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SECRETARY OF LABOR
Complainant,
v.
L. G. DEFELICE
Respondent.

OSHRC DOCKET
NO. 92-3349

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 February 25, 1994. The decision of the Judge will become a final order of the Commission on March 28, 1994 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 March 17, 1994 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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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.

Date: February 25, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3349

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SECRETARY OF LABOR,

Complainant,

v.

L. G. DEFELICE, INC.,

Respondent.

OSHRC Docket No. 92-3349

APPEARANCES:

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For Complainant

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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

L. G. Defelice, Inc. (Defelice), is a prime contractor specializing in highway construction (Tr. 381). It was the general contractor's job to rehabilitate and, where necessary, to replace specific portions of roadway and bridges along a two-mile stretch of Interstate I-70 near Washington, Pennsylvania (Tr. 11-12, 77).

On August 24 and 25, 1992, Occupational Safety and Health Administration (OSHA) Compliance Officer Vance Delsignore conducted a referral inspection of Defelice under the Occupational Safety and Health Act of 1970 (Act). The Secretary alleges that Defelice was

in serious violation of §§ 1926.601(b)(4), 1926.20(b)(1), and 1926.20(b)(2) by operating a truck without a backup alarm or observer, and that its safety program and inspection of its jobsite were deficient. He alleges a willful violation of § 1926.550(a)(15)(i) for failure to maintain a 10-foot clearance of electrical lines and an "other" than serious violation of § 1926.550(a)(12) for alleged distortions in a crane windshield. Defelice denies that the conditions cited constituted violations.

ALLEGED SERIOUS CITATION NO. 1

Item 1a: § 1926.601(b)(4)

The Secretary charges Defelice with a violation of § 1926.601(b)(4) for failure to have operational backup alarms or signal observers on two trucks owned and operated by Defelice. Delsignore asserts that one of its employees was directing the backup operation. The standard requires:

> (4) No employer shall use any motor vehicle equipment having an obstructed view to the rear unless: (i) The vehicle has a reverse signal alarm audible above the surrounding noise level or: (ii) The vehicle is backed up only when an observer signals that it is safe to do so.

Delsignore and Defelice Vice-President Jonathan Miller, who was a part of the walk-around party, observed a tri-axle dump truck backing up without a functioning alarm. Miller asked the driver if he had checked the alarm the previous morning and the driver informed Miller he had (Tr. 250). A second dump truck had pulled into the area and was waiting to be filled with dirt (Tr.57). In an attempt to convince Delsignore that the lack of an alarm on the first truck was a "fluke," Miller directed the second dump truck to back up. The backup alarm on that truck likewise did not operate (Tr. 268). Miller radioed for a mechanic, and the alarms were immediately repaired.

Although not an issue raised during the inspection, Miller contends that foreman Nelson Kletski was standing within 15 feet of the dump truck, on the right side of the truck, directing the driver (Tr. 248-249). Miller testified that the driver was observing the signalman through his right-hand mirror.

Was someone directing backup operations as Defelice attests? Delsignore, on the other hand, recalled that "a foreman" (whom he incorrectly identified as Gregory Nunes) was 50 to 60 feet from the truck,"walking around and talking with different people that were working there at the jobsite" (Tr. 60, 125). Delsignore, who believed someone told him that the foreman's name was Gregory Nunes, considered the foreman to be the exposed employee. At one point in his testimony, Delsignore recalled that an employee was standing within 15 feet of the truck (Tr. 59). While Delsignore was firm in his recollection that no one was directing the dump trucks or keeping people away from standing behind the trucks, he did not speak with the operator or anyone else at this job location (Tr. 124-125).

Defelice maintained not only that Kletski was directing the dump truck, but that it was its general policy to assign a signal person to direct the trucks (Tr. 251). Neither party presented the testimony of the operator or Kletski. Delsignore's misidentification of Kletski indicates a less than precise observation of the scene. Whether the vehicle backed up only when an observer signaled that it was safe to do so is a disputed matter between two eyewitnesses, one of whom spoke to the operator and was familiar with its operation. The Secretary has failed to carry his burden of proof that the violation occurred. The violation is vacated.

