



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1825 K STREET NW  
4TH FLOOR  
WASHINGTON, DC 20006-1246

FAX  
COM (202) 634-4008  
FTS (202) 634-4008

SECRETARY OF LABOR  
Complainant,

v.

FUELLGRAF ELECTRIC COMPANY  
Respondent.

OSHRC DOCKET  
NO. 92-1065

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 8, 1993. The decision of the Judge will become a final order of the Commission on March 10, 1993 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 1, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: February 8, 1993

DOCKET NO. 92-1065

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
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Michael E. Wright, Safety Director  
Fuellgraf Electric Company, Inc.  
600 S. Washington Street  
Butler, PA 16001

John H. Frye, III  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Room 417/C  
1825 K Street, N.W.  
Washington, DC 20006 1246

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SECRETARY OF LABOR,

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FUELLGRAF ELECTRIC COMPANY,

Respondent.

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Docket No. 92-1065

Appearances:

Anita Eve Wright, Esquire  
Office of the Solicitor  
United States Department of Labor  
Philadelphia, Pennsylvania  
For Complainant

Michael D. Wright  
Safety Director  
Fuellgraf Electric Company  
Butler, Pennsylvania  
For Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

On January 15 and January 17, 1992, OSHA compliance officer Michael Laughlin inspected a construction worksite at the Connoquenessing Valley Elementary School in Zelienople, Pennsylvania. Respondent Fuellgraf Electric Company (Fuellgraf) was one of several contractors working on that site. Subsequently, on February 26, 1992, Fuellgraf received one serious citation which enumerated three items and one other than serious

citation which also enumerated three items. Respondent Fuellgraf contested only Items 1(a), 2(a), and 3 of the serious citation. Those violations which were not contested and the penalties proposed therefor became a final order of the Occupational Safety and Health Review Commission by operation of law.<sup>1</sup>

The Secretary filed a complaint on May 11 and Respondent answered on July 2, 1992. Because the answer did not address the allegations of the complaint with respect to the nature and the place of Respondent's business and the jurisdiction of the Commission, those allegations are deemed to be admitted.<sup>2</sup>

As a preliminary matter at the hearing, the Secretary's counsel moved to vacate Item 2(a) of Citation 1 issued for an alleged violation of 29 C.F.R. 1926.20(b)(1). The grouped penalty attributed to Citation 1, Items 2a, 2b and 2c in the amount of \$500.00 became attributed to Items 2b and 2c.<sup>3</sup>

In a prehearing motion, Complainant also moved to amend Item 1 of Citation 1, which alleges a violation of Section 5(a)(1) of the Act to, allege in the alternative a violation of 29 C.F.R. 1926.20(b)(4). The amendment is based on the same set of facts as the Section 5(a)(1) violation, but is specifically related to the employer's failure to ensure that the operator of the platform was properly trained and qualified to operate the platform. Respondent opposed this motion at the hearing, but did not show that it was prejudiced by it in the course of the hearing. Consequently, the Secretary's motion is granted.<sup>4</sup>

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<sup>1</sup>See § 10(a) of the Occupational Safety and Health Act of 1970, as amended (the Act).

<sup>2</sup>See Commission Rule 34(b)(2), 29 CFR § 2200.34(B)(2).

<sup>3</sup>At the hearing, the Secretary's counsel indicated that the withdrawal of item 2a, which Respondent had contested, raised the issue of whether the \$500 proposed penalty for items 2a, 2b, and 2c was appropriate for items 2b and 2c alone. Respondent's representative, Mr. Wright, indicated that while Respondent did not contest the existence of the condition which led to the issuance of these items, Respondent did contest the appropriateness of the penalty. See Tr. 24-25. Given the nature of the hazard identified in items 2b and 2c, the storage of eight full 100 pound propane tanks inside, I find that the \$500 penalty is appropriate.

<sup>4</sup>Tr. pp. 4-6.

The following items were contested at the hearing.

Standard	Alleged Violation
Section 5(a)(1) of the Act and, alternatively, 29 CFR § 1926.20(b)(4).	Item 1(a) "Gym; Employees were exposed to being struck by and/or falling 15 feet off an aerial lift in that the operator was not properly trained and qualified in [its] safe operation.... Additionally, the [lift] was leaking hydraulic fluid, the steering fluid reservoir was empty, there was no operating manual on site, and the outriggers were not down and locked."
29 C.F.R. 1926.25(a)	Item 3 "Debris was not kept cleared from the following areas: (a) Cafeteria; Employees handling materials where scrap, block, drywall, plastic and insulation were not cleared exposing employees to tripping and fall hazards."

1. Item 1a - The Self-Elevating Platform.

On January 17, the second day of the inspection, Mr. Laughlin observed an employee of Fuellgraf working atop a fully extended self-elevating platform in the gymnasium area of the worksite. The platform was being operated while its outriggers were not down and locked and while it was leaking hydraulic fluid. On interviewing the operator of the self-elevating platform, Mr. Laughlin learned that an operator's manual was not maintained with the platform and that the operator did not perform a pre-operation inspection and function test of the platform. Nor could the operator locate the hydraulic fluid reservoirs on the platform, one of which was empty. Mr. Laughlin concluded that the operator's lack of training created a hazard of the operator falling from the platform. (Tr. 18, 30, 32, 37-39, 66).

As a result, Respondent was cited for a violation of Section 5(a)(1) of the Act. As a means of abatement, the citation referred to the need to develop a training and preventative maintenance program in accord with the manufacturer's specifications and ANSI/SIA A92.6-1990. Respondent believes it is clear that this standard is not applicable, and that, as a result, no citation should have been issued in the first place. In such event, Respondent maintains that the Secretary will not meet the Burden of Proof and the citation must be vacated.

