UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
VOGEL BROTHERS
Respondent.

OSHRC DOCKET
NO. 91-2557

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 10, 1993. The decision of the Judge will become a final order of the Commission on March 12, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 2, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
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Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2557

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SECRETARY OF LABOR, Complainant, v. VOGEL BROTHERS BUILDING COMPANY, INC., Respondent.	OSHRC Docket No. 91-2557

APPEARANCES:

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For Complainant

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For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Vogel Brothers Building Company, Inc. (Vogel), contests six serious and five "other than serious" alleged violations. The citations emanated from an inspection conducted by Compliance Officer Warren Knopf on April 22, 1991, at a construction site in Tampa, Florida (Tr. 10). It was a planned inspection, although a complaint had been received (Tr. 11). A waste water administration building was under construction. The building contained two floors for office space and a third floor for a garage.

Upon arrival at the site, Knopf proceeded to Vogel's trailer. Vogel was the general contractor. Knopf showed his credentials and asked to meet with all the subcontractors on the site (Tr. 24). The opening conference was attended by William Monroe, Vogel's superintendent at the site, and Roger Wright, a Vogel supervisor (Tr. 12). Wright accompanied Knopf on the subsequent walk-around (Tr. 12). The inspection lasted one day (Tr. 12).

Serious Citation - Item 1

Alleged Violation of § 1926.152(d)(2)

Vogel was charged with failure to maintain a fire extinguisher within 75 feet of a flammable liquid storage area. Section 1926.152(d)(2) provides:

> (2) At least one portable fire extinguisher having a rating of not less than 20-B units shall be located not less than 25 feet, nor more than 75 feet, from any flammable liquid storage area located outside.

The standard requires a 20-B fire extinguisher to be within 25 to 75 feet of any refueling station (Tr. 13).

Two tanks at a refueling station on the site contained diesel fuel (Exh. C-1; Tr. 13-15). Vogel employees were engaged in working around the station on April 22, 1991 (Tr. 15). Knopf could not locate a fire extinguisher at the diesel refueling station. He requested Wright to assist him. Wright was unable to locate a fire extinguisher.

Vogel argues that Knopf may have believed there were no fire extinguishers, but that fire extinguishers were at the site. Vogel states that a fire extinguisher was located in one of the sheds. Interpreting the facts most favorable to Vogel, a fire extinguisher was within 75 feet but was not readily visible and its exact presence was unknown to a supervisor.

Wright moved the fire extinguisher from the shed near the diesel fuel tanks to the shed closest to the fuel tanks after the inspection so there would not be a problem with seeing it in the future (Tr. 98). Knopf concedes that the fire extinguishers that were in place four days after the initial inspection were sufficient to meet the OSHA requirements (Tr. 61).

Vogel insinuates that Knopf was not overly concerned making certain whether a fire extinguisher was within 75 feet of the tanks because he chose to move on without checking the trailer or the other shed. It argues that the only issue is whether the fire extinguisher meeting the requirements was at the site and within the requisite distance of the refueling area on the date of the inspection, not whether Knopf saw it that day. This is fallacious reasoning and overlooks the purpose of the standard. The compliance officer was not compelled to spend his inspection time looking for a fire extinguisher. If it is not readily visible, he may assume that employees would have a problem locating it.

Wright accompanied Knopf and was unable to locate the fire extinguisher. The standard assumes that the fire extinguisher will be readily available for any emergency. One needs to know its location for it to be beneficial. Employees need to know immediately where the fire extinguisher is located. The supervisor was unable to show its location to Knopf. The failure to be aware of its exact location is sufficient to support the violation. Vogel had its opportunity to demonstrate compliance and failed to do so.

Wright could not locate a fire extinguisher within 75 feet of the fueling station during the course of the inspection (Tr. 109). He located three fire extinguishers within 75 feet of the fueling station after Knopf had completed the inspection and had vacated the jobsite (Tr. 97-98). Wright indicated that he showed the fire extinguishers to Knopf during the closing conference and that he had approved their size and location (Tr. 98, 123). Knopf denied he was shown the fire extinguisher at the closing conference (Tr. 211-212) but concedes it was in place on April 26 (Tr. 61).

The alleged violation is affirmed.

Serious Citation - Item 2

Alleged Violation of § 1926.350(j)

Section 1926.350(j) states:

> (j) *Additional rules.* For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting, shall apply.

