BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DOVER ELEVATOR COMPANY, INC.,

RESPONDENT.

DOCKET NO. OSHANC 92-2443

ORDER

This is an appeal by Respondent, Dover Elevator Company, from an Order entered by the Hon. Roger Askew. Judge Askew held that the Commissioner's citation alleging Dover with a violation of the general duty clause be affirmed and ordered Dover to pay the recommended penalty of $3500.00. Dover appeals that decision.

The Board received briefs, heard oral arguments and reviewed the record. No request was made by either party to present further evidence. Based on its review of the Record the Board finds as follows:

FINDINGS OF FACT

1. In April, 1992 Dover began work for Cumberland County Hospital Systems. Dover was to install six elevators and two dumbwaiters in a new addition of the Cape Fear Valley Medical Center that was under construction. Dover employed six individuals at its Cape Fear worksite, including Charles Cooper, Sam James and Tony Griffen. Griffen was Dover's supervisor at the Cape Fear site.

2. In addition to Dover, there were many other employers working on the addition. These employers included Fowler Jones Construction Company, the general contractor.

3. When Dover arrived at the work site, it discovered that hoisting beams and attachment points had been omitted in the structure for several elevator and dumbwaiter shafts. Among the shafts missing attachment points was shaft number two. A dumbwaiter was to be installed in shaft number two.

4. Dover could not install the dumbwaiter in shaft number two without attachment points. This is so because the installation of dumbwaiters requires lifting of the dumbwaiter off the ground to align the dumbwaiter with the shaft. The lifting of the dumbwaiter involves the use of a chain and hoist attached to an attachment point above the dumbwaiter. The chain and hoist is then attached to the dumbwaiter and used to lift the dumbwaiter off the ground and into place. Without an attachment point there is no means to make the lift.

5. The installation of the dumbwaiter in shaft number two at the Cape Fear work site necessitated one employee to stand on top of the dumbwaiter with an employee below the dumbwaiter during the lifting and installation process. Using the chain and hoist the two employees lift the dumbwaiter into place. For the particular configuration of the dumbwaiter in shaft number two at the Cape Fear facility, the installation of the dumbwaiter required a horizontal lift. Dover was aware of the method and manner of installation and lift required at the Cape Fear facility.

6. Dover was aware that the attachment point must have the capacity to hold the weight of the dumbwaiter, chain, hoist and man in the manner the lift was to be conducted. Dover estimated the combined weight was 500-800 pounds. If the attachment point does not have the capacity to hold the weight in the manner the lift is to be conducted, the attachment point could give way during the lift potentially resulting in the fall of heavy objects (including the dumbwaiter and the hoist).

7. Dover's supervisor reported the structural omission of attachment points to Fowler Jones. Fowler Jones was responsible for ensuring attachment points were installed in the structure. Dover had no contractual relationship with Fowler Jones.

8. Thereafter, Dover's supervisor (Griffen) met with Fowler Jones representatives concerning the need for attachment points to allow Dover to install the dumbwaiters. Several meetings were held in an effort to decide on the type of attachment point to be installed.

9. During the meetings between Fowler Jones and Dover regarding the selection of an attachment point, Dover's supervisor informed Fowler Jones that all that would be necessary for the lift of the dumbwaiter was an attachment point that would have the strength to hold 500-800 pounds. Dover did not apprise Fowler Jones that installing the dumbwaiter would require a horizontal (90 degree) lift.

10. During these meetings Dover's supervisor recommended that Fowler Jones use a metal plate with a metal attachment point welded to the plate which could be anchor bolted through the upper level of the structure. Fowler Jones rejected Dover's recommendation. Fowler Jones informed Dover that it would not install the attachment point recommended by Dover.

11. Dover's supervisor was informed that red head eye bolts would be installed for use as attachment points. The eye bolts are installed by screwing the bolts into the upper level of the structure.

12. The manufacturer's instructions for the red head eye bolts rate capacity based on vertical lifts. The specifications indicate that capacity of the bolts decrease with angular lifts. The specifications clearly state in bold letters that "ANGULAR LIFTS SHOULD BE AVOIDED WHENEVER POSSIBLE". The specifications prohibit the use of this particular eye bolt for lifts at an angle greater than 45 degrees. The red head eye bolt was not certified for use with a horizontal lift of 90 degrees.

