



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

IRWIN STEEL ERECTORS INC.
Respondent.

OSHRC DOCKET
NO. 90-2368

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 30, 1993. The decision of the Judge will become a final order of the Commission on August 30, 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 August 19, 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
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Petitioning parties shall also mail a copy to:

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Room S4004
200 Constitution Avenue, N.W.
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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.
Executive Secretary

Date: July 30, 1993

DOCKET NO. 90-2368

NOTICE IS GIVEN TO THE FOLLOWING:

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E. Carter Botkin
Administrative Law Judge
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SECRETARY OF LABOR,

Complainant,

v.

IRWIN STEEL ERECTORS, INC.,

Respondent.

OSHRC DOCKET NO. 90-2368-S

APPEARANCES:

Daniel Curran, Esquire
Dallas, Texas
For the Complainant.

James Irwin
Roanoke, Texas
For the Respondent, *pro se*.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 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") inspected a construction project in Austin, Texas, where Respondent was performing erection and welding work, from May 10-25, 1990; the project engaged numerous contractors and involved the construction of new manufacturing and administration buildings at a Motorola facility. As a result of the inspection, Respondent was issued a serious citation with nine items and

an "other" citation with three items. Respondent contested the serious citation, and a hearing took place on April 9, 1991.¹

Item 4 - 29 C.F.R. § 1926.352(d)

Vern Bechtel, the OSHA compliance officer who inspected the site, testified that he observed Respondent's work activities on May 17, 22 and 23, 1990, and that James Irwin was the management representative he dealt with during his inspection. He further testified the company had employees performing welding on the roof of one of the structures and that there was no fire extinguisher at that level; Irwin stated he knew there was no extinguisher on the roof, but said during a later phone conference there had been one 25 feet away. Bechtel did not recall seeing a welder under the deck or Irwin showing him an extinguisher in that area. (Tr. 18; 23; 26; 31-38; 65-71).

James Irwin is Respondent's vice president of operations. He testified that while he had had employees welding on the roof at some point, he and Bechtel encountered a worker welding under the deck of the structure; Bechtel asked about a fire extinguisher, and Irwin told him there was one on a column base about 35 feet away and that it was kept there due to the grading work in progress and equipment and traffic in the area. Irwin noted he showed the extinguisher to Bechtel, who said it was too far away, and that he accordingly set it on the ground underneath the employee; it was subsequently destroyed when the employee, in descending, came down on top of it. (Tr. 109-12; 122).

The subject standard provides as follows:

Suitable fire extinguishing equipment shall be immediately available in the work area and shall be maintained in a state of readiness for instant use.

Based on the conflicting testimony of Bechtel and Irwin, the resolution of this item requires a determination of the credibility of these two witnesses. While Bechtel was sincere as he testified, the discussions regarding the other contested items set out *infra* indicate he

¹At the hearing, the parties settled items 1, 2, 3, 5(a), 5(b) and 9, which alleged violations of 29 C.F.R. §§ 1926.59(e)(2)(ii), 1926.59(g)(1), 1926.152(f)(1), 1926.450(a)(9), 1926.450(a)(10) and 1926.550(a)(14)(i), respectively. Specifically, the Secretary reduced the penalties for items 1, 2 and 3 to \$70.00 each, reduced the grouped penalty for items 5(a) and (b) to \$245.00, and reduced the penalty for item 9 to \$35.00, after which Respondent withdrew its contest of these items. (Tr. 12-14).

did not have an accurate recollection of what transpired at the site. Irwin, on the other hand, had a precise recall of the events at the site, and I observed his demeanor as he testified and found him credible and convincing. Moreover, Irwin's version of what happened is supported by the phone conference about which Bechtel testified. Irwin's testimony is therefore credited over that of Bechtel.

The standard requires fire extinguishing equipment to be immediately available in the work area. Irwin's testimony reflects that the extinguisher was put on the column base about 35 feet away rather than on the ground underneath the welder to avoid its being damaged by the equipment, work and traffic in the area, and moving it to the exact work area of the employee resulted in precisely what he was trying to prevent. Under the particular facts of this case, I conclude the extinguisher was as immediately available as possible, and that there was no violation of the standard.

Item 6 - 29 C.F.R. § 1926.550(a)(1)

Vern Bechtel testified that he and Kathryn Miller, an OSHA industrial hygienist trainee with him for the inspection, observed a Link Belt crane operating on May 17, 22 and 23 which James Irwin was using to lift steel up to employees on a roof over 10 feet high. Bechtel identified C-2-4 as photos he took of the crane; C-4 shows it in one location preparing to lift the steel in front of it based on its outriggers being out and its tires off the ground, and C-2-3 show it right after a lift in another location with its tires down and its right rear pontoon sitting on loose boards over a hole. Bechtel said he and Miller measured the crane with an inclinometer each time they saw it operating and never found it within 1 percent of level with the horizontal as required by the manufacturer's specifications he consulted in his office.² He noted the condition was hazardous as the crane's load could have shifted and struck an employee.³ (Tr. 25; 36-47; 78-83; 95; 98).