Vogel allegedly stored oxygen and acetylene tanks together. An oxygen and acetylene tank was strapped to a cart (Tr. 16). Knopf considered the tank to be in a storage position. Vogel submits that the cart Knopf saw is the typical cart that oxygen and acetylene cylinders are placed on while they are in use. The standard requires the two cylinders to be separated if they were not in use and are being stored. Vogel argues that the fact that the cylinders were not being used at that specific moment does not mean they were "not in use" for the purposes of the regulation.

Knopf's determination that the cylinders were being stored on the cart relies on a statement supposedly made to Knopf by Braxton. Knopf stated that Braxton indicated that he had worked at the site on Friday and that the cylinders had been in the same position since Friday with no use. Braxton unequivocally denied this version of the facts. He testified that he used cutting torches in his job quite often for cutting rebar (Tr. 130). Braxton further testified as to the procedure for using and storing the tanks (Tr. 131, 136). According to him, the oxygen and acetylene cylinders were never put away together and were never left on the same cart except when being used during the day. They were put away separately each night (Tr. 126, 135). Exhibit C-2 shows an oxygen-compressed gas container and an acetylene-compressed gas container strapped to a portable welding cart within inches of each other. Section 3.2.4.3 of the American National Standards Institute Z49.1-1967, as adopted by § 1926.350(j), requires that these tanks be stored at a minimum distance of 20 feet of each other or separated by a noncombustible barrier at least 5 feet high.

Braxton testified that he vaguely remembered speaking with Knopf during the inspection but did not remember the substance of the conversation (Tr. 135). He stated that it was Vogel's general practice to store the cylinders in separate locations (Tr. 136). Wright testified that he could not recall if the containers had been in use three days prior to the inspection (Tr. 122-123). Storing the containers together could result in their leaking or exploding which could cause serious burns to employees (Tr. 23). Vogel offered no testimony to directly refute Knopf's testimony except the nebulous denial by Braxton, who suffered from a lapse of memory. No substantive evidence was offered to establish that the tanks had been in use during the three days prior to the inspection.

Wright testified that the two cylinders were on the cart to be moved and stored (Tr. 126). The fact that the cylinders were on the cart does not imply that they are in storage--a fact assumed by Knopf. Generally, the carts are utilized when the cylinders are being used. To be in use, the cylinder does not have to be utilized 100 percent of the time. Braxton was clear that tanks are stored separately at the end of the day. There is no convincing evidence that the cylinders had been stored on the cart. This conclusion is purportedly based on the admission of Braxton which he denies.

The alleged violation is vacated.

Serious Citation - Item 3

Alleged Violation of § 1926.500(d)(1)

Section 1926.500(d)(1) provides:

> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Item 3 of the serious citation states the alleged violation as follows:

> a) First floor north side - employees were not protected at the floor edge by a standard guardrail where there was a potential fall of 12 feet to the ground, on or about 4/22/91.
>
> b) First floor, south west side - employees were not protected at the floor edge by a standard guardrail where there was a potential fall of 12 feet to the ground, on or about 4/22/91.
>
> c) First floor, east end - south facing west - employees exposed to a potential fall of approximately 12 feet to the ground, no protection by a standard guardrail, on or about 4/22/91.

Guardrails were missing at three locations on the second floor. Employees were working within inches of the unguarded perimeters and were exposed to falls of 12 feet (Tr. 26-27, 29, 73). Photographs show employees working in close proximity to the unguarded floors. The unguarded areas are highlighted on the photographs (Exhs. C-3, C-4, C-5). Vogel was responsible for the guardrail at the site (Tr. 29).

Vogel placed the guardrail on the floors as they went up with the building (Tr. 160). Wright stated that the guardrails were not taken down by Vogel (Tr. 100) and that subcontractors (either Filigree or Bickey) may have taken the guardrails down because they were in the way of some operations these subcontractors were attempting to conduct and that the subcontractors were responsible for replacing the guardrails (Tr. 100-101). He stated that Vogel continually "stayed after" the subcontractors to get them to replace the guardrails (Tr. 101).

Vogel argues that there is no evidence as to how close the individuals who were on the floor were to the edge where the guardrails had been taken down. Such an assertion ignores Knopf's testimony. Knopf relied on photographs C-3, C-4 and C-5 in making his recommendation that a violation be charged (Tr. 74-75). He was not on the floor on which the men are shown to be standing when he took the photographs (Tr. 74) and he did not measure how far the men were from the edge (Tr. 75). He did observe the men and interviewed them (Tr. 76-77). He observed the men within inches of the unguarded perimeter (Tr. 79).

