

SECRETARY OF LABOR,
Complainant,
v.
PRECISION CONCRETE
CONSTRUCTION,
Respondent.

OSHRC Docket No. 99-0707

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

Precision Concrete Construction (“Precision”) is a concrete contractor based in Georgia. On October 19, 1998, Precision employee Stanley Freeman died when a 347-pound concrete bucket suspended from a crane fell on him from a height of approximately 30 feet. As a result of the fatality, OSHA inspected the worksite and cited Precision, in part, for a serious violation of 29 C.F.R. § 1926.701(e)(1) for allowing its employees to work under buckets while the buckets were being elevated or lowered into position. The judge found that the standard did not apply and vacated the citation. For the reasons that follow, we find that the standard applies but that the Secretary failed to establish a violation. We therefore vacate the citation.

Background

Precision contracted with general contractor R. J. Griffin and Company (“Griffin”) to perform concrete construction for a parking deck at the Northside Mall Office Building in Alpharetta, Georgia. Precision had approximately 14 employees at the site including foreman Billy Freeman.¹ On October 19, 1998, Precision began concrete work on the third level of the parking deck.

Subcontractor Phoenix Crane provided the 90-ton Lorain crane. The crane had a 210-foot long boom that was used to transport the concrete from the concrete truck to the worksite of Precision’s employees. Attached to the crane’s cable was a 347-pound bucket for concrete. The bucket was approximately 5½ feet tall and 4 feet wide. There were three ways in which the crane could maneuver the bucket. “Swinging” the crane would move the bucket left or right in an arc. “Cabling” up or down would move the bucket vertically by reeling up or letting out the crane’s cable. “Booming” up the crane’s boom would raise the bucket and simultaneously bring it towards the crane’s cab, while booming down would lower the bucket and simultaneously move it away from the crane’s cab. Booming the crane had the effect of moving the bucket both vertically and laterally. In transporting concrete to the worksite, crane operator L. Donovan Jones, an employee of Phoenix Crane, partially filled the bucket at the concrete truck, swung the bucket clockwise approximately 180 degrees to the end of the parking deck farthest away from the crane and the concrete truck, deposited the concrete, and then swung back again in order to refill it. As oriented from the crane’s cab, work progressed from the far left corner of the parking deck slab over to a cinder block wall on the far right side.

The crane’s cab was located at ground level, two levels below the parking deck slab that Precision was working on. Because the crane operator could not see the slab pour from

¹Foreman Billy Freeman was not related to employee Stanley Freeman.

the cab of his crane, he relied on Precision foreman Freeman to act as a “flagman” and direct him in and out of the pour site by radio.

According to the foreman’s testimony, when he saw that the bucket was approaching and was 80 feet away, he would have his men evacuate the work area and stand about 15 feet behind him.² When the bucket was 10 to 14 feet from the slab, he would begin communicating with the crane operator and guide the operator in. When the bucket was 2½ to 3 feet above the ground, the foreman and another employee would grab the bucket, position it, and pour the load of concrete. After the pour was completed, the foreman and the employee would step back 5 to 10 feet and the foreman would tell the crane operator to raise the bucket. When the bucket was approximately 30 feet high, the foreman would tell the crane operator to swing the bucket back to the concrete truck. The crane operator followed the foreman’s instructions for moving the bucket until the bucket was about 30 feet high, at which point the crane operator would take over control. The crane operator took the bucket out of the pour site on the same path that he had taken it in. When the bucket was elevated 30 feet and was beginning its swing back to the concrete truck, Precision employee Stanley Freeman would come in first from where the employees were standing to “vibrate” the freshly poured concrete in order to remove any air pockets. The rest of the crew followed.

At approximately 9:00 a.m., the crane operator was delivering concrete to the far right corner of the parking lot. When the crane operator cabled up the bucket after the concrete was unloaded, he simultaneously boomed it up to such an extent that it caused the bucket to move not only upwards but also laterally in the direction of the crane’s cab. Instead of going in front of the foreman and to his left as it had after the previous pours, the bucket traveled over the foreman and went behind him towards where the employees were standing.

