United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NATIONAL ENGINEERING & CONTRACTING
Respondent.

OSHRC DOCKET
NO. 95-0137

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 4, 1996. The decision of the Judge will become a final order of the Commission on May 6, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 23, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SHA

Date: April 4, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0137

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. NATIONAL ENGINEERING & CONTRACTING COMPANY, Respondent.	OSHRC Docket No. 95-137

APPEARANCES

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For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

National Engineering & Contracting Company (National Engineering) contests two citations issued by the Secretary on December 21, 1994. The Secretary issued the citations following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Frank Coffelt. Coffelt's inspection took place at National Engineering's worksite near the intersection of Riverside Drive and Madison Avenue in Lakewood, Ohio. National Engineering employee Edward Ruthsatz had been injured when a crane overturned on August 19, 1994. This accident prompted the OSHA inspection.

National Engineering is a construction company whose headquarters are in Strongville, Ohio. It was the general contractor under a contract with the Ohio Department of Transportation (ODOT) for a project to prevent soil erosion. Riverside Drive in Lakewood (State Route 237) follows a ravine that threatened parts of the road. National Engineering's job was to remove 12 feet of pavement and construct an erosion wall 1,928 feet long under the pavement to prevent future erosion (Tr. 22, 39, 317). To build the support wall, National Engineering drilled caissons into which H-beams were sunk (Tr. 468). While moving mats for a Spiradrill, which was used to drill caissons at the edge of the ravine, a 28-ton Grove crane overturned (Tr. 35-36, 96).

Prior to the hearing, the Secretary withdrew Items 1, 3, 5, 6, and 7 of Citation No. 1, and instances 3, 5, and 6 of Item 2 of Citation No. 1 (Tr. 5-8). Subsequent to the hearing, the Secretary withdrew the alternative alleging a violation of 29 C.F.R. § 1926.550(b)(2) in Item 1b of Citation No. 2, leaving the alternative alleging a violation of 29 C.F.R. §1926.550(a)(1). Remaining at issue are Items 2, 4, and 8 of Citation No. 1, and Items 1a, 1b, and 1c of Citation No. 2.

Citation No. 1

Item 2: Alleged Serious Violation of 29 C.F.R. § 1926.21(b)(2)

The Secretary alleges that National Engineering committed a serious violation of §1926.21(b)(2), which 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.

The Secretary cited National Engineering for three specific instances of alleged failure to instruct employees in the recognition and avoidance of unsafe conditions: (1) the improper use of outriggers, (2) the absence of matting, and (3) the location of the crane in proximity to the edge of the ravine. As determined *infra*, National Engineering was not in violation of any standard due to its decision not to use outriggers or mattings. Nor did National Engineering violate any standard due to its location of the crane.

At the hearing, the Secretary elicited testimony regarding National Engineering's instructions to its employees on hazardous conditions. Compliance officer Coffelt determined through his observations and employee interviews that (Tr. 355):

> [T]he employees were not instructed how to avoid these conditions. They may have been instructed of the conditions and certainly how to recognize the conditions. There is a second prong to the standard which requires employees take action to avoid the unsafe conditions. I don't believe that was accomplished in this case.

Employee Edward Ruthsatz, who was operating the Grove crane when it overturned, testified that he did not go through apprentice training to learn how to operate a crane, but learned "[j]ust by watching other people and working with other operators" (Tr. 484). Ruthsatz also testified regarding National Engineering's "safety meetings" (Tr. 520-521):

> Q.: Now, did you ever attend safety meetings when on the site?
>
> Ruthsatz: If they had meetings, I attended them, yes.
>
> . . .
>
> Q.: And, was there a discussion or did they pass a sheet around? How was it done?
>
> Ruthsatz: The foreman generally brought a sheet of paper around.
>
> Q.: And you read the sheet?
>
> Ruthsatz: If you took the time to read it, yes. If it wasn't about you, I normally didn't. I signed it.
>
> Q.: Did the safety meetings ever cover site conditions at the erosion wall project?
>
> Ruthsatz: No.
>
> Q.: Were there ever any specific instructions for operators working in hazardous areas?
>
> Ruthsatz: Not on that job, no.
>
> Q.: Have you attended any training courses through the union or other organizations?
>
> Ruthsatz: On safety?
>
> Q.: On safety or crane operations.
>
> Ruthsatz: No.
>
> Q. Have you received any form of disciplinary action in terms of a safety rule violation in regard to the overturned crane?

Ruthsatz: No.

Ruthsatz was shown a weekly safety meeting form which he had signed the Monday before his accident (Exh. C-13; Tr. 522). The form contains safety tips for crane operators. When asked if the exhibit refreshed his memory regarding the safety meeting, Ruthsatz responded, "This is not a safety meeting. It was brought up to me in my pick-up truck at about quarter to 6:00 in the morning because I started a 6:00. Everybody else started at 7:00, but me and another laborer started at 6:00. I signed it and went to work" (Tr. 523).