The standard requires that guardrails of specific strength be installed on open-sided floors 6 feet or more above the ground or adjacent floor. Exhibits C-3 through C-5 show unguarded perimeters on the second floor of the jobsite and employees working along those unprotected edges. Vogel admitted that the perimeters on the second floor were unguarded during the inspection (Tr. 99-100, 114). Vogel's defense to this violation is predicated on the fact that the subcontractors were taking down installed guardrails and failing to replace them even after they were admonished to do so (Tr. 99-100, 180). Vogel, as the general contractor and controlling party at the jobsite, was responsible for maintaining a safe workplace and may be cited for violations caused by a subcontractor. *Grossman Steel &*

Aluminum Corp., 4 BNA OSHC 1185, 1975 CCH OSHD ¶ 20,691 (No. 12775, 1975); *Frank J. Rooney*, 14 BNA OSHC 1959, 1990 CCH OSHD ¶ 29,163 (No. 89-1691, 1990).

While Vogel states that it did everything possible to have subcontractors reinstall guardrails, the exact procedure followed is unknown. Many of the violations were in plain view and had existed for some time. If Vogel had been vigilant and had had a competent person conducting inspections, it would have been more aware of the failures to comply. Implementation of the safety program was deficient. While lanyards were kept on the site, they were obviously not worn by employees when they would have been appropriate. Vogel contends that if any workers were exposed, the violation resulted from unpreventable employee misconduct. It has failed to establish this defense. The evidence fails to disclose policy and procedures pertaining to enforcement of its safety rules. There is no evidence of an enforced disciplinary policy.

The violation is affirmed.

Serious Citation - Item 4

Alleged Violation of § 1926.550(a)(9)

The Secretary charged Vogel with a violation of § 1926.550(a)(9).[1] This standard provides:

> (9) Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

The location of the crane at the time of the inspection was on an access drive around the building. There was no barricade or other obstruction to prevent employees from walking within the swing radius of the crane while it was in operation. The access drive around the building had limited access for walking. The drive provided the shortest way to reach the other side of the building. Knopf observed that Vogel employees came within the radius of the crane (Exh. C-6; Tr. 30-32). The crane was in operation (Tr. 32).

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[1] The citation alleges a violation of § 1926.550(a)(16). The complaint refers to § 1926.550(a)(9).

Knopf interviewed the crane operator and engaged in a conversation with Wright concerning the operation of the crane. According to Knopf, Wright informed him that the crane moved so often that it was not practical to put out barricades (Tr. 34). Exhibit C-6 is a photograph which purportedly shows the crane in operation. Vogel's counsel insisted that there was no operator in the cab. Knopf felt the cable of the crane was under load (Tr. 60, 62-64).

Photographic evidence reflects a crane without its swing radius being barricaded (Exh. C-6). The argument over whether the crane in Exhibit C-6 is in operation does not mean that the crane was not in operation at the time of the inspection. Knopf visually observed the crane hoisting material to the second floor and employees walking within the danger zone of the radius' swing (Tr. 31, 213-214). Wright admitted that the crane was not barricaded during the inspection but contends that the crane had just been placed in that position when the compliance officer arrived (Tr. 123-125). Vogel's crane operator conceded that the crane was not barricaded. He remembers speaking to Knopf but could not recollect whether he had operated the crane prior to speaking with him (Tr. 149). Knopf's testimony has not been rebutted and is totally credible. Knopf had ample opportunity to observe the crane in operation.

The violation is affirmed.

Serious Citation - Item 5

Alleged Violation of § 1926.652(a)(1)

Section 1926.652(a)(1) provides as follows:

> (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or
>
> (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The Secretary has charged Vogel with a cave-in danger and improper excavation.

There was an excavation on the side of the building. It was 8 feet deep and 10 feet wide at the narrowest point on its vertical walls. Wright was not aware of any testing having been conducted on the soil. A foreman of Vogel informed Knopf that it was not necessary to test the soil at that location. He indicated that the soil was "garbage." A foreman and a laborer were working in the excavation. The excavation had vertical walls. There was no shoring or sloping (Exhs. C-7; C-8; Tr. 34-36). The foreman was engaged in positioning the pipe (Tr. 36-37).

Knopf initially testified that he measured the depth of the trench. He was assisted by Wright. Knopf later said that he did not personally measure the depth (Tr. 66). According to him, Wright read the depth tape and called out the approximate footage to him (Tr. 64-65). He thought Wright said the excavation was 8 feet deep. Wright denies making the statement. Knopf's observation was that the employees in the trench were from 5 to 6 feet tall. In his opinion, the excavation was 2 to 3 feet above their heads (Tr. 68-69).

