COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5481-18

COMMISSIONER OF THE
DEPARTMENT OF WORKPLACE STANDARDS
KENTUCKY LABOR CABINET — COMPLAINANT

v.

STERETT CRANE AND RIGGING, LLC — RESPONDENT

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Hon. James Leif Sanders, Frankfort, Attorney for the Complainant. Hon. John David Meyer, Owensboro, Attorney for the Respondent.

## DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes before the Kentucky Occupational Safety and Health Review Commission ("Review Commission") from the Commissioner of the Department of Workplace Standards, Kentucky Labor Cabinet's ("Commissioner's") and Sterett Crane and Rigging, LLC's ("Sterett's"), timely petitions for discretionary review of our hearing officer's recommended order. We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we find as follows:[1]

[1] The parties have not asked the Review Commission to review our hearing officer's findings on Citation 1, Item 4 or Citation 2, Item 2. His findings on those matters are hereby adopted by the Review Commission.

1. Sterett violated the regulation, 29 CFR §1926.251(a)(6), as alleged in Citation 1, Item 1;

2. Sterett violated the general duty clause in KRS §338.031(1)(a) by failing to remove damaged synthetic round slings from service as alleged in Citation 1, Item 2 (as amended);

3. 29 CFR §1926.1404(d)(1)(i) applies to the mobile crane at issue in this case and Sterett violated that regulation by not having an assembly director make sure everyone understood their tasks as alleged in Citation 1, Item 3;

4. Sterett violated 29 CFR §1904.29(b)(1) when it failed to completely fill out OSHA 301 incident reports for three injured employees as alleged in Citation 2, Item 1;

5. Sterett failed to prove the employee misconduct defense; and

6. The proposed penalties stated in the Citations for the above referenced four items were appropriate.

**Standard of Review**

KRS §336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health Act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the Department of Workplace Standards of the Labor Cabinet issues citations. KRS §338.141 (1). If the cited employer notifies the Commissioner of its intent to challenge

a citation, the Review Commission "shall afford an opportunity for a hearing." KRS §338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS §338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review with the Review Commission; the Review Commission may grant the petition, deny the petition or elect to call the case for review on its own motion. 803 KAR 50:010, Section 47 (3). When the Review Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan v. O.S.H.R.C.*, 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the commission hears a case it does so "de novo." *See also Accu-Namics, Inc. v O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975) ("the Commission is the fact-finder, and the judge is an arm of the Commission....[2]").

As stated by our Supreme Court in *Sec'y of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer". "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another." *Terminix International, Inc. v Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

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2 *See* federal commission rule 92(a), 29 CFR §2200.

## Facts[3] and Summary of Proceedings

Sterett leases cranes and personnel for customers needing heavy lifting on job sites. Sterett contracted with Scott, Murphy and Daniel, LLC to supply two cranes, a 650 ton Liebherr mobile crane and a 500 ton Liebherr mobile crane, for an expansion of a Highway 61 overpass over a CSX rail line in Shepherdsville, Kentucky. These cranes can be used without on-site assembly after deployment of stabilizers. For this job, however, Sterett increased the lifting capacity of the cranes by installing counterweights and attachments called TY frames or TY guys. These components are delivered using tractor trailers. The mobile crane lifts the components off trailers and position them for installation. A separate crane is not required to lift and install these components.

Sterett planned to install the TY frames and counterweights onto the 500 ton Liebher crane on August 23, 2017. Although only two people are required for installing these components, four employees undertook these tasks on this particular day. Mark Francies was the field tech and customer liaison for both cranes. Aron D. O'Neal operated the 500 ton crane while Mark Aders was assigned as the "oiler," the person who directs the lifts and handles the rigging of the loads. David Hatfield, operator, and Mark Francies, oiler, were the crew assigned to the 650 ton Liebherr crane, which had TY frames and counterweights installed on it the day before.

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[3] The facts as we have recited them in this section of our decision are consistent with our hearing officer's recommended order's "R.O.'s" Findings of Fact, Nos. 1 - 16. We adopt those findings and his references to the record in support thereof. Regardless, none of these facts in this section of our decision appear to be in dispute.

After the counterweights were installed on the Liebherr 500 ton crane without any problems, the employees began to install the two TY frames onto the boom. The procedure for installing TY frames requires each of the two TY frames to be lifted off a trailer onto two separate supports located on the deck of the crane. The crane conducts the lifts using synthetic round slings to secure the TY frames to the cable of the boom. After both TY frames are in place on these supports and secured with pins, the boom is lowered in between the two TY frames. The operator retracts the telescoping boom, which causes other interlocking pins to automatically attach the TY frame to the boom. Once attached, hydraulic hose connections are made to the TY frame.

An accident occurred after the employees had placed the second of two TY frames onto the crane deck. One of the slings used to lift the frame was accidentally left attached to the TY frame after it had been positioned. The crane operator, believing that all the slings attached to the frame had been removed, lifted the crane cable and caused the TY frame to topple onto the workers. A compliance officer, Seth Bendorf, conducted a post-accident inspection of the site on the day of the accident and interviews with the employees who were involved in the months following, after which the Commissioner issued two citations on December 11, 2017.