While the evidence shows that National Engineering's safety training was sparse, the Secretary has failed to establish unsafe conditions as alleged. In the discussion of the willful citation, *infra*, it is concluded that National Engineering's decision not to use outriggers or matting, and to locate the crane where it did were not violations of the cited standards. Thus, it cannot be said that National Engineering failed to instruct its employees in the recognition and avoidance of unsafe conditions, when the conditions cited are not deemed unsafe.

The Secretary has failed to establish a violation of 29 C.F.R. § 1926.21(b)(2).

Item 4: Alleged Serious Violation of 29 C.F.R. § 1926.95(a)

The Secretary alleges that National Engineering committed a serious violation of § 1926.95(a), which provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The Secretary contends that National Engineering violated this standard because Ruthsatz did not wear a seat belt while moving the Grove crane. The Secretary does not contend that the crane operator was required to wear a seat belt while setting up for a pick. The operator is required to wear a seat belt while traveling in the crane along a roadway. The Secretary specifies in the citation that the seat belt in the Grove crane was "not worn during over-the-road traveling."

National Engineering's safety manual contains a rule under "Motor Vehicles and Mechanized Equipment," which provides, "Buckle your seat belt before operating" (Exh. C-20, p. 20). National Engineering's policy was that "seat belts on the picker were to be worn if they were out in traffic and they were driving like a vehicle" (Tr. 85).

The 28-ton Grove crane was equipped with a standard seat belt (Tr. 84). Ruthsatz admitted that he never used the seat belt during any operation (Tr. 359, 488). He stated that he had never been told by National Engineering superintendent Michael Hearn or anyone else with National Engineering to wear a seat belt when traveling over the road (Tr. 487).

National Engineering argues that 29 C.F.R. § 1926.95(a) does not encompass seat belts. However, under the identical General Industry Standard, § 1910.132(a), the Review Commission has recognized "that seat belts are a form of protective equipment." *Ed Cheff Logging,* 9 BNA OSHC 1883, 1888 (No. 77-2778, 1981). The same reasoning applies here. Section 1926.95(a) applies to seat belts.

National Engineering also argues that it had no knowledge that Ruthsatz was not wearing his seat belt. While the Secretary does not contend that the Company had actual knowledge, he argues that with the exercise of reasonable diligence National Engineering could have known of Ruthsatz's habitual failure to wear a seat belt. Superintendent Hearn stated that, despite National Engineering's policy that seat belts be worn, "I don't recall going up to see if [Ruthsatz] did have one or he didn't have one, or was wearing it or not wearing it" (Tr. 85). Where a cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993).

National Engineering asserts the affirmative defense of unpreventable employee misconduct with regard to this item. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). While National Engineering did have a work rule requiring its employees to wear safety belts, it did not

adequately communicate that rule to Ruthsatz, nor did it take steps to discover violations or enforce the rule.

The Secretary has established that National Engineering violated §1926.95(a). That the violation was serious is demonstrated by the severity of Ruthsatz's injuries in this case.

Item 8: Alleged Serious Violation of 29 C.F.R. § 1926.1053(b)(16)

Section 1926.1053(b)(16) provides:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

Coffelt observed National Engineering Superintendent John Karason use a 20-rung portable aluminum ladder positioned against the ravine embankment (Exh. C-12; Tr. 363). The side rails of the ladder were warped and several of the rungs were pitted and warped (Exhs. C-26, C-27; Tr. 364-366).

William Bunner, National Engineering's safety director, stated that "if a ladder is defective, our rule is to remove it from service" (Tr. 300). National Engineering argues that the aluminum ladder at issue "had been removed from service and placed in an out-of-service area." Coffelt testified, however, that when he photographed the ladder as it appears in Exhibits C-26 and C-27, "[i]t was laying flat on the concrete pad"(Tr. 441). There was nothing to indicate that the ladder had been marked as defective, tagged, or removed from service..

National Engineering also implies that the ladder was only used on an emergency basis to aid in the rescue of Ruthsatz. Nothing in the record supports this implication (Tr. 436-439).

The hazard created by National Engineering's failure to remove the ladder was that the rungs or the side rails could collapse, resulting in fractures and multiple injuries for the employee using the ladder (Tr. 367). The violation was serious.

Citation No. 2

Item 1a: Alleged Willful Violation of 29 C.F.R. § 1926.550(b)(2), or, Alternatively, of 29 C.F.R. § 1926.550(a)(1).