Items 1b and 1c: § 1926.20(b)(1) and § 1926.20(b)(2)

The Secretary alleges that Defelice violated § 1926.20(b)(1) for failure to enforce its written safety program and § 1926.20(b)(2) for failure to sufficiently inspect the worksite to eliminate hazards. Admitting that Defelice had an adequate safety program "on paper," the Secretary maintains that it did not translate its written program to the field.

The standards provide:

> 20(b) *Accident prevention responsibilities.*
>
> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(2) Such programs shall provide for frequent and regular inspections...by competent persons designated by the employers.

Defelice correctly asserts that the simple fact that other violations occurred at a worksite does not establish that an employer had defective safety or inspection programs. However, proof common to other violations may establish § 1926.20(b) violations without being duplicative. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶ 29,964 (No. 87-2059, 1993).

Because § 1926.20(b) is a general standard, the Commission and the courts have held that an employer must instruct its employees in the recognition and avoidance of hazards which a reasonably prudent employer would have been aware. The "reasonably prudent employer" standard applies equally to safety inspection of worksites. *E.g., R&R Builders, Inc.*, 15 BNA OSHC 1383, 1991 CCH OSHD ¶ 29,531 (No. 88-282, 1991); *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991). Although grouped with item 1 (no backup alarm), Delsignore explained that the alleged inadequacy of the safety program and inspections also related to employees working under overhead electrical lines (Tr. 64, 66).

In order to comply with § 1926.20(b)(1), employees must be instructed on dangerous conditions that they may reasonably be expected to encounter in their workplace. Three electrical lines crossed the main accessway, which was near the top of a rise, at heights of 22 to 23 feet (Tr. 154). The heavy equipment which regularly traveled the accessway was more than 11 feet high in its lowest configuration (Tr. 239, 241). A worksite having less than an 11-foot clearance between overhead electrical wires and equipment was the type of hazard a reasonable employer would identify and train employees to avoid.

Defelice had a safety orientation program and conducted weekly safety meetings. Employees were required to attend and to verify their attendance at meetings. The safety instruction relating to overhead electrical lines, however, was only a most general admonition to "approach and handle" high voltage lines taking "complete precautions" (Exh. C-1, pg. 11). Defelice relies heavily on the fact that a 4-foot clearance requirement applied to

the facts of this case. Yet employees were not instructed on either the distances of the 4-foot or 10-foot clearance requirements or on the circumstances under which the varying distance requirements would apply. The fact that a veteran 45-year crane operator may be able to maneuver the area does not relieve Defelice of its responsibility to train its employees on appropriate clearances. It should have relied not on the skill of one employee but upon a specific safety rule known by all its employees. Since Defelice's supervisors were aware of the specific hazard but failed to train employees in recognizing and avoiding it, the company had knowledge of the inadequacy of its training program. A violation of this standard is serious if the specific deficiency (*i.e.*, electrical shock) is serious. Electrical shock results in death or serious bodily injury. The Secretary has established a serious violation of § 1926.20(b)(1). Defelice employs 200 workers, half of whom worked on the Washington project. Defelice had a history of previous serious violations (Tr. 50). The gravity of the violation is high (Tr. 208, 343). A penalty of $1,000 is assessed.

The standard at § 1926.20(b)(2) requires frequent inspections by a competent person. Francis Nations, operations superintendent, and other management personnel, including Jonathan Miller, testified that they regularly inspected the jobsite (Tr. 230). Defelice further relies on the fact that a technical consultant with its insurance carrier examined the worksite on several occasions. In fact, management had identified the existence of the overhead lines as a potential hazard and had discussed how these and other electrical lines should be dealt with (Tr. 230-231, 371, 373). Its supervisors' assessment of the hazard was faulty since they "decided to not use insulation because of the limited amount of work being done around [the wires]" (Tr. 231). Their error in judgment alone does not establish the violation. The Secretary's position is that a competent person would have insulated the wires over this portion of the accessway. Since the wires were not insulated, the Secretary asserts the inspections were not performed by a competent person. The backgrounds of persons inspecting its worksite was sufficient to qualify as "competent." The violation is vacated.

