United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

SECRETARY OF LABOR, Complainant, v. ALL ERECTION AND CRANE RENTAL CORP., Respondent.	OSHRC Docket No. 11-0745

Appearances:

Paul Spanos, Esquire, Office of the Solicitor, U.S. Department of Labor
Cleveland, Ohio
For the Complainant

Tod T. Morrow, Esquire, Morrow & Meyer LLC
North Canton, Ohio
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act). All Erection and Crane Rental Corp. (All Crane) is an Ohio corporation located in Independence, Ohio. It provides cranes and crane services to other companies. In September 2010, All Crane provided a crane and two employees at a work site located in Brook Park, a suburb of Cleveland, Ohio. The worksite was for the construction of a rail bridge over Eastland and Sheldon Roads in Brook Park. All Crane was responsible for lifting heavy steel pieces which comprised the bridge structure. The bridge collapsed on September 18, 2010. [1] As a result of the bridge collapse, the Occupational Safety and Health

[1] The collapse of the bridge was not caused by All Crane's work at the site.

Administration (OSHA) conducted an inspection of the site. Thereafter, on February 17, 2011, OSHA issued a one-item serious citation to All Crane. The citation alleges a violation of 29 C.F.R. 1926.550(a)(9), for failing to ensure that employees were protected from crushing hazards while accessing/working within the swing radius of the crane, and proposes a penalty of $4,500.00. All Crane filed a timely notice of contest, and the undersigned held a hearing in Cleveland, Ohio, on June 23, 2011. Both parties filed post-hearing briefs.

For the reasons that follow, the undersigned affirms Item 1 of Citation No. 1 as serious and a penalty of $2,500.00 is assessed.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also stipulated that at all times relevant to this action, All Crane was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 6).

The OSHA Inspection

As a result of the bridge collapse on September 18, 2010, two OSHA compliance officers went to the site to conduct an inspection (Tr. 18). Compliance officer Scott McNulty arrived first, and compliance officer Jocko Vermillion arrived later that afternoon (Tr. 18, 51-52). The site was cordoned off and no work was taking place (Tr. 19). The compliance officers viewed the site and took photographs and measurements. They also spoke to representatives of Allega Construction (Allega), the general contractor at the site, and requested a list of the subcontractors on the project (Tr. 19, 26). Later in the day on September 18, 2010, OSHA directed Vermillion to take over the inspection of the entire site as the sole compliance officer for OSHA (Tr. 18-19).

On September 20, 2010, Vermillion returned to the site and met with Mike Garrity, All Crane's sales representative (Tr. 19-20). Garrity told Vermillion the only two employees All Crane had on the site were Dean Feiler and Dean Feiler, Jr. (Tr. 20-21). Vermillion then conducted an opening conference with the elder Feiler (Feiler) while on site (Tr. 58). Feiler told Vermillion he had been with All Crane for 26 years, and he identified himself as the foreman and operator "in charge of everything to do with the crane." He also told Vermillion he was in charge of the oiler, Dean Feiler, Jr., and the oiler's safety at the site (Tr. 21-22). When Vermillion asked if other supervisors of All Crane were ever at the site, Feiler said the only other

person who visited the job was Garrity. In response to Vermillion's inquiry as to whether Garrity came to check on safety matters, Feiler said Garrity visited the job only to check on the crane and to "see if everything was all right" (Tr. 22-23).

The crane used by All Crane at the site was a "Manitowoc 2250" (Tr. 25-26). It had a rotating superstructure so that it could pick up a load from one spot, rotate, and then set down the load in another spot (Tr. 29). During his two days at the site, Vermillion did not see a barricade around the crane (Tr. 29). He interviewed employees who told him there had never been a barricade set up around the crane (Tr. 42-44). Vermillion asked Feiler whether the crane had been barricaded. Feiler told Vermillion he had barricaded the crane with two pallets set in an "A frame," and placed in a location near a soil pile so that nobody could walk "between there" (Tr. 29-33; Exhs. C-4, C-5 and C-6). However, Feiler told Vermillion he had only used the pallets in that one spot. Further, he told Vermillion he did not have caution tape (Tr. 36-37).

Vermillion asked whether the oiler had worked inside the swing radius while the crane was being operated, to check the crane. Feiler told him yes, and that the oiler had worked all around the crane (Tr. 38). Vermillion determined the oiler would have been "within inches" of the rotating superstructure (Tr. 38-39). When Vermillion explained to Feiler that the oiler could not be inside the swing radius while the crane was operating, Feiler said he thought the oiler could be there to check the crane's mechanics and that there was an exemption for the oiler (Tr. 39). Vermillion determined other employees at the site also were exposed to the hazard of the rotating crane (Tr. 38-40). He noted employees entered the job site by walking behind and around the crane, and by doing so when the crane was rotating, the employees could have been pinched or struck by the counterweight as it rotated while the crane picked up steel pieces (Tr. 34-36, 40-43; Exhs. C-2, C-5 and C-6).

Kirk Ward, All Crane's safety director, told Vermillion he had not been to the site until after the accident took place (Tr. 23-24).

