

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Ben Hur Construction Co.,

Respondent.

OSHRC Docket No. **09-1366**

Appearances:

Evert Van Wijk, Esquire, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Julie O'Keefe, Esquire, Armstrong Teasdale, LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Ben Hur Construction is a steel erection contractor. On February 3, 2009, Steven Lillicrap, an operator apprentice for Ben Hur, was killed as he and other Ben Hur employees were attempting to disassemble a crawler crane at a construction site in Maryland Heights, Missouri. Occupational Safety and Health Administration (OSHA) compliance officers John Schauster and Robert Rose arrived at the site later that day to inspect the crane and surrounding area. Based on their inspection, the Secretary issued two citations to Ben Hur on July 24, 2009.

Citation No. 1 alleges two violations of the Occupational Safety Act of 1970 (Act). Item 1 alleges a serious violation of 29 C. F. R. § 1926.550(a)(1), for failure to comply with the crane manufacturer's specifications and limitations applicable to the crane's operation. The Secretary proposes a penalty of \$ 7,000.00 for Item 1. Item 2 alleges a serious violation of 29 C. F. R. § 1926.550(a)(8), for failure to guard moving parts of equipment to which employees were exposed. Prior to the hearing, the Secretary withdrew Item 2 (Tr. 5).

Item 1 of Citation No. 2 originally alleged a willful violation of 29 C. F. R. § 1926.503(a)(2)(iii), for which the Secretary proposed a penalty of \$ 70,000.00. At the hearing, the

Secretary moved to amend the citation to allege a serious violation of 29 C. F. R. § 1926.21(b)(2), for failure to instruct employees in the recognition and avoidance of unsafe conditions. She proposed a penalty of \$ 7,000.00 for this item. The court granted the Secretary's motion to amend (Tr. 5).

The court held a hearing in this matter on May 11 and 12, 2010, in St. Louis, Missouri. Ben Hur stipulates jurisdiction and coverage (Tr. 5). The parties have filed post-hearing briefs. Ben Hur denies it violated either of the standards at issue.

For the reasons discussed, the alleged violations are vacated.

Background

Ben Hur is a steel erection contractor with its corporate headquarters in St. Louis, Missouri. The company is more than 100 years old. In addition to steel erection, Ben Hur also erects precast concrete and fabricates steel. Its president is William Brown, who began work as an ironworker in 1974 (Tr. 539-540, 564).

Ben Hur's projects are concentrated in the Midwest. It operates three divisions: the western division, the central division, and the eastern division, with St. Louis; Indianapolis, Indiana; and Cincinnati, Ohio, respectively, as its divisional headquarters (Tr. 564). Generally, Ben Hur employs 150 to 160 employees. This number includes seven or eight project managers, seven or eight superintendents, and fourteen to sixteen foremen. Ben Hur runs from fifteen to twenty projects at a time (Tr. 542). Ben Hur owns five crawler cranes that it uses in the field (Tr. 563). It also rents cranes for some of its projects (Tr. 565).

McCarthy was the general contractor for a project for Edward Jones. McCarthy entered into several subcontracts with Ben Hur to set the steel for various phases of the project. Edward Jones South refers to the corporate headquarters being constructed for the company. Edward Jones North refers to the set of buildings where the company's brokers were going to work (Tr. 562). In early February 2009, a Ben Hur crew had completed setting the steel for Building 1 at Edward Jones North, and was preparing to move its crane to another job site (Tr. 18).

The crane Ben Hur used on the Edward Jones North site was a 100-ton lattice boom Linkbelt 218 crawler crane (Tr. 17). In order to move the crane, the crew had to disassemble it. On February 3, 2009, Ben Hur's crew consisted of crane operator Virgil ("Pete") Bell, operator apprentice Steven Lillicap, equipment manager Joe McDermott, and three ironworkers (Tr. 20).

The disassembly of the crane began at 7:00 a. m. Lillicrap experienced problems with his truck that morning, and arrived late, at 7:30 a. m. By the time Lillicrap arrived, the crew had already removed the catwalks and was preparing to lower the boom to the ground so it could be taken apart. The boom included a 20-foot butt section that remains on the crane after disassembly. Together, Bell and Lillicrap took the main pendants apart. The pendants are 14 inches in diameter, with a lug and pin on each end so the pieces fit together. The ironworkers hooked onto the boom with a helper crane, knocked the pins out, and loaded the boom onto a truck (Tr. 26-27, 36, 40-41, 178).

The Linkbelt crane has three drums. The main drum is the front, or load drum, and is located to the left of the operator cab. The auxiliary drum is located slightly behind the load drum. The boom hoist drum is in the back, and houses the cable that lifts the boom up and down (Exhs. C-1, C-2; Tr. 43-47).

