THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>A CRANE RENTAL LLC d/b/a A CRANE RENTAL OF GA LLC,<br>Respondent. | OSHRC Docket No. **19-1667** |

**DECISION AND ORDER ON REMAND**

**Attorneys and Law firms**

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JUDGE: John B. Gatto, United States Administrative Law Judge.

## I. INTRODUCTION[1]

The Commission remanded this case for consideration of whether the Secretary has proven that A Crane was a "creating employer." *A Crane Rental LLC*, No. 19-1667, 2023 WL 192889, at *2 (OSHRC Jan. 10, 2023) (citation omitted). Further. If the court determines on remand that A Crane "was shown to be a creating employer," the Commission directs the court "to reconsider, in light of the company's creating employer status, the noncompliance and knowledge elements of the Secretary's case with respect to both citation items." (*Id.* at *3) (citation omitted). For the reasons indicated *infra*, the court concludes Amended[2] Citation 1, Items 1 and 2 must be vacated.

[1] The court incorporates by reference its finding from *A Crane Rental LLC*, No. 19-1667, 2023 WL 192889, **4-7.

[2] At trial, the parties agreed to amend the citation to reflect the correct date of the accident was March 21, 2019. (Tr. 52: 10-22). Any references herein to the accident date have been corrected to March 21, 2019.

## II. ANALYSIS

Under the law of the Eleventh Circuit where this case arose,[3] "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (citing *id.* at 1308).

As indicated *supra*, the Commission has directed the court to consider whether the Secretary has proven that A Crane was a "creating employer," and if so, to reconsider "the noncompliance and knowledge elements of the Secretary's case[.]" *A Crane Rental*, 2023 WL 192889 at *2.[4] Under OSHA's Multi-Employer Citation Policy, a "creating employer" is defined as an "employer that caused a hazardous condition that violates an OSHA standard." (Multi-Employer Citation Policy, CPL 02-00-160 § X.B.1). "Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site." (*Id.* at § X.B.2). Under the Commission's long-standing precedent, an employer that has "created a hazard" can be held liable for violations of the Act when the only

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[3] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the alleged violations occurred in Norcross, Georgia, which is in the Eleventh Circuit and A Crane's principal place of business is in Dravosburg, Pennsylvania, which is in the Third Circuit. (*See* Compl. ¶¶ III, IV; Answer ¶¶ III, IV). Since both parties cited to the Eleventh Circuit in their post-trial briefs, the court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable that the case will be appealed.

[4] A Crane did not dispute that the cited provisions applied. *A Crane Rental LLC*, No. 19-1667, 2023 WL 192889, at *1. The Commission also indicated in footnote 6 of its remand order that the court "need not revisit the exposure element because the parties' factual stipulations along with undisputed testimony at [trial] establishes that employees of Superior were exposed to the alleged violative conditions." *Id.* n. 6 (*citing Summit Contractors*, 23 BNA OSHC at 1205 (creating employer "is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard")).

employees exposed to the hazard are those of other employers on a multi-employer construction worksite. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197-99 (No. 3694, 1976) (consolidated); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976); *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000); *Smoot Constr.*, 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010).

**Creating Employer**

In Amended Citation 1, Item 1, the Secretary alleges on or about March 21, 2019, A Crane violated §1926.1431(f)(4) when the "maximum capacity of the personnel basket was exceeded, exposing employees to fall and struck-by hazards." (Ex. C-1 p. 6). The cited standard mandates that the "number of employees occupying the personnel platform must not exceed the maximum number the platform was designed to hold or the number required to perform the work, whichever is less." 29 C.F.R. § 1926.1431(f)(4). Thus, the hazard created was the fall and struck-by hazard created by the overcrowding condition when the maximum capacity of the personnel basket was exceeded. A Crane created the hazardous condition when [redacted] conducted a lift without ensuring the personnel platform was not overloaded. Thus, the court conclude A Crane was a creating employer as it relates to Item 1.