13. Dover took no actions to assure itself that the red head eye bolt installed by Fowler Jones in shaft number two, with the knowledge of Dover, was certified for use with the particular load and manner of lifting Dover utilized.

14. The red head eye bolt installed in shaft number two was "not an industry standard hoisting mechanism". Dover was aware of this fact.

15. Lifting dumbwaiters during installation requires considerable care. Dover was aware of this fact. Dover's safety manual states "The supporting structure to which the hoist is attached must have sufficient strength to support the load."

16. Dover had never before installed elevators or dumbwaiters using red head eye bolts in this method.

17. When the red head bolts arrived, its setting tool (one of the parts necessary for installation) was missing. The manufacturer's instructions required the use of the setting tool for proper installation. Dover's supervisor was made aware of the missing part and was part of the decision making process, and agreed with the decision, to install the bolt without the missing part.

18. When the bolts arrived without all of the necessary pieces, work on the installation of elevators and dumbwaiters was at a standstill. Fowler Jones, with Dover's supervisor's acquiescence decided not to wait for new red head bolts with all its fixtures to arrive. Instead the decision was made, with Dover's supervisor's knowledge, to improvise using cut rebar instead of the required setting tool. The installation was further modified at the request of Dover's supervisor.

19. Fowler Jones employees installed one of the modified red head bolts atop shaft number two.

20. Dover was aware that a modified red head bolt was installed for use in shaft number two.

21. Dover proceeded to install the dumbwaiter in shaft number two. Dover's installation of the dumbwaiter in shaft number two proceeded despite never using red head bolts for installation, despite knowledge of modification of the red head bolt and despite the lack of any assurances as to the capacity of the modified red head bolt as installed for the use to be made.

22. On June 31, 1992, Dover employees were installing a dumbwaiter in shaft number two using a hoist and chain attached to the red head bolt and the dumbwaiter. The dumbwaiter was lifted approximately 10 feet off the ground. The red head bolt gave way. The dumbwaiter, the hoist and chain fell to the ground. One Dover employee was killed another injured.

23. Thereafter the Department of Labor conducted an inspection of Dover at the Cape Fear facility.

24. As a result of that inspection, the Commissioner of Labor issued a citation alleging, inter alia, a violation of:

> N.C.G.S. §95-129(1) in that 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 improperly installed hoist attachment points with an abatement date of 9/30/92 and assessed penalty of $3,500.

25. A hearing was held before the Hon. Roger Askew. Judge Askew issued a decision holding that the cited violation of the general duty clause and the proposed penalty be affirmed.

CONCLUSIONS OF LAW

1. The Hearing Examiner's Opinion commingles findings of fact and conclusions of law. The Board rejects the Hearing Examiner's Opinion.

2. The Board is authorized by statute to adopt findings of fact and conclusions of law based on the record, or it may take additional evidence should it be necessary. Where the record is clear and no further evidence is necessary for the Board to reach a decision it may do so by adopting its own findings of fact and conclusions of law. See NCGS 95135(i); accord Crump v. Independent Nissan, 112 NC App. 587 (1993). To require remand in every situation where a hearing officer's opinion is not artfully written would unnecessarily bog down the scarce administrative resources available for effective case management. Furthermore because contested conditions do not have to be abated during contested cases, potentially unsafe conditions may go unabated while constant remand takes place.

3. Dover recognized the hazard of falling heavy objects associated with dumbwaiter installation.

4. Should an accident occur where heavy objects fall during lifting, employees involved in the lifting are likely to incur serious injury or serious physical harm.