Bell entered the crane cab and wound the cable back up on the auxiliary drum, which is the only drum the crew had been using at that point. The cable from the boom hoist drum runs up through the gantry, through the mast and back, and then ends alongside the boom hoist drum, approximately 2 feet away. A beckett holds the end of the cable in place. (Tr. 43-48, 58-59, 77, 194).

The next step in the disassembly was to remove two counterweights that sit on the back of the crane. Each counterweight weighs between 22,000 and 23,000 pounds. Ben Hur has a work rule requiring employees to use fall protection anytime they are working at heights of 6 feet or more above the ground. Lillicrap kept a safety harness in the Linkbelt crane for these occasions. Bell told Lillicrap that he would have to tie off, climb on top of the counterweights (approximately 9 feet above the ground), and hook up the counterweights. Bell saw Lillicrap wearing his safety harness and attached lanyard, but did not see where he tied off to. The crew then used the helper crane to pick up the counterweights (Tr. 50, 61, 65, 104).

After the counterweights were laid down, the crew needed to pull the pins on the gantry so it could be lowered. However, the Linkbelt crane was situated in a tight space, and Bell needed to move the crane forward 10 to 12 feet in order to lower the gantry. Bell told Lillicrap to get down from the crane while he moved it forward, and stay on the work platform (or landing) on the back of the crane. The work platform is next to the boom hoist drum and is 6 feet, 9 inches above the ground. As Bell stood on the ground, he told Lillicrap he would move the crane forward and raise

the butt section (boom up), and then Lillicrap would pull four pins on the gantry so the gantry could be lowered. Bell got up on the top of the track of the crane and repeated the instruction. When Bell gave the instruction the second time, Lillicrap was standing on the work platform at the back of the crane. Lillicrap acknowledged Bell's instruction each time. Bell did not say anything to Lillicrap about tying off while on the work platform. Bell could see Lillicrap from the chest up. He knew Lillicrap was wearing his safety harness, but could not tell if he was tied off. There is no engineered anchor point on the back of the crane (Exh. C-2; Tr. 69-72, 324).

When Lillicrap got onto the work platform, the butt section of the crane was a couple of feet off the ground. The purpose of lifting the butt section of the boom was to make sure it did not hit the ground, because the boom bounces as the crane moves forward. The boom also had to be raised because the gantry and boom had to be scissored. Scissoring refers to keeping the boom cable tight in order to keep it from getting slack. It requires the operator to lift the butt section approximately 45 to 50 degrees in order to get the hydraulic cylinders on the gantry to overhaul, otherwise the cylinders will stall (Tr. 72-77).

Bell began moving the crane forward, boomed up, and then heard an ironworker yell, "Stop." Bell went back and saw that Lillicrap had been pulled down next to the boom hoist drum when Bell boomed up and the drum turned. Lillicrap had attached his lanyard to the live end of the boom hoist drum cable. He died from his injuries (Tr. 77-78).

Someone at the site called 911. The emergency dispatcher informed OSHA's local office of the accident. Compliance Officers John Schauster and Robert Rose arrived at the site at approximately 9:30 a. m. They inspected the site, took photographs, and interviewed employees. Based on this inspection, the Secretary issued the instant citations.

Discussion

The Secretary has the burden of proving the violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Ben Hur does not dispute the applicability of the cited standards, employee exposure, or employer knowledge. The company disputes only the Secretary's contention it failed to comply with the terms of the cited standards¹.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.550(a)(1)

The Secretary contends Ben Hur did not comply with the manufacturer's specifications and limitations applicable to the operation of cranes. The citation alleges:

At the Edward Jones construction site, building B1, during the disassembly of the Linkbelt 218 crane, and specifically just preceding lowering the gantry, when the boom was raised, the boom hoist cable was inrunning into the drum, and the operator did not have direct sight of the apprentice; the apprentice oiler was exposed to the hazard of being pulled into the rotating boom hoist while standing next to the drum in violation of the manufacturer's warning. The operation manual, Model Linkbelt 218H, Book No. WDT0002-004, states on page 5-23, "WARNING Stay Clear Of All Moving Machinery During Raising Or Lowering Of Gantry. Position A Signalman To Observe All Areas Of Motion And Warn Operator Of Danger."

Section 1926.550(a)(1) provides:

The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes[.]

Ben Hur argues (1) the company complied with the manufacturer's specifications and limitations applicable to the operation of cranes, (2) the disassembly procedure described in the operation manual is merely a recommendation and not a specification or limitation, (3) the manual refers at other points to "booming up" without requiring a signal person, and (4) operator Virgil Bell was not lowering the gantry when the accident occurred.