ALLEGED WILLFUL CITATION NO. 2

Item 1: § 1926.550(a)(15)(i)

On two separate occasions Defelice equipment came into contact with overhead electrical lines. The Secretary asserts that either or both of the occurrences were willful violations of § 1926.550(a)(15)(i). Defelice admits that the equipment contacted the electrical lines but denies that this constituted a violation or that the violation should be characterized as willful. It asserts as a defense that the events were unforeseeable and that Defelice was without knowledge of the hazard. It further posits that, in any event, the cited conditions are governed by Subpart (iii) rather than the cited Subpart (i).

APPLICABLE STANDARD

The standards at issue provide:

> (a)(15) Except where electrical distribution and transmission lines have been de-energized and visibly grounded ...or where insulating barriers...have been erected.., equipment or machines **shall be operated** proximate to power lines only in accordance with the following: (i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be **10 feet.**
>
> (iii) **In transit** with no load and boom lowered, the equipment clearance shall be a minimum of **4 feet** for voltages less than 50 kV . . . .
> (Emphasis added)

Admitting that its equipment regularly traveled under the electrical wires, Defelice denies that it "operated" under the wires at the times of the accidents. Defelice argues that since the equipment was "in transit" at those times, only § 1926.550(a)(15)(iii) could apply and that the incorrectly cited standard must be vacated. The argument is rejected for reasons discussed below.

Defelice mistakenly assumes that Subpart (15)(i) applies only when the crane is set up to perform an "operation." Proper construction of this standard was discussed in *H. B.*

Zachry Co. v. OSHRC, 638 F.2d 812 (5th Cir. 1981). In *Zachry*, the crane was to travel several hundred feet with its boom lowered carrying a load of pipe. Zachry claimed that these circumstances were not governed by any standard since the term "operating" in Subpart (15)(i) did not apply whenever a crane "traveled." Rejected as too narrow a reading of the standard, the Review Commission found the term "operation of equipment or machines" may cover cranes in transit. On appeal the First Circuit agreed and further explained:

> It is more logical and in keeping with the standard's terms and its purpose to find (15)(iii) as an exception--*only* when a crane is in transit without a load--to the general rules of (15)(i) & (ii) concerning minimum clearances between cranes and electrical transmission lines whether or not the crane is loaded or in transit. It is doubtful that (15)(iii) would have been needed if (i) & (ii) were intended only to regulate cranes operating in a stationary position . . . .
>
> 638 F.2d at 818

The *Zachry* analysis does not mean that Subpart (15)(iii) is an "exception" in a traditional sense which shifts the burden of proof. *See e.g., Finnegan Construction Co.*, 6 BNA OSHC 1496, 1497, 1978 CCH OSHD ¶ 22,675, p. 27,371 (No. 14536, 1978). It does indicate that the terms of 15(iii) must be strictly applicable if 15(iii) is to override the 10-foot clearance requirement of 15(i). As noted in *Zachry*, and as demonstrated and acknowledged in this case, electrical lines present significant potential hazards on construction jobsites. Considering the factual circumstances here, the incidents were properly cited by the Secretary under Subpart 15(i). The occurrences did not fit within each of the terms of 15(iii), *i.e.*, the equipment was not (1) in transit, (2) with no load, and (3) with the boom lowered. Thus, the standard permits a lesser clearance when brief exposure under power lines is anticipated and equipment is fully in a transportation mode.

Contrary to respondent's argument, equipment may travel at a worksite without being considered "in transit" for purposes of 15(iii). The standard does not contemplate that "in transit" is to be so broadly defined that it encompasses every occasion that equipment moves at a construction site.

The area where both accidents occurred was a dirt accessway which inclined upward at the point where electrical lines crossed it. The accessway had been a part of the highway before Defelice removed concrete in order to facilitate the planned repavement of the road at a later date (Tr. 36). The accident area was a part of the overall construction site.

