

subitem 3c(a); and subitem 6a of citation no. 2.¹ We conclude that the judge did not err, and we affirm his decision.

I. Citation No. 2, Item 2e: No Record of Annual Inspection or Certification of Inspection

The standard requires both that the crane receive an annual inspection and that the employer maintain a record of the inspection.² At issue is item 2e, which alleged that ACR failed to maintain the required record.

¹The Commission first considered this case on review of Judge Schoenfeld's decision holding ACR responsible for the exposure of employees of other contractors at the site. *Anthony Crane Rental, Inc.*, 16 BNA OSHC 2107, 1993-95 CCH OSHD ¶ 30,620 (No. 91-556, 1994), *aff'd in part, vacated and remanded in part*, 70 F.3d 1298 (D.C. Cir. 1995). The Commission concluded that the judge properly determined that ACR created and controlled the violative conditions and therefore correctly applied the Commission's well-settled principles for allocating responsibility for violations of the Act at multi-employer construction worksites. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (consolidated); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976). On review, the D.C. Circuit observed that whether an employer can be found in violation of the Act for the exposure of employees not its own is a question of first impression in that court, but it declined to decide that issue at this time. Rather, the court remanded to the Commission for further factual findings on whether ACR's employees were exposed to the hazards at issue. In turn the Commission remanded to the judge, and it is his decision finding that employees of ACR were exposed to the hazards that is now before us for review.

Although both parties in their briefs reargue whether ACR has a duty under the Act to protect employees of other employers from hazards it created or controlled, in view of our disposition it is unnecessary for us to reach that question.

²The standard provides as follows:

§ 1926.550 Cranes and derricks.

(a) *General requirements.* . . .

. . . .

(6) A thorough, annual inspection of the hoisting machinery shall be made by a competent person, or by a government or private agency recognized by the U.S. Department of Labor. The employer shall maintain a record of the dates and results of inspections for each hoisting machine and piece of equipment.

The facts are largely undisputed. ACR inspected the crane at its service facility in West Mifflin, Pennsylvania, before sending the crane to Midwest on October 8, 1990. ACR's employee James Workman drove the crane, which is a truck crane, to the airport construction site. When the crane was delivered, the heel of the boom and the boom hoist cable were in place, and at the site Workman went into the operator's cab and demonstrated the operation of the crane for James Cepec, Midwest's crane operator. Enough of the crane was assembled at that time for Workman to be able to check whether the boom stop functioned. Thereafter, Jeffrey Paisley, ACR's mechanic responsible for making repairs to the crane, was at the worksite either working on the crane or in its vicinity on a number of occasions.

William Draper, the compliance officer, noted that the term "hoisting machinery" used in the standard refers to all components that enable the crane to lift and lower loads. Therefore, the appropriate inspection is necessary to protect employees against the serious hazards that could result from defects in these components. Both Draper and Ronald Kohner, the Secretary's expert witness, testified that a record of dates and results of inspections helps a crane lessor such as ACR accomplish this objective by ensuring that the crane has been inspected with the thoroughness required by the standard before it is sent onto a job and by providing a "yardstick" to determine when the crane is due for reinspection. Similar testimony was given by: Joseph Beasley, the union business manager; Andrew Davis, ACR's shop maintenance superintendent at its Florida branch; and Ronnie Lee, an operator and equipment mechanic for a construction company that had rented the crane earlier in 1990.

