 240–43). Once the crypt is in position, the excavator operator lowers the crypt to a height of 1–2 feet off of the ground. (Tr. 241). At this point, the ground employee stands approximately 2 feet away from the crypt and maneuvers it by hand in order to get the proper alignment, in some cases spinning it in order to achieve the proper orientation. (Tr. 241, Jt. Stip. No. 8). Once it is properly aligned, the excavator operator sets the crypt down on a patch of pea gravel, which allows for proper drainage and leveling of the crypt. (Tr. 235). Using a laser, Respondent ensures that the crypt is level and is at the proper elevation. (Tr. 450). If the crypt is not level, the excavator operator will lift the crypt out of position and allow the ground employee to add, spread, or remove pea gravel to achieve the proper elevation. (Tr. 247–48). This leveling process would be accomplished with a long-handled tool, such as a rake or shovel, which would obviate the need to physically reach under the crypt while it was suspended. (Tr. 248). If the leveling measurements were particularly off, then the excavator operator would move the crypt out of the way to allow the ground employee to place additional gravel in a hard to reach area. (Tr. 248).

On May 6, 2011, [redacted] was working as a ground person at the worksite while his foreman, Tyler Felton, was operating the excavator. During the process of orienting one of the crypts, one of the wire slings slipped from its pre-cut groove and amputated [redacted]'s thumb. (Jt. Ex. 1). Further investigation revealed that a latent defect in the cement caused the sling's anchor point on the corner of the crypt to crumble, which, in turn, caused the sling to slip out of place. (Tr. 604). However, when the crypt failed, the sling slipped upward and tightened down on the upper portion of the crypt, which prevented it from falling to the ground. (Tr. 605). This incident was reported to Cal-OSHA, who referred the case to OSHA because the incident

occurred on federal property. (Tr. 45–46). An investigation was conducted on May 20–24, 2011 by Compliance Safety and Health Officer ("CSHO") Pete Mollenberndt. (Tr. 46). As a result of his inspection, CSHO Mollenberndt issued the Citation.

VI. Controlling Case Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

To establish a *prima facie* violation of Section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co*., 17 BNA OSHC 1869 (No. 92-2596, 1996). The evidence must also show that the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is

serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

VII. Conclusions of Law

A. Citation 1, Item 1

i. General Duty Clause

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to amputation, struck by and crushed by hazard, while guiding a suspended load by hand.
>
> a) Miramar National Cemetery – On or about 06MAY11, an employee suffered an amputation injury when the burial crypt he was guiding by hand slipped in its wire rope basket hitch, the wire rope left grooves cut into the corner of the burial crypt, the employee's hand was positioned above the basket hitch on the suspended load, the burial crypt slipped down approximately eight inches before the wire rope hitch caught it, the employees left hand was caught by the wire rope at his left thumb, amputating the thumb.
>
> Among other methods, feasible and acceptable methods to correct this hazard is to:
>
> (1) Follow the American Society of Mechanical Engineers (ASME B30.9-1996, Slings) Safety Standard for Cranes, Derricks, Hoists, Hooks, Jacks, and Slings, Section 9-2.9: Operating Practices, which states:
>
> (h) Portions of the human body should be kept from between the sling and the load and from between the sling and the crane hook or hoist hook.
>
> (i) Personnel should stand clear of the suspended load
>
> (r) The sling's legs should contain or support the load so that the load remains under control
>
> (2) Follow 29 C.F.R. 1910.184(c)(6) Slings shall be securely attached to their loads.

(3) Reject burial vaults with manufacturer flaws that can affect the stability of the suspended load.

The cited standard provides:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. § 654(a)(1).

This citation is directed at the work method described above, which Respondent employs to install the burial crypts in their final resting place. In particular, Complainant cited Respondent for exposing its employees to amputation, crushing, and struck-by injuries during the course of guiding a suspended crypt by hand.

First, the Court must determine whether the work method employed by Respondent presented a recognized hazard to its employees. According to Complainant's expert, Mr. Nelson, there is no safe location to place one's hands on a suspended load, which is one part of Respondent's work method. This conclusion is based, in part, upon the American Society of Mechanical Engineers (ASME B30.9-1996, Slings) Safety Standard for Cable-Ways, Cranes, Derricks, Hoists, Hooks, Jacks, and Slings, which is a set of consensus standards governing the use of slings. (Ex. C-30). Although many of the specific provisions were discussed at trial, the three that are most pertinent to this discussion are subsections (h), (i), and (r), which are referenced above. (Ex. C-30).

Complainant contends that the work method employed by Respondent is hazardous in light of Respondent's failure to adhere to these standards. Specifically, Complainant argues that Respondent's work practice is unsafe in light of the following: (1) Respondent uses a basket hitch sling configuration, which is prone to disengagement from the load because there is no positive contact between the load and lifting mechanism; (2) the purported insufficiency of the

load capacity of the slings and custom lifting accessory increased the potential for disengagement; and (3) the use of hydraulic equipment, which Complainant's expert testified is jumpy and erratic, increasing the likelihood of the crypt swinging unexpectedly. (Tr. 338–40).