²Bechtel said the crane was 4 percent out of level when measured in the location shown in C-3, but that his notes reflected no specific measurement for the location shown in C-4. (Tr. 37-40; 45-46; 98).

³Bechtel indicated that the pontoon's resting on the boards in C-3 exacerbated the hazard if the lifting was done with the weight on the pontoons rather than the tires, but did not know which had occurred. (Tr. 37-40; 45-47; 80; 95).

Bechtel identified R-1-2 as additional photos of the Link Belt he did not take. He said the crane was in a lifting position in R-2 and could have been lifting the pipe rack in the photos, but that he could not tell without seeing the crane's jib or crown.⁴ He also said one of the racks at the site was lifted by a hydraulic crane operated by another company, but that he did not know if that company was lifting the rack in R-1-2. (Tr. 61-64; 75-77).

Kathryn Miller testified she saw the Link Belt crane as shown in C-2-4, and that she also observed it lifting the pipe racks depicted in C-4. (Tr. 99-103).

James Irwin testified that while his crane laid iron in the position depicted in C-4 for several weeks it did not lift the pipe racks shown in that photo and in R-1-2; another company with a hydraulic crane was responsible for lifting the racks and placed them there, and as soon as that company got them out of the way the Link Belt was moved to the location in C-3 so the other company could do its work. Irwin said R-1-2 showed his crane was not lifting the racks due to the way it was facing, and offered R-3, which he identified as a letter from his company's contracting firm, as further proof it did not lift the racks. Irwin also said there were leveling devices on the Link Belt, that it was level when laying iron in the position depicted in C-4, and that while he left after the crane was moved he did not believe it lifted steel in the location shown in C-3 because his company had basically completed its job. (Tr. 106-09; 112-16; 122-23).

The subject standard provides, in pertinent part, as follows:

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

Although Bechtel testified he and Miller measured the crane and found it not within 1 percent of level each time they saw it operating, the only two specific locations he identified were those shown in C-2-4. Moreover, both he and Miller testified that C-2-4 were taken on May 23. (Tr. 40-41; 81-83; 101-02). The issue to resolve, accordingly, is whether the Link Belt crane was, in fact, operating in those locations when Bechtel and Miller observed it on May 23. I find it was not, for the following reasons.

⁴In this regard, Bechtel noted there was another load line in R-1 left of the one from which the rack was suspended. (Tr. 64).

While Miller testified she saw the crane lifting the racks in C-4 Irwin was emphatic that his company did not lift any such racks at the site because another company was responsible for doing so. His testimony was credible and convincing and supported by that of Bechtel, who admitted he saw another company's crane lifting one of the racks.⁵ Bechtel also acknowledged, essentially, that the other company could have been lifting the racks in R-1-2, and that such was the case is bolstered by the second load line in R-1 to the left of the one supporting the rack. R-3, in which a business Irwin identified as his contracting firm states it was unaware of any involvement of the company with the installation of mechanical support framing and that that work was awarded to a different contractor, is consistent with Irwin's testimony and provides further support for Respondent's position. Based on the record, it is concluded that Miller and Bechtel confused the activities of the other company with those of Respondent and that the Link Belt was not lifting loads in the C-4 location when they saw it on May 23.

In regard to the location depicted in C-2-3, Bechtel testified the photos were taken right after a lift. However, he also testified he discussed the crane with Irwin, who told him, *inter alia*, that he had parked the crane there and wasn't going to use it. (Tr. 40). This testimony is in accord with Irwin's testimony that the crane was not used after it was moved to his knowledge because the company was basically through with the job. I found Irwin's testimony in this regard persuasive, and it is supported by the fact, discussed more fully in item 8, *infra*, that the company finished its job on May 23 and left the site on that date. (Tr. 55-56; 119-20; 125-26). Based on the record, it is found Miller and Bechtel were mistaken about the crane making lifts in the C-2-4 locations on May 23, and that the Secretary has not demonstrated a violation of the standard. This item is accordingly vacated.

Item 7 - 29 C.F.R. § 1926.550(a)(6)

Vern Bechtel testified he asked Mack Hoffman, the management company representative at the site, if he had a safety inspection record for the Link Belt crane, and that Hoffman told him he did not. Bechtel said he looked for such a record in the crane

⁵I also found persuasive Irwin's testimony that although the crane had previously been lifting at the C-4 location it was level when it did so due to the leveling devices on it.

and did not find one, that he asked Irwin about it at that time and one was never produced, and that while Irwin agreed to his inspecting the crane it was removed from the site before he could do so; Bechtel noted he asked Irwin about the inspection on May 23, that it was postponed until the next day because it was raining, that the company and crane were gone on May 24, and that Irwin did not attend the closing conference on May 25. (Tr. 52-56; 90-91).