On August 4, 1992, the backhoe was not "in transit" as defined by Subpart 15(iii). The specific work area was approximately 75 feet beyond the overhead lines at the accessway (Exh. R-4; Tr. 306-307). The activity required by the Kobelco 916 backhoe operator on August 4, 1992, was not merely to move the equipment from one point to another, although that was his ultimate objective. The backhoe operator was expected to maneuver over or around or to move a 4-foot dirt pile on the accessway under the lines (Tr. 307-309). As foreman Gregory Nunes explained:

> A. As [Lloyd] proceeded up the ramp, going westbound, he had cleared the lines. We had him on the flat. I had him turned around. I stopped the operator, got out of the machine, and we walked up and I explained to him exactly what needed to be done . . . .
>
> Q. In your opinion, could he have done that? Could he have gone around [the 4-foot dirt pile]?
>
> A. Yes, he could have, but he would have had to actually, I believe, drag some material out of his way to make it a little better.
>
> (Tr. 306-308)

Since Westfall was required to maneuver the equipment and remove dirt from the dirt pile, the backhoe was not strictly "in transit," and Subpart 15(iii) does not apply.

The standard likewise cannot apply to conditions existing on August 22, 1992. The crane was to be driven approximately 100 to 150 feet from the area where the overhead wires crossed the accessway. The operator of the P&H crane proceeded up the incline of the accessway with the boom raised 3 feet (Tr. 320, 324). Since the boom was not in the lowest transportation mode, as required by 15(iii), that subpart does not apply.

Moreover, the operations superintendent knew that equipment such as the P&H crane regularly maneuvered under the wires. As he described it:

> But, Bill Caldwell, he could go up the ramp, swing his boom sideways and clear the thing at 11 feet. It's operator--I'm not knocking [Lloyd], but he was not familiar with the machine. Bill ran this thing every day. He could run up to the top of the hill, and when he got to the lines, swing his boom, and get right up underneath it, and he cleared this thing by 11 feet. (Tr. 357).

The cited standard at Subpart 15(i) is applicable to both incidents at issue.

BACKGROUND

From the beginning, the accessway was a potential problem for Defelice where it crossed under electrical wires. The bottom conductor measured 22 feet above the ground; the second and third lines measured 23 feet above the ground (Tr. 154-155). These measurements were taken after the 4-foot mound had been removed (Tr. 173).

The Kobelco backhoe involved in the August 4 incident measured 11 feet 4 inches in height as it sat in its travel mode. Similarly, the P&H crane involved in the accident of August 22 measured 11 feet 7 inches in height when the boom was completely folded (Exhs. R-5, R-7; Tr. 239, 241). At best, only a 10-foot 8-inch to 10-foot 1-inch clearance existed when the equipment crossed under the lines. Measured from the 4-foot mound existing before the August 4 accident, the ground-to-wire distance was 6 feet 8 inches. Defelice considered that it must maintain a 4-foot clearance whenever equipment was in transit under the lines. Since it did not anticipate that equipment would "operate" under the wires once the pavement had been removed, it viewed all other movement of the equipment as being "in transit."

DISCUSSION

To establish a violation of a specific standard, the Secretary must prove by a preponderance of the evidence that the standard applies, that the terms of the standard were not met, that employees had access to the condition, and that the employer either

knew of the condition or could have known with the exercise of reasonable diligence. *E.g., Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

On August 4, 1992, the boom of the backhoe struck electrical lines when it angled upward as it crossed the 4-foot dirt mound along the accessway (Tr. 289-290). The backhoe operator, Eugene Westfall, was moving the backhoe to begin excavation work at a piling midway between the accident location and the bridge (Exhs. C-1, pg. 11; R-4). Defelice denies that it had knowledge of the violation. However, its operational foreman, Gregory Nunes, directed Westfall in the operation. Nunes specifically stopped Westfall at the portion of the accessway which resulted in the accident. Nunes "went over with [Westfall] about the wires. I said I didn't want to take any chances whatsoever" (Tr. 308). A superior's knowledge and actions normally are imputed to their employers. *Dover Elevator Co.*, 15 BNA OSHC __, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991); *Pride Oil Well Service*, 15 BNA OSHC 1809 at 1814, 1992 CCH OSHD ¶ 28,876 at p. 40,584 (No. 87-692, 1992). Nunes' knowledge of the violation is imputed to Defelice.