The evidence offered by the Secretary in support of the allegation contains photographs of the excavation (Exhs. C-7, C-8). The photographs support Knopf's testimony that the walls of the excavation were nearly vertical and that there was no shoring. Knopf conceded that he personally did not take any measurements of the depth or width (Tr. 68).

Knopf bolstered his testimony by saying that Vogel employees Jeff Sicheri and Dan Weiss told him the soil consisted of "garbage" (Tr. 70). The pictures do not depict any "garbage" and both Jeff Sicheri and Dan Weiss denied ever telling Knopf that the soil was "garbage" (Tr. 159, 207-208). Vogel argues that the Secretary has the burden of making a prima facie case by showing that a significant portion of the trench wall was composed of some soil which requires sloping of the trench, citing *CCI, Inc. v. OSHRC*, 688 F.2d 88, 90 (10th Cir. 1982) including the following:

> To establish a prima facie showing of non-compliance with § 1926.652(c), the Secretary must show that a significant portion of the trench wall is composed of hard or compact soil. A Respondent may then rebut this prima facie case by proving that its trench was dug entirely in solid rock, shell, or cemented sand or gravel, which are not required to be shored or sloped. 688 F.2d 90.

Vogel states that until the Secretary offers evidence that sloping or trench protection is required, it is not necessary for it to rebut the presumption that sloping is required. It submits that the Secretary put forth no such prima facie case but relied entirely upon uncorroborated, and totally refuted statements that the soil was "garbage." Under the circumstances, Vogel states that it was not incumbent upon it to offer any evidence to rebut the Secretary's case, citing *CCI, Inc., supra*.

Even if a prima facie case is established showing that protective systems or sloping were necessary, Vogel contends that it has totally and completely rebutted the Secretary's position with testimony of its witnesses and Exhibits R-1 and R-2. Sicheri testified that the excavation was only about 4½ feet deep and not above the heads of the men (Tr. 160). Glanton testified that the excavation was not over his head but was only up to about the "Y" of his breastbone, which was 18 inches below the top of his head. He is approximately 6 feet 3 inches tall (Tr. 173). Due to the angle at which the photographs were taken, it is difficult to make an accurate estimate of the depth. Five feet is the threshold at which § 1926.652 applies.

Vogel contends that the excavation was less than 5 feet deep and that it was composed of soil cement (Tr. 89-90, 111, 159-160). Wright testified that on the day of the inspection he saw Knopf measure the excavation and remembers his stating that it was either 7 or 8 feet deep (Tr. 112). He claims to have disputed the depth offered by Knopf (Tr. 90, 112). Wright stated that he disputed the measurement because the tape was at an angle (Tr. 90). The excavation covers six rungs of an 8-foot ladder which was leaning on one of the vertical walls of the excavation (Exh. C-7; Tr. 184-185).

Monroe stated that Vogel has a policy that all excavations in excess of 5 feet have to be properly sloped and shored (Tr. 183). According to him, the deepest part of the excavation in issue was 4½ feet (Tr. 183). This opinion is also shared by Jeffrey Sicheri, Vogel's pipe foreman (Tr. 160). The actual depth of the excavation remains a mystery. The photographs of the excavation do not convincingly establish a depth. They are subject to varying interpretations due to the angle at which they were taken (Tr. 165).

Neither party tested the composition of the soil (Tr. 167). Knopf relied on the pipe foreman's supposed characterization of the soil as "garbage" (Tr. 85). This statement was denied by Sicheri (Tr. 159), who characterized the soil as "soil cement" (Tr. 159). He described the soil as harder than concrete (Tr. 160).

In view of the failure to establish a depth and to determine the composition of the soil, the alleged violation is vacated.

Serious Citation - Item 6

Alleged Violation of § 1926.651(j)(2)

Section 1926.651(j)(2) provides:[2]

> (2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The standard requires that any spoil pile of material removed from an excavation be placed 2 feet back from the edge of the walls of the excavation. This is to prevent the spoil pile from falling on employees in the excavation (Tr. 38-39).

At the time of the inspection, the spoil pile was located at the edge of the excavation (Exhs. C-9, C-10, C-11; Tr. 38-39). The excavated material was located on the walls. The spoil was located in a manner that there was no discernable edge between the spoil and the wall (Tr. 40-41).