Respondent, on the other hand, argues that its extensive use of this equipment and method without incident shows the absence of a recognized hazard because its method for aligning crypts by hand requires that employees to keep their bodies and body parts out of specified "kill zones", wherein the potential for injury is high. (Tr. 446, Ex. R-5).

The Court finds that working around suspended loads is a hazard that is recognized both by the industry engaged in hoisting materials and by Respondent specifically. *See Kokosing*, 17 BNA OSHC at 1873 (voluntary industry codes may be used to demonstrate industry recognition). However, in light of; (i) the training provided by Respondent; (ii) the work methods Respondent employs; and (iii) the Complainant's own recognition that every method of abatement identified in its Citation as being feasible to eliminate the hazard is being done by the Respondent, the Court finds that Respondent's employees were not exposed to the hazard identified by Complainant.

First, the Court would note that, with the exception of when the load is 1–2 feet off of the ground, Respondent's employees stand clear of the suspended load. It is not clear to this Court that the ASME standard, which states that "[p]ersonnel should stand clear of the suspended load," is absolute. The standard is couched in discretionary (should) rather than mandatory (shall) terms, and both experts stated that there are circumstances in which employees need to stand near a suspended load in order to guide it. (Tr. 317, 398, 603–604). Mr. Nelson, Complainant's expert, testified that the nature and difficulty of certain work, such as handling I-beams, allows for work on suspended loads. (Tr. 397–98). This understanding is confirmed by the standards found at 29 C.F.R. § 1926, Subpart CC, Cranes and Derricks in Construction,

which allows for employees to stand within the fall zone when guiding a load. *See* 29 C.F.R. § 1926.1425(b). Further, the Court would also note that subsections (h) and (i) of the ASME standards appear to be at odds with one another. If employees are always supposed to stand clear of suspended loads, then it would appear unnecessary to also require that they keep their hands and body parts from between the sling and the load. That is, unless, there are circumstances in which employees need to stand near the suspended load in order to guide it; in which case, the employee would need to be sure to avoid placing their hands and/or body parts in a position where there is a potential pinch point. Unfortunately for [redacted], the hazard associated with placing your hands between the sling and the load came to fruition; however, the Court finds that this was a product of his failure to follow work rules, not from the hazard associated with standing near suspended loads.[6]

Second, the Court is unconvinced by Complainant's other assertions regarding the purported problems associated with Respondent's use of a basket hitch configuration or its use of an excavator to hoist the crypts. The basket hitch configuration of the sling is clearly an acceptable method for hoisting as it is listed in both the Certex load capacity chart (Ex. C-29) as well as in 29 C.F.R. § 1910, Subpart N. *See* 29 C.F.R. § 1910.184 fig. N-184-4. Merely opining that such a configuration is prone to disengagement, without describing why Respondent's use of that particular set-up was deficient—and in the face of OSHA standards that allow its use—is insufficient to establish a hazard. As noted above, the Court is also unpersuaded by Mr. Nelson's calculation of the sling angle and, thus, his determination of the sling capacity. The

6. By saying this, however, the Court does not find that Respondent has established the defense of unpreventable employee misconduct. In light of the conclusion reached later that the Complainant has not carried his burden to establish a *prima facie* case of a violation of the General Duty Clause, it is unnecessary for the Court to address that affirmative defense.

Court's conclusion is buttressed by the fact that Respondent has used this particular set-up thousands of times without an incident involving the actual ability of the slings to hold the load.[7]

Finally, the Court does not find that the use of a hydraulic excavator imposed a unique hazard as posited by Mr. Nelson. Respondent's expert, Mr. Harrell, credibly testified that, although hydraulic equipment used to present the problem of erratic movement, such concerns have been remedied through the advances in hydraulic technology. (Tr. 587–88). The Court is convinced in particular by Mr. Harrell's experience operating and training the operation of such equipment, as well as his testimony regarding the use of hydraulic excavators to carry suspended loads in construction and underground work. (Tr. 557, 587).

The Court is also unconvinced that Respondent was aware of the hazard identified by Complainant. If the hazard addressed by this citation item is, as the proposed abatement suggests, the potential for amputation injuries as a result of the sling not being securely attached to the load, the Court finds that such problems were not attributable to the work method employed by Respondent. The injury suffered by [redacted], while unfortunate, was the product of a latent defect in the crypt that could not have been foreseen by Respondent. Each crypt was quality checked by a VA engineer prior to being transported to the staging area. Although, as Complainant points out, loads had slipped in the past, nobody testified that the lifting system failed; rather, this was a product of crypt defects, most of which were caught prior to being installed. (Tr. 468–69). Respondent accounted for this by training its employees to look at the crypt grooves prior to attaching the slings and to place their hands below the sling and out of the way of the pinch point.[8] (Tr. 245, 469–70). Ultimately, the Court finds that Respondent used

7. The Court is aware that the primary purpose of the Act is to prevent the first accident; however, as it regards the capacity of the slings to carry their intended load, the repeated use of this particular sling set-up is relevant to the question of whether the sling capacity was adequate. The incident involving [redacted] was the result of a faulty crypt and not the inability of the slings to carry the load.