Citation 1 alleged the following serious violations each with a proposed penalty of $4900:

1. Citation 1, Item 1 – a violation of 29 CFR §1926.251(a)(6) for failing to have slings inspected by a competent person;

2. Citation 1, Item 2 – a violation of 29 CFR §1926.251(e)(8)(iii), which applies to the removal of damaged synthetic web slings from use. This item was later amended to a general duty clause violation under KRS §338.031(1)(a) after the Commissioner acknowledged that the slings at issue were synthetic round slings;
3. Citation 1, Item 3 – a violation of 29 CFR §1926.1404(d)(1)(i) requiring an assembly/disassembly (A/D) director to ensure that crew members understood their assigned tasks before commencing assembly of a crane; and
4. Citation 1, Item 4 – a violation of 29 CFR §1926.1419(a)(1) requiring a competent signal person on site.

Citation 2 alleged two non-serious violations. Item 1 alleged a violation of 29 CFR §1904.29(b)(2) for Sterett's failure to complete OSHA 301 incident reports for the three employees who were injured. The proposed penalty for that item is $1950. Item 2 claimed that Sterett failed to post hand signal charts in violation of 29 CFR §1926.1422. Sterett essentially admitted that it did not a have hand signal chart on site and no penalty was proposed for this item.

Sterett submitted a timely notice of contest and a hearing was conducted on January 29 and 30 of 2019. After considering post-hearing briefs, our hearing officer issued a recommended order on September 30, 2019 in which he affirmed Citation 1, Items 1 and 2, and Citation 2, Item 2 and dismissed the remaining items of the

Citations. The hearing officer also rejected the affirmative defense of employee misconduct raised by Sterett in defense of Citation 1, Items 1 and 2.

Both parties petitioned the Review Commission to review the hearing officer's recommended order. As we elaborate below, Sterett claims that the hearing officer erred in affirming Citation 1, Items 1 and 2. The Commissioner believes that the hearing officer improperly dismissed Citation 1, Item 3, and Citation 2, Item 1. Neither party wishes to challenge the hearing officer's findings with respect to Citation 1, Item 4 and Citation 2, Item 2.[4]

**General Requirements to Sustain each Item of the Citations**

The Commissioner must prove four elements for us to sustain each of the three subject standard-based violations on review:

(1) the applicability of the standard;

(2) the employer's noncompliance with the terms of the standard;

(3) employee access to the violative condition; and

(4) the employer's actual or constructive knowledge of the violation.

*Bowlin Group, LLC v. Secretary of Labor*, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)). Sterett does not dispute the employer knowledge or employee access elements to any of the alleged violations on review.[5]

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[4] As stated above, the hearing officer's findings with respect to Citation 1, Item 4 and Citation 2, Item 2 are adopted by the Review Commission in their entirety.

[5] Even so, we hereby find that Sterett had knowledge of the alleged violations. At least two men on site held the title of foreman. Mr. Francies was also designated a supervisor in charge of making sure that the cranes were assembled and set up properly. These supervisors' knowledge is imputed to the employer. We also find that the employees had access to the hazards associated with each violation.

The Commissioner must prove the following elements to establish the general duty clause violation alleged in Citation 1, Item 2:

> (1) that the employer failed to render its workplace 'free' of a hazard which was;
>
> (2) 'recognized;'
>
> (3) and 'causing or likely to cause death or serious physical harm; and
>
> (4) the Secretary must . . . specify the particular steps a cited employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of those measures.

*See National Realty & Constr. Co. v. O.S.H.R.C.*, 489 F.2d 1257, 1265, 1268 (D.C. Circ. 1973)). In this case, the dispute is whether Sterett's continued use of worn synthetic round slings presented a recognized serious hazard.

**Citation 1, Item 1: Alleged Violation of 29 CFR §1926.251(a)(6)**

29 CFR §1926.251(a)(6) provides:

> Each day before being used, the sling and all fastenings and attachments shall be inspected for damage or defects by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.

The Citation alleges that Sterett "used synthetic slings that were not inspected by a competent person, to erect a Liebherr crane" prior to their use on August 23rd, 2017. The only disputed element for this alleged violation is whether the employer failed to comply with terms of the standard. In other words, did Sterett inspect the slings prior to their use? We hold that that Sterett did not and therefore violated this standard.

An inspection is performed to determine whether or not a piece of rigging equipment needs to be removed from service. *Sec. of Labor v. Winesburg Builders,*

*LLC*, 23 O.S.H. Cas. (BA) ¶1721 (Feb. 28, 2011). An inspection therefore "requires a careful and critical examination, and is not satisfied by a mere opportunity to view the equipment." *Austin Commercial v. O.S.H.R.C.*, 610 F.2d 200 (5th Cir. 1979).

