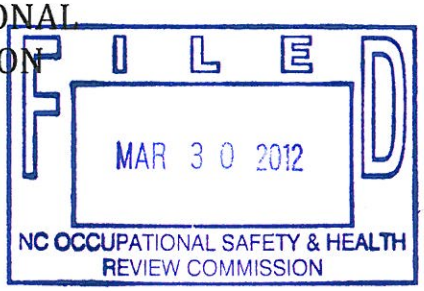
BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO.: OSHANC-2009-4927
OSHA INSPECTION NO.: 312455561
CSHO ID: G6529

vs.

LEE CONSTRUCTION COMPANY
OF THE CAROLINAS,
and it successors

ORDER

Respondent.

APPEARANCES:

Complainant:
Daniel D. Addison, Special Deputy Attorney General,
North Carolina Department of Justice

Respondent:
William W. Pollock, Ragsdale, Liggett PLLC
Counsel for Respondent

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on

August 30, 2011, at the North Carolina Medical Society Auditorium, 222 North Person Street, in Raleigh, North Carolina.

The Complainant was represented by Daniel Addison, Special Deputy Attorney General; and the Respondent was represented by Attorney William Pollock, Ragsdale Liggett, PLLC. Present for the hearing for the Department of Labor, OSHA Division, was Paul Vogel, Safety Compliance Officer, and Lafayette Atkinson, District Supervisor. Present at the hearing for the Respondent was Mr. Ron Shaw, President of Lee Construction Company of the Carolinas (Respondent), and John Cummins, General Superintendent for Respondent.

After reviewing the record file and the evidence presented at the hearing, with due consideration of the closing argument filed by the Respondent and the Complainant, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about August 3, 2009, contesting a citation issued on June 2, 2009, to Respondent, Lee Construction Company of the Carolinas ("Respondent" or "Lee Construction").

3. Respondent is a corporation in the business of bridge erection which does bridge erection in the State of North Carolina and is subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the

meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 52 workers overall, and 10 people were employed at the worksite at the time of the accident.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. On December 3, 2008, and several times thereafter, Safety Compliance Officer Paul Vogel ("SCO Vogel") inspected Respondent's worksite located at #2 East Yacht Drive, Oak Island, North Carolina ("site"), on the basis of a report of a fatality/catastrophe that occurred on December 3, 2008, as a result of a girder collapse during a bridge construction project.

6. The construction site consisted of a bridge construction project over the Intracoastal Waterway and new road installation leading to the bridge on the mainland side.

7. At the time of the inspection, the site was a multi-employer site. Barnhill Contracting was the general contractor, and Respondent was a subcontractor performing bridge erection work.

8. SCO Vogel conducted an opening conference with Mr. Ron Shaw, President of Lee Construction ("Mr. Shaw"). He presented his credentials to Mr. Shaw and was given permission to do the inspection.

9. SCO Vogel took photographs, reviewed video from the Oak Island Police Department, diagrams of the bridge, and a forensics engineering study by Rimkus Consulting Group. He interviewed Mr. Shaw; Mr. John Keel, Project Superintendent; and Roberto Hernandez, Carpenter.

10. SCO Vogel conducted a closing conference with Mr. Shaw. As a result of the inspection, Lafayette Atkinson recommended that citations be issued.

11. As a result of the recommendations by Atkinson, on June 2, 2009, the Complainant issued one Citation to Respondent as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1a, alleges a serious violation of NC. Gen. Stat. §95-129 also known as the general duty clause of OSHANC(1): "The employer did not furnish each of his employees conditions free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck by hazards:

(a) job site – The employer, using an unfamiliar bridge construction method, allowed employees to weld on components of a strong back temporary support system without determining it was safe to do so. On or about December 3, 2008, one employee was killed, and others were injured, when the support system failed causing a concrete girder to fall.

The proposed penalty for this violation was $2800.00.

12. Plans for the construction of the Oak Island Bridge were prepared by the North Carolina Department of Transportation ("NCDOT").

13. The entire bridge was projected to span 700 feet long.

14. Respondent used DYWIDAG rods ("rods"), couplers, nuts, and bolts to assemble a "strong back system" to Girders, (135 feet long concrete support beams equipped with preset holes weighing 125 tons each) that would become the support for the bridge deck. (See Complainant's Exhibit 8)

15. The plans required the strong back system to be used to connect the end girders to the haunch girders on the bridge. ("original plan") This support was designed by Triplett-King

& Associates ("Triplett") and then submitted to and approved by NCDOT prior to construction.