8. It is also worth noting that when [redacted] was injured, the sling slipped from the groove; however, it did not completely disengage and remained suspended by the lifting device. (Tr. 605).

reasonable diligence to uncover and address the hazards at its worksite. *See N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001).

As previously stated, the Court is reluctant to find exposure to a hazard existed when every means of abatement identified by the Complainant in his citation item was performed by the Respondent. Lastly, the means of abatement suggested by Complainant in this citation item (reproduced above) were all performed by Respondent: (1) personnel stood clear of the suspended load as it was being moved into its final position, and it was not until it was 1-2 feet above the ground that an employee, standing 2 feet away from the load, would align the load by hand; (2) Respondent trained its employees to keep body parts away from between the sling and the load, or "kill zones"; (3) the sling's legs contained and supported the load so that it remained under control—only when the load itself crumbled due to a defect did the load slip, and even then the slings kept the crypt elevated; and (4) crypts with observable manufacturer flaws were rejected by either the VA or Respondent. Not only did Complainant fail to prove that Respondent's measures were inadequate, he identified abatement measures that were, for the most part, already being implemented.

At trial, fully aware that the Respondent had implemented all the methods of abatement suggested by the Complainant, the Complainant attempted to propose "new" alternative methods of abatement, such as tag lines, a rigid 15-foot long pole, or a template, which were not identified in the citation item.[9] With respect to these "new" alternative methods of abatement, the Court notes that litigation is not a moving target that permits a party, in the face of strong countervailing evidence, to continually throw the proverbial dart until a theory of liability sticks.

9. Mr. Nelson made a passing suggestion that Respondent could use a template, which would obviate the need to manipulate the crypts by hand; however, there was scant discussion of the feasibility of such a measure. *See ACME Energy Svcs. dba Big Dog Drilling*, 23 BNA OSHC 2121 (No. 08-0088, 2012) ("The Secretary has the burden of 'demonstrat[ing] both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.'" (quoting *Beverly Enters.*, 19 BNA OSHC 1161 (No. 91-3344, 2000))).

Notwithstanding, Complainant still failed to prove that these "new" implements were feasible or an effective means to address the hazards associated with working on a suspended load. In addition to the problem of how tag lines or a rigid pole could be attached to the load in order to align it, the primary problem was one of precision. Complainant's expert testified that using one's hands would be a quicker way of accomplishing the task of alignment; however, he did not believe that a hands-on approach would be any more precise. (Tr. 473). The Court disagrees. Mr. Peacock testified that the crypts had to be placed precisely within a specified area of inches or the whole row of crypts could be crooked, thereby disrupting the precision required for the placement of thousands of crypts. (Tr. 450, 474–75). To that end, Mr. Peacock stated that it would be near impossible to make the sort of minute adjustments necessary when standing 15 feet away from the crypt. (Tr. 479–80). Further, [redacted] stated that the use of a rigid pole would not be practical because the loads were simply "too heavy" to move with a pole. (Tr. 287). Mr. Harrell also testified that the use of a rigid pole may result in a greater hazard. If a crypt abruptly shifted with the pole resting on it, this could result in the pole being jammed back into the body of the holder of the pole. (Tr. 607). Complainant failed to prove that Respondent's measures were inadequate or that the measures it proposed were feasible and effective.

The Court finds that Complainant failed to prove a violation of the general duty clause for the reasons stated above . Accordingly, Citation 1, Item 1 based upon an alleged violation of the general duty clause will be VACATED.

ii. Training Violation[10]

On September 11, 2012, Complainant filed a *Motion for Leave to Amend the Complaint and Citation*, which was granted by the Court. Complainant requested leave to amend Citation

10. Since the two alternative theories rest, in large part, on the same set of facts and conclusions, the Court incorporates by reference its findings of fact and conclusions of law from Section VII.A.i.

1, Item 1 to plead in the alternative a violation of 29 C.F.R. § 1926.21(b)(2). The cited standard provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

29 C.F.R. § 1926.21(b)(2).

The cited standard requires Complainant to prove that "the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993). "Thus, the obligation to train 'is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard.'" *Compass Environmental, Inc.*, 23 BNA OSHC 1132 (No. 06-1036, 2010) (citing *W. G. Fairfield Co.*, 19 BNA OSHC 1233 (No. 99-0344, 2000)). When the Respondent produces evidence of training, then the burden shifts to the Secretary to show that training was inadequate or that the employee otherwise was unable to recognize and avoid the hazards. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126–27 (No. 96-0606, 2000).