Credibility Determination

All Crane contends Vermillion was not a credible witness on the basis that Vermillion was uncertain as to when he was onsite and as to the date of the bridge collapse; and because he testified he had taken all of the photographs offered by the Secretary (All Crane's Brief, pp. 7-9).

That Vermillion initially indicated his belief at the hearing that the accident had occurred on September 17, 2010, does not suggest that he is not credible, especially since he was

testifying from memory and only used his investigation file to refresh his recollection. All Crane asserts that Vermillion could not have been at the site on September 18, 2010, because Ward did not see him there that day. Vermillion's testimony about being at the site on September 18, 2010, with McNulty is credible, particularly in view of his other testimony that he and McNulty were at first assigned to inspect the site together and later that day, OSHA directed him to take over the entire inspection. Vermillion testified McNulty arrived first and he arrived later (Tr. 18-19, 50-51). This would explain why Ward did not see Vermillion at the site, especially since Ward indicated he did not see McNulty until he (Ward) was leaving the site (Tr. 175-177). Vermillion also testified credibly regarding the photographs admitted into evidence. Despite his initial testimony that he took all of the photographs, he later conceded he could be mistaken since the position of the crane's boom was in a different position from when he saw it, as reflected in the photograph admitted as Exhibit C-2. Vermillion testified the batteries in his camera had died at some point during day and that McNulty probably took the photograph admitted as Exhibit C-2 (Tr. 50-52).

During his testimony, Vermillion appeared to the undersigned to be composed, sincere and believable. The undersigned has considered what All State contends are discrepancies in his testimony. However, those discrepancies are not significant when considering Vermillion's testimony as a whole, as well as Vermillion's explanations as to the discrepancies. Therefore, the undersigned credits Vermillion's testimony in this matter, and rejects All Crane's contention that he was not a believable witness.

The Alleged Violation of 29 C.F.R. 1926.550(a)(9)

The cited standard provides that:

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

The citation alleges a violation of the standard as follows:

> On or about September 20, 2010, during steel erection work, the employer did not ensure that employees were protected from crushing hazards while accessing/working within the swing radius of the crane.

To prove a violation of an OSHA standard, the Secretary must show that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the cited condition, and (4)

the employer either knew of the cited condition or could have known of it with the exercise of reasonable diligence. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Section 1926.550 addresses "Cranes and Derricks." All Crane operated a Manitowoc 2250 crane at the site, and Feiler rotated the superstructure of the crane in order to move steel pieces from one place to another at the job site (Tr. 29). The cited standard applies.

The record shows the crane's swing radius was not barricaded as required. Feiler admitted he did not properly barricade the crane's swing radius, and All Crane concedes as much (Tr. 125; All Crane's Brief, pp. 19-20). Feiler told Vermillion he had placed two wooden pallets along one side of the crane to keep anyone from walking between the crane and a soil pile along that side of the crane (Tr. 29-30, 106; Exhs. C-5-6). However, he did not barricade the back of the crane or the side of the crane closest to the work area (Tr. 34). The terms of the standard were not met.

As to employee exposure, the Secretary notes that to meet this element, she must show that "it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prod.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Miniature Nut and Screw Corp*., 17 BNA OSHC 1557, 1560 (No. 93-2535, 1996). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (Secretary's Brief, p. 8).

As the Secretary points out in her brief, Feiler admitted to Vermillion that the oiler worked within the swing radius of the crane, performing maintenance on the crane while it operated (Secretary's Brief, p. 9; Tr. 38-39). At the hearing, Feiler denied making this statement to Vermillion (Tr. 112). The undersigned finds Vermillion's testimony as to this point to be credible and consistent with Feiler's un-rebutted statement to Vermillion that he believed there was an exception permitting the oiler to work within the swing radius of the crane. Also, Feiler testified the oiler walked from the rear of the crane to the front of the crane while it was running (Tr. 139).

In addition, other employees also had access to the zone of danger. Ward, All Crane's safety director, testified that the job site was "very tight" and that there "was not a lot of room to walk. . . ." (Tr. 161-162). In order to enter the job site, employees walked behind and around

the crane, in proximity to the rotating counterweight (Tr. 34-36, 40-43). There was nothing to prevent the employees from accessing the area of the crane's swing radius. A preponderance of the evidence supports a finding that the oiler worked within the zone of danger and other employees had access to the un-barricaded area of the crane's swing radius. The Secretary has shown employee exposure to the cited condition.

In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Here, Feiler identified himself to Vermillion as the foreman and operator "in charge of everything to do with the crane," and said that he was in charge of the oiler and the oiler's safety at the site (Tr. 21-22). At the hearing, however, Feiler testified he did not identify himself as a member of management or a foreman (Tr. 113). Whether Feiler was a foreman or a member of management is not controlling. The fact that Feiler was in charge of the crane operations on the site, and as he stated, that he was responsible for the safety of the oiler on the jobsite, is determinative. No evidence was adduced at the hearing to dispute Feiler's claims as to his responsibilities as to the crane and the oiler.