Eighteen days later the August 22, 1992, incident occurred at roughly the same location as the first accident. August 22 was a Saturday, and a skeleton crew was setting up newly-delivered equipment. Present were an operations superintendent, Francis Nations; a carpenter "foreman," John Evans; a master mechanic, Jack Schaffer; and other employees, including Maurice Lloyd, a mechanic-greaser (Tr. 313, 353). When parts for the new machine were not delivered, Nations left to call the supplier. While he was gone, Evans informed Schaffer that "we have to bring [the crane] up" to allow the men to work on the new machine (Tr. 341). Schaffer and Evans went to the crane but were having difficulty raising its outriggers. Lloyd observed the problem raising the outriggers and offered to help (Tr. 336).

Maurice Lloyd worked under Schaffer (Tr. 334). Lloyd was qualified by his union to operate various types of equipment, including the P&H crane, which Schaffer directed him to operate that day. Lloyd had previously operated this and other heavy machinery, usually in conjunction with his work in maintenance (Tr. 313, 327). When Lloyd was successful in

raising the outriggers, Schaffer told Lloyd to take the crane "up on top of the hill to the area where they wanted it" (Tr. 317). The accessway was narrow as Lloyd proceeded up the incline. Attempting to determine how much room remained on the sides, he raised the boom 3 feet and into the electrical wires (Tr. 324). There were no injuries, but West Penn Power was required to repair the lines and investigate this second incident (Tr. 239).

Defelice denies that it had knowledge of employees' actions in bringing up the P&H crane. If Evans and Schaffer were supervisory employees, their knowledge of the violation is imputed to the company. Defelice distinguishes between management or "operational" supervisors (only Nations was "operational") and "union" supervisors (such as Evans and Schaffer). Whether an employee is paid hourly and has authority to hire or fire are relevant but are not dispositive of management status for purposes of the Act. Schaffer was, as Lloyd considered him to be, Lloyd's first-line supervisor, whose directions must be complied with (Tr. 331, 334). As with other supervisory staff, Schaffer had his own "office" with telephone and parts cabinet (Tr. 352). Such "union" supervisors are comparable "lead men" or working foremen (Tr. 351-352, 359). In Defelice's supervisory scheme, union supervisors direct employees' actions and have responsibilities and authority sufficient to bind the company. This fact is illustrated by Nation's reaction to finding the crane "up the hill" when he returned from making his phone call. Nations was not surprised to see the crane there, and "I didn't say anything because I would have probably g[iven] the order sooner or later to get the crane up there myself, but it was up there" (Tr. 354). The supervisors' knowledge of the August 22 violation is imputed to Defelice.

DEFELICE'S EMPLOYEE MISCONDUCT DEFENSE

Defelice sought to establish its defense of "unpreventable employee misconduct." The defense recognizes that an employer is not held liable for idiosyncratic conduct of an employee in carrying out orders which violate a company's safety policy. However, the burden of compliance remains with the employer who must affirmatively show that: (1) it established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover

violations of those rules and effectively enforced the rules when violations were discovered. *E.G., Hamilton Fixture*, 16 BNA OSHC 1073, 1993 CCH OSHD ¶ __ (No. 88-1720, 1993); *Gary Concrete Prods., Inc.*, 15 BNA OSHC at 1055, 1991 CCH OSHD ¶ __ at p. 39,452 (No. 86-1087, 1991).