The Court finds that the standard applies; however, the Court does not find that the standard was violated. Respondent had a training program in place that addressed the specific hazards identified by Complainant. As noted above, Respondent's program identified specific "kill zones" wherein employees could be stuck or crushed by suspended loads, as well as the specific locations where it was proper to place one's hands or feet during the alignment of the crypts. Each of these instructions was specifically tailored to the concerns highlighted by Complainant in this citation item. This program was reiterated to its employees through initial training and tail gate meetings, wherein employees had to sign in and indicate that they were present and had received the information. (Tr. 274, 441–42, 495, Ex. R-4, R-5, R-6).

Complainant contends that Respondent's training program was inadequate on two separate bases: (1) its employees were exposed to hazards when they were working in close proximity to suspended loads; and (2) [redacted] could not recall the specifics of his training, which indicates that Respondent's training program was not sufficiently specific so as to be remembered. *See Pressure Concrete*, 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992) ("A reasonably prudent employer would attempt to give instructions that are understood and remembered by its employees, and would make at least some effort to assure that the employees did, in fact, understand the instructions."). As to (1), the Court has already addressed how Respondent addressed the hazards associated with working on suspended loads in its discussion regarding the general duty clause and concluded that Respondent's employees were not exposed to a hazard. With respect to (2), the Court finds that, although it is important to ensure that current employees both understand and remember the instructions given by their employer, by the time of trial, [redacted] had not worked for Respondent for almost a year-and-a-half. (Tr. 226). It is understandable that he may not recall specifics about the training that he received or that which he provided as a foreman. That said, even though he was not able to recall specific terminology or instructions, he was able to generally recall certain prohibitions that were put in place by Respondent, such as not pulling on the cables, not getting between crypts, watching your feet, and the distance he was supposed to stay away from the suspended crypt. (Tr. 287–89). The general principles enunciated by [redacted] reflect that Respondent provided adequate training to its employees. [redacted]'s inability to recall specific terminology, such as "kill zone", or the particular discussions that were had at tailgate meetings or even his initial orientation is not indicative of faulty training; rather, it is to be expected considering that it had been over a year-and-a-half since he had worked for Respondent and, thus, he had no need to recall such terms or implement the training provided.

Based on the foregoing, the Court finds that Complainant failed to prove a violation of the general duty clause, or, in the alternative, a violation of 29 C.F.R. § 1926.21(b)(2). Accordingly, Citation 1, Item 1 will be VACATED.

B. Citation 1, Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> 29 C.F.R. 1926.251(a)(4): Special custom design lifting accessories for material handling were not marked to indicate the safe working loads and were not proof tested prior to use to 125 percent of their rated load(s):
>
> a) Miramar National Cemetery: On or about 24MAY11, an LBX Link-Belt 225 Excavator, SN ECAJ8-3866, was equipped with un-tested and un-marked custom lifting accessory used to lift and transport concrete burial vaults weighing 8,472 pounds.
>
> b) Miramar National Cemetery – On or about 24MAY11, a SkyTrak 10054 rough terrain fork lift, SN 0160003864, was equipped with un-tested and un-marked custom lifting accessory used to lift and transport concrete burial vaults weighing 8,472 pounds.

The cited standard provides:

> Special custom design grabs, hooks, clamps, or other lifting accessories, for such units as modular panels, prefabricated structures and similar materials, shall be marked to indicate the safe working loads and shall be proof-tested prior to use to 125 percent of their rated load.

29 C.F.R. § 1926.251(a)(4).

By its terms, the cited standard applies to custom design lifting accessories for material handling. *Id.* Mr. Peacock, president of Respondent, designed the custom lifting accessories that were attached to both the forklift and excavator. (Jt. Ex. 1). Thus, the standard applies. The Court also finds that the standard was violated.

First, the standard requires that all special custom design lifting accessories "shall be marked to indicate the safe working loads . . . ." *Id.* Respondent does not dispute the fact that the lifting accessory designed by Mr. Peacock was not marked. Rather, Respondent contends

that § 1926.251(a)(4) is "one of those standards in which there is no presumption a hazard exists when its terms are not met." (Resp't Br. at 26). In support of this argument, Respondent cites to *Anoplate Corp.*, 12 BNA OSHC 1678 (80-4109, 1986), wherein the Commission held that 29 C.F.R. § 1910.94(d)(9)(v) required the Secretary to prove a significant risk of harm. The Commission imposed such a burden on the Secretary because the requirement to wear eye protection was prefaced by the phrase "whenever there is a danger of splashing . . . ." 29 C.F.R. § 1910.94(d)(9)(v). By using such a phrase in promulgating the regulation, the Secretary left it to the Commission to determine whether there was a significant risk of harm on a case-by-case basis. *Anoplate*, 12 BNA OSHC 1678. In other words, the standard in *Anoplate* did not presume a hazard when its terms were not met because the requirement to wear eye protection was conditioned by the presence of a splashing hazard. *Id.* The standard cited in this case, however, presumes that there is a significant risk of harm associated with the failure to mark equipment and proof test it to 125% of its rated load. There is no precedent condition that activates the requirement to tag and test custom lifting accessories, there is only a mandate that such actions shall be taken. Although Respondent is technically correct that the failure to mark the equipment does not render its use presumptively hazardous, the standard is intended to prevent the hazard of overloading equipment and accessories. Thus, with respect to the first requirement—marking the load capacity on custom lifting accessories—Respondent violated the standard.

