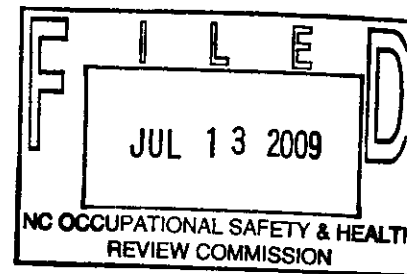


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF THE LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

vs.

CALDWELL TANKS, INC.,

RESPONDENT.

ORDER
OSHANC DOCKET NO. 2007-4739

THIS MATTER was heard by the undersigned on September 10 and 11, 2008 in Charlotte, North Carolina.

The complainant is represented by Tawanda Foster-Williams, Assistant Attorney General; the respondent is represented by Carl B. Carruth and Andrew W. Lax of the McNair Law Firm, P.A.

At the conclusion of the hearing on September 11, 2008, counsel for the parties indicated that they would prefer to submit written briefs on the issues in the case, in lieu of oral argument. It was agreed that the briefs would be exchanged within 65 days of receipt by Counsel of the transcript of the hearing. This required the briefs to be served by June 19, 2009.

After hearing and receiving the evidence and reviewing the briefs submitted by counsel for the parties, the undersigned makes the following

FINDINGS OF FACT

1. The complainant as Commissioner of Labor of the State of North Carolina is charged by statute with enforcing compliance in the State with the provisions of the Occupational Safety and Health Act of North Carolina (the "Act").

2. The respondent is a corporation which is engaged in the construction of elevated steel tanks in the State of North Carolina and other states. It employs 175 people.

3. On July 3, 2007, the respondent was constructing an elevated water tank off Houston Road near the town of Troutman, in Iredell County, North Carolina. It had seven employees on the site.

DATABASE
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4. On that date, complainant's Compliance Safety Officer Jerry Barker observed respondent's Houston Road worksite and commenced a comprehensive inspection of the site. Such an inspection was permitted pursuant to the complainant's construction special emphasis program, which included Iredell County.

5. Mr. Barker, who has nine years of experience as a safety compliance officer, was accompanied by Health Compliance Officer Gary Johnston and Health Compliance Officer Trainee Ben Teal, who together conducted a comprehensive health compliance inspection of the worksite.

6. At the conclusion of both inspections, one serious citation (Citation 1, Item 1) and notification of penalty was issued on August 30, 2007 to respondent alleging a violation of 29 CFR § 1926.553(a)(4) or, in the alternative, a violation of N.C. Gen. Stat. §95-129(1), the General Duty Clause. No health compliance citations were issued and the complainant's personnel were complimentary of the overall safety and health conditions of the respondent's work site.

7. The alleged violation which formed the basis for the citation was the use by the respondent of a base mounted drum hoist in a manner which supposedly did not meet the requirements for design, construction, installation, testing, inspection, maintenance and operation as prescribed by the manufacturer. Specifically, the hoist was used to lift personnel to work stations as much as 115 feet above the ground in the course of construction of the elevated water tank.

8. The following is a recitation of the citation:

29 C.F.R. § 1926.553(a)(4): All base-mounted drum hoists in use did not meet the applicable requirements for design, construction, installation, testing, inspection, maintenance and operations, as prescribed by the manufacturer:

(a) jobsite water tower, Gearmatic Model 25 hoist used to left personnel was not designed or configured with an external brake release part capable of sustained lowering of a load under full control under emergency loss-of-power applications, exposing employees to a 115-foot fall hazard.

Reference: Gearmatic Service Bulletin No. 2072 Rev. 2 dated June 2002.

Or in the alternative:

North Carolina General Statute 95-129(1) of the Occupational Safety and Health Act of North Carolina: The employer did not furnish to each of his employees conditions of employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a fall hazard:

Among other methods, one feasible method to reduce this hazard would be to use a hoist designed and maintained in accordance with AP1 Spec 2C as identified in the Gearmatic Service Bulletin No. 2072 Rev. 2 dated June 2002.

9. During the inspection, the respondent's employees acknowledged that a Gearmatic Model 25 base mounted four drum hoist was being used to power a personnel lift. During the inspection, respondent's employee Randall Weaver did not know whether the Gearmatic Model 25 hoist was rated for use as a personnel lift. Mr. Barker subsequently researched this issue on the Internet and found that Gearmatic, the manufacturer, had issued Service Bulletin 2072, Revision 2, published June 2002.

10. Gearmatic Service Bulletin 2072, Revision 2 reads in pertinent part as follows:

In order to be acceptable for use as a personal hoist, a hoist must have been designed and rated in accordance with API Spec. 2C and maintained in accordance with API RP2D, and must have been configured to perform emergency load lowering per API 2C. To be acceptable for use in handling personnel, a hoist must have originally been factory configured with an external brake release part and be capable of sustained lowering of a load under full control under emergency loss-of-power conditions. The hoists listed above were not designed per API 2C.

11. The respondent's Gearmatic Model 25 was not designed and rated in accordance with API Spec 2C and was not configured to perform emergency load lowering per that API standard.