None of the employees told Mr. Bendorf during interviews that they performed an inspection. Mr. Bendorf testified as follows:[6]

> Q: Did you interview employees about the sling inspection?
>
> A: I did.
>
> Q: During your interviews, did you ask the employees who inspected the sling?
>
> A: I did.
>
> Q: What were you told?
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> A. I learned that the slings had not been inspected that day prior to use. The answers that I got were kind of a back and forth nature.
>
> The company had policies in place that stated that the crane operator was ultimately responsible for the crane during the erection process. The crane operator stated that he had not inspected the slings that day. That that (sic) was the riggers (sic) responsibility. The employees that I interviewed, the other employees and the foreman that I interviewed stated that they had not personally inspected the slings that day.
>
> One employee stated that, we all look at the slings, but when asked further if he inspected the slings he said, no, he would not consider it an inspection.
>
> Q: Who was in charge of inspecting the slings that day?
>
> A: I didn't find anybody as being in charge of inspecting the slings that day. As I mentioned, the company had written policies that said the crane operator was responsible. The crane operator stated the riggers were responsible. At least one employee said, we're all responsible. I found that no one had been designated as the competent person and required to inspect the slings.

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6 Transcript Day 1, p. 31- 33.

The Hearing Officer concluded that Sterett violated this regulation. He referred to Mr. Bendorf's testimony[7] and then intertwined his conclusion that Sterett violated this regulation with his finding that Sterett violated the general duty clause by failing to remove the damaged slings from service.[8] He noted that the employees on site were all qualified to inspect the slings, and "if there had been an 'inspection' the inspection was so cursory that the men failed to properly assess the conditions of the slings and allowed obviously damaged slings to remain in service."[9]

Sterett contends that an inspection was performed because one employee told Mr. Bendorf that everyone "looked at" the slings.[10] It also believes that a crane inspection sheet shows that the rigging and slings were inspected by the crane operator, Aron O'Neal.[11] This checklist, however, is inconclusive at best because the rigging section of this form is blank. Sterett also argues that the hearing officer wrongfully concluded that the employees failed to inspect the slings simply because he determined that the sling should have been removed under industry standards.[12] As discussed below, Sterett refutes that the Commissioner proved that removal of the slings from service was mandated.

We find that the slings were not inspected prior to their use on the day of the accident. The employees interviewed by Mr. Bendorf were qualified and experienced

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7 R.O. Finding of Fact 14.

8 See R.O. Conclusion of Law, No. 34.

9 Id.

10 See Brief in Support of Respondent's Petition for Discretionary Review, p. 9-10.

11 A copy of the checklist was entered into evidence as Defendant's Exhibit ("D. Exh.") 11. The exhibits are labeled as Plaintiff's exhibits (those entered by the Commissioner) and Defendant's exhibits (those entered by Sterett). Even though those labels incorrectly describe the parties, we refer to the exhibit as they are labeled.

12 See Brief in Support of Respondent's Petition for Discretionary Review, p. 8.

crane personnel. When Mr. Bendorf asked if they inspected the slings, the employees would have known what a proper inspection entails. One employee's comment that everyone "looks at" slings is not sufficient to rebut all four employees stating that they did not actually "inspect" the slings. Bolstering our finding is the rigging section being left blank on the crane inspection form and that the slings with significant wear and holes in them remained in service.[13] Even the CEO of the company, Mr. Jonathan Spong, acknowledged that the damaged slings should have been removed from service under company policy and yet the employees failed to do just that.[14] We therefore affirm our hearing officer's finding that Sterett committed a serious violation of 29 CFR §1926.251(a)(6).

**Citation 1, Item 2: Alleged Violation of General Duty Clause, KRS 338.031(1)**

The amendment to Item 2 of Citation 2 alleges that the employer failed to comply with the general duty clause found in KRS §338.031(1).[15] The amended Citation alleges that the synthetic round slings used to lift the TY Frames were damaged to such an extent that they should have immediately been removed from service. We find that that the hearing officer correctly affirmed this item of the Citation.

Synthetic round slings employ load bearing polyester core surrounded by a double layer fabric protective cover.[16] Mr. Bendorf took pictures of these slings during

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13 See D. Exh. 11; Plaintiff Exhibit (P. Exh.) 1, pp. 0072 – 75, 90.

14 See Transcript Day 2, p. 96 – 97, 129 – 30.

15 The Commissioner initially cited Sterett for violating a regulation governing synthetic web slings providing that such slings should be immediately removed from service when they have snags, punctures, tears or cuts. After realizing that Mr. Bendorf had misidentified the slings as web slings, the Commissioner amended the citation and complaint.

16 See RO, Finding of Fact, No. 13.

the inspection. The Commissioner entered into the record several of his pictures depicting that the cover of the slings were frayed and had holes in them exposing the interior material of the slings.[17]

The Commissioner contends that the tears in the outer fabric cover of the slings created a recognized hazard that was likely to cause death or serious physical harm. To prove that this hazard was "recognized," the Commissioner must show that (1) Sterett, in particular, had knowledge of the hazardous condition of using a round sling with a hole in the outer fabric, or (2) that the construction/crane industry in general recognized the outer fabric tear on a round sling as a hazard. *St. Joe Minerals Corp. v. O.S.H.R.C.*, 647 F.2d 840, 845 (8th Circ. 1981).

Both parties entered evidence into the record regarding the criteria under which synthetic round slings should be immediately removed from service under OSHA guidance, industry standards and the sling manufacturer's instructions. The Commissioner argues that one removal criteria in particular applies here, which is that synthetic round slings must be immediately taken out of service if they have holes, tears, cuts, embedded particles, abrasive wear or snags that expose the sling's core yarns.[18] Even Sterett admits that this removal criteria applies to synthetic round slings.[19]

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17 *See e.g.*, P. Exh. 1, pp. 00072 - 75, 90

18 See D. Exh. 5, Manufacturer's Instructions; D. Exh. 4, Directorate of Standards and Guidance – Guidance on Safe Sling Use; and P. Exh. 4, ASME B30.9-2014, Safety Standard for Cableways, Cranes, Derricks, Hoists, Hooks, Jacks and Slings, p. 29 (removal criteria).