Respondent also violated the second part of the standard. In addition to marking the safe capacity of the custom lifting accessories, Respondent is also required to proof test the accessories to 125 percent of their rated loads. Respondent's failure to comply is two-fold: (1) It is unclear that Respondent was aware of what the rated load of the accessories were; and (2) Respondent failed to conduct a proof test up 125 percent of the accessories' rated loads. According to the definitions found in 29 C.F.R. § 1910.184(b), which address the use of slings

and material handling equipment in general industry, a proof test is "a nondestructive tension test performed by the sling manufacturer or an equivalent entity to verify construction and workmanship of a sling." *See Simpson, Gumpertz & Heger Inc.*, 15 BNA OSHC 1851 (No. 89-1300, 1992) (reiterating the general principle that standards containing broad or undefined terms may be given meaning by reference to other standards). First, in order to conduct a proof test, Respondent must be aware of the rated load of the custom accessory. The only evidence introduced by Respondent that would indicate knowledge of the rated load was Mr. Peacock's and Mr. Harrell's testimony regarding the capacity of the slings to carry the load, which they estimated to be 7.8 tons. (Tr. 510–11, 598–99). This rating, however, does not take into account the angle of loading, which, as discussed above in Section V, reduces the load capacity of the slings. Nor, in the case of the forklift attachment, does it account for the use of an eye bolt that was welded onto the attachment instead of bolting it to the attachment using the threads. According to Mr. Nelson, the "most concerning feature of [the design of a load transferring member] is always the connection." (Tr. 371). Mr. Nelson opined that there are many factors that have to be considered when evaluating the integrity of the weld, including geometry, configuration, and metallurgy of the weld. (Tr. 372). Neither Mr. Peacock nor Mr. Harrell was able to provide concrete information about these critical factors that would impact the load capacity of the custom attachment; Mr. Peacock could not even testify as to what the rated load capacity of the attachments was. (Tr. 508–509). Without knowledge of the rated capacity of the custom attachment, Respondent could not have performed a proof test of 125 percent of the rated load.

Even if the Court were to assume that the rated load of the custom accessory was known, Respondent failed to conduct an adequate proof test of the accessory. Mr. Peacock testified that a test was performed on the equipment approximately one month prior to the beginning of the

Miramar project. (Tr. 507). This test involved placing a crypt loaded with a couple of cubic yards of dirt, weighing roughly 3 tons, on top of another crypt. (Tr. 456). This means that the load carried by the attachment was roughly 14,000 pounds. (Ex. C-28). By Respondent's own admission, however, this test was not performed for the purposes of testing the custom lifting attachment; rather, the test was performed to test the structural integrity of the crypt lids. (Tr. 508). Mr. Peacock also testified that these tests were performed with the attachment provided by the manufacturer, which means that the devices that were actually used during the crypt installation process were not tested. (Tr. 533–34). Based on the foregoing, the Court finds that the terms of the standard were violated.

The Court also finds that Respondent's employees had access to the cited condition. [redacted] and other employees worked in close proximity to the suspended loads during the final installation process. The failure to proof test and mark the custom lifting accessories on the forklift and excavator exposed Respondent's employees, including the ground person and equipment operator, to potential crushing and struck-by injuries, because employees could potentially misjudge the safe lifting capacity of the lifting devices and overload the equipment, which could lead to failure of the lifting device.

Respondent also knew or could have known of the violative condition. Mr. Peacock, president of Respondent, was responsible for the design and creation of the custom lifting accessories on both the forklift and the excavator. Mr. Peacock also testified that he was aware that the custom devices were not marked to indicate their safe working loads. (Tr. 502). Finally, Mr. Peacock also testified that the test performed on the crypts was actually done with the attachment provided by the crypt manufacturer, which means that, even if the test was a legitimate means of determining 125% of the attachment's rated capacity, the test was not

performed with the equipment indicated in this citation item. Respondent was directly aware of violative condition.[11]

The violation was also serious. CSHO Mollenberndt testified without dispute that, if an accident occurred, there was a substantial probability that death or serious physical harm could result if an accident occurred. (Tr. 126–27). As noted above, the custom lifting accessory could be overloaded and fail, which would expose employees to crushing injuries as well as the possibility of being struck by the suspended 8,472-pound crypt while working in the vicinity of the forklift or excavator. Accordingly, Citation 1, Item 3 will be AFFIRMED.