²The record does not establish where the foreman would stand at that stage of the process.

The bucket was still being raised when it dropped from an elevation of approximately 30 feet. Precision employee Stanley Freeman had taken about two steps towards the freshly poured concrete when the concrete bucket dropped on him. The bucket dropped because the hoist lever became disengaged.

Based on an inspection by OSHA Compliance Officer Walter Harvey, the Secretary cited Precision for two serious violations. Serious Citation 1, Item 1(a) alleged a violation of 29 C.F.R. § 1926.701(e)(1), which requires that “[n]o employee shall be permitted to work under concrete buckets while buckets are being elevated or lowered into position.” Serious Citation 1, Item 1(b) alleged a violation of 29 C.F.R. § 1926.701(e)(2), which requires that “[t]o the extent practical, elevated concrete buckets shall be routed so that no employee, or the fewest number of employees, are exposed to the hazards associated with falling concrete buckets.” After the hearing, the Secretary withdrew Serious Citation 1, Item 1(b), “on the ground that the evidence now available does not appear to sustain the violation as alleged.”

The judge vacated the remaining citation, finding that the Secretary failed to prove that the standard applied. In his decision, the judge found that “[t]wo conditions must exist in order for § 1926.701(e)(1) to apply: (1) the bucket must be moving, and not stationary, and (2) the movement can only be up or down, and not lateral.” He based his interpretation on the “plain meaning of the words of the standard” as well as the language of section 1926.701(e)(2). He held that because the bucket in this case “was moving in a lateral direction, as well as being elevated, § 1926.701(e)(1) does not apply.” Instead, he found that the applicable standard would have been the one withdrawn by the Secretary, section 1926.701(e)(2). On review, the Secretary challenges the judge’s interpretation of section 1926.701(e)(1) and argues that the Commission should affirm the citation.

Discussion

We find that section 1926.701(e)(1) applies. “It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned.” *Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993). Section 1926.701(e)(1) requires that “[n]o employee shall be permitted to work under concrete buckets while buckets are being elevated or lowered into position.” There is nothing in the standard’s text or structure that limits its applicability to purely vertical motion, as the judge found, or would prevent its application if a bucket is raised diagonally out, as was the case here. This interpretation does not render section 1926.701(e)(2) “meaningless,” as alleged by Precision. The two standards can reasonably be read to cover different phases of the transportation of concrete buckets to and from the location where they would be utilized. Section 1926.701(e)(1) applies when a concrete bucket is being raised or lowered into position. Section 1926.701(e)(2) applies when an already elevated bucket is being transported to or from the concrete trucks.³

The legislative history is consistent with our reading. It states that the previous version of this standard, former 29 C.F.R. § 1926.700(d)(7)(ii),⁴ “only afforded protection

³The Secretary argues that subsection (e)(1) applies when there is vertical movement alone or vertical movement combined with lateral movement, while subsection (e)(2) applies when the movement is strictly lateral. The Secretary further argues deference to her interpretation, citing to *Martin v. OSHRC*, 499 U.S. 144, 155 (1991). Precision argues that such an interpretation would render subsection (e)(2) a nullity, because it would always be possible that a load would be rising or falling slightly during transit. We need not reach the precise parameters of when subsection (e)(2) applies as opposed to subsection (e)(1) because such a determination is not required for finding that subsection (e)(1) applies under the facts here, where the bucket was clearly in the process of being raised.