"Specifications" is not defined in the Act. *The American Heritage Dictionary* (2d. Coll. Ed.) defines a specification as, "A detailed and exact statement of particulars, especially a statement prescribing materials, dimensions, and workmanship for something to be built, installed, or manufactured." "Specifications" connotes steps or instructions that are required, mandatory,

¹Issues not briefed are deemed waived. See *George-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713).

obligatory, and compulsory. The sense of “specifications” is an employer can be penalized if it does not comply with the specification.

On the other hand, “recommendation” does not imply an employer will be penalized if the recommendation is not followed. It is a suggestion, a proposal, an option to be considered. A recommendation is offered when one or more other courses of action are possible.

The manual to which the Secretary refers in the citation is entitled “Disassembly Of The Crane And Attachment” (Exh. R-4). Page 5-1 of the manual states (emphasis added):

The size and weight of this machine usually requires that it will be partially disassembled for transportation. When it is moved to the job site, it will require reassembly. *The instructions in this Section are the recommended, safe procedures for disassembling the machine.* Due to job site conditions, availability of additional equipment and previous equipment disassembly experience, *other methods may be used* only if they are proven, safe methods.

Page 5-23 of the manual addresses “Folding The Gantry.” As noted in the alleged violation description of Item 1, a boxed message on the page warns:

Stay Clear Of All Moving Machinery During Raising Or Lowering Of Gantry.
Position A Signaller To Observe All Areas of Motion And Warn Operator Of
Danger.

The Secretary contends that, while the step-by-step instructions for lowering the gantry are recommendations, the warning to use a signaller on page 5-23 is a specification the employer must follow. The Secretary offers no evidence to support her reading of the manual. Each step of the recommended instructions is written as an imperative sentence, commanding the workers to proceed in a certain manner, just as the boxed warning is. Nowhere in the manual does the manufacturer indicate that some of the sentences are recommendations, while others are specifications. The first paragraph of the Disassembly Section states: “The instructions in this Section are the recommended, safe procedures for disassembling the machine.” Placed as it is at the beginning of the Disassembly Section, that sentence applies to all that follow.

Assuming the warning is a specification Ben Hur was required to follow, the Secretary would still fail to establish a violation of § 1926.550(a)(1). The warning states a signaller is needed “during raising or lowering of gantry.” Bell was doing neither at the time of Lillicrap’s accident. This is acknowledged by the Secretary’s own alleged violation description for Item 1, in which she states

the accident occurred “specifically just preceding lowering the gantry.” The disassembly step Bell was performing when Lillicrap was fatally injured was booming up. In this instance, Bell was booming up preparatory to lowering the gantry, but lowering the gantry does not always follow booming up. As Ben Hur points out in its brief, other steps in the manual instruct the operator to boom up without warning the operator to position a signalman to observe the areas of motion (Exh. R-4, p. 5-10). It is the act of raising or lowering the gantry, and not booming up or down, that triggers the warning to position a signalman.

The Secretary has not established Ben Hur failed to comply with the manufacturer’s specifications applicable to the crane. Item 1 of Citation No. 1 is vacated.

Citation No. 2

Amended Item 1: Alleged Serious Violation of § 1926.21(b)(2)

Amended Item 1 alleges:

At the Edward Jones construction site, building B1, during the disassembly of the Linkbelt 218 crane, and specifically just preceding lowering the gantry, an employee who was fatally injured, and who was found immediately after the incident to have had his lanyard snaphook connected to the live line of the boom hoist drum resulting in the employee being pulled into the boom hoist drum, was not provided training on the use of personal fall arrest harness and double lanyard, and specifically on where, when, and how to attach his lanyard to a safe anchor point.

Section 1926.21(b)(2) provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Section 1926.21(b)(2) requires an employer to “instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware.” *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992). The Secretary alleges Ben Hur failed to instruct Lillicrap in the use of fall protection, specifically in the hazard of tying off to “inappropriate anchor points” (Secretary’s brief, p. 14). Ben Hur argues its training complies with the requirements of § 1926.21(b)(2), and the Secretary did not prove the company failed to instruct Lillicrap to tie off to safe anchor points.

Lillicrap was an apprentice operator and had completed one year of Operating Engineers Local 513 apprenticeship program. The program lasts three years. The first year includes 120 hours of training on a rubber tire backhoe. The second year focuses on cranes and the third year focuses on rubber tired scrappers. At the Operating Engineers training center, Lillicrap had completed 8 hours of orientation, 32 hours of pre-apprenticeship, 40 hours of an indentured week, and 120 hours of backhoe training. The indenture week was a full week of classroom safety training, the OSHA 10-hour class, a tool class, and a crane oiler class (Tr. 261-268).

The record establishes Lillicrap was an exceptionally able apprentice. Bell testified he recognized Lillicrap's abilities and potential shortly after they began working together. Lillicrap came from a family that had worked in crane operation, and he was familiar with the industry (Tr. 158-159, 197-200). Bell testified Lillicrap was a quick learner and "very mechanically inclined" (Tr. 166).