19 See Brief in Support of Respondent's Petition for Discretionary Review p. 5 – 8; Reply Brief in Support of Respondent's Petition for Discretionary Review, p. 4 – 6. "The critical question is whether the core yarns are exposed." *Id.*, at p. 4.

Mr. Bendorf introduced into the record the following definitions in the Web Sling & Tie Down Association's ("WSTDA's") Recommended Standard Specification for Synthetic Polyester Round Slings:[20]

> Round sling – a sling type used for general lifting purposes, also referred to as a tubular sling, that is comprised of a load bearing core(s), made from synthetic yarns of unwoven continuous filament fibers, which is fully enclosed in a protective cover(s).
>
> Yarn – strands of synthetic fibers, which are used to make the round sling core, cover and thread materials.
>
> Core – That yarn which comprises the load bearing part(s) of the round sling.
>
> Cover – a seamed or seamless protective material that completely encloses the core(s).
>
> Thread – The synthetic yard that is used to sew the cover.

Mr. Bendorf identified the yarns exposed beneath the torn sling covers as core yarns.[21] He also opined that immediate removal of the slings with exposed core yarns is required by industry standards because dirt, debris can easily enter the core yarn when it is exposed causing latent damage to the core yarns that cannot be detected by visual inspection.[22]

The hearing officer's recommended order noted the manufacturer's instructions and Mr. Bendorf's opinion concerning dirt and debris causing latent damage to the core yarns. [23] The hearing officer, however, did not solely base his conclusion that the sling should have been removed because the core yarn was

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20 A copy of this standard specification was entered into evidence as P. Exh 5. The definitions are in Sections 1.4. Section 2.2 also discusses core yarn.

21 See Transcript Day 1, pp. 72-79.

22 See id., p. 76-77.

23 See RO, Findings of Fact, No. 13 and FN. 8; Conclusion of Law No. 33.

exposed.[24] He also quoted portions of Sterett's internal safety manual stating that slings should be inspected for damage and defects and that damaged slings shall not be used.[25] Regardless, he found the sling was obviously damaged and should have been removed under Sterett's own safety policy and "standards prescribed by the manufacturer of the sling."[26]

Sterett's only argument on review is that there is insufficient evidence to find that core yarn was exposed such that immediate removal was required under recognized industry standards and the slings manufacturer's instructions. It argues Mr. Bendorf was not qualified by training or experience to identify the core yarn from the pictures of the slings. It also noted that a document purporting to be issued by Vernon Corporation, the manufacturer of the slings at issue, states that Vernon slings have red indicator yarn in the core to assist with inspections and that such red yarn is not visible in the pictures of the slings. We are not persuaded by these arguments.

At the time of the hearing, Mr. Bendorf had been a compliance officer for 17 years after graduating with a Bachelor of Science in Fire and Safety Engineering Technology.[27] He is also certified as a tower crane inspector.[28] The crane at issue here is not a tower crane, but Mr. Bendorf testified that he became familiar with sling construction during the classes he took to obtain that certification and through his

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24 See id.
25 See RO FN 8, and Conclusion of Law No. 33.
26 RO Conclusion of Law, No. 33.
27 See Transcript Day 1, p. 9 – 10.
28 See id., p. 11.

many years of experience as a compliance officer.[29] We believe that Mr. Bendorf was qualified to identify the core yarn in the pictures, especially after he studied and reviewed the consensus standards describing the components of the sling. We also hold that expert testimony was not even required to determine whether the material exposed under the cover of the round slings was core yarn. The WSTDA definitions make clear that everything under the covering of a synthetic round sling is the core of the sling, which is in turn made of "yarn." The pictures entered into the record clearly show that the two outer coverings of the sling were torn revealing the core material inside.

Whether red indicator yarn is apparent from the pictures is also not dispositive in determining whether core yarn was exposed. The Vernon Corporation material on which Sterrett relies may not apply to the type and model of sling that was used on the day of the accident. No one at the hearing properly laid the foundation establishing that fact. Another Vernon sling was brought to the hearing as an example of sling construction. This sling had part of its core exposed and the Commissioner's counsel's pictures of it were entered into the record.[30] That sling had blue indicator yarn in the core, which at the very least implies that not every Vernon sling has red indicator yarn as argued by Sterett. Regardless, the WSTDA standard definitions elucidate that all the material underneath the two covers of the sling is the load bearing core.

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29 See id., p. 78 – 79.