12. The Gearmatic Parts, Service and Maintenance Manual for the Gearmatic Model 25 hoist contains no language which would prohibit it from being used to lift personnel.

13. The respondent's Gearmatic Model 25 hoist used at the Houston Road site was at least 30 years old and did not have an external brake release port, as is now incorporated into newer model Gearmatic hoists. This external brake release port purports to allow a personnel lift to be lowered under full control in the event of a loss of power.

14. Based on Gearmatic Service Bulletin 2072, Revision 2, Mr. Barker concluded that the Gearmatic Model 25 hoist could not be used to hoist personnel because it was not so designed and constructed by the manufacturer. Consequently, he cited respondent with the violation of 29 CFR § 1926.553(a)(4).

15. Because Mr. Barker was able to locate Service Bulletin 2072 on the internet, he believed that the respondent could have so learned of its existence. Thus, he believed that using the Gearmatic Model 25 joist as a personnel lift was a recognized hazard of which the respondent should have been aware.

16. For these same reasons, Mr. Barker cited respondent in the alternative with a violation of N.C. Gen. Stat. § 95-129(1), the General Duty Clause, believing that the respondent did not furnish its employees working on the Troutman elevated water tank conditions of employment free of recognized hazards that might cause death or serious bodily harm.

17. Mr. Barker proposed a penalty of \$1,750.00 for this violation, based on a gravity based penalty of \$3,500.00 reduced by credits totaling 50%.

18. Apparently, Mr. Barker was not informed by respondent's employees and was not otherwise aware that the respondent's Gearmatic Model 25 hoist was being used as a power source for a derrick or crane that was part of the personnel lift system being utilized by the respondent at the Troutman worksite. Photographs taken by Mr. Barker show the derrick on the site. Mr. Weaver testified that the base mounted drum hoist was connected to the derrick and served as its power source.

19. Apparently Mr. Barker did not observe the lines from the base mounted drum hoist connected up through the partially constructed tank to the derrick.

20. Mr. Barker acknowledged that when a derrick is used as a personnel lift, 29 CFR § 1926.550(g) would be the applicable standard, even if the base mounted drum hoist was connected to the derrick. That standard covers work platforms suspended from a derrick or crane.

21. The respondent offered the testimony of two employees, Wilson Frazier and Brian Hope. Both are certified safety professionals and have qualifications including extensive education, training and experience in safety issues involving respondent's operations. Neither was aware of the Gearmatic Service Bulletin 2072, Revision 2. Both testified that the standard in the steel tank industry is to use derricks powered by base mounted drum hoists as personnel lifts and that the hoists do not have the external brake port.

22. After receiving a copy of Service Bulletin 2072, Mr. Hope obtained copies of Barden Publication PB 308, API Spec 2C and API RP2D, all of which were referenced in the Service Bulletin 2072, Revision 2.

23. The respondent offered the testimony of James Rhudy, who was qualified as an expert in the field of safety in the water tank construction industry and the use of cranes and derricks to hoist personnel platforms.

24. Mr. Rhudy served as a member of the ANSI A-10 Committee, part of which was the ANSI A-10.28 Committee on the requirements for crane and derrick suspended work platforms.

25. Mr. Rhudy testified that the ANSI A-10.28 standard does not require an emergency load lowering capability for hoists used with cranes or derricks to lift employees on work platforms and actually prohibits such capability. This is because the standard requires that the load line used to hoist employees must have power down features and cannot be controlled only by a brake.

26. Mr. Rhudy also testified that the use of the Gearmatic Model 25 hoist did not constitute a recognized hazard because if there were a power failure to the hoist, the suspended worker platform would not move and the employees would not be exposed to the fall hazard. The employees would be inside the basket and would presumably be tied off with a harness and lanyard.

27. All the witnesses agreed that 29 C.F.R. § 1926.550(g) governs the use of derricks to hoist personnel. Specifically, 29 C.F.R. § 1926.550(g)(ii)(D) provides:

a load line hoist drum shall have a system or device on the power train other than the load hoist brake which regulates the rate of speed of the hoist mechanism (controlled load lowering). Free fall is prohibited.

28. Barden Publication PB 308 details the recommended method of lowering a load in the event of a loss of power to Gearmatic's "later model" hoists as referenced in Service Bulletin 2072. This essentially amounts to using the brake to lower the load. PB 308 states that the hoists used for personnel comply with API Spec 2C, ANSI B30-5 or the applicable OSHA standard, which is 29 C.F.R. § 1926.550(g).

29. Mr. Rhudy testified that the load emergency lowering procedure in PB-308 actually violates 29 C.F.R. § 1926.550 (g)(ii)(D) because the PB-308 procedure allows the brake to solely hold the load. With no power, only the brake is controlling the fall. If the brake loses hydraulic oil, it will fail and the load will free fall.

30. Mr. Rhudy further testified that API stands for American Petroleum Institute. The API Spec 2C applies only to pedestal mounted offshore cranes used by the petroleum industry on an offshore oil drilling platform. The standard does not apply to the hoisting apparatus used by the respondent.