5. Dover did not furnish its employees conditions of employment which were free of recognized hazards during the lifting and installation of the dumbwaiter in shaft number two at the Cape Fear Valley Medical Center on June 31, 1992 in that:

> a. Dover did not provide the general contractor with all necessary and pertinent information concerning the method the lift was to be made allowing for the selection and installation of an attachment point which was improper for the intended use;
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> b. Dover was aware of, participated in, and agreed to, the installation of an attachment point that was missing manufacturer required parts leading to the use by its employees of an improperly installed attachment point;
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> c. Dover recommended that the attachment point be installed with modifications inconsistent with manufacturer requirements leading to the use by its employees of an improperly installed attachment

point; and

d. Dover did not take reasonable steps to assure itself that the attachment point used in shaft number two was certified for the capacity and manner of lift to be performed by its employees. Such assurances would have disclosed the fact that the installed attachment point was improper for the intended use.

6. That by its actions and inactions, Dover permitted a condition to exist (allowing employees to work with and under and [sic-an?] improper attachment point during installation and lifting of a dumbwaiter) that increased the likelihood of the hazard of heavy objects falling.

7. That the Commissioner's citation to Dover of a violation of the General Duty Clause, N.C.G.S. §95-129(1), is affirmed. The Commissioner's proposed penalty of $3500.00 is affirmed.

DISCUSSION

This case involves the general duty clause and its applicability in a multi-employer setting.[1] The general duty clause is codified at N.C.G.S. § 95-129(1) and 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.

As a starting point we must define the hazard. Here the hazard is the conditions, practices or policies that increase the possibility of heavy equipment falling during a lift. The condition at issue is improperly installed attachment points.

The record leaves little doubt that the attachment points were improperly installed for the particular lift performed by the employer in that:

1. The attachment point installed was not certified for the capacity of the lift given the horizontal lifting;

2. The attachment point was installed without manufacturer required parts; and

3. The attachment point was modified in a manner inconsistent with manufacturer's specifications.

Indeed, the employer does not seriously contest this point. Instead the employer argues that it is exculpated from any OSHA violation by the mere fact that it did not control the installation of the attachment point.

This argument fails for three reasons. The first is that lack of control is not a defense if the employer knew or should have known, with reasonable investigation, of the potentially unsafe condition. Here Dover knew what attachment point would be used. It had never before used that type of attachment point. It knew that it was not an industry accepted device. It could have reviewed the manufacturer's recommended load capacity. If it had done so, it would have discovered that horizontal lifts were not permitted with this particular bolt. Dover also knew that the attachment point did not come with all its parts. Thus, Dover could have reviewed the manufacturer specifications showing that the missing part was essential for proper installation and no allowance is made for alternate installation methods. Had Dover made such inquiry it could have demanded of the general contractor, an attachment point that was proper for the lift before subjecting its employees to hazardous conditions.

Second, Dover, in effect, did control the selection of the attachment point. The selection itself was improper. Dover informed Fowler Jones of its load requirements. It was this information which, in part, controlled the attachment point selection. Based on Dover's information Fowler Jones selected the attachment point to be installed. Dover did not inform Fowler Jones of the manner in which the lift was to be made. Dover knew that the manner of the lift, horizontal, has an impact on the load capacity but did not convey that information to

Fowler Jones. Such information would have been critical in selecting and installing a proper attachment point. By its silence, Dover, in part, controlled the processes by which the selection of the improper attachment point was made and installed.

Third, it would be inimical to the purposes of OSHA for an employer to subject its employees to known or possible hazards merely because it did not "control" the hazard. Dover wanted a safe attachment point. That is to be commended. The mere fact that it was not ultimately responsible for the selection and installation of the attachment point however. does not provide a release of its obligations to its employees. When Fowler Jones rejected Dover's suggested attachment point, Dover did not then have a right to subject its employees to whatever attachment point Fowler Jones installed, regardless of the potentially hazardous conditions created. Dover should not have allowed its employees to work under an attachment point it had never before used and was not an industry standard without first assuring itself that the attachment point was proper for the work to be done. Dover failed to make such assurances. As such, the general duty clause was violated.

Dover's duty, under OSHA, is owed to its employees, not the general contractor. Under the facts in this case, i.e., where the original designed attachment points were missing and alternatives suggested by Dover were rejected, Dover had a duty to ensure that the attachment point Fowler Jones installed was proper and safe for the work to be performed by Dover employees before allowing its employees to horizontally lift heavy objects with that attachment point.