16. Steel temporary diaphragms used by Respondent maintained spacing between the girders. (See Complainant's Exhibit 2)

17. Girders, the temporary diaphragms, and walers (steel I beams with holes at each end) had to be properly aligned and clamped with the strong back system. (See Complainant's Exhibit 11)

18. Strong backs and temporary diaphragms were usually put on girders prior to being lifted in place by a crane.

19. The girders were then lifted up and supported on a device called a bent, a concrete structure that rises from the ground to top where end girders rest on. (Complainant's Exhibit 4)

20. Long rods for the strong back system were in the original plan and available by special order.

21. Respondent made the decision to use shorter rods for this span of the bridge, then available at that time from the manufacturer, and couplers to connect the rods together to create "longer" rods necessary to erect a bridge of this size (2 rods connected by a coupler). (See Complainant's Exhibit 11 and 12)

22. The Respondent has 30 years of experience in constructing bridges and has never used rods and couplers on a project this large.

23. The Respondent received confirmation from manufacturer DYWIDAG that the couplers could withstand the same force to be applied to the rods.

24. The Respondent then received verbal approval of the use of couplers from the NCDOT.

25. NCDOT employees (2 to3) were at the site to oversee the work daily to make sure the construction was performed in accordance with the plans submitted.

26. When Respondent connected the rods with the couplers, it was not a secure fit, and it created a gap. (See Exhibit R-5)

27. To avoid the couplers separating from the rods, Ricky Bryant ("Bryant"), site foreman and certified welder with 20+ years of experience in industry, and John Keel ("Keel"), Project superintendent with 30+ years of experience in industry, decided to "marry" or bond the rods and couplers by tack welding.

28. Shaw testified that it probably took Byrant no more than 15 seconds to create the bond between the rods and couplers.

29. In the process of tack welding, high heat is used to melt and join the metals.

30. The welding of the rods reduced the strength of the rods.

31. Bryant welded the rods without consulting the manufacturer DYWIDAG's materials.

32. Respondent did not contact DYWIDAG prior to tack welding to see if it was safe.

33. Welding to attach plates to beams was in Tripletts's original plan with a note at the bottom stating "All Welding Shall be in Accordance With Current AWS Specifications and be Performed by a Certified Welder."

34. Tack welding the rods and couplers was not in Triplett's original plan, nor did Respondent receive prior approval

from DYWIDAG or NCDOT to tack weld the rods and couplers prior to the actual welding.

35. Couplers were received by Respondent in a box, and there were no printed material or anything stated about not welding.

36. One NCDOT inspector, Joey Jetton ("Jetton"), was aware that couplers had been tack welded to the rods prior to the collapse.

37. When interviewed, Jetton said "no information was provided to the field that welding to the DYWIDAG rods was prohibited." (Complainant's Exhibit 14, pg.12)

38. SCO Vogel found the manufacturer DYWIDAG Prestressing Steel Thread Bar System's data on its website, and it states "do not weld or allow welding sparks in contact."

39. Prior to the collapse:

a. Bents 1 and 2 substructures were constructed at the south and north ends of Span B.

b. Haunch Girders 1 through 8 had been installed on Bent 2 and secured to the top of Temporary Shoring Tower 1. (See Complainant's Exhibit #7)

c. Temporary diaphragms had been installed on the haunch girders.

d. The strong-back assemblies on Girders 2-8 had been pre-attached to the girders on the ground prior to setting each girder. Couplers had been installed on each rod to facilitate the installation of the rods and the walers.

e. The couplers and rods had been tack welded in the strong-backs on End Girders 2 and 3 to keep the couplers from rotating out of position.

f. The couplers on Girders 4 through 8 were not tack welded.

g. Girder 8 was placed up first with no temporary diaphragm.

h. The temporary diaphragm was attached to Girder 7, bolted, and lifted up easily.

i. The temporary diaphragms between Girders 3 and 4 had been improperly installed. This was unknown to Respondent prior to the collapse.

j. By December 2, 2008, End Girder 3 was successfully set and remained in place until the time of the collapse.

k. Tack welding for Girder 2 was done at ground level.

l. Four rods and couplers were tack welded.

m. The thru-bolts connecting the temporary diaphragm between Girder 3 and 4 were loosened to facilitate the setting of Girder 2 and the installation of the temporary diaphragm between Girder 2 and 3.

n. The temporary diaphragm between Girder 2 and 3 was not attached to Girder 2 at ground level. It was lifted separately to make installation easier.

o. Respondent had difficulty getting the thru bolts to align properly with the temporary diaphragm. Sledge hammers were used to force bolts through.

p. Girder 2 was lifted by a crane and set in place, and Respondent began to tighten the bolts.