In Amended Citation 1, Item 2, the Secretary alleged on or about March 21, 2019, A Crane violated § 1926.1431(m)(2) when it did not ensure that "employees hoisted in a personnel basket attended the pre-lift meeting with the crane operator and competent person responsible for the communication tower work." (Ex. C-1 p. 7). The cited standard mandates that the pre-lift meeting must be attended by "the equipment operator, signal person (if used for the lift), employees to be hoisted, and the person responsible for the task to be performed." 29 C.F.R. § 1926.1431(m)(2). "This addresses hazards which result from misunderstanding of the requirements, particular lift conditions or procedures." *Cranes and Derricks in Construction*, 75 FR 47906, 48042 (2010).

Gorman, Superior's lift director, held a pre-lift meeting with [redacted]. Missing at that meeting were Superior's employees to be hoisted and a signal person (if used for the lift). The crane manufactures' manual indicates "[e]very crane operator shall be held directly responsible for safe operation of the crane and any attachment to the crane" and "[i]f there is any doubt as to safety, the operator should stop the crane until safe conditions have been restored." (Ex. C-10, p. 3.) Even if [redacted] did not have the authority to make anyone attend the pre-lift meeting, he

could have refused to operate the crane until he attended a proper pre-lift meeting. Therefore, A Crane created the hazardous condition when [redacted] operated the crane without first attending a proper pre-lift meeting. Thus, the court conclude A Crane was a creating employer as it relates to Item 2.

**Noncompliance**

A Crane provided the crane, the personnel basket, the sling system used to hoist the personnel basket at the worksite on March 21, 2019, and the crane operator. The personnel basket had a maximum capacity of two people. The personnel basket at the worksite was hoisted while three people were inside the basket. The Secretary has established by a preponderance of evidence that A Crane failed to comply with 29 C.F.R. § 1926.1431(f)(4).

Section VI (B)(6) of A Crane's written procedure for Crane Hoisted Personnel Platforms required that "workers to be hoisted" attend the pre-lift meeting. While Gorman and [redacted] attended a pre-lift meeting on March 21, 2019, none of the workers who were to be hoisted attended that meeting. Hammons, A Crane's expert, testified if the crane operator holds the pre-lift meeting it would be a diversion or distraction for him. (Tr. 234:21-24). The court disagrees. Since the meeting must be held *prior* to the lift, clearly there would be no diversion or distraction when the subsequent lift actually occurred.

Hammons also opined that although best practice is to have a meeting with everyone involved, a pre-lift meeting can be done through multiple, separate meetings if a job requires it. (Tr. 197:15-198:14). The court again disagrees. The pre-lift requirement is intended to provide "an opportunity for all employees involved to have a common and complete understanding of the hoisting operation and to give uniform information and instructions immediately prior to the lift." *Cranes and Derricks in Construction*, 75 FR at 48042 (emphasis added). The clear intent of the standard is to require all the participants to attend the meeting together. A Crane violated the standard when [redacted] conducted a lift without first attending a proper pre-lift meeting with the required participants. Thus, the Secretary has established by a preponderance of evidence that A Crane failed to comply with 29 C.F.R. § 1926.1431(m)(2).

**Knowledge**

The Act imposes liability on the employer for a serious violation only if the employer knew, or with the exercise of reasonable diligence, should have known of the presence of the violation. *Fla. Lemark Corp. v. Sec'y, U.S. Dep't of Lab.*, 634 F. App'x 681, 687 (11th Cir. 2015).

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Lab.*, 723 F. App'x 695, 697 (11th Cir. 2018) (*citing ComTran Grp., Inc.*, 722 F.3d at 1311).

As to Item 1, the Secretary asserts [redacted] was A Crane's supervisor and his knowledge is imputed to A Crane for purposes of establishing employer knowledge of violative conditions. (Sec'y's Br. 13). As to Item 2, the Secretary asserts "there is no dispute that [redacted], Respondent's competent person on-site to supervise crane operations, knew of the need for a pre-lift meeting." (Sec'y's Br. 23). "And he signed Respondent's pre-lift document as a job site supervisor certifying that a pre-lift meeting occurred with all personnel involved." (*Id.*) "But he never met with the employees to be hoisted and only allegedly spoke with the Superior foreman." (*Id.*) Again, the court disagrees with the Secretary.