Citation 1, Item 5

Complainant alleged a serious violation of the Act in Citation 1, Item 5 as follows:

> 29 C.F.R. 1926.602(c)(1)(ii): Modifications or additions which affect the capacity or safe operation of the equipment were made without the manufacturer's written approval:
>
> a) Miramar National Cemetery – On or about 24MAY11, a SkyTrak 10054 rough terrain forklift, SN 0160003864, removed the manufacturer forks, and added an employer crafted, custom attachment on the end of the boom without approval of the manufacturer.

The cited standard provides:

> No modifications or additions which affect the capacity or safe operation of the equipment shall be made without the manufacturer's written approval. If such modifications or changes are made, the capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly. In no case shall the original safety factor of the equipment be reduced

29 C.F.R. § 1926.602(c)(1)(ii).

According to 29 C.F.R. § 1926.602(a), the rules contained therein apply to earthmoving equipment, such as "scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks,

11. Alternatively, the Court also finds that Respondent had constructive knowledge of the condition through its foreman, Tyler Felton. The custom lifting accessories on the forklift and excavator, which were operated by Mr. Felton, were in plain view and were repeatedly used to move crypts throughout the working day. The knowledge of Respondent's foreman, Mr. Felton, is properly imputed to Respondent. *Revoli Const. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001) (holding that actions and knowledge of supervisory personnel are generally imputed to their employers).

graders, agricultural and industrial tractors, and similar equipment." More specifically, subsection (c) applies to lifting and hauling equipment. *See* 29 C.F.R. 1926.602(c). The forklift clearly falls under the rubric of lifting and hauling equipment. Accordingly, the standard applies.

In order to prove that that the terms of the standard were violated, Complainant must establish: (1) there was an addition or modification to the forklift, (2) that affected the forklift's capacity or safe operation, and (3) Respondent failed to procure the manufacturer's written approval. *See id.* § 1926.602(c)(1)(ii). First, Respondent admitted that it did not receive the manufacturer's approval to make modifications to the forklift. (Tr. 513). Second, the Court finds, at the very least, there was an addition to the forklift to the extent that Respondent created a custom lifting accessory that was connected to the boom by means of a custom attachment. (Ex. C-13, C-14). In other words, because the attachment itself was not made by the manufacturer, Respondent was required to craft a connection point to attach the custom lifting assembly to the boom of the forklift. Thus, the sole operative question for the resolution of this citation item is whether the capacity or the safe operation of the forklift was affected by the addition. The Complainant has the burden of proof to present credible objective and verifiable evidence that either the capacity or the safe operation of the forklift was affected in order for it to prevail.

Complainant contends that the standard was violated because the anchorage point of the forklift was altered, which resulted in the forklift lifting the crypts from above the load instead of from below it. (Tr. 126, 160). Additionally, Complainant's expert, Mr. Nelson, was most concerned about the stability of the weld, which was main point of connection between the custom lifting device and the boom of the forklift. (Tr. 371–72, 431). Respondent argues that the equipment never failed and that the removal of the fork attachment to the forklift actually

increased its capacity from 10,000 pounds to 29,805 pounds.[12] Respondent's expert testified that the use of a custom attachment did not alter the capacity of the forklift itself, nor did the attachment render the use of the forklift unsafe as evidenced by the thousands of times it had been used prior to the inspection without incident. (Tr. 583–86).

First, the Court does not find that the removal of the forks changed the capacity of the forklift from 10,000 pounds to 29,805 pounds as contended by the Respondent. The terms "Maximum Capacity" and "Maximum Weight Without Attachments" that are used in Exhibit C-19 should be given their common sense meaning. As such, the Court finds that the both terms do not refer to the same thing, i.e., different load carrying maximums; rather, the former refers to the forklift's capacity to lift and the latter refers to how much the forklift weighs without anything attached to it. According to Exhibit C-19, the maximum capacity for the forklift was 10,000 pounds as designed by the manufacturer. (Tr. 373). Thus, any changes made to the forklift that altered its capacity needed to be approved by the manufacturer.

It is interesting to note, however, that neither party discussed the asterisk on the manufacturer's plate, which states "Refer to load capacity chart for truck with attachment and individual load ratings stamped on forks, if equipped. Use lowest capacity of all ratings." (Ex. C-19). What this suggests is that the capacity of the forklift is dependent upon the attachments used and, as noted by Mr. Harrell, the extension of the telescoping lift, but, in any case, the capacity of the machine maxes out at 10,000 pounds. (Tr. 580, 582). Complainant introduced the load capacity chart for the excavator, which takes into account different attachments and the extension of the boom at various lengths and heights; however, *the chart specifically mentioned on the forklift was not introduced as evidence*, which deprives the Court of the opportunity to determine what the capacity of the forklift is when taking into account different variables like the

12. The Court sincerely doubts that a manufacturer of lifting equipment would equip a machine with attachments that reduce the lifting capacity by close to two-thirds of its maximum.

attachments used and extension of the boom.[13] Further, the failure to introduce the load chart or operator's manual for the forklift also deprives the Court of the ability to ascertain whether this particular machine is designed for overhead lifting.