40. As the bolts were being tightened, a loud popping noise was heard; and Girder 3 fell to the ground along with the

portions of the strong-back assembly for Girder 3 and the temporary diaphragms between Girders 2 and 3 and Girders 3 and 4.

41. The strong-back assembly for Girder 2 broke, and Girder 2, still attached to the crane, remained suspended.

42. Respondent's employee, Jose Montalvo, was tied off to Girder 3 at the time of the collapse and died as a result of crushing injuries. Bryant, working on the end of the Girder, fell 65 feet and suffered multiple broken bones and serious injuries to his lower extremities.

43. Respondent retained Rimkus Consulting Group, Inc., to determine the cause of the collapse. They prepared a 23-page written report in addition to attachments including plans, models, and photographs ("Rimkus Report").

44. The Rimkus Report concluded that the primary cause of the collapse of Girder 3 was improper tack welding of couplers to the rods.

45. The Rimkus Report also concluded that a contributing cause to the collapse of Girder 3 was improper installation of the temporary diaphragms between Girders 3 and 4 and Girders 2 and 3.

46. Thread bars for support system could fail because of tack welding of rods and couplers resulting in catastrophic injuries, most likely death.

47. Tack welding of DYWIDAG rods and couplers created a hazardous condition.

48. The hazardous condition created the possibility of an accident in that if the concrete beams fell, Respondent employees working below or under beams could be crushed, the substantial probable result of which could be death; and Respondent employees working on beams 65

feet above the ground, could fall, the substantial probable result of which could be death.

49. Respondents' employees working on the ground near Girder 3 were exposed to this hazard.

50. Respondent's employee, Montalvo, who was tied off to Girder 3 when it collapsed was exposed.

51. Respondent knew or could have known of this condition if it read or inquired into the manufacturer's precaution of welding on the rods.

52. This hazard could have been avoided by Respondent contacting DYWIDAG before welding, not welding, or using a single longer rod.

53. SCO Vogel found the severity to be high, the probability to be high, and accessed a Gravity based penalty of $7,000.

54. SCO Vogel applied a 50% reduction for size, 10% reduction for good faith, and proposed an adjusted penalty in the amount of $2,800. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Recognized Hazard Discussion

N.C.G.S. § 95-129(1), the general duty clause, states:

> Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.

In order to establish a violation of the general duty clause, the Commissioner has the burden of proving by a preponderance of the evidence the following: (1) The employer failed to keep its workplace

free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; (4) there were feasible measures that can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees (5)employees were exposed; and (6) the hazard created the possibility of an accident. *Metric Constructors,* OSHANC 96-3407 (1999) *citing Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E. 2d 342 (1988). The issue here is whether under the general duty clause, the Complainant satisfied its burden of proving that Respondent failed to provide it employees with a workplace free from a recognized hazard. To show that the employer recognized that the condition was a hazard, the focus must be upon the hazard generally, rather than the incident, and the hazard must be defined. *National Rlty. & C. Co., Inc. v. Occupational S. & H.R. Com'r.,* 489 F.2d 1257, 1266 (D.C. Cir. 1973). Complainant alleged that the welding on rods used in the strong back system was the recognized hazard in this case. The issue is not whether the welding caused or contributed to the collapse, but rather ***whether welding of the rods was a "recognized hazard."*** "A 'recognized hazard' has been defined as one about which the employer knew or one known about within the industry." *Rebarco* at 345, *quoting Usery v. Marquette Cement Mfg. Co.,* 568 F.2d 902 (2nd Cir.1977). The Court in *Rebarco* further found that the Review Board applied the correct standard when it held "[w]hether or not a hazard exists is to be determined by the standard of a reasonable prudent person. Industry custom and practice are relevant and helpful but are not dispositive. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes." *Id.* at 345. Therefore, "proof that a hazard was recognized can be accomplished by showing actual employer knowledge of the hazard ***or by use of the reasonable man standard.***" *Metric Constructors,* OSHANC 96-3407 (1999).