An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). The undersigned finds that Feiler was a supervisor for purposes of imputing knowledge to All Crane. Accordingly, the undersigned finds that the Secretary has met her burden of employer knowledge and has established a prima facie case as to the cited standard.

An employer may rebut the Secretary's prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. In particular, the employer must show it had a work rule that satisfied the requirements of the standard, which it adequately communicated and enforced. *Aquatek Systems, Inc.*, 21 BNA OSHC 1400, 1401-02 (No. 03-1351, 2006). Moreover, "[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991). As set forth below, All Crane has not put forth sufficient evidence to show that it had a work rule which was adequately communicated and, therefore, has not made the requisite showing to rebut the Secretary's prima facie case.

The Secretary has proven each of the elements of the alleged violation. She classified Item 1 as serious. Under Section 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Being struck by the swing radius of the crane could cause serious injury or death. Accordingly, the undersigned finds the Secretary has properly classified the violation as serious.

Employee Misconduct (Isolated Incident)

All Crane contends that the violation was the result of an isolated incident of employee misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated these rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997); *e.g., Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1502 (No. 98-1192, 2001), *aff'd* 319 F.3d 805 (6th Cir. 2003)*; Precast Services, Inc*., 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). *Oil Well Serv.,* 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). *See also Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). An employer may defend on the basis that the employee's misconduct was unpreventable. In order to establish the defense, the employer must show that the action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.,* 9 BNA OSHC 1230,

(No. 76-4627, 1981); *Merritt Electric Co.*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Wander Iron Work*, 8 BNA OSHC 1354 (No. 76-3105, 1980), *Mosser Construction Co.* 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991).

The record shows that All Crane had a written safety program which it communicated to its employees (Tr. 65, 173-175). Further, All Crane had a specific rule that required the counterweight swing area to be properly barricaded (R-3, p. 40, No. 10). Ward, All Crane's safety director for eleven years, testified that among other duties, he conducts and/or schedules all the training programs for employees. Ward covers barricading the swing radius in the training he provides, and in safety bulletins and memos he issues (Tr. 154). Also, All Crane's insurance carrier provides training to employees, as does a company called Safety Resources (Tr. 50-52). Additionally, crane manufacturers such as Manitowoc provide training for All Crane's operators, especially when a new crane has been purchased (Tr. 153-154). Feiler testified he receives training every five years to renew his certified crane operator (CCO) certificate, has served as a CCO trainer himself, and has received training from All Crane (Tr. 90-91, 126-127). According to Feiler, his training frequently covers crane barricading which he acknowledged is one of the "cardinal rules" of crane safety (Tr. 93).

Ward testified that he and others conduct regular safety audits of sites and employees are disciplined when violations are found. Feiler was given a week off without pay for the subject violations (Tr. 95-96, 123, 133).

Despite Feiler having received training and certifications, he was unaware that the oiler was not permitted to work within the swing radius of the crane while the crane was operating. Feiler's statement to Vermillion that he believed there was an exemption for the oiler which permitted the oiler to work within the swing radius of the crane while the crane was operating, indicates Feiler's understanding of crane safety and All Crane's rules was not as extensive as All Crane claims (Tr. 39). This suggests to the undersigned a deficiency in the communication of All Crane's work rules. Further, a supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax. *Ceco Corp.*, 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995). Accordingly, the undersigned finds All Crane's work rules were not effectively communicated and All Crane has not established the defense of unpreventable employee misconduct.[2]

[2] All Crane has made several other arguments relating to prejudice, as to why the violation should not be affirmed.

Penalty Determination

The Secretary proposed a penalty of $4,500.00 for the violation in this case. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. Vermillion testified he considered all of these factors (Tr. 44). He considered the severity of the violation to be high, as being pinched or struck by the counterweight could result in serious injury or death (Tr. 45-48). He determined the probability was greater, due to the number of hours the oiler was exposed to the hazard and the fact that other persons on the site were also exposed (Tr. 45-48). The undersigned agrees that a high gravity is appropriate. There was no deduction for size because Feiler told him All Crane had about 1100 employees (Tr. 45, 60). All Crane did not refute this testimony. Vermillion gave All Crane a 10-percent deduction for history, as it had no history of violations in the previous three years (Tr. 45-47). A lack of history of OSHA violations weighs against a large penalty. No deduction was given for good faith because Vermillion did not believe All Crane had implemented its safety and health program at the site (Tr. 45). All Crane cooperated with the investigation, however. This cooperation weighs in favor of a lower penalty. Based on the record, the undersigned finds a penalty of $2,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is ORDERED that:

Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.550(a)(9), is affirmed, and a penalty of $2,500.00 is assessed.

/s/ Sharon D. Calhoun
Sharon D. Calhoun
Judge

Date: August 4, 2011
Atlanta, Georgia

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[2] continued The undersigned afforded All Crane an opportunity at the hearing to review the un- redacted OSHA 1-A and 1-B in this case so that All Crane could make appropriate inquiries at the hearing. The undersigned has considered All Crane's arguments relating to prejudice and finds them unpersuasive.