The Secretary alleges that National Engineering willfully violated 29 C.F.R. § 1926.550(b)(2), or, in the alternative 29 C.F.R. § 1926.550(a)(1).[1] Section 1926.550(b)(2) incorporates ANSI B30.5-1968, Section 5-3.2.3(I), which provides in pertinent part:

> Outriggers shall be used when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane.

The Secretary charges that National Engineering failed to extend the outriggers and stabilizers on the Grove crane. The outrigger pads were down but not extended (Tr. 233, 510-511). The day of the accident, Ruthsatz placed an outrigger pad 24 to 30 inches from the edge of the remaining asphalt road surface along the ravine. The outrigger on the other side of the crane was lined up with the concrete barriers used to close one lane of traffic. If fully extended, the outrigger would have been in the lane of traffic (Exhs. C-7, C-18; Tr. 508-510).

The Grove crane has two capacity charts. One capacity chart is used for the operation of the crane on outriggers, and the other is used for the operation of the crane on "rubber," or tires (Exh. C-14). In a situation such as the one in the instant case, where the outriggers are down but not fully extended, the rubber chart is used to calculate the crane's lifting capacity (Tr. 155).

Ruthsatz's operating radius was approximately 25 feet (Tr. 514, 543). The boom length was approximately 45 feet, and the angle was between 40 and 50 degrees (Tr. 511, 513). Robert DeBenedictus, a crane and rigging safety consultant, testified for National Engineering (Tr. 131). He calculated that the 28-ton Grove crane operated at a 25-foot radius has a lifting capacity of 5,120 pounds without the outriggers extended (Tr. 148). The mats lifted by the crane were each 24 feet long, 4 feet wide, and 10 inches thick. DeBenenictus viewed the mats and calculated their weight to be approximately 4,000 pounds (Tr. 148-149). This is consistent with Ruthsatz's estimate that

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[1] Section 1926.550(b)(2) provides in pertinent part:

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

the mats were between 2,000 and 5,000 pounds (Tr. 489).[2] Adding the weight of the load block, the weight of the ribbing, and any other apparatus on the machine, such as a stowed jib, DeBenedictus calculated a total weight of 4,666 pounds (Tr. 149).

The weight of the mats was within the lifting capacity of the 28-ton Grove crane as given on the rubber chart. The Secretary has failed to establish a violation of 29 C.F.R. § 1926.550(b)(2).

In the alternative, the Secretary alleges that National Engineering violated 29 C.F.R. § 1926.550(a)(1), which provides in pertinent part:

> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks.

The Secretary has failed to show that National Engineering did not follow the manufacturer's specifications. He cites to a rule in National Engineering's safety manual that states that outriggers must be fully extended before lifting with cranes (Exh. C-20, pp. 11, 12). But the operator's manual for the Grove crane, which contains the manufacturer's specifications, states (Exh. C-21, p. 4-17):

> THE OUTRIGGERS MUST BE FULLY EXTENDED AND SET BEFORE ANY OTHER OPERATION OF THE CRANE IS ATTEMPTED, UNLESS LIFTING ON THE RUBBER.

National Engineering was lifting on the rubber in this case, and the pick was within the crane's lifting capacity. The alleged violation has not been established.

Item 1b: Alleged Willful Violation of 29 C.F.R. § 1926.550(a)(1)

The Secretary charges that cribbing was not used to distribute the load where firm footing was not supplied for the Grove crane along the ravine, in violation of 29 C.F.R. § 1926.550(a)(1).

Coffelt testified that the crane was not set up on the concrete pavement (Tr. 383-384, 433). National Engineering used no timbers, cribbing, or other structural members under the Grove crane

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[2] John DeLuca, National Engineering's vice president general superintendent at the time of the accident, testified that the weight of the mats varied "from two to three tons depending on the type of timber used and the amount of dirt on them" (Tr. 275). DeBenedictus's estimate of 4000 pounds is deemed the more credible one. DeBenedictus actually measured the mats and based his weight calculations on these measurements, taking into account the type of wood used.

(Tr. 380). Coffelt did not observe the crane as it was actually set up. He only viewed the area after the crane had fallen into the ravine.

Ruthsatz testified that the crane "had all four wheels up on the black top" (Tr. 472). The crane was 24 to 30 inches from the edge of the road surface (Tr. 509). Ruthsatz explained that "we never used cribbing because we was on concrete asphalt" (Tr. 536). Ruthsatz's statements regarding the position of the crane on the asphalt is corroborated by Zane Scott, Ruthsatz's assistant, who was present when the crane was set up (Tr. 472): "[W]e had all four wheels up on the black top. . . and we had the [outrigger] pad down approximately about a foot and a half from the culvert." They testified the concrete was 8 to 9 inches thick with a reinforced base; the asphalt overlaying the concrete was 4 to 6 inches thick (Tr. 120, 542).