30 See P. Exhs. 12 & 13.

The slings' purpose was to lift heavy loads that if were to come unsecured could cause serious injury or death. Industry standards, manufacturer's instructions and OSHA guidance all required immediate removal of the slings from service once the core yarns are exposed. The pictures entered into the record clearly show that the inner core yarns of the slings were exposed. Sterett's continued use of these slings contrary to this removal criteria represented an unacceptable risk of sling failure and resulting serious injury or death.[31] We therefore affirm the general duty clause violation.[32]

**Item 3: Alleged Violation of 29 CFR §1926.1404(d)(1)(i)**

This item alleges a violation of 29 CFR §1926.1404(d)(1)(i) providing:

> (d) Crew instructions. (1) Before commencing assembly/disassembly operations, the A/D director must ensure that crew members understand all of the following:
> (i) Their tasks.

The Citation states: "On August 23, 2017 Sterett Crane and Rigging LLC, as an Exposing Employer, did not ensure that an assembly director had instructed crew members on their assigned tasks for the assembly procedure of a "Liebherr" 1400 mobile crane being erected at a job site . . . ." We find that Sterett violated this regulation and reverse our hearing officer's dismissal of this item.

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[31] We offer no opinion on the underlying science behind why exposed core yarns require immediate removal under industry standards and manufacturer's instruction. It is enough that there is clear consensus that continuing to use slings in this condition is unacceptable and therefore presented an unacceptable and serious safety risk. We therefore find Mr. Bendorf's opinion as the scientific underpinning for these standards and instructions is not critical to our conclusion that Sterett violated the general duty clause.

[32] We adopt and incorporate by reference the hearing officer's conclusion that there was a feasible means of abatement. See RO, Conclusion of Law, No. 32.

Our hearing officer dismissed this item of the Citation based on his ultimate conclusion that the standard did not apply because the crane was not the type of equipment covered under the standard.[33] He stated that the regulation's requirement for someone to fill the role of A/D director only applies to "more complex lattice boom and tower cranes, which require a crew of several men to assemble."[34] He also indicated that the operations performed by Sterett did not require an A/D Director because the operations were not that complex and could normally be performed by two people.[35] We find that the hearing officer's bases for dismissing this item of the citation was erroneous.

First, mobile cranes are a type of equipment explicitly covered under the standard. The applicability section of the assembly/disassembly regulations, 29 CFR §1926.1400, covers mobile cranes. The Liebherr crane used on the day of the accident is in fact a mobile crane.[36]

The hearing officer seemed to ignore this explicit applicability section and instead gave credence to an excerpt from a Small Entity Compliance Guide for Final Rule for Cranes and Derricks in Construction proffered by Sterett.[37] Sterett claimed that the primary reason for the regulation was to address accidents during the assembly and disassembly of tower and lattice cranes as noted by this compliance guide:[38]

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33 R.O., Conclusion of Law, No. 10.
34 Id.
35 Id., Conclusion of Law No. 38 & 39.
36 See testimony of Mr. Sterett, Transcript Day 2, p. 203.
37 A copy of this excerpt was entered into the record as Def. Exhibit 9.
38 Id.

> Accidents during the assembly and disassembly of lattice boom and tower cranes are one of the major causes of crane-related fatalities. These sections are designed to prevent such accidents by requiring safe assembly/disassembly procedures for lattice boom and tower cranes. Hydraulic boom cranes are generally not assembled on site, but these sections contain some provisions, such as the requirement (section 1404(q)) for proper setting of outriggers and stabilizers, that apply to cranes with hydraulic booms.

As the Commissioner points out, however, the compliance guide contains a disclaimer stating that it "does not alter or determine compliance responsibilities, which are set forth in OSHA standards in the Occupational Safety and Health Act."[39] As this disclaimer warns, the compliance guide does not amend the plain meaning of the words of any safety regulation. Moreover, this excerpt acknowledges that some provisions of the assembly/disassembly regulations apply to the type of mobile crane used by Sterett. We therefore find that this compliance guide does not establish that the regulation only applies to lattice boom and tower cranes.

Since the Liebherr crane is clearly equipment covered under the standard, the element of applicability hinges on whether installation of counterweights and the TY-frames onto the crane constitutes "assembly." If so, the regulation applies and requires an A/D director to make sure that everyone involved understood their tasks before commencing those operations. Unfortunately, the regulations circularly define assembly/disassembly as "assembly and/or disassembly of equipment covered under this standard."[40]

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39 See Transcript Day 2, p. 160-61.

40 29 CFR §1926.1401.

When a regulation does not clearly define a word, we often look to the word's common meaning. *See e.g., Secretary v. Schindler Elevator Corp.*, KOSHRC No. 4817-11 (July 5, 2017), slip opinion at * 13 – 14. Meriam Webster's online dictionary[41] defines assemble as "to fit together the parts of" and assembly to mean "fitting together manufactured parts into a complete machine, structure, or unit of a machine." The Commissioner's interpretation of assemble is also entitled to deference if it is "consistent with the statute under which it was promulgated and not otherwise defective as arbitrary or capricious." *Cabinet for Health Services v. Family Home Health Care, Inc.*, 98 S.W.3d.524, 527 (Ky. App. 2003); *see also, Sec. of Labor v. Unarco Commercial Products*, 16 O.S.H. Cas. (BNA) ¶ 1499 (Dec. 16, 1993) (reasonable interpretation entitled to deference).

Whether equipment is assembled does not depend on the number of people involved in the process. The regulation contemplates a situation where only one person assembles a crane, and in such case that person is considered the A/D director and must have the requisite qualifications.[42] Thus, the hearing officer erred when implying that assembly only occurs when there are more than two employees involved.