This the 31st day of August, 1994.

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J.B. Kelly, Chairman

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HUGH M. WILSON, MEMBER

FOOTNOTES

[1] The Commissioner also cited Respondent, in the alternative, for a violation of 29 CFR § 1926.554(a)(6) which states:

> all overhead hoists in use shall meet the applicable requirements for construction, design, installation, testing, inspection, maintenance, and operation, as prescribed by the manufacturer.

The Hearing Examiner dismissed this citation and that decision was not appealed by either party. Nevertheless, the Board may review the entire decision on appeal. Having done so, we express our agreement with the dismissal of that citation. However we do not adopt the hearing examiner's rationale for the dismissal. Instead we note that the cited regulation deals exclusively with hoists. It does not directly regulate attachment points. There is no evidence in the record that the hoist, as opposed to the attachment points, used by Respondent did not meet the applicable requirements set forth in 29 CFR § 1926.554(a)(6). Because the Commissioner failed to meet his burden of proof on this citation it is dismissed. We have not been asked to, nor do we, decide whether or not an employer could be cited under 29 CFR § 1926.554(a)(6) for having improper attachment points where the hoist manufacturer's requirements for hoist use include testing and inspection of attachment points with which the hoist will be used.

Kiser, Kenneth K. dissenting:

This case is bubbling over with issues of fundamental fairness. The ALJ's order failed to include essential elements of proof and findings of fact. The ALJ affirmed a violation of the general duty clause, as opposed to a specific standard which specifies the employer's duty. The location of the alleged violation of its general duty was a multi-employer site, with numerous specialized trades.

See J.L. Foti Construction Company, 1980 OSHD ¶24,572 (RC 1980) . There, the dissent objected to a remand because the ALJ's findings were fully adequate. As Commissioner Cottine explained, a remand is justified by such exigencies as intervening changes of law, the need to supplement the record, and the absence of requisite findings or conclusions. And see Asplundh Tree Expert Co., 1978 OSHD ¶23,033 (RC 1978) and cases cited therein: "It is not sufficient for the Judge to merely state his ultimate findings and conclusions; he must set forth sufficiently detailed findings and reasons to assist the Commission in fulfilling its role as the ultimate finder of fact." Of course, detailed findings also permit the employer to know how and why the government's allegation was affirmed against it.

The OSHANC general duty clause (N. C. Gen. Stat. §95-129(1)) is identical to the federal general duty clause (P.L. 91-596(5)(a)(1), 29 U. S. C. 654):

> 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 turn, since its inception, the federal general duty clause has always presented serious due process concerns. It evolved from a compromise between the bill passed as amended by the U. S. Senate (S.2193), which did not provide for any penalty unless the employer failed to correct its general duty violation (Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Congress, 1st Session, Committee Print, U . S . Government Printing Office, June 1971, at 150, 197), and the bill passed by the U.S. House (H.R. 16785), which did provide for a penalty but which was restricted to "readily apparent hazards" (Leg. Hist., 1120).

The parties in the case at issue were at odds as to what the commissioner of labor must prove to establish a violation of the general duty clause. Heretofore, the Review Board has not addressed within one decision the elements of proof to sustain a violation of the general duty clause.

The North Carolina court of appeals held in Rebarco, Inc., 3 NCOSHD 1, at 6, 91 N. C. App. 459, 372 S. E.2d 342 (Ct. of Appeals 1988) that: "Federal courts have held that to successfully prosecute a violation under the 'general duty clause' a complainant must show that an employer failed to render its workplace free of a hazard which was 'recognized' and causing or likely to cause death or serious physical harm" (citing National Realty and Construction Co ., 1973-1974 OSHD ¶17,018, 489 F.2d 1257 (DC Cir. 1973)).