31. He further testified that the API RP2D standard does not address emergency load lowering in the event of loss of power and that the ANSI B 30.5 standard applies only to locomotive and mobile cranes.

32. The respondent offered the testimony of Harry Leidich, who was qualified as an expert on hoists and their safe usage. He is a part member of ASME and served

many years on various ASME and ANSI committees dealing with the ANSI standards concerning base mounted drum hoists and derricks.

33. Mr. Leidich testified that ASME standards are essentially ANSI standards. While ANSI is the sanctioning body, ASME directs the work on standards.

34. Mr. Leidich testified to an opinion that a Gearmatic Model 25 hoist was a better device to use than the "later model" Gearmatic hoist for lifting personnel because the Gearmatic Model 25 hoist will not allow free fall. His testimony and opinion corroborated the testimony of Mr. Rhudy. Mr. Hope also testified that the respondent would not use a brake to lower a load because, in respondent's view, it would be a violation of 29 C.F.R. § 1926.550(g).

35. Mr. Leidich further testified that winches with an emergency load lowering mechanism of the type now supplied by Gearmatic are rare, which he believes is because it is recognized that such a system violates 29 C.F.R. § 1926.550(g).

36. Mr. Leidich further testified that in the event of a power failure suspending the employee basket in the air, the load can be lowered by hooking up an alternate power source to the derrick. This could include a portable power source on site or the respondent's Grove crane, which was on the jobsite in Troutman.

37. Mr. Leidich also testified that a base mounted drum hoist as used on the respondent's jobsite in Troutman is considered part of the derrick because the derrick will not function without a hoisting mechanism with a power source.

38. The undersigned finds that the respondent's expert witnesses were knowledgeable in their fields of expertise, were consistent and corroborative in their testimony and were credible witnesses.

39. Likewise, the undersigned finds that Mr. Barker was a credible witness, as were the other witnesses, all of whom were employees of the respondent.

40. The first factual issue to be determined is whether the base mounted drum hoist was connected to the derrick as part of a hoisting system. The preponderance of the evidence indicates that it was so connected as part of a hoisting system. The respondent's employees and witnesses so testified and Mr. Barker's testimony amounted to being unsure because he did not see the hoist drum lines connected to the derrick.

41. The second factual issue is whether the respondent had knowledge of Service Bulletin 2072, Revision 2. The respondent had no knowledge of it; the complainant found it on the Internet. The complainant has not provided any evidence to indicate that Gearmatic systematically notified customers of these Service Bulletins or advised that they were available on the Internet.

42. The third factual issue is whether there was evidence of a recognized hazard of falling if the hoisting system used by respondent lost power. The complainant has not provided any evidence other than Mr. Barker's assertion of such a hazard. The respondent's evidence was more compelling on this issue.

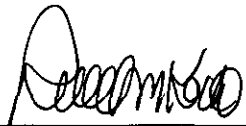
Based on the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The respondent is subject to the provisions of the Act.
3. The complainant has failed to prove by the greater weight of the evidence that the respondent violated the provisions of 29 C.F.R. § 1926.553(a)(4) and that under the facts of this case, such standard was the applicable standard. Gearmatic Service Bulletin 2072, Revision 2 by its language creates confusion as to whether it even applies to a personnel hoisting system used by respondent, when read in conjunction with the standards it references and other Gearmatic literature. There is also considerable evidence in this case to call into question the safety of the load lowering procedures recommended in Barden Publication PB 308. Moreover, there is insufficient evidence of the employer knowledge of these requirements--that it should have reasonably known of the requirements.
4. Likewise, the complainant has failed to prove by the greater weight of the evidence that the respondent has violated the provision of N.C. Gen. Stat §95-129(1), the General Duty Clause. The complainant has failed to show by the greater weight of the evidence that there is not an applicable standard that preempts citing under the General Duty clause and that there is a recognized hazard.

Based on the foregoing Findings of Fact and the Conclusions of Law, IT IS ORDERED that Citation 1, Item 1 be dismissed.

This 27th day of June, 2009.



RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

**CARL B. CARRUTH
MCNAIR LAW FIRM PA
P O BOX 11390
COLUMBIA SC 29211**

**ANDREW W. LAX
MCNAIR LAW FIRM PA
TWO WACHOVIA CENTER
301 SOUTH TRYON STREET SUITE 1615
CHARLOTTE NC 28282**

by depositing same the United States Mail, Certified Mail, postage prepaid at Raleigh, North Carolina, and upon:

**TAWANDA FOSTER-WILLIAMS
NC DEPARTMENT OF JUSTICE
Labor Section
P O Box 629
Raleigh NC 27602-0629**

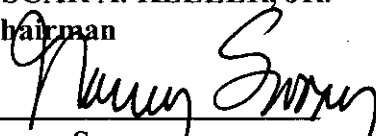
by depositing a copy of the same in the United States Mail, First Class;

**NC DEPARTMENT OF LABOR
Legal Affairs Division
1101 Mail Service Center
Raleigh, North Carolina 27699-1101**

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 16th DAY OF July, 2009.

**OSCAR A. KELLER, JR.
Chairman**


**Nancy Swaney
Administrative Assistant
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