Ultimately, it is unclear that the load capacity of the forklift itself was affected by the custom attachment. Complainant's expert focused almost entirely upon the design of the custom lifting attachment and the weld that connected the attachment to the boom. Specifically, he testified about the number of ways in which the weld *could* fail and the impact of dynamic, lateral loading which *could* cause the welded attachment to separate "at any given time." (Tr. 374, Compl't Br. at 20). The problem, however, is that these concerns are all directed towards the load capacity of the custom attachment and weld, not the capacity of the forklift itself.[14] (Tr. 371). As noted above, the operative question in this case is whether the *load capacity of the forklift* has been affected by virtue of the modification or addition. Merely because the structural integrity of the custom attachment is in question does not mean that the capacity of the forklift has been affected. Complainant's witnesses opined that the capacity of the forklift *could have* been affected by the addition of the custom attachment; however, Complainant was unable to show that it was, *in fact*, affected.

The question of capacity, however, does not resolve the issue. The standard also states that modifications or additions that affect the *safe operation* of the vehicle must also be approved by the manufacturer. Complainant's arguments with respect to the safe operation of the forklift are speculative at best. Mr. Nelson's testimony was, for the most part, couched in hypotheticals about what *could* happen *if* the weld were to break in a certain way; however, none of those

13. According to Mr. Harrell, the load chart for the forklift would be located inside the cab of the forklift next to where the operator sits and operates the equipment.

14. The load capacity of the custom attachment was already addressed by Complainant in Citation 1, Item 3. It is a much different issue to address the actual lifting capacity or safe operation of the forklift to which the custom accessory was attached. In that regard, it is interesting to note that the forklift was cited for a violation of 29 C.F.R. § 1926.602(c)(1)(ii), and the excavator was not even though both vehicles were equipped with custom attachments that may or may not have affected the capacity or safe operation of the vehicle.

hypotheticals actually addressed identifiable deficiencies in the welded portion of the custom attachment. This is due to the fact that Mr. Nelson did not physically examine the attachment or weld, but instead based his opinion on pictures of the attachment and weld. The only concrete evidence introduced by Complainant that addressed the safe operation of the forklift was the video, which showed the crypt swaying as it was being hauled by the forklift. (Ex. C-12). Mr. Nelson testified that the swaying motion of the crypt imparted dynamic, lateral stress on the weld, which, if it failed, could strike employees in the vicinity of the load, including the operator of the forklift. (Tr. 374, Ex. C-12). Respondent's expert, Mr. Harrell, on the other hand, noted that the forklift, although operating on uneven ground while hauling a dynamic load, was still able to remain stable with all wheels firmly on the ground. (Tr. 586). Though he could not testify as to the integrity of the welded attachment, Mr. Harrell also noted that the design of the rough terrain forklift accounts for uneven terrain and dynamic loads. (Tr. 586). Specifically, Mr. Harrell pointed to the front tires and outriggers, which serve to protect the operator from swinging loads. (Tr. 586–87). Although the Court appreciates Mr. Nelson's concerns regarding the potential for a weld to fail, the same concerns could be expressed with respect to any welded attachment. Though the purpose of the Act is to prevent the first accident, the Court cannot disregard the fact that this same set-up has been used thousands of times without incident. Even the accident that precipitated the inspection at issue was not the product of Respondent's faulty equipment; rather, it was the result of a poorly manufactured crypt, which was not an aspect that Respondent could control. The Court gives little weight to the testimony of Mr. Nelson on the issues of capacity or safe operation since his conclusions are either speculative or based on unexamined or untested assumptions about the integrity of the weld. This Court cannot permit the Complainant to meet his burden of proof with conclusions based on speculation. To do so would undermine the integrity of longstanding case law that places the burden on him to prove a

violation of the Act. Complainant failed to present credible, objective, factual evidence that established the custom attachment affected the capacity of the forklift or rendered it unsafe to operate for the reasons stated above. Accordingly, Citation 1, Item 5 will be VACATED.

C. Citation 1, Item 6

Complainant alleged a serious violation of the Act in Citation 1, Item 6 as follows:

> 29 C.F.R. 1926.701(b): All protruding reinforcing steel, onto and/or into which employees could fall or come against, was not guarded to eliminate the hazard of impalement:
>
> a) Miramar National Cemetery – On or about 20MAY11, steel reinforcing rods were not capped against impalement.
>
> b) Miramar National Cemetery – On or about 24MAY11, steel reinforcing rods were not capped against impalement.

The cited standard provides:

> Reinforcing steel. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

29 C.F.R. § 1926.701(b).

On the first day of CSHO Mollenberndt's inspection of the worksite, he noticed several uncapped steel reinforcing rods that had been pounded into the ground to aid in the alignment of the burial crypts. (Tr. 59). On May 20, 2011, Respondent's foreman, Tyler Felton, advised CSHO Mollenberndt that he knew the rods should be capped and that he would ensure that the rods would be capped in the future. (Tr. 67–68). When CSHO Mollenberndt arrived at the worksite a couple of days later on May 24, 2011, he observed that many of the rods remained uncapped. (Tr. 68). There were approximately 8–12 rods that stood 1–4 feet out of the ground, and, depending on the location of the crypts, located adjacent to or roughly 6 feet away from the crypts. (Tr. 60, Ex. C-4). At the time of the inspection, CSHO Mollenberndt observed employees working in close proximity to the uncapped rods, including some employees that were standing on top of the crypts. (Tr. 61, Ex. C-4).