Sterett relies on an OSHA interpretation letter to another employer stating that some set-up operations of mobile cranes do not constitute assembly and therefore do not require an A/D director.[43] The interpretation letter distinguishes between set-

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41 http://meriam-webster.com/dictionary.

42 See 29 CFR §1926.1404(a)

43 A copy of this letter was entered into the record as D. Exhibit 10.

up of assembled crane and assembly, the latter of which does not require an AD director:[44]

> Some models of truck cranes require relatively simple assembly of the boom. Other cranes require complex assembly such as adding counterweights or attachments, attaching outriggers/stabilizers, or using an assist crane to position the boom or jib for pinning/unpinning. In contrast, OSHA considers "set up" as involving the deployment of an assembled crane. For example, set up includes activities like deploying and pinning outriggers, leveling the equipment, or unfolding and pinning a boom or swing-away jib and not assembly.

Sterett suggest that adding counterweights and the TY frames were not that complex and therefore constituted set-up rather than assembly.

We agree with the Commissioner's reasonable interpretation of the regulation and hold that the operations to install the counterweights and TY frames onto the mobile crane constitute assembly. This interpretation is consistent with the common meaning of the word assembly and is supported by the interpretation letter itself.

The subject activities fall under the common meaning of the word assembly. For some jobs, the mobile crane arrives at the worksite as a completely assembled machine with only minor set-up required. In this case, some assembly was required. Sterett needed to fit together additional parts (TY frames and counterweights) to make a complete machine capable of lifting the heavier loads as required for the job at hand.

The interpretation letter itself suggests that adding counterweights and TY frames to the mobile crane constitutes assembly. In fact, the letter explicitly states that adding counterweights is an example of assembly. This interpretation letter is

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[44] Id.

also consistent with a related regulation, 29 CFR §1926.1404(h), providing that the A/D director supervising the assembly/disassembly operation must address hazards associated with the operation, including the potential for unintended movement from inadequately supported counterweights and from hoisting counterweights. This regulation presumes that an A/D director is required to supervise counterweights installation onto the mobile crane as Sterett performed on the day in question. The letter also does not include hoisting large components like the TY frames and installing them on the boom as an example of set-up activities. Installing the TY frames and the hazards associated therewith is more akin to installing counterweights, which the letter states constitutes assembly. Their installation required hoisting them off another truck and placing them in the correct location on the crane deck in a similar manner as the counterweights.

Having found that 29 CFR §1926.1404(d)(1)(i) applies, we must decide whether the Commissioner proved that Sterett failed to comply with the terms of the standard. The employer argues that the record evidence shows that even though it did not believe an A/D Director was required, it still had a person filling that role and he made sure that everyone understood their tasks.

Sterett did not designate an AD director. One employee interviewed by Mr. Bendorf stated that a designated assembly/disassembly director was not required for these operations per company policy.[45] This policy was confirmed by the CEO of the company, William Sterett.[46] Mr. Bendorf also stated that the employees exhibited

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45 See Transcript Day 1, p. 103, 106 – 07.
46 See Transcript Day 2, p. 148.

general confusion about who was in charge of the crane assembly.[47] He also believed that the accident itself was evidence that no one was serving as an AD director making sure that everyone understood their roles and tasks.[48]

Even though Sterett did not officially designate someone with the title AD director, Mr. Francies served as an assembly tech or field tech who had the responsibility of making sure the cranes were properly set up.[49] Sterett claimed that Mr. Francies was essentially the A/D Director even though he was not officially designated as filling that role.[50] When Mr. Francies was asked by Mr. Bendorf who was the A/D Director, he replied that "he guessed it was him."[51] The regulation supports the theory that Mr. Francies could have been the A/D director supervising the assembly even if he had not officially been given that title. An A/D Director is "an individual who meets the requirements for A/D director, irrespective of the person's formal job title or whether the person is non-management or management personnel."[52]

The person supervising assembly "must meet the criteria for both a competent person and a qualified person, or by a competent person who is assisted by one or more qualified persons."[53] A competent person is "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees, and who has the authorization to

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47 See Transcript Day 1, p. 164 – 65.
48 See Transcript Day 1, p. 193 - 94.
49 See Transcript Day 2, p. 170 – 74.
50 See id.
51 See Transcript Day 1, p. 164 – 65.
52 29 CFR §1926.1400.
53 29 CFR §1926.1404.

take prompt corrective measures to eliminate them."[54] A qualified person is "a person who, by possession of a recognized degree, certificate, or professional standing, or by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems related to the subject matter, the work, or the project."[55]

We find that Mr. Francies was a qualified and competent person. Mr. Francies had thirty-eight years of experience and was qualified as a rigger and signal person.[56] He also held a certification by the National Commission for the Certification of Crane Operators.[57] He also completed OSHA 10 training providing training on identifying and recognizing hazards in the workplace.[58] His designation as assembly tech/field erector also granted him the authority to take prompt corrective measures to eliminate them.[59] The key then is to examine whether Mr. Francies made sure that everyone understood their tasks before the operations to install the counterweights and TY-frames began.