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[2] The complaint refers to § 1926.651(h)(i)(1). The citation refers to § 1926.651(j)(2). Section 1926.651(h)(i)(1) provides:

> (i) *Stability of adjacent structures.* (1) Where the stability of adjoining buildings, walls, or other structures is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees.

Section 1926.651(j)(2) is more specific. Since the facts remain the same, the issue is decided under § 1926.651(j)(2), as alleged in the citation.

The material being removed from the excavation was placed at the edge of the excavation. Knopf took photographs of spoil piles which were at the opening of the excavation. The photograph does not show any discernable space between the excavated material and excavation (Exhs. C-9, C-10; Tr. 38-42).

Vogel alleges that the soil is removed from the excavation by a backhoe prior to being moved back from the bank. Wright stated that the soil was constantly being removed from the bank (Tr. 92). It is a violation of the standard to place the material within 2 feet of the bank. The backhoe could initially place the soil more than 2 feet from the bank. Vogel was in violation of the standard for failing to do so. The fact that the soil is placed within 2 feet of the bank at any time creates additional stress on the wall of the bank. It is the intent of the standard to prohibit the additional stress at all times.

The violation is affirmed.

Characterization of the Violations

Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This statement does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but rather that a serious injury is the likely result should an accident occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973).

The violations of §§ 1926.152(d)(2), 1926.500(d)(1), 1926.550(a)(9) and 1926.651(j)(2) subjected employees to risk of either burns, internal injuries, broken bones, sprains, suffocation, or contusions (Tr. 23, 29, 33, 38, 41). The violations are serious within the meaning of the Act.

"Other Than Serious" - Item 1

Alleged Violation of § 1926.20(b)(1)

Section 1926.20(b)(1) provides:

> (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The standard requires a safety program be developed and implemented by the employer.

Vogel had developed a safety plan which was shown to Knopf. Knopf determined that the plan contained the following three deficiencies: (1) Management was not maintaining or following safety rules; (2) Vogel was not enforcing their safety rules; and (3) the plan failed to address certain safety items (Tr. 42-43).

Knopf made it clear that the failure to maintain the program applied to a specific portion and not the entire safety program (Tr. 56). He felt Vogel was not observing or following their own program directives (Tr. 58). Knopf observed violations that he thought would have been avoided had management followed their own safety programs (Tr. 59). The absence of guardrails and the excavation were in plain view. In Knopf's opinion, there would have been no safety violations had Vogel maintained and implemented the safety program. If a violation of any safety rule occurs, there is, in his opinion, an automatic violation of § 1926.20(b)(1) (Tr. 59-60).

Since Knopf observed violations, he assumed noncompliance with § 1926.20(b)(1). The presence of hazards by themselves does not establish a violation of the standard. *Century Steel Erectors, Inc.*, 13 BNA OSHC 1484, 1987 CCH OSHD ¶ 28,066 (No. 86-1509, 1987). The standard in issue requires an employer to initiate and maintain such programs as may be necessary to comply with Part 1926. While the purpose of § 1926.20(b)(1) is to assure compliance with the safety standards, the existence of an adequate safety program does not guarantee that no violations will occur. It is illogical to assume that the presence of a violation automatically justifies a violation of § 1926.20(b)(1). Section 1926.20(b)(1) places its emphasis on initiating and maintaining a safety program. The Secretary must

prove that the employer did not initiate, or if initiated, did not maintain a safety program. A violation of a safety standard does not per se result in a violation of § 1926.20(b)(1).

The violation is vacated.

"Other Than Serious" - Items 2a and 2b

Alleged Violation of § 1926.59(e)(1) and (f)(5)

The Secretary alleges that Vogel had not developed or implemented a written hazard communication program in violation of § 1926.59(e)(1) and that the diesel fuel was not labeled.

Sections 1926.59(e)(1) and (f)(5) provide:

> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> > (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and
> >
> > (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.
>
> (f) *Labels and other forms of warning.* (5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:
>
> > (i) Identity of the hazardous chemical(s) contained therein; and
> >
> > (ii) Appropriate hazard warnings.

Knopf did not testify that Vogel had not developed or implemented a written hazard ommunication program (Tr. 43-46). Vogel had such a program (Exhs. R-6, R-7; Tr.

177-180). Knopf determined that the program was not maintained because there was diesel fuel on the site in two tanks that were not labeled. This is the same reasoning Knopf applied to Citation No. 2, item 1; *i.e.*, if a violation exists, the program was not maintained. Such reasoning is fallacious. The violation is vacated.