⁴Former section 1926.700(d)(7)(ii) had provided that the “[r]iding of concrete buckets for any purpose shall be prohibited, and vibrator crews shall be kept out from under concrete buckets suspended from cranes or cableways.”

to workers of vibrating crews,” and that “[c]learly, overhead concrete buckets pose the greatest hazard to vibrating crews” but that “other workers on the site are faced with the same hazard, albeit less often, when concrete buckets pass over their heads.” 53 Fed. Reg. 22612, 22619 (June 16, 1988). According to OSHA, its aim in the new standard was to “protect all employees from the hazard of falling concrete buckets, not just the vibrating crew which is afforded protection under the existing requirements in § 1926.700(d)(7)(ii).” 53 Fed. Reg. at 22619. OSHA emphasized that:

[T]he most critical times during the lifting cycle occur when the bucket is initially raised and when it is being lowered into position for unloading. Therefore, employees must be kept out from under concrete buckets while buckets are being elevated or lowered into position.

53 Fed. Reg. at 22620. Here, the record establishes that the concrete bucket was still being “elevated” when the accident occurred. Accordingly, we conclude that the standard applies and that Stanley Freeman was exposed to the hazardous condition.

Having found that the standard applies, we turn to another element of the Secretary’s case, knowledge.⁵ In order to establish knowledge, the Secretary must show that Precision knew of, or with the exercise of reasonable diligence could have known, of the noncomplying condition. The Secretary does not claim that Precision had actual knowledge that any of its employees worked under a concrete bucket. In fact, she stated in her petition for discretionary review that the cause of the violation, the bucket’s movement over the employees after the last pour, was “unanticipated.”

Instead, the Secretary argues that Precision had constructive knowledge of the violation because it failed to exercise reasonable diligence. Whether an employer was

⁵To make a prima facie showing that a cited standard was violated, the Secretary must prove that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *E.g.*, *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991).

reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992). The Secretary does not challenge the adequacy of Precision's safety program or the foreman's supervision of the employees. Instead, the Secretary argues, in effect, that Precision failed to anticipate the hazard posed by the position of the bucket. She claims that it is simply "not credible" that the foreman did not recognize that the unpredictable paths taken by the bucket and the movement of the employees towards the pour area seconds after the bucket began its elevation created the precise conditions the cited standard was designed to protect against.

The Secretary has not carried her burden in support of this argument. She has not proved that the movement of the bucket — with the exception of the final lift — was unpredictable. The weight of the evidence is to the contrary. Except for the changes required by the progress of the work to new locations, the crane operator, Griffin assistant superintendent Terry Gossett, employee Moffitt, and foreman Freeman testified that the bucket's path to and from the pour sites had been the same all that morning. Moreover, there is no convincing evidence that the crane had previously boomed back to the degree it did when the accident occurred. Nor does the evidence establish that the employees were exposed to a hazard by starting to walk back towards the pour site while the bucket was still elevating. We are unable to tell from the record with reasonable certainty how far away employees were from being under the bucket when they started to move toward the poured concrete, how quickly they moved toward the pour site, or the speed at which the bucket moved away from the pour site. Thus, we cannot find that foreman Freeman could have known that the decedent's movement toward the pour site would take him under the bucket.

A lack of reasonable diligence may also be shown by evidence of an employer's failure to take measures to prevent the occurrence of violative conditions. *Id.* Here, the Secretary has not suggested what additional measures Precision could have taken to comply with the standard. *See Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 1017, 2000 CCH OSHD ¶ 32,158, p. 48,527 (No. 98-0144, 2000), *appeal filed*, No. 00-60673 (5th Cir. Sept. 22, 2000). Indeed, the Secretary has not proposed and the record does not otherwise reveal when employees would have been within a zone of danger created by the elevated bucket.⁶ The testimony indicates that foreman Freeman and his helper were much closer to the pour site than the decedent and the rest of Precision's crew when the foreman ordered the bucket to be elevated. Yet the Secretary has not argued that the foreman and his helper were ever in a zone of danger, despite her position that the decedent was within the zone of danger. Without proof of what the zone of danger would have been and what compliance with the standard would have required here, we lack a basis for determining whether Precision was reasonably diligent in its efforts to comply with the Act. As to the circumstances of the accident itself, we find the evidence insufficient to show that the foreman could have anticipated that Stanley Freeman would be exposed to the hazard. As we have already discussed, it was not shown that Precision could have anticipated the bucket's movement over the employees.