Actual Employer Knowledge of Hazard

Complainant relies on *Young Sales Corporation*, OSHRC Docket No. 8184, May 1, 1979, 1979 OSAHRC LEXIS 488; 7OSHC (BNA) 1297; 1979 OSHD (CCH) P23, 768 and *Denny Hunter dba Denny Hunter Construction*, 2007-4247 (NCOSHARC, Hearing Examiner decision) to argue that the manufacturer's warning that its product should not be treated in a certain way will support the conclusion that a particular treatment or use is a recognized hazard. In *Young*, Respondent's division manager

testified that he had ***read*** the manufacturer's brochure with the warning and in *Denny Hunter,* the warning was ***clearly stated*** on the outside of the box the materials were delivered in. In this case, the box containing the couplers and rods did not include the precaution or warning "not to weld," nor was it clearly stated on the box itself. Respondent was unaware of the DYWIDAG manufacturer's precaution "not to weld" which was found by SCO Vogel on the DYWIDAG website. Tack welding was used by Respondent to close the gap created between the coupler and the rod, and NCDOT was aware of the tack welding. Respondent had never used rods and couplers on bridge erection this large, and in Respondent's 30+ years of experience, had never welded on DYWIDAG rods and couplers before. There was no evidence in this case to show that Respondent had direct knowledge that welding should not be performed on the rods and then chose to tack weld the rods and couplers anyway. If that were in fact what had occurred, the Court agrees with Complainant's position; it would be considered a willful violation. Respondent's reliance on *Marshall v. L.E. Meyers Company*, 589 F.2d 270 (7th Cir. 1979), however, is misplaced. In *Meyers,* Respondent's alleged hazardous procedure, while contrary to the manufacturer's published "Application Procedures," was not only followed within the industry, but was the preferred method in the industry, **and** it was determined that the procedure was at least as safe as other recognized methods. There was no evidence in this case that tack welding rods and couplers was a method ever used in the industry.

Reasonable Man Standard

The question remains; would a reasonable prudent employer recognize the hazard? Respondent contacted DYWIDAG to inquire about the comparable strength of shorter rods and couplers instead of the longer rods and Respondent argues that the Manufacturer did not comment or warn about welding. The Respondent's decision to weld, however, was not made until construction was underway and the manufacturer was unaware of this decision. Respondent provides no explanation why they did not inquire about the safety of tack welding prior its use. Respondent further argues that it should not be responsible for providing internet access at a remote construction site to access the product manufacturer's website to determine hazards. Would a reasonable person, with no previous experience welding rods and couplers that are used to support concrete beams weighing hundreds of tons, review the manufacturers' instructions, safety warnings, or precautions before welding? The Court thinks so. It is irrelevant that the

manufacturer's website does not state why the rods should not be welded or what the hazards could be resulting from welding. The manufacturer's precaution (a measure taken ***beforehand to prevent harm***) stating "Do not weld" is clear. Moreover, in *Dover Elevator Company, Inc.* OSHANC 92-2443 (1994), NCOSHARC determined that the general duty clause was violated, and the employer subjected its employees to hazardous conditions when the employer did not make an inquiry or review the manufacturers' specifications to safely complete the work being done. Similar to Respondent in this case, the *Dover* employer "improvised" when an essential part was missing to safely complete the work being done, and modified it in a manner inconsistent with manufacturer's specifications. Respondent here decided to "improvise" and use shorter rods with couplers instead of longer rods called for in the plans for the bridge and then tack weld them. Respondent should not have allowed its employees to tack weld on the DYWIDAG rods and couplers it had never before used in the construction of a bridge this large, which was also not an industry standard, without first assuring itself that to do so was safe and proper.

Citation 1 Item 2: Serious

Citation 1, Item 2, alleges a serious violation of 29 CFR 1926.501 (b)(12): "The employee(s) engaged in the erection of precast concrete members (including, but not limited to, the erection of wall panels, columns, beams, and floor and roof 'tees') and related operations such as grouting of precise concrete members, who is 6 feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems:
(a)job site – Employee was not protected by personal fall arrest system because anchorage used by the employee was not secure, in that the double locking snap hook was placed over the open end of the rebar on the top of the girder.