James Irwin testified he has a degree in civil engineering, that his company has been in business for forty years, that the company maintains and inspects its own equipment and is competent to do so, and that it has never had an accident caused by a crane's mechanical failure. He further testified Bechtel did not ask him for an inspection record when they were in the crane or any other time, and that there were, in fact, such records in one of the doors of the crane. Irwin said he was not there when the issue came up, that Bechtel had discussed the records with his brother David, who was also at the site and resembles him, and that he understood Bechtel was to have inspected the crane on the 23rd but did not do so, possibly because of the weather. Irwin noted his company left the site and removed the crane on the 23rd because its job was finished and not because of the inspection, and indicated his closing conference was conducted over the phone and that he had discussed doing so with Bechtel previously. (Tr. 109-10; 118-26).

The subject standard provides as follows:

A thorough, annual inspection of the hoisting machinery shall be made by a competent person....The employer shall maintain a record of the dates and results of inspections for each hoisting machine and piece of equipment.

It is clear that Bechtel believed the crane was removed in order to avoid his inspecting it. (Tr. 94-95). However, Irwin's explanation of why the crane was removed was credible, as was his testimony about the inspection records being in the crane, and it appears Bechtel was simply mistaken about having asked for the records when he and Irwin were in the crane. Further, Irwin's account of what happened is supported by Bechtel's own testimony that David Irwin was at the site and that there was a phone conference with James Irwin after the inspection. (Tr. 26; 31; 33-34). On the basis of the record, the Secretary has not established a violation. This citation item is therefore vacated.

Item 8 - 29 C.F.R. § 1926.550(a)(9)

Vern Bechtel testified he saw the crane operating on three occasions without a barricade that would keep employees from being caught in a pinch point or struck by the rotating superstructure and counterweight; he discussed the hazard with Irwin each time, and after the second time Irwin put up a nylon cord and wrapped it around a 55-gallon drum, as shown in C-3. Bechtel said this was adequate protection against a pinch point but not against being struck; he took no measurements, but as he recalled the cord was inside the swing radius of the counterweight. He also said the lines along the perimeter of the superstructure shown in C-4 did not constitute a barricade. (Tr. 48-52; 84-88; 93-98; 127-28).

Kathryn Miller testified she observed the crane as in C-3, and that while it had appeared to her at the site that a person outside the cord could have been struck by the counterweight, the cord seemed to be outside the swing radius in the photo. (Tr. 100-04).

James Irwin testified that the cord around the crane was a sufficient barricade in his opinion, and that he had roped off cranes in this manner for twenty years; yellow or red tape serves as a warning to employees, and the cord around the crane makes them aware of the hazard since they would have to duck under it in order to approach the crane. (Tr. 116-18).

The subject standard provides as follows:

Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

Bechtel testified he observed the crane operating three times without an adequate barricade. However, the only two specific instances he documented were those depicted in C-3-4, and pursuant to my findings in the item 6 discussion, *supra*, Bechtel and Miller were mistaken in their belief the crane was operating when they saw it in those locations. Moreover, I found Irwin's testimony about his long-standing practice of roping off cranes credible, and while he did not specifically testify that the swing radius of the counterweight would have been inside the rope in C-3 he indicated such was the case and the testimony

of Bechtel and Miller in that regard was equivocal.⁶ On the basis of the record, the Secretary has not shown a violation of the standard, and this citation item is vacated.

Conclusions of Law

1. Respondent, Irwin Steel Erectors, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.59(e)(2)(ii), 1926.59(g)(1), 1926.152(f)(1), 1926.450(a)(9), 1926.450(a)(10) and 1926.550(a)(14)(i).

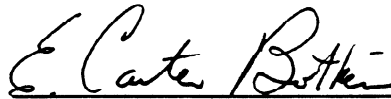
3. Respondent was not in violation of 29 C.F.R. §§ 1926.352(d), 1926.550(a)(1), 1926.550(a)(6) and 1926.550(a)(9).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1, 2, 3, 5 and 9 of citation number 1 are AFFIRMED as serious violations. A penalty of \$70.00 each is assessed for items 1, 2 and 3, and penalties of \$245.00 and \$35.00 are assessed for items 5 and 9, respectively.

2. Items 4, 6, 7 and 8 of citation number 1 are VACATED.



E. Carter Botkin
Administrative Law Judge

Date: JUL 12 1993

⁶Had the crane been operating as shown in the photos, it is clear that the roped area in C-3 would have been required to have been outside the counterweight's swing radius and that the lines around the superstructure in C-4 would not have been an adequate barrier. However, since it has been found that the crane was not operating in those locations when observed by Bechtel and Miller, the issue of whether the photographed conditions violated the standard need not be resolved.