Since the Secretary has the burden of proving that the manner in which Precision conducted its pouring operations constituted a failure to exercise reasonable diligence, her

⁶The Commission analyzes employee access, the third element of the Secretary's prima facie case of a violation, in terms of whether it is reasonably predictable that "employees have been, are, or will be in the zone of danger" posed by the violative condition. *See Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,507 (No. 93-1853, 1997). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995).

failure to do that here requires our finding that knowledge has not been shown. *See Milliken & Co.*, 14 BNA OSHC 2079, 2084, 1991-93 CCH OSHD ¶ 29,243, p. 39,178 (No. 84-767, 1991), *aff'd*, 947 F.2d 1483 (11th Cir. 1991), *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-0851, 1994). Accordingly, we find that the Secretary failed to carry her burden of proving employer knowledge and vacate Serious Citation 1, Item 1(a).

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Ross Eisenbrey
Commissioner

Dated: April 25, 2001

Secretary of Labor,
Complainant,

v.

Precision Concrete Construction,
Respondent.

OSHRC Docket No. **99-0707**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Precision Concrete Construction (Precision) is a concrete contractor whose business offices are located in Alpharetta, Georgia. On October 19, 1998, Precision was in the process of pouring concrete for the construction of a parking deck for the Northside Mall Office Building in Alpharetta. One of Precision's employees was struck and killed by an empty concrete bucket that was attached to the cable of a crane.

As a result of the fatality, Occupational Safety and Health Administration (OSHA) compliance officer Walter Harvey inspected the construction site that same day. The Secretary subsequently issued a citation to Precision alleging two serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1a alleges a violation of § 1926.701(e)(1), for allowing employees to work under concrete buckets while the buckets were being elevated or lowered into position. Item 1b, which was withdrawn by the Secretary after the hearing, alleged a violation of § 1926.701(e)(2), for failing to route elevated concrete buckets so that no employee, or the fewest number of employees, was exposed to the hazards associated with falling concrete buckets. A penalty of \$4,500 is proposed.

This case went to hearing in Atlanta, Georgia, on October 6 and 7, 1999. Precision stipulated to jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

Precision contends that it was in compliance with § 1926.701(e)(1) because its employees were not under the concrete bucket while it was being elevated or lowered. Precision argues that the concrete bucket fell suddenly while the crane operator moved it in an unexpected route of travel.

For the reasons stated, the court agrees with Precision and vacates item 1a of the citation.

Background

General contractor R. J. Griffin subcontracted with Precision in August 1998 to perform the concrete construction for a parking deck for the Northside Mall Office Building in Alpharetta, Georgia (Tr. 20, 59-60). Precision's crew on the project consisted of approximately 14 employees, supervised by foreman Billy Freeman (Tr. 26, 287-288).

To pour the concrete on the third level of the parking deck, subcontractor Phoenix Crane positioned its 90-ton Lorain crane on the ground at one end of the deck. The boom of the crane was 210 feet long (Exh. C-1, C-2; Tr. 20, 60, 142). Attached to the cable of the crane was a concrete bucket weighing 347 pounds and capable of holding approximately 1½ cubic yards of concrete (Tr. 32).

On October 19, 1998, Precision began pouring concrete at approximately 7:00 a. m. (Tr. 218). Phoenix Crane operator L. Donovan Jones could not see the bucket on the far side of the parking deck from the crane cab. Precision foreman Billy Freeman used a radio to communicate with Jones (Tr. 120-121).

In order to make pours, crane operator Jones would swing the filled concrete bucket 180° to his right. Billy Freeman and another employee would usually position the bucket, direct the bucket to be lowered, and then pull a lever to release the concrete. Billy Freeman would then signal to Jones to raise the bucket and swing it back to the concrete truck for another load of concrete. Jones returned the emptied bucket to the concrete truck by swinging it 180° to his left (Tr. 30, 50, 129-130, 134-136, 225-226, 270-271, 280, 292).