Respondent contends that the cited standard is inapplicable and the citation should be vacated. Specifically, Respondent points to the scope and application paragraph of 29 C.F.R. § 1926.700(a), which states:

> This subpart sets forth requirements to protect all construction employees from the hazards associated with concrete and masonry construction operations performed in workplaces covered under 29 CFR Part 1926. In addition to the requirements in Subpart Q, other relevant provisions in Parts 1910 and 1926 apply to concrete and masonry construction operations.

29 C.F.R. § 1926.700(a). Respondent admits to using "protruding reinforcing steel", as that term is used in § 1926.701(b); however, Respondent argues that the standard does not apply because Respondent was not engaged in concrete or masonry operations. Complainant contends that because Respondent was using reinforced steel rods that protruded from the ground, the standard applies. Respondent may not have been performing concrete or masonry operations *per se*; however, it was utilizing tools/implements—rebar—associated with that specific industry. *See Kunz Constr. Co.*, 15 BNA OSHC 1343 (No. 90-2995-S, 1991) (ALJ Schwartz) (finding a violation of 1926.701(b) when uncapped, reinforcing steel rods were used to "stake out the drive to the company trailer"). It is undisputed that the reinforcing steel rods were uncapped and protruding out of the ground. Thus, the standard applies and was violated.

One of the hazards associated with the use of uncapped, reinforced steel rods is the potential for impalement, which was present at Respondent's worksite. CSHO Mollenberndt observed an employee working on top of the crypts, approximately 5 feet off of the ground, near an uncapped steel rod. (Tr. 61, Ex. C-4). Additionally, other employees of Respondent were exposed to the impalement hazard when they worked on the ground in close proximity to uncapped rods. (Tr. 65–67). Accordingly, the Court finds that Respondent's employees were exposed to the hazard.

Finally, Respondent knew or should have known about the presence of the violative condition. As noted above, Respondent's foreman, Mr. Felton, indicated that he was both aware of the requirement and that he would resolve the problem of the missing caps, which were identified by CSHO Mollenberndt on the first day of his inspection. When CSHO Mollenberndt returned a few days later, he observed more uncapped steel rods. Not only was the condition open and obvious, but Respondent's foreman was directly aware of the uncapped rods and allowed the condition to exist. It is well-settled that the actual or constructive knowledge of a foreman can be imputed to his employer. *Rawson Contractors Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003); *A.P. O'Horo Co.*, 14 BNA OSHC 2004 (No. 85-369, 1991). Mr. Felton held himself out as a representative of Respondent, and, therefore, his knowledge of the uncapped reinforced steel is properly imputed to Respondent.

The violation was also serious. Sufficient testimony was presented by Complainant to establish that falling onto reinforced steel rods creates an impalement hazard, which could lead to serious injuries and even death. Based on the foregoing, the Court finds that Complainant established a violation of the standard. Accordingly, Citation 1, Item 6 will be AFFIRMED.

VIII. PENALTY

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case

and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

CSHO Mollenbernt provided credible testimony to support his characterization of the size of Respondent's business, the gravity of the violation, good faith, and prior history of violations. With respect to Citation 1, Item 3, the Court finds that the gravity associated with using an improperly tested, custom lifting device is high—if the device is not sufficiently tested and marked, it is possible for an employee to overload the equipment and expose himself and other employees to the potential for crushing injuries from the 8,000-plus pound crypts. Accordingly, the Court finds that a penalty of $3,000 is appropriate. With respect to Citation 1, Item 6, the Court finds that CSHO Mollenberndt overstated the gravity of the violation. For the most part, employees were exposed to the hazard while walking on the ground, which reduced the likelihood that an employee would trip and fall onto the protruding rebar. Further, when standing on top of the crypts, most of the rebar was approximately 6 feet away, which further reduced the likelihood of an impalement injury. In light of these facts, the Court finds that a penalty of $2,000 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1(as originally plead and as an alternative amended citation) and its associated penalty are hereby VACATED.
2. Citation 1, Items 2(a) and 2(b) are AFFIRMED as other-than-serious and a penalty of $900 is ASSESSED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of $3000 is ASSESSED.

4. Citation 1, Item 4 is AFFIRMED as other-than-serious and a penalty of $900 is ASSESSED.

5. Citation 1, Item 5 and its associated penalty are hereby VACATED.

6. Citation 1, Item 6 is AFFIRMED and a penalty of $2000 is ASSESSED.

Date: April 17, 2013
Denver, Colorado

/s/
Patrick B. Augustine
Judge, OSHRC