Hugh Murphy is the general manager for Linkbelt's distributor in the Midwest (Tr. 487). In October 2008, Murphy went to St. Louis to coordinate on-site supervision and training on a new Kobelco CK-2000, 200-ton crawler crane that Ben Hur had purchased. Murphy spent the day with Bell and Lillicrap, instructing them in the use of the new crane (Tr. 488-489). He testified he found Lillicrap to be "work-wise," which "is a term we use in the field to compliment a person when they know what's going on; when they're in the game, when they have the mechanical aptitude, the ability to be around machinery and to understand the processes" (Tr. 500). Murphy stated:

Mr. Lillicrap was work-wise, no question about it. I think there were several comments on what a good hand he was, how he carried himself, how he tried to anticipate the next move, how he was definitely in the game. And, I think, you know, Mr. Bell and I had a discussion afterwards where I complimented him on his apprentice, you know, that the person was certainly work-wise and capable.

(Tr. 500).

General contractor McCarthy requires any employee working on one of its sites to complete a safety orientation given by the McCarthy safety coordinator. The orientation consists of safety videos and discussion, followed by a test. The orientation covers fall protection, including the 6-foot tie-off requirement, and the requirement an employee must be tied off to an

anchor point capable of supporting at least 5,000 pounds. Lillicrap attended the orientation with Bell on the Edward Jones South project. He also attended the orientation without Bell on the Edward Jones North project when he first started (Exhs. C-12, C-13; Tr. 84-88). The Ben Hur foreman on the Edward Jones project conducted tool box meetings during which he discussed fall protection (Exh. C-6; Tr. 100-102).

The Secretary contends this safety training regarding fall protection did not address tying off to safe anchor points. Bell, however, testified he specifically instructed Lillicrap, “[M]ake sure you’re tied off to the dead end [of the crane cable], make sure you’re not on the live end” (Tr. 192). The Secretary suggests Bell’s testimony is “highly suspect” on this point (Secretary’s brief, p. 21). Even if Bell did instruct Lillicrap not to tie off to a live cable, the Secretary argues, this instruction did not come from a designated safety representative for Ben Hur, and should not be considered.

Mitch Angell was a superintendent for Ben Hur on the Edward Jones North precast project (Tr. 521). He corroborates Bell’s testimony that he instructed Lillicrap not to tie off to a live cable. Angell had previously worked with Bell and Lillicrap on another project. He observed Bell tell Lillicrap at least three times on that project, “Watch the cables, watch the drums, don’t have your hands or anything in the way of moving parts” (Tr. 526). Angell also stated he observed Bell tell Lillicrap, “Do not tie off to your cable or anything, watch where your feet are too” (Tr. 523).

On the issue of whether Bell trained Lillicrap in anchor point safety, the court credits the testimony of Bell and Angell. The court also finds Bell was qualified to provide safety training to Lillicrap. The record establishes Bell is a highly qualified crane operator. At the time of the hearing, he had been a union member for 42 years. He had worked for Ben Hur for 24 years (Tr. 16-17). Ben Hur president William Brown testified Bell is highly regarded as the best crane operator working in the St. Louis area. Ben Hur keeps Bell on the payroll year round, even when he is not working on a project, because the company does not want another company to hire him, thus limiting his availability (Tr. 551). On the Edward Jones project, Bell was the crane operator and Lillicrap the operator apprentice. Bell worked more closely with Lillicrap than anyone else on the job. As an experienced, qualified operator, Bell was able to instruct Lillicrap in the fall

protection safety, including anchor point training.

The Secretary has failed to show by a preponderance of the evidence that Ben Hur failed to instruct Lillicrap in the use of anchor points. She seems to base her argument that Lillicrap did not receive anchor point training on the basis that Lillicrap tied off to a live cable. The Secretary wants the court to extrapolate from this fact that Ben Hur did not train Lillicrap to recognize tying off to a live cable is a hazard. The court declines to do so. As Schauster conceded, Lillicrap “could have been properly instructed, and he potentially could mistakenly put his latch on the live line and not on the dead line” (Tr. 385). As stated by the Review Commission, the issue “is whether the employer’s program of safety instructions provided adequate guidance to the employees, not whether the accident could have been averted.” *El Paso Crane and Rigging Co., Inc.*, 16 BNA OSHC 1419 1427 (No. 90-1106, 1993).

Item 2 of Citation No. 2 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.550(a)(1), is vacated, and no penalty is assessed;
2. Item 2 of Citation No. 1, alleging a serious violation of § 1926.550(a)(8), was withdrawn by the Secretary; and
3. Item 1 of Citation No. 2, as amended, alleging a serious violation of § 1926.21(b)(2), is vacated, and no penalty is assessed.

Date: November 3, 2010

/s/_____
KEN S. WELSCH
Judge