Mr. Bendorf testified about what the employees told him during interviews. He asked whether the employees had gone over specific pre-lift tasks, and they said they had not.[60] It is also significant that the employer believed that an A/D was not required for the crane operations on the day in question. If Mr. Francies believed

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54 See 29 CFR §1926.1401

55 Id.

56 See Transcript Day 2, pp. 50- 56.

57 See id., p.

58 See id., 52 – 53.

59 In this role, Sterett expected Mr. Francies to make sure crane was properly assembled according to specifications. See Transcript Day 2, p. 53.

60 See Transcript Day 2, p. 34-35.

that an A/D Director was not required, then it is less likely that he took the lead and made sure everyone understood what they were supposed to do before the operations commenced as specified in the regulation. Last, there was an accident resulting from someone not removing a sling from the TY frame. A reasonable inference from the occurrence of the accident is that not everyone understood their role or the proper sequence of installation.

Sterett did not rebut Mr. Bendorf's testimony to any significant degree. Mr. Francies did not testify about what he said to Mr. Bendorf. Mr. Sterett's testimony centered on his belief that an A/D director was not even required. He also implied that everyone involved in the assembly of the crane already understood their tasks because they had performed similar assemblies during other jobs.[61] We find, however, that regulation required more from Sterett than relying on what happened during previous assemblies and assuming that everyone would perform exactly the same roles as they did before. Sterett did not even provide evidence that everyone involved in the day of the accident performed the same tasks as they did the day before on the 650 ton crane. At the very least, the operator of each crane assembled on the worksite was not the same person. Mr. Hatfield operated the 650 ton crane the day before whereas Mr. O'Neal operated the 500 ton crane on the day of the accident.[62]

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61 See id. p. 190 – 91. The same people were also involved in assembling the 650 ton crane the day before. See RO Finding of Fact, No. 4.

62 See RO, Findings of Fact No. 4.

The Commissioner proved that 29 CFR §1926.1404(d)(1)(i) applied and that Sterett failed to comply with its terms. We therefore reverse our hearing officer and find that Sterett violated this regulation as alleged in Item 3 of the Citation.

**Citation 2, Item 1: Alleged Violation of 29 CFR §1904.29(b)(2)**

Citation 2, Item 1 alleges that Sterett violated 29 CFR §1904.29(b)(2) requiring employers to fill out an OSHA 301, or equivalent workplace injury incident report form, within seven calendar days of receiving information that a recordable injury has occurred. In this case, Sterett filled out equivalent forms that it used for workers compensation reporting. Copies of the OSHA 301 or equivalent forms that Sterett filled out and submitted to Mr. Bendorf during his inspection were entered into the record.[63] There were several deficiencies in the forms used for each of the three injured employees. The forms for all the injured employees failed to contain the case number from the associated OSHA 300 log, an adequate description of the type of injury sustained, including the part of the body affected for Mr. Hatfield and Mr. Francies, or the details about how the injuries occurred.[64]

Our hearing officer found that Sterett did not fill out these forms with sufficient information.[65] Yet, he still dismissed the item of the Citation finding that the employer substantially complied with the regulation by providing the missing information to Mr. Bendorf directly.[66] He believed that a "violation only exists if the employer failed to comply with the regulation by not submitting timely any of the

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63 See P. Exhibit 9.

64 See RO, Conclusions of Law Nos. 50 – 51. Copies of the OSHA 301 incident reports entered in the records as P. Exh. 9 speak for themselves.

65 See RO Finding of Fact No. 9.

66 See RO Conclusion of Law, No. 52.

required information or if there is total absence of data for one of more its injured employees."[67] Our hearing officer erred in this regard.

"OSHA standards have been drafted for literal compliance and employers are expected to comply with them in every detail."[68] 29 CFR §1904.29(b)(2) requires the employer to fill out OSHA 301 forms completely and accurately with the required information. The form must contain the following information: "the employee activities at the time of the incident; the details of the injury or illness; the extent of harm suffered by the employee; and the nature of the treatment provided."[69] A citation for a violation of §1904.29(b)(2) should issue if an employer's completion of the 301 "materially impairs the understandability of the nature of hazards, injuries and illnesses in the workplace."[70] Form 301 incident reports are also official employer safety records that must be retained for a period of five years.[71] We therefore hold that an employer cannot substantially comply with its record creation and retention duties by providing information that is supposed to be on the form to a compliance officer by e-mail or other means. The form itself must contain the information required by the standard.

It is undisputed that the forms filled out by Sterett did not have all the information required by the standard. Anyone reviewing the form could not ascertain the nature of the hazards involved or the injuries that resulted on the day of the

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67 See RO Conclusion of Law, No. 53.
68 Rothstein, *Occupational Safety and Health Law* (2020 Ed.) § 5:3.
69 Id. at § 8.6.
70 See OSHA Directive CPL 02-00-135, December 30, 2004.
71 See 29 CFR §1904.33(a).

accident. We therefore reverse our hearing officer and find that the employer violated this standard as alleged in Citation 2, Item 1.

**Employee Misconduct Defense**

Sterett attempted to prove the affirmative defense of employee misconduct concerning its employees' failure to inspect and remove the defective slings. To prove employee misconduct, the employer has the burden to prove that it:

1. has established work rules designed to prevent the violation;
2. has adequately communicated these rules to its employees;
3. has taken steps to discover violations, and
4. and has effectively enforced the rules when the violations have been discovered.