Vogel stored diesel fuel on the site in two portable tanks across from the general contractor's trailer. Employees used the fuel to power the crawler crane, front-end loader, and crawler backhoe. The tanks were not labeled to indicate what they contained (Tr. 45). Vogel does not dispute these facts. Knopf observed Vogel employees obtaining fuel from the unlabeled tanks.

Vogel contends that it did not violate the standard because only knowledgeable operators and supervisors had access to the tanks (Tr. 102). This specious argument is rejected. The standard specifies that hazardous material must be labeled so that all employees at a jobsite are protected. *Lauterbush Construction Co.*, 4 BNA OSHC 1769, 14 BNA OSHC 1768, 1990 CCH OSHD ¶ 29,044 (No. 89-2575, 1990).

The violation is affirmed.

Alleged Violation of § 1926.152(g)(9)

Section 1926.152(g)(9) provides:

> (g) *Service and refueling areas.* (9) Conspicuous and legible signs prohibiting smoking shall be posted.

The standard requires placing a sign in any refueling area of the construction site. Vogel contends the Secretary failed to prove exposure and requests dismissal of the allegations.

The refueling area on the site contained two diesel tanks. There was no "No Smoking" signs in the area (Tr. 47). Vogel offered no evidence to dispute Knopf's testimony. The photographs in evidence do not depict any "No Smoking" signs, and the Secretary did put forth testimony that there was no such sign in the vicinity. While Knopf testified that there was no sign in this area, he did not testify that there was any exposure or that he saw any employees in the area at the time he witnessed a lack of signs.

The standard does not require that exposure be established in the strict sense. Practically speaking, anyone at work at the site is exposed to a possible explosion and fire. It is not necessary to establish employees in the area. Employees were at the site.

The violation is affirmed.

Alleged Violation of § 1926.550(a)(6)

Section 1926.550(a)(6) states:

> (6) A thorough, annual inspection of the hoisting machinery shall be made by a competent person, or by a government or private agency recognized by the U. S. Department of Labor. The employer shall maintain a record of the dates and results of inspections for each hoisting machine and piece of equipment.

The standard requires that an annual inspection be made of all critical parts of the crane, particularly the hoisting portions of the mechanism (Tr. 48).

Knopf requested to see the annual certification. It was unavailable. According to Knopf, Daniel Vogel, vice-president of Vogel, indicated to Knopf that certification was not necessary (Tr. 48). The annual inspection requires that critical portions of the crane be inspected on an annual basis. The annual inspection requires that additional parts be inspected other than what is included in the daily and monthly inspections (Tr. 50).

Vogel's crane operator testified that he performed daily inspections on certain parts of the crane (Tr. 141, 151). The cited standard, however, requires that a thorough annual inspection of the hoisting machinery be conducted. This comprehensive inspection is distinct from any routine daily inspections Vogel may have conducted. *See Secretary v. William Enterprises, Inc.*, 10 BNA OSHC 1260, 1981 CCH OSHD ¶ 20,875 (No. 16184, 1981).

Vogel argues that Knopf concluded there was not an annual inspection because he was not shown an inspection sticker. The point is made that the standard does not require a certification or inspection sticker. The standard does require that the employer maintain a record of the dates and results of inspections for each hoisting machine. Vogel had many opportunities to exhibit its records of dates and results of inspection. It failed to establish compliance by offering evidence of the record. It is assumed that a record of the annual inspection would have been exhibited if it had been performed.

The violation is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Vogel demonstrated good faith by fully cooperating during the inspection. The company employed approximately thirty-five employees. There is no evidence established that Vogel had been inspected or received any citations prior to this inspection. The gravity of each of the violations was moderate.

Upon due consideration, it is determined that the following penalties are appropriate:

Serious Citation	Item	Assessed Penalty
1	1	$500
	3	500
	4	500
	6	625

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

ORDERED: (1) That items 1, 3 and 4 of the serious citation are affirmed and a penalty of $500 is assessed for each of the violations;

(2) That items 2 and 5 of the serious citation and proposed penalties are vacated;

(3) That item 6 of the serious citation is affirmed and a penalty of $625 assessed for the violation; and

(4) That items 2 through 4 of the "other than serious" citation are affirmed and no penalty assessed for each of the violations; and

(5) That item 1 of the "other than serious" citation is vacated.

/s/ James D. Burroughs
JAMES D. BURROUGHS
Judge

Date: February 5, 1993