The proposed penalty for this violation was $2100.00.

55. Respondent's employee Montalvo was working on Girder 3, 65 feet about the ground, wearing personal fall protection

equipment; a full body harness with double hooking lanyard attached to a D ring.

56. Training was provided on proper use of fall protection gear.

57. Respondent provided cable lifelines for their employees to always tie off for safety. (See Complainant's Exhibit 7 & 8)

58. There was a cable lifeline on the shoring tower next to the end of Girder 3 and a suspended cable lifeline on the top of Girder 3.

59. After viewing a police photograph (See Complainant's Exhibit #17), SCO Vogel concluded that prior to the collapse, Montalvo was inadequately tied off to a rebar (not closed ended)on the concrete beam instead of a cable lifeline.

60. No witness statements were obtained, and SCO Vogel did not personally view the scene as depicted in the police photograph.

Citation 1 Item 3a: Serious

Citation 1, Item 2, alleges a serious violation of 29 CFR 1926.550 (a)(9): "Accessible area(s) within the swing radius of the rear of the rotating superstructure of crane(s) were not barricaded in such a manner as to prevent employees from being struck or crushed by the crane."

(a) job site – the accessible area within the swing radius of the Mantiwoc 888 crane was not barricaded to prevent employees from being struck by the crane.
(b) job site – the accessible area within the swing radius of the Terex model HC 210 crane was not barricaded to prevent employees from being struck by the crane.

The proposed penalty for this violation was $3500.00.

61. Respondent used two cranes at each end of the site: Manitowoc 888 crane and the Terex HC 210 crane.

62. The cranes had rotating superstructures, and Respondent used the cranes to pick up concrete beams from the storage location; and after the strong back system was attached, the cranes were used to lift the Girders into place.

63. No barricades were in place at the rear of the cranes that would prevent employees from entering those areas.

64. Respondent purchased radios for two spotters to communicate in case employees were in close proximity to cranes.

65. Signs, flashing lights, and horns were also used by Respondent as an alternative to barricades.

66. While an attached stand-off type of barricade was impractical at the site, Respondent could have used a stanchion-type barricade using rope or tape.

67. Working around a crane where there were no barricades created a hazardous condition.

68. All Respondent employees working at ground level had the potential of walking into the area of danger, especially those in close proximity to the cranes and were all exposed to the hazard.

69. The hazardous condition created the possibility of a struck-by accident from the rotating superstructure, the substantial probable result being serious injury or death.

70. Respondent knew or should have known of the hazardous condition in that Keel and Bryant were in plain view of the cranes and knew that they were not barricaded. Respondent admitted that the cranes were not barricaded.

71. The hazard could have been abated or reduced by using a stanchion-type barricade with rope or tape.

72. SCO Vogel found the severity to be high, the probability to be medium, and accessed a Gravity based penalty of $3500.00.

73. SCO Vogel applied a 50% reduction for size, 20% for good faith and 10% for history and proposed an adjusted penalty in the amount of $700.

Citation 1 Item 3b: Serious

Citation 1, Item 3b alleges a serious violation of 29 CFR 1926.20 (b)(2): "The employer's safety and health program did not provide for frequent and regular inspections of the job sites, materials, and equipment to be made by a competent person:

(a)job site – where the designated competent person failed to correct employees from working under suspended loads. (b) job site – where the designated competent person failed to insure that barricades were provided to prevent employees from working in close proximity to rotating crane superstructures.

Citation 1, Item 3a, is grouped with Citation 1, Item 3b, for penalty purposes.

74. Keel was designated the competent person by Respondent.

75. Inspections were done on the site.

76. The conditions at the site Keel failed to detect; the lack of barricade around the cranes and the hazard of walking under a suspended load, created the possibility of an

accident, the substantial probable result of which could be an employee being crushed resulting in death.

77. Not recognizing and correcting these actions allowed Respondents' employees to be exposed to those hazardous conditions.

78. Respondent knew or should have known of the hazardous condition in that Keel and Bryant were in plain view of the cranes and knew that they were not barricaded and Keel was the on-site superintendent walking under the suspended load. Respondent admitted that the cranes were not barricaded.