The manufacturer's capacity chart for the Grove crane contains "Notes to Lifting Capacities," which states in part (Exh. C-14):

> The crane shall be leveled on a firm supporting surface. Depending on the nature of the supporting surface, it may be necessary to have the structural supports of sufficient strength under the outrigger floats or tires to spread the load to a larger bearing surface.

The operator's manual states, "Use adequate cribbing under outrigger floats to distribute weight over a greater area. Check frequently for settling" (Exh. C-21, p. 2-14).

Nothing in the manufacturer's specifications requires that cribbing be used in the circumstances of the present case. Ruthsatz set the crane on a level, hard surface. The Secretary has failed to establish that National Engineering violated 29 C.F.R. § 1926.550(a)(1).

Item 1c: Alleged Willful Violation of 29 C.F.R. § 1926.550(b)(2), or, in the alternative, of 29 C.F.R. § 1926.550(a)(1)

The Secretary alleges that National Engineering violated 29 C.F.R. § 1926.550(b)(2), or, in the alternative, 29 C.F.R. § 1926.550(a)(1), by failing to adequately assess the ground conditions before the crane was used to move the timber mats. The Secretary cites ANSI standard § 5-1.11.1(d) of B30.5-1968, as incorporated by 29 C.F.R. § 1926.550(b)(2):

> The effectiveness of these preceding stability factors will be influenced by such additional factors as freely suspended loads, track, wind or ground conditions, condition and inflation of rubber tires, boom lengths, proper operating speeds for

existing conditions, and, in general, careful and competent operation. All of these shall be taken into account by the user.

DeBenedictus concluded that the crane fell into the ravine because of loss of ground support (Tr. 210-211).

The Secretary contends that this loss of ground support was foreseeable, given the conditions known about the area in which National Engineering was drilling. These conditions, as cited by the Secretary, include: The worksite was a soil erosion project to buttress a road that threatened to slide into a ravine; 12 feet of the road had been removed to excavate the trench; 35 to 40 feet from where Ruthsatz set up the crane; National Engineering had drilled into an existing sewer line the preceding month (Tr. 333-336); there were six manholes in the area (Exh. C-4; Tr. 24, 320); and the week before the accident there had been "heavy" rain.[3]

DeBenedictus testified that from his observation of the accident site, he determined that the soil conditions provided proper ground support for the crane (Tr. 159). DeBenedictus did not believe that the crane operator or the work crew could have anticipated the loss of ground support (Tr. 160).

The Secretary offered no expert testimony explaining why the conditions he cited necessarily lead to a conclusion that the area where Ruthsatz set up was unstable. The crane was set up on a level concrete and asphalt surface. The fact that there were manholes in the area or an old sewer line 40 feet away do not mandate a conclusion that the ground beneath the roadway was unstable. The only expert who testified at the hearing stated that he would not have done "anything different than this operator on this crew" (Tr. 160).

The Secretary has failed to establish that National Engineering did not adequately assess the stability of the ground, under either 29 C.F.R. § 1926.550(b)(2) or 550(a)(1).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under section 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good

[3] Coffelt testified that he contacted the National Weather Service and learned that on August 13, 1994, six days before the accident, the rainfall "was in excess of three inches" (Tr. 385).

faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

National Engineering employed approximately 500 employees (Tr. 358). It had a history of previous violations (Tr. 357). There was no evidence of bad faith on National Engineering's part.

It is determined that $2,500.00 is an appropriate penalty. Item 4 of Citation No. 1 concerns National Engineering's failure to ensure that its crane operator was wearing a seat belt while moving the crane. The gravity of this offense is high. A penalty of $1,500.00 is assessed. The gravity of Item 8 of Citation No. 1 is moderate. A penalty of $1,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 2 of Citation No. 1, alleging a violation of 29 C.F.R. § 1926.(b)(2), is vacated and no penalty is assessed;

2. Item 4 of Citation No. 1, alleging a violation of 29 C.F.R. § 1926.95(a), is affirmed and a penalty in the amount of $1,500.00 is hereby assessed;

3. Item 8 of Citation No. 1, alleging a violation of 29 C.F.R. § 1926.1053(b)(16), is affirmed and a penalty in the amount of $1,000.00 is hereby assessed;

4. Items 1a and 1c of Citation No. 2, alleging violations of 29 C.F.R. § 1926.550(b)(2), or, in the alternative, of 29 C.F.R. § 1926.550(a)(1), are hereby vacated and no penalty is assessed;

5. Item 1b of Citation No. 2, alleging a violation of 29 C.F.R. § 1926.550(a)(1), is vacated and no penalty is assessed.

/S/ PAUL L. BRADY

PAUL L. BRADY
Judge

Date: March 25, 1996