The federal Review Commission has established the elements of proof for a violation of the federal general duty clause. By extrapolation, to prove a violation of N. C. Gen. Stat. §95-129(1), the commissioner of labor must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, (4) there existed feasible means to eliminate or materially reduce the hazard. See Coleco Industries, Inc., 1991 OSHD ¶29,200 (RC 1991) The parties in the case at issue disagreed as to how a recognized hazard may be established. The briefs were in dispute as to whether required proof is limited to recognition by the employer's industry, or includes the employer's actual knowledge, or may be assessed by the reasonable person standard. In Rebarco, Inc., supra, at 3 NCOSHD 6, the North Carolina court of appeals held that "a 'recognized hazard' may be defined as one about which the employer knew or one known about within the industry." The court also held that the Review Board did not err by using the reasonable prudent person criterion to determine that the employer knew that the condition was a hazard. It is clear that the Review Board intended to confine its use of the "reasonable prudent person" test to persons familiar with the employer's industry. See the Review Board's decision at 2 NCOSHD 589 (FF#26) and its discussion at p.591.

There is no need to address industry recognition if it is shown that the employer possessed actual knowledge that the condition was a hazard. Vy Lactos Laboratories , Inc., 1974 OSHD ¶17,573 , 494 F. 2d 460 (8th Cir. 1974). To the extent that the complainant relies upon expert testimony to establish actual employer knowledge, "a reasonably conscientious safety expert familiar with the pertinent industry" is required. Magna Copper Co., 1979 OSHD ¶24, 050, 608 F.2d 373 (9th Cir. 1979) .

To show that the employer recognized that the condition was a hazard, under the general duty clause, the focus must be upon the hazard, generally, rather than the incident, per se (National Realty, supra at 1973-1974 OSHD p.21,685); and the hazard must be defined. "To respect Congress' intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." Pelron Corp., 1986 OSHD ¶27,605 (RC 1986).

In addition to showing that the employer knew that the condition was hazardous, it must be proven that the employer knew that the condition recognized to be a hazard existed within its workplace. That is true because violation of the general duty clause is by definition serious and serious violations require proof of knowledge of the condition. See Getty Oil Co., 1975-1976 OSHD ¶20,649, 530 F.2d 1143 (5th Cir. 1976).

The condition recognized to exist as a hazard must be causing or be likely to cause serious injury or death. This requirement does not demand proof that the incident giving rise to the citation was foreseeable. See United States Steel Corp., 1982 OSHD ¶26,l23 (RC 1982). Rather, the burden is satisfied in the same manner as for establishing any serious violation. See National Realty, supra, n.33.

The commissioner must show "demonstrably feasible measures that would have materially reduced the likelihood" of the hazard. See National Realty, supra, at 1973-1974 OSHD p.21,687. "The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. " Id., at n.37. The commissioner must prove the feasibility and utility of suggested abatement means. Royal Logging Company, 1981 OSHD ¶25,395, 645 F.2d 822 (9th Cir. 1981).

The ALJ's Order

As it contended in its petition for review, the employer was denied its right to challenge the ALJ's findings and conclusions precisely and concisely. The findings and conclusions simply were inadequate or did not exist. The Board cannot review for error that which does not exist. That is at once a serious due process matter and a frustration of this Board's proper role.

Through its creation of the Review Board, OSHANC established a body with expertise in OSHA law to resolve contested matters through a balance of regard for employee safety and employers' due process rights. There is no hazard to be abated in this case. There are crucial due process concerns. This employer should have its day before both levels of the Review Board without being forced to bear the expense of defending itself against the State through its various courts. Ensuring that advantage to the State may well deprive this employer of due process.

The OSHANC review scheme requires clear, distinct findings and conclusions to permit review. "The report of the hearing examiner, and the report. . . of the Board. . . shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record" (emphasis added). N. C. Gen. Stat. §95 -135 (i) (1993) .

The Board's time-honored precedent has been to review the whole record for assertions of errors of fact, and not disturb lower findings as long as there was evidence upon which the lower decision could have been founded (Snow Hill Metalcraft Corporation, 2 NCOSHD 377, 380 (RB 1983)) . Where only errors of law have been at issue, the Board has remanded (Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981)) and applied de novo review (House of Raeford Farms, Inc., 2 NCOSHD 403 (RB 1982)) , and was within its right to pursue either course. But where there have been sharp factual disputes between the parties, the Board has remanded. (T.R. Driscoll, 2 NCOSHD 717 (RB 1986)).