On October 19, 1998, Precision began pouring the last 16-foot section next to an existing parking deck. Precision had poured all of the concrete at the end of the slab deck that was furthest

away from the crane and the concrete truck. Work proceeded from a dirt area on the left to a cinder block wall on the right (Exhs. C-1 and C-2; Tr. 36, 155-156, 239, 241).

By approximately 9:00 a. m. on October 19, Jones was swinging in the concrete bucket from the far right of the existing parking lot. The crew was standing about 15 feet behind Billy Freeman (Tr. 279-280). After the last bucket was dumped, Billy Freeman signaled Jones to raise the bucket. Unlike the previous pours, the trajectory out of the bucket did not follow the trajectory in. As the bucket rose, instead of going in front of Billy Freeman and to his left, the bucket traveled behind him and went straight over him (Tr. 236, 283, 303). When the bucket reached approximately 30 feet, it dropped suddenly, striking and killing employee Stanley Freeman (no relation to Billy Freeman) (Tr. 39, 45).

Compliance officer Walter Harvey arrived at the worksite approximately one hour after the accident occurred (Tr. 164). He observed the site and conducted interviews with employees and witnesses (Tr. 165). The Secretary issued the citation at issue in this proceeding on April 7, 1999.

Item 1a: Alleged Serious Violation of § 1926.701(e)(1)

The Secretary alleges that Precision committed a serious violation of § 1926.701(e)(1), which provides:

No employee shall be permitted to work under concrete buckets while buckets are being elevated or lowered into position.

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Applicability of § 1926.701(e)(1)

The cited standard requires employees not to work under concrete buckets “while buckets are being elevated or lowered into position.” In her post-hearing brief, the Secretary states (Secretary’s brief, p. 9): “It is undisputed that subject concrete bucket was elevated above employees immediately before it fell. . . . It is of no consequence if the load was moving or stationary immediately before it fell.” The Secretary’s interpretation of the standard is rejected.

The language of the standard makes clear that it addresses only situations in which the concrete bucket is in the process of being raised or lowered in a vertical plane. Two conditions must exist in order for § 1926.701(e)(1) to apply: (1) the bucket must be moving, and not stationary, and (2) the movement can only be up or down, and not lateral. This interpretation is mandated by the plain meaning of the words of the standard, and is supported by the language § 1926.701(e)(2), which provides:

To the extent practical, elevated concrete buckets shall be routed so that no employee, or the fewest number of employees, are exposed to the hazards associated with falling concrete bucket.

If the Secretary’s interpretation is credited, then she has promulgated two standards that address one situation. One standard absolutely prohibits employees from working underneath the concrete bucket, while the other one requires only that employee exposure be minimized. Reading the standards in this manner would render § 1926.701(e)(2) superfluous and would be unfairly confusing to employers. It is determined that the cited standard applies only to situations in which the concrete bucket is being elevated or lowered with no lateral movement.

The record establishes that on the last pour, the crane operator not only raised the bucket with the cable, he also raised the boom, which caused the bucket to move laterally in an unanticipated trajectory (Tr. 235-236, 303-304). Because the bucket was moving in a lateral direction, as well as being elevated, §1926.701(e)(1) does not apply. The applicable standard would be § 1926.701(e)(2), which the Secretary withdrew subsequent to the hearing.

Accordingly, item 1a 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 upon the foregoing decision, it is hereby ORDERED that:

1. Item 1a of citation No.1, alleging a serious violation of § 1926.701(e)(1), is vacated and no penalty is assessed; and
2. Item 1b of citation No. 1, alleging a serious violation of § 1926.701(e)(2) and withdrawn by the Secretary post-hearing, is vacated and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: January 28, 2000