The only safety rule which arguably pertains is found in one paragraph of the company's *Employee Handbook and Safety Rules*, which reads:

> High voltage electric equipment and transmission lines are to be approached and handled only by persons qualified and authorized to do so and only after complete precautions have been taken for the safety of themselves and others. (Exh. C-1, pg. 11)

It is not sufficient to establish the defense for safety rules *in general* to have been communicated and enforced. The safety rule must be specific enough to advise employees what they must do to avoid the hazard. *See Hamilton Fixture, supra*. Defelice's work rule was so general that it is questionable whether it even applied to the hazard. There was no enforcement of even the general work rule. Defelice's superintendent, Augie Aresta, stated that he was "very disappointed" in the men and that "if it ever happened again, [he would] fire the entire bunch" (Tr. 372). This falls far short of the type of effective enforcement required by the defense. Signs provided by the utility, even assuming arguendo they were posted, is not a substitute for enforcement of the company's own work rule. Employees must be given specific instructions and training on identifiable hazards, not merely blamed if accidents occur. The defense has not been met.

WILLFULNESS

Was the violation of § 1926.550(a)(15)(i) willful?

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.G., Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *Id.*

> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. *Id.* Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances. *Id.* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990).

Asserting that Defelice had a heightened sense of the illegality of its conduct, the Secretary notes that in May 1992, West Penn Power furnished Defelice a series of warning signs relating to overhead and underground electrical wires (Exh. C-10), and that its employee manual contained the previously quoted section (Tr. 41).

Defelice interpreted §1926.550(a)(15)(iii) as permitting it to maintain a clearance of 4 feet under the wires on the accessway when the equipment was "in transit." At the beginning of its job, Defelice assessed the need for electrical protection for the jobsite, including use of insulated covers for the electrical lines. While securing the insulated covers for other areas of the jobsite, it determined that it would not need the insulation at the location involved in the accidents since it intended to maintain a 4-foot clearance. In response to the August 4 incident, Defelice removed the 4-foot dirt mound which it considered to be the cause of the accident. Defelice should have secured insulated line covers for the electrical conductors under which its equipment could move. However, its understanding of the requirements of 15(iii), though too broad, does not establish a "heightened awareness" necessary to prove a willful violation of the Act. Although not willful, the violation is serious. An accident could endanger not only those touching the outside of the machinery which contacted electrical lines but, because of ground gradience, those merely approaching it (Tr. 208). Death or serious injury is the expected result. Considering the statutory factors and the high gravity of the violation, a penalty of $4,000 is assessed.

ALLEGED "OTHER" THAN SERIOUS CITATION NO. 3

Item 1: § 1926.550(a)(12)

The Secretary observed two cracks in the windshield of the P&H crane while it was operating on August 24, 1992. One crack ran vertically up the side of the windshield, and the other ran horizontally across it (Exh. C-15).

The standard provides:

> (12) All windows in cabs shall be of safety glass, or equivalent, that introduces no visible distortion that will interfere with the safe operation of the machine.

Delsignore stated that he did not observe the scene from inside the crane cab since he did not wish to bring the operator down from the equipment (Tr. 71). The simple existence of a crack does not *per se* constitute a violation. *Capitol Tunneling Co.*, 15 BNA OSHC 1304, 1991 CCH OSHD ¶ 29,894 (No. 89-2248, 1991). Neither photographs nor testimony established that the cracks in the P&H windshield created a distorted view for the operator. Delsignore speculated that cracks "could present distortions" and had the "potential" to distort (Tr. 71, 128). Lloyd, who operated the crane on August 4, 1992, did not find that the cracks in the windshield distorted his view (Tr. 326). The Secretary has not established a violation, and it is vacated.

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 on the foregoing decision, it is ORDERED:

(1) That the violation of § 1926.601(b)(4) is vacated;

(2) That the violation of § 1926.20(b)(1) is affirmed as serious and a penalty of $1,000 is assessed;

(3) That the violation of § 1926.20(b)(2) is vacated;

(4) That the violation of § 1926.550(a)(15)(i) is affirmed as serious and a penalty of $4,000 is assessed; and

(5) That the violation of § 1926.550(a)(12) is vacated.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: February 15, 1994