

April 29, 2005

Mr. Russell B. Swanson
U.S. Department of Labor
OSHA/Directorate of Construction
200 Constitution Avenue, N.W.
N-3468
Washington, DC 20210

Dear Mr. Swanson:

Thank you for providing me an opportunity to serve on the Occupational Safety and Health Administration (OSHA) Crane and Derrick Advisory Committee (C-DAC). As a member of C-DAC, I worked to find common ground with the other members of the committee and at the end of the day we reached agreement on the majority of the issues that we had to confront. In discussing section 1427 "*Operator qualification and certification*," however, I found it necessary to dissent from the others. I request that you include this letter of explanation of why I dissented regarding the preamble of the proposed revision of the crane and derrick regulation when the consensus document is published in the Federal Register.

I opposed Section 1427 because its requirements for the qualification and certification of crane and derrick operators are too restrictive. For many construction contractors, none of the four options for operator qualification and certification are practical to pursue. The reasons they are not are as follows:

- The consensus language for Operator Qualification and Certification offers basically one practical option "*Certification by an accredited crane/derrick operator testing organization*." Namely, the only crane testing organization, other than organized labor, that currently meets the OSHA definition is the National Commission for the Certification of Crane Operators (NCCCO), which is accredited by the National Commission for Certifying Agencies (NCCA). I hold the NCCCO in high regard, but I doubt that this single organization could meet the enormous demand that section 1427 would generate for crane and derrick operator testing and certification. Not one of my fellow C-DAC committee members, nor OSHA, has undertaken a study of the costs that additional organizations would have to incur to qualify for accreditation, or considered the cost to provide testing or certification services on the massive scale that section 1427 contemplates. This is too important to the success of the standard for OSHA to just hope that the supply of the necessary services would materialize. If other testing organizations do not enter the market, or they subsequently fail for financial or other reasons, or they simply find it necessary to charge more than most contractors could bear, the construction industry could quickly find itself in gridlock.
- Paragraph (c), Qualification by an Audited Employer Program, is restrictive and is not an option for most construction companies. I doubt that small- or medium-sized construction contractors would have the resources necessary to develop written and practical tests under these guidelines. An additional obstacle is the fact that paragraph (c)

would require the employer to have its “program” re-audited every three years, and suspend the employer’s “program” for any “significant deficiency.” Paragraph (c) would also render the employer liable for the auditor’s failure to file a “documented report” of any “significant deficiency” to OSHA within 15 days, to maintain records of his or her audits for three years, and make such records available to the U.S. Department of Labor.

- Paragraph (d), Qualification by the U.S. Military, is limited to the men and women in uniform. By its terms, it is “not portable,” meaning that it meets the requirements of paragraph (a) only where the operator is employed by and operating the equipment for the employer that issued the qualification. This section provides little if any assistance to the construction industry.
- Whether or not paragraph (e), licensing by a government entity, provides any practical options for construction contractors would depend entirely on how state and local governments responded to it. This provision would permit employers to use state or local government agencies to test and license their crane and derrick operators, and in some ways paragraph (e) is superior to paragraphs (b) and (c) for safety’s sake. Paragraph (e) does not, however, go far enough to save Section 1427, because a government license issued under paragraph (e) would satisfy section 1427 only within the jurisdiction of the agency that issued it.

Another issue with the proposed qualification and certification regulation is a potential legal risk for employers who provide training under section 1427. The training requirement would put employers who provided hands-on training for crane or derrick operators at great and maybe uncontrollable risk of liability for any accidents that their trainees or apprentices might cause. This could become a legal deterrent to necessary crane operator training. My concerns here are focused on paragraph (f), which establishes legal requirements and not goals or principles which contractors should strive for. Holding employers strictly liable for any accident that a trainee or apprentice may cause would unfortunately discourage useful training and hinder the effort to protect construction workers.

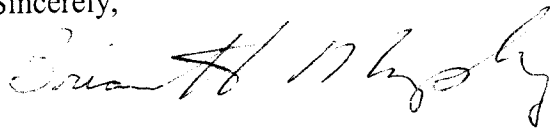
I also encourage OSHA to reconsider the broader question that Section 1427 raises that the construction workforce is not entirely English-speaking. No organization that has been identified by C-DAC or OSHA currently provides nationally recognized testing for crane or derrick operators in any language other than English, which would limit the industry’s ability to provide crane operators at this time and in the near future.

Additionally, I would suggest that OSHA consider other requirements to better provide safe crane operations. I believe that physical examinations for crane and derrick operators as well as drug and alcohol testing are essential. It is my recommendation that OSHA require construction industry employers to follow guidelines for their crane operators similar to the guidelines that the U.S. Department of Transportation (DOT) mandates for transportation industry employers to follow relating to physical examinations and controlled substance and alcohol testing for commercial truck drivers.

As detailed above, there are many reasons that neither my constituents nor I could support the proposed consensus language for Section 1427 *Operator Qualification and Certification*. It is the lack of alternatives to the proposed operator qualification and certification, which may not be in the best interests of the majority of employers. It is my belief that OSHA should instead provide multiple, crane operator certification options that are based on accepted consensus standards and performance criteria that demonstrate the knowledge, skills, and ability of the operator to safely operate the crane that has been assigned to the crane operator.

In closing, I would like to thank you again for the opportunity to serve on C-DAC. Crane and derrick safety is extremely important to me and to the construction industry. I greatly appreciated the chance to participate in the committee's deliberations.

Sincerely,

A handwritten signature in cursive script, reading "Brian H. Murphy". The signature is written in dark ink and is positioned below the word "Sincerely,".

Brian H. Murphy, P.E., C.S.P.
C-DAC Representative