In Crump v. Independence Nissan and Employers Mutual Casualty Companies, 9210IC982 (Ct. of Appeals filed Nov. 16, 1993), the court held that the North Carolina Industrial Commission was within its right to conduct its own hearing of an issue on appeal or alternatively to remand to its deputy commissioner. While the review schemes for the Industrial Commission and Review Board appear similar in ways, they actually differ materially. N. C. Gen. Stat. § 97-85 allows the Industrial Commission latitude to re-deliberate the proceedings: "to reconsider the evidence, receive further evidence, rehear the parties or their representatives." The court's review of the Commission's history supports that interpretation: the Commission may "resolve matters in controversy even if those matters were not addressed by the deputy commissioner." Finally, the court held that the Commission had in fact adopted the lower opinion (even implicitly, its findings of fact) as its own. Crump, supra.

OSHANC (N. C. Gen. Stat. §95-135(i)) only authorizes the Review Board to "allow the introduction of newly discovered evidence, or . . . [to take] further evidence. The parties or their representatives may appear at the review hearing. OSHANC allows the Board to adopt and operate under its own rules (§95-135(d)); our own Rules require a petition for review to "concisely and precisely. . identify by number any fact or conclusion set forth by the hearing examiner which is not supported by a preponderance of the evidence or which is contended to constitute an error of law.... Normally, review will be strictly limited to issues raised in the petition for review" (.0602(b), .0602(c)). The Board's history supports that limited review practice (Utility Construction Company of Charlotte, 2 NCOSHD 478, 480 Decision, 2nd ¶ (RB 1982)).

This case should have been remanded.

No Recognized Hazard; Feasibility of Abatement not Established

The complainant failed to prove that the hazard as alleged was recognized by the employer's industry, that the employer recognized the condition as a hazard, or that the employer was aware of the condition; and failed to establish the feasibility of abatement. On those issues, I would find the following:

1. The general contractor's decision to use rebar in lieu of the setting pin to set the eyebolt (T-25-26) does not show that the respondent knew to load test for improper installation by the general contractor. The respondent knew of the decision (T-42). Yet it was a safe procedure in the mind of the general contractor. And use of the rebar was a competent alternative, according to the compliance officer. (T-138, 185-186).

2. The general contractor's request of the load test does not show that the respondent knew to load test for improper installation by the the general contractor. The compliance officer concluded that the eyebolt was improperly installed (T-185-186) so that is what the citation alleged. Admittedly, the complainant's questions helped link the need for the load test to the allegation, viz., "Based upon your opinion would the load test be necessary to check the bolt rating or would it be necessary to check the installation of that bolt?" In the wake of the fatal accident, the general contractor is able to say that it requested the load test to determine proper installation. But the general contractor did not tell the respondent why the load test was requested, whether for determining proper installation, the integrity of the concrete, or bolt, or for some other reason (T-31, 48, 73).

3. The actual load test by the respondent of a separate shaft (shaft #8) does not show that the respondent knew to load test for improper installation by the general contractor. It only shows the employer's voluntary safety effort to assist the general contractor with its duty.

4. The testimony does not show that the employer knew to load test for improper installation by the general contractor.

> a. Asked whether it still remains in dispute as to whether the load test was even necessary, the compliance officer replied, "that is true. I was trying to determine who shot John the entire time I was there. " (T-184) .
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> b . Asked whether the load test was necessary or advisory, the general contractor's assistant superintendent responded "advisory -advisory because of the use of the bolt. " (T-70) . Load testing was merely advisory in the view of the trade which installed the attachment point.

c. The only witnesses who were from the employer's industry both testified that having been in the elevator industry for 25 years and at thousands of construction sites, neither had heard of an eyebolt coming loose and that it was not a known practice in the elevator industry to load test to determine if the general contractor improperly installed attachment points (T-189, 209-210)

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5. Neither of the compliance officers' testimony establishes a recognized hazard. Compliance Officer Brown was not a certified safety professional, had no degree in safety engineering, and was limited in experience regarding load testing to completing paper work verifying that someone else in the Navy had tested eyebolts (T-117, 121-122). Compliance Officer Whitley had no training at all in rigging hoists, was not familiar with elevator installation, and relied upon the assistance of a Department of Labor elevator inspector who did not normally inspect dumbwaiters (T-170).