*Commissioner v. Morel Construction Co.*, (KOSHRC Nos. 4147-04, 4151-04, 4149-04 (consolidated) Oct. 7, 2008), slip opinion at * 37 (quoting and adopting rule set forth in *Jensen Construction Co.*, 7 OSH Cas. (BNA) 1477, 1479 (O.S.H.R.C. 1979)). We have reviewed the record and concur with our hearing officer's ultimate conclusion that Sterett failed to prove every element of this defense.[72]

The hearing officer noted that Sterett had an internal safety manual.[73] That safety manual provides that "each day before being used, the sling and all fastenings and attachments shall be inspected for damage and defects by a qualified rigger."[74] It also mandates that "all slings that are damaged or defective shall not be used."[75]

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72 See RO Conclusion of Law No. 58 – 59.
73 See RO Finding of Fact, No. 20.
74 See P. Exh. 3, p. 45.
75 Id.

These work rules, however, do not specify removal criteria for any type of sling or distinguish between normal wear and tear and damage warranting removal.

The employer failed to offer specific information about whether Sterett adequately communicated these safety rules to its employees. The employees were supposed to read and review the safety manual when hired after which they were to sign an acknowledgment form.[76] Sterett, however, did not enter into the record any acknowledgment forms signed by the employees involved in the accident. Mr. Spong stated that the company conducted Monday Go-To Meetings and provided other type of safety training to its employees.[77] He also testified that customers also provided job site specific training.[78] That may be true, but Mr. Spong did not reveal the substance of any of that training, including whether it covered how to properly inspect synthetic round slings or the removal criteria for those types of slings. He also neglected to provide evidence of what in-house safety training was specifically attended by the employees involved in the accident.

Steret also neglected to offer sufficient evidence of what steps upper management took to discover safety violations. In fact, Mr. Spong testified that Sterett had fired its safety manager a couple of weeks before the accident because he had problems providing safety training records to customers and because he failed to meet Sterett's expectations for conducting audits of work sites for compliance with

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[76] See Transcript Day 2, p. 62 – 63.
[77] See id., p. 63 – 64.
[78] See id., p. 64.

safety protocols.[79] One of Sterett's internal post-accident findings was also that employees had become too complacent.[80]

Lastly, the hearing officer correctly found that the employer failed to offer significant evidence of how effectively Sterett enforced the rules when violations were discovered.[81] The safety manual provided for progressive discipline for safety violations, but Sterett's witnesses offered no examples of that discipline actually being meted out. There was not even evidence offered showing that the employee who committed the misconduct forming the basis for Sterret's defense was disciplined. According to the company policy, the operator, Mr. O'Neal, was the person who was supposed to inspect the slings at issue here. Yet, Sterett offered no evidence of how he was disciplined.

The employer failed to meet its burden of proof on establishing each element of the employee misconduct defense. We therefore affirm the hearing officer's ultimate conclusion on that issue.

**Penalties**

The parties did not raise an issue with the proposed penalties for each item of the Citations. Even so, we find that Mr. Bendorf's testimony supports that the amounts proposed for each violation and that the Commissioner already provided reductions from the maximum penalties allowed for each violation. We therefore will

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79 See Transcript Day 2, p. 127 – 28.
80 See RO, Finding of Fact No. 20.
81 See id.

impose the proposed penalties for each Item of the Citations that have not been dismissed.

**Order**

For the reasons discussed above, we hereby order as follows:

1. Affirm the alleged serious violation of 29 CFR §1926.651 (h)(1) as set forth in Item 1 of Citation 1 and impose the proposed penalty of $4900;

2. Affirm the alleged violation of the general duty clause of KRS §338.031(1)(a)as set forth in Item 2 of Citation 1, as amended, and impose the proposed penalty of $4900;

3. Reverse our hearing officer's dismissal of Item 3 of Citation 1 and impose the proposed penalty of $4900 for Sterett's serious violation of 29 CFR §1926.1404(d)(1)(i);

4. Reverse the hearing officer's dismissal of Item 1 of Citation 2 and impose the proposed $1950 penalty for Sterett's non-serious violation of 29 CFR §1926.1904.29(b) (a);

5. Adopt and incorporate by reference our hearing officer's dismissal of Item 4 of Citation 1, which was not an issue on review; and

6. Adopt and incorporate by reference our hearing officer's findings providing that Sterett committed a non-serious violation of 29 CFR §1926.1422 as alleged in Item 2 of Citation 2 with no proposed penalty.

Respondents shall pay the penalties stated herein totaling $16,650 within thirty (30) days of entry of this Order. Payments shall be made payable to the

Kentucky State Treasurer and mailed to the Workplace Standards Legal Division, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky, 40601.

It is so ordered.

July 7, 2020.

DeBorah J. McCormack (Signed with permission by Jenny Kays)
Chairperson

Larry Clark (Signed with permission by Jenny Kays)
Commissioner

Steven Griffin (Signed with permission by Jenny Kays)
Commissioner

**Certificate of Service**

I certify that a copy of the foregoing order and decision has been served this 7th day of July, 2020, on the following as indicated:

Electronic mail:

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