79. The hazard could have been abated or reduced by having a competent person on the site who was capable of recognizing the safety of barricades around the cranes and the safety of not having employees walk under suspended loads.

80. SCO Vogel found the severity to be high, the probability to be medium, and accessed a Gravity based penalty of $3500.

81. SCO Vogel applied a 50% reduction for size, 20% for good faith and 10% for history and proposed an adjusted penalty in the amount of $ 700.

Citation 1 Item 4: Serious

Citation 1, Item 4 alleges a serious violation of 29 CFR 1926.550(a)(19): "All employees were not kept clear of loads about to be lifted and of suspended loads":

(a)job site – where employees were allowed to work under loads suspended from two cranes.

The proposed penalty for this violation was $3500.00.

82. All of the girders were suspended until unhooked from the crane.

83. After SCO Vogel showed Keel a video of the Respondent's worksite that was taken by the Public Information Office of the Town of Oak Island (See Complainant Exhibit #19 admitted for illustrative purposes), he confirmed that he was walking under suspended concrete beam.

84. The beam was suspended in the air, but the crane was not operating at the time Keel was walking under beam.

85. To ensure Respondent employees are not under a suspended load, the general practice of Keel and Respondent is to have a spotter in place to check with operator to make sure he is not carrying a load.

86. Walking under a suspended load is a hazardous condition in that an employee could be struck by a falling suspended load.

87. The hazardous condition created the possibility of an accident if the lifting mechanism failed, the substantial probable result of which could be death resulting from crushing injuries.

88. Respondent knew or should have known of the hazardous condition in that Mr. Keel was the on-site superintendent walking under the suspended load and Mr. Keel's knowledge is imputed to the Respondent.

89. SCO Vogel found the severity to be high, the probability to be medium, and accessed a Gravity based penalty of $3500.

90. SCO Vogel applied a 50% reduction for size, 20% for good faith and 10% for history and proposed an adjusted penalty in the amount of $700.

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. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant properly proved that (1) Respondent failed to keep its workplace free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; (4) there were feasible measures that can be taken to reduce materially the likelihood of death or serious physical harm resulting to Respondent employees; (5) Respondent employees were exposed; and (6) the hazard created the possibility of an accident.

4. Complainant proved by a preponderance of the evidence and substantial evidence that Citation 1, Item 1, was a serious violation of N.C.G.S 95 §129(1) and the proposed penalty of $2,800 was computed in accordance with the provisions of the Field Operations Manual and is appropriate.

5. Respondent failed to meet its burden of proving the affirmative defense that any employee action was a result of isolated employee misconduct.

6. Complainant failed to prove by a preponderance of the evidence that the Respondent violated 29 CFR §1926.501(b)(12).

7. Complainant proved by a preponderance of the evidence and substantial evidence that Citation 1, Item 3a, was a serious violation of 29 CFR §1926.550(a)(9) and the proposed penalty of $700

was computed in accordance with the provisions of the Field Operations Manual and is appropriate.

8. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 1, Item 3b, was a serious violation of 29 CFR §1926.20(b)(2).

9. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 1, Item 4, was a serious violation of 29 CFR §1926.550(a)(19) in that even though the suspended load was stationary, Respondent employee was in the zone of danger and in violation of the standard. The proposed penalty of $700 was computed in accordance with the provisions of the Field Operations Manual and is appropriate.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that Citation 1, Item 1, alleging a serious violation of N.C.G.S. § 95-129 is hereby affirmed with a penalty of $2800; Citation 1, Item 2, alleging a serious violation of 29 CFR 1926. 501(b)(12) is hereby dismissed; Citation 1, Item 3a, alleging a serious violation of 29 CFR 1926.550(a)(9) is herby affirmed with a penalty of $700; Citation 1, Item 3b, alleging a serious violation of 29 CFR 20(b)(2) is hereby affirmed and grouped with Citation 1, Item 3a, for penalty purposes; Citation 1, Item 4, alleging a serious violation of 29 CFR 1926. 550(a)(19) is hereby affirmed with a penalty of $700.

This the 28 day of March 2012.

Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

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

WILLIAM W POLLOCK
RAGSDALE LIGGETT PLLC
PO BOX 31507
RALEIGH NC 27612

DANIEL ADDISON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

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

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

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

THIS THE 30th DAY OF March 2011.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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