The preface of ANSI/SIA A 92.6-1990, states:

The design and manufacturing requirements of this standard apply to all aerial platforms manufactured on or after the effective dates. All other provisions of this standard apply to both new and existing units delivered by sale, lease, rental, or for any form of beneficial use on or after the effective date.

Respondent argues that the ANSI Standard is not applicable because the date the platform was delivered for beneficial use was eight months before the January 2, 1992, effective date. Respondent's job superintendent, William E. Hindman, indicated that the platform had been continuously on the site since May 1991. (Tr-89, 97).

Respondent is correct that this ANSI Standard, by its express terms, does not apply to the platform which Mr. Laughlin observed in use in the gymnasium. Consequently, Respondent cannot be cited for failure to comply with its terms in using this platform. However, the Secretary has amended this citation to allege a violation of § 1926.20(b)(4).

That standard states:

The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.

The Secretary asserts that the operator's failure to perform a pre-operation inspection and function check, his operation of the lift in the presence of a hydraulic fluid leak and

deficiency, and his inability to locate the hydraulic fluid reservoirs all indicate that the operator was not qualified.<sup>5</sup> Respondent's witness, Mr. Hindman, testified only that the operator had indicated that he had operated the platform on numerous occasions on other jobs and that the two of them had gone "... over the basic safety of keeping the outriggers out and keeping the chains locked...." (Tr.86.)

I find that the Secretary has established by a preponderance of the evidence that Respondent violated § 1926.20(b)(4). The Secretary submits that the gravity of the violation is significant. The violation exposed at least one employee to the hazard of serious physical injury, particularly the platform operator as the result of a 15 foot fall from the top of the platform.

Mr. Laughlin reduced a gravity based penalty of \$3,500.00 based on the employer's company size, no history of similar violations, and its immediate abatement of the violation. Under the circumstances presented herein, I find that the reduced proposed penalty in the amount of \$875.00 is appropriate and affirm it.

2. Item 3 - The Debris.

Mr. Laughlin cited Respondent for a violation of 29 C.F.R. 1926.25(a) on January 15 because debris was not kept clear from the cafeteria area where the employers maintained their gang boxes. Mr. Laughlin testified that the cafeteria was utilized by all contractors at the site and that Fuellgraf employees had to walk through the cafeteria where there was a significant accumulation of debris, i.e., scrap, block, drywall, plastic and insulation, which presented a tripping hazard. Mr. Laughlin further testified that he inquired of several

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<sup>5</sup>Mr. Laughlin also believed that the operator was in error in operating the platform at its fully extended position without having the outriggers, which were extended, in the down and locked position. However, it is not clear that this operation was in contravention of the manufacturer's specifications. See Tr. pp. 60-66.

individuals how long the debris had been present and was told “at least a week.” The specific source of this information was not identified. Mr. Laughlin indicated that the job superintendent of another contractor indicated that Respondent had been on-site during that period. (Tr. 20-21, cf. Tr. 76). Mr. Hindman acknowledged that the Respondent had one of its five on-site gang boxes located in the cafeteria and that there was debris in the room. (Tr. 97.)

I find this falls short of establishing employee exposure by a preponderance of the evidence. Mr. Laughlin did not encounter any of Respondent’s employees on the day he found the debris. He did not testify that he was informed that they had used that gang box during the period while the debris was present, but only that they were on-site during that period. On this record, a finding of employee exposure requires an assumption that this box was actually used by Respondent’s employees while the debris was present. Given Mr. Hindman’s testimony that the gang box in the cafeteria was one of five on-site and the equivocal nature of the evidence on the length of time the debris was present, that assumption is not justified. Citation 1, Item 3, is vacated.<sup>6</sup>

### 3. FINDINGS OF FACT

All facts relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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<sup>6</sup>Respondent mounted the multi-employer worksite defense with respect to this item and also asserted the citations should be dismissed based on the alleged impropriety of Mr. Laughlin’s inspection of the Connoquenessing Valley Elementary School worksite on January 15. In light of this result, it is not necessary to address these arguments.



4. **CONCLUSIONS OF LAW**

A. **Respondent was at all times pertinent to this decision an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970).**

B. **The Occupational Safety and Health Review Commission has jurisdiction over the parties and subject matter.**

C. **The Secretary of Labor established by a preponderance of the evidence that Respondent breached the standard at 29 CFR § 1926.20(b)(4) as recited in Citation 1, Item 1, as amended. A civil penalty of \$875 is appropriate.**

D. **The Secretary of Labor failed to establish by a preponderance of the evidence that Respondent violated the duty imposed by § 5(a)(1) of the Occupational Safety and Health Act of 1970 as recited in Citation 1, Item 1.**

E. **The Secretary of Labor failed to establish by a preponderance of the evidence that Respondent breached the standard at 29 CFR § 1926.25(a) as recited in Citation 1, Item 3.**

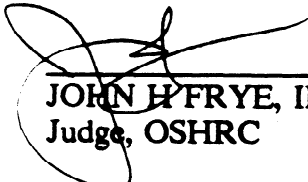
F. **A civil penalty of \$500 is appropriate for the violations stated in Citation 1, Items 2b and 2c.**

VII. **ORDER**

**Based on the above findings of fact and conclusions of law, it is hereby ORDERED that:**

A. **Items 1, 2b, and 2c of Citation 1 are affirmed as serious violations of the Act; and**

**B. A total civil penalty of \$1325 is assessed.**



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JOHN H. FRYE, III  
Judge, OSHRC

**Dated:**

**FEB - 5 1993**  
**Washington, D.C.**