It is true that when "a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *ComTran Grp., Inc.*, 722 F.3d at 1317 (citation omitted). "It is reasonable to do this because a corporate employer can, of course, only act through its agents . . . and the supervisor acts as the 'eyes and ears' of the absent employer. That makes his knowledge the employer's knowledge." *Id.*

Here, however, [redacted] was the only A Crane employee at the worksite when the violations occurred and he credibly testified he was not in management at A Crane, did not supervise anybody, and had never supervised anybody at A Crane. Starks also admitted [redacted] had no supervisory authority over any of the workers who were to be hoisted. As to A Crane's pre-lift document, it had two signature lines: one inside the "Trial Lift" box section and the second at the very bottom of the form, which the Secretary asserts [redacted] signed "as a job site supervisor certifying that a pre-lift meeting occurred with all personnel involved." (Sec'y's Br. 23; *see also* Ex. R-6). The court disagrees. The second signature is *not* inside the "Pre Lift Meeting" box; it's in its own self-contained box. And [redacted] testified "this is just reviewing your weights, showing that you accept those weights and that is all correct. That's what that's showing there." (Tr. 146:16-22). The court concludes neither of [redacted]'s signatures were intended to certify that all the pre-lift requirements had been met, but rather, were intended to certify his weight

calculations. Therefore, the court concludes [redacted] was not an A Crane supervisor and his actual or constructive knowledge cannot be imputed to A Crane.

The Secretary also argues that even if [redacted] "somehow did not know of the violation[s]," he "would have known of the violation[s] if he had exercised reasonable diligence." (Sec'y's Br. 15). However, since [redacted] was not an A Crane supervisor, whether or not he exercised reasonable diligence is not relevant since his actual or constructive knowledge cannot be imputed to A Crane. Since the Secretary cannot prove A Crane had knowledge of the violation by imputing the actual or constructive knowledge of a supervisor, the Secretary must prove it "by demonstrating constructive knowledge based on [A Crane's] failure to implement an adequate safety program." *Samsson Constr.*, 723 F. App'x at 697.

A Crane's Hoisted Personnel Platforms policy mandates that a pre-lift meeting shall be held after approval has been given for crane hoisted personnel platform use, and the attendees at this meeting must include but are not limited to:

1. Crane Operator,
2. Rigging Supervisor,
3. Requesting Customer Supervisor,
4. Safety Representative,
5. Flagman/Signal Person ( designated), and
6. Workers to be hoisted.

(Ex. C-11, p. 3). Activities to be completed at the pre-lift meeting include:

1. Required crane, rigging and platform inspections,
2. Functional test of anti-two block device,
3. Test lift with sample weight,
4. Safety instruction for workers, and
5. Permit signing and issuance.

(*Id.*) A Crane's pre-lift document also states that "[p]rior to the lift a meeting must be held with all personnel involved with the lift." (Ex. R-6).

The only evidence the Secretary points to in his brief related to A Crane's safety program is [redacted]'s testimony that he had reviewed A Crane's safety manual, "quite a while before then" and his testimony that "he was only certifying his load calculations for the lift and not the pre-lift meeting" is "further evidence" of A Crane "failing to require that their policies be

enforced[.]" (*Id.*) The court concludes this evidence is not enough to show by a preponderance that A Crane failed to implement an adequate safety program. Therefore, the court concludes the Secretary has failed to carry his burden to establish his prima facie case with respect to employer knowledge. Accordingly,

**IT IS HEREBY ORDERED THAT** the Amended Citation 1, Item 1 and Item 2 are **VACATED** and no penalty is assessed.

**SO ORDERED**.

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JOHN B. GATTO, Judge

Dated: March 21, 2023
Atlanta, GA