6. The record does not show that the respondent knew of the condition. The dumbwaiter weighed 400 pounds (T-19). The general contractor selected an eyebolt with a 10,000 pound lifting capacity with which to suspend the dumbwaiter (T-23). When the general contractor put the anchor for the attachment point in place, it was not possible to recognize whether it was properly installed (T-48) . The attachment point in shaft #2 was installed exactly the same as in shaft #8 --with one exception--in shaft #2, the carpenter failed to center the eyebolt (T-101-102). The respondent was not aware of how the eyebolts were actually installed (T-106).

7. The abatement means suggested by the compliance officer included I-beams, bolting through, and load testing; the citation suggested load testing and certifying by an engineer. The general contractor selected eyebolts because I-beams were not feasible (the walls were 12 inches of solid concrete -T-22); and because bolting through was not feasible (it would penetrate the roof membrane T-38). According to the compliance officer, inspection by an engineer was not required: Asked whether the attachment point should have been certified by an engineer after it was installed, the compliance officer replied, "I don't think an engineer is required to check that, no." (T-171-172). If load testing was feasible, it certainly was not of utility, in that it did not prove that it would reduce the presence of the hazard. The record does not show that the load test in shaft #8 revealed anything to notify the employer of improper installation. Shaft #8 passed the load test and the record does not show what caused the attachment point in shaft #2 to fail when it did not fail in shaft #8 (whether improper installation, or the integrity of the eyebolt and/or its surroundings), yet both eyebolts were installed in the same manner (T-140-141).

The record reflects what was litigated, what the commissioner established, and how the employer responded in its defense. The hazard alleged and litigated in this case was working beneath an attachment point improperly installed by a separate trade. The citation was affirmed by the ALJ because the respondent's employees worked beneath a hoist suspended by a different (redhead) eyebolt than that of which the respondent was familiar, yet it failed to test for the general contractor's improper installation (ALJ FF#6), and because the redhead eyebolt had not been used by other elevator companies, yet the respondent failed to test for the general contractor's improper installation (ALJ FF#6, 7).

The record does not show that other elevator companies do not use the redhead eyebolt (T-199, 211). All that the record does show is that this respondent commonly suspended dumbwaiters from eybolts of different types (T-37, 39, 59). Had the general contractor used a bolt-through, or I-beam, or had its selection of eyebolts been that of which the respondent was familiar, the respondent would not have been expected to test for the competency of the other trade's work, and it would not have been cited or the citation would have been vacated. Yet, because of any number of factors, including improper installation, those attachment points may have failed. The general contractor's selection of an eyebolt could not have given the respondent fair notice that it should load test for improper installation by the general contractor.

The general duty clause imposes general obligations which ipso facto raise questions of whether the employer had fair notice of what it should or should not have done. National Realty, supra, 1973-1974 OSHD p. 21,688. The multi-employer worksite is a place of employment with employers of different specialties and with divided responsibilities. A penalty is mandated for a first instance violation of the general duty clause, because, unlike

safety and health standards, the general duty clause violation is always serious. Given those due process considerations, the government should be strictly held to its allegations. Consolidated Engineering Co., Inc. and Otis Elevator Co., 1974-1975 OSHD (RC 1974).

The commissioner may have been on firm ground if the citation had alleged that the recognized hazard was working beneath a suspended load. Working under a suspended load without acquiring certification that all elements necessary to its integrity are in place might be a hazard recognized across numerous industries. But alleging that this employer of the elevator industry should have checked the competency of the general contractor's work, based solely on its own choice of an attachment point, is truly remarkable (see Royal Logging Company, supra, 1981 OSHD p.31,649), and surpassed only by the affirmation of the citation.

The citation should have been dismissed.

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KENNETH K. KISER, MEMBER