The test for determining whether employees are exposed to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870, 1997 CCH OSHD ¶ 31,207, p. 43,722 (No. 92-2596, 1996); *RGM Constr. Co.*, 17 BNA OSHC 1229, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003-04, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). ACR does not dispute that its employees were near the crane but contends that the Secretary failed

to show that the noncomplying conditions on the crane resulted from its failure to have a record of the crane's annual inspections. The standard, however, does not require proof that the absence of an inspection record was the direct cause of a specific defect in the crane. As the judge properly determined, the standard is intended to ensure that the employer has sufficient information to institute an adequate maintenance program. *See General Dynamics Corp., Electric Boat Div.*, 15 BNA OSHC 2122, 2128 n.13, 1991-93 CCH OSHD ¶ 29,952, pp. 40,955-57 n.13 (No. 87-1195, 1993) (quick and efficient identification and correction of potential hazards through the maintenance of accurate records is essential to an effective safety program). Since the evidence shows, and ACR does not dispute, that Workman, who delivered the crane, as well as Paisley, the mechanic at the site, were sufficiently close to the crane to be exposed to any unsafe or defective condition that might result from an inadequate preventive maintenance program, the judge properly determined that exposure of ACR's employees was established.

II. Citation No. 2, Item 3c(a): Adjustments Not Maintained to Assure Correct Function of Components

At issue are instances 2, 3, and 4 of this subitem, which allege the following defects respectively: two load hoist drum mechanisms controlling the power down (safety adjustments controlling the movement of pistons and springs nonfunctional), boom cable shroud cover (misaligned guide sheave and cover), and tail shaft governor (proper speed control not provided).³

³The standard requires in pertinent part:

§ 1926.550 Cranes and derricks.

....

(b) *Crawler, locomotive, and truck cranes.* . . .

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

(continued...)

The record shows that the crane was at the job for about three weeks and in actual use for about five days during that time. James Cepec, Midwest’s crane operator, was dissatisfied with the crane as soon as he started making lifts with it. Among other things, the braking action on the load line was not smooth, and the power down⁴ did not work. Also, the jib pendant lines were very rusty. On October 9, when Paisley came out to the site, Cepec demonstrated the improper operation, and Paisley went onto the crane and examined the power down. Two days later Paisley returned and began working on the power down. At the same time Paisley also repaired the crane’s horn and a bushing at the rear of the crane as well as the boom dog linkage. The latter controls the raising of the boom and had to be properly engaged in order for the crane to operate safely. After Paisley had completed the repairs to his satisfaction, Cepec wanted to be sure that the power down was working properly; at Cepec’s request Paisley remained while Cepec lifted a load.

The day of the accident, October 26, 1990, Paisley came out again because the boom kept swinging to the left. After making that repair, Paisley went to the rear of the crane to address another of Cepec’s complaints—that the oil tank was leaking. He then remained to

³(...continued)

The citation references section 5-2.3.3-b of the ANSI standard, which provides as follows:

Section 5-2.3 – Maintenance

....

5-2.3.3 Adjustments and Repairs

....

b. Adjustments shall be maintained to assure correct functioning of components. The following are examples:

1. All functioning operating mechanisms.
2. Safety devices.
3. Control systems.
4. Power plants.

⁴The “power down” is a system that allows the rate of descent of a load to be reduced and controlled by the gear train and engine in addition to the brakes, much as a motorist might downshift into a lower gear while going down a steep hill.

observe the crane's operation and left when it appeared that the boom was no longer swinging.⁵ Cepec had also noticed that the boom would repeatedly "jump" from one position to another. This condition persisted until the day before the accident, when Midwest determined that it was due to a groove that allowed the cable to lie and accumulate in one place instead of distributing itself over the full width of the drum. As a temporary fix, an ironworker drove a wedged-shaped piece of wood into the cable spool to keep the cable directed away from the groove.

Draper felt that the defects in the crane were such as to present hazards of the crane overturning and the boom or load falling, which could result in crushing injuries or death to those near the crane. This hazard could occur even on a light load because defective wire rope greatly diminishes the safety factor of the crane and a malfunction in the hoist drum could cause the rope to break. Injury could occur directly or from collateral impact of parts flying off the crane or being struck by broken cables. Draper specifically described Paisley as being exposed inasmuch as he was at the crane while it was operating or while he was making repairs.

The judge found that ACR's employees when engaged in delivery, observation, or repair were on the crane or in its "immediate vicinity" at a time when the defective conditions existed and therefore found that they came within the zone of danger created by the violative conditions. We agree, and we reject ACR's contentions to the contrary as unsupported by the record.

ACR asserts that no exposure to hazards resulting from the defective power down could have existed after October 11, when Paisley adjusted the power down, and that the record does not "definitively" establish that Paisley was exposed when he was at the site prior to this date. In ACR's view, the record is deficient because it does not show where

⁵Paisley also testified to further exposure, stating that he would stop by the site occasionally and "observe" the crane operation just to check if the operator was having any problems. These observations were in addition to his actual repair work.

Paisley was located when he observed the improper operation of the crane on October 9 and therefore does not establish “reasonable predictability” that Paisley would be within a zone of danger. Similarly, there is no evidence that Workman was exposed to this hazard when he delivered the crane. Draper, however, testified that Paisley would have been in close proximity to the crane while performing his tasks including “reviewing” the condition of the crane. Although Paisley in his own testimony was not asked how close he came to the crane when observing it prior to October 11, Cepec testified that Paisley actually went onto the crane on October 9. Accordingly, ACR’s contention that Paisley was not shown to be within the zone of danger is contrary to the evidence.⁶

As to the boom cable shroud at issue in instance 3, ACR contends that it is not shown on the record when the defective condition of this component developed and that because the boom was not rigged when the crane was brought to the site, Workman could not have been exposed even if the boom shroud had been defective at that time. ACR also claims that Paisley was not exposed either because the insertion of the wedge corrected the hazard and that the “most reasonable inference from the evidence” is the wedge was inserted “shortly after” delivery of the crane.

As ACR correctly notes, Draper regarded the wedge as a “field adjustment” that allowed the cable to function correctly. However, Draper also concluded that the condition under which the cable had been running through the groove in the shield would have resulted in damage to the cable with the resultant hazard of the cable breaking. Moreover, contrary to ACR’s contention, there is direct evidence that Midwest did not insert the wedge until the

⁶In his first decision, the judge found that Paisley was exposed to the hazard at issue in instance 1 of subitem 3c(a), which also involved components that affected the power down. Although instance 1 is not before us now, we note that the court recognized the obvious factual similarity between the specific conditions at issue in instances 1 and 2 and concluded that exposure to the hazard at issue in instance 1 would very likely be indistinguishable from exposure to that involved in instance 2. 70 F.3d at 1305.

day before the accident. Since it is undisputed that Paisley made numerous visits to the crane during the intervening time, we find exposure of Paisley is established.

Lastly, ACR does not dispute that the defective condition of the tail shaft governor existed during the time when its mechanic was present at or near the crane but instead asserts that there is no evidence to show that Paisley was within the zone of danger. However, ACR presented no evidence to rebut the testimony of Draper that all of the cited conditions, including the tail shaft governor, present similar hazards in terms of “catastrophic failure” of the crane, collapse of the boom, dropping of the load, and load-bearing components of the crane breaking apart. Accordingly, we find that there was exposure of an ACR employee to the cited hazard.

III. Citation No. 2, Item 6a: Repairs or Replacements Not Provided Promptly as Needed for Safe Operation on All Critical Parts.

This item refers to components—pawl assemblies and rod bolts—involved in the drum hoist system for operating the boom and the power down.⁷ Draper’s investigation revealed that these conditions were not corrected until October 11. Again, in Draper’s view

⁷The citation cites the same paragraph of section 1926.550 as the preceding item and section 5-2.3.3-c of the ANSI standard, which states:

Section 5-2.3 – Maintenance

....

5-2.3.3 Adjustments and Repairs

....

- c. Repairs or replacements shall be provided promptly as needed for safe operation. The following are examples:
1. All critical parts of functional operating mechanisms which are cracked, broken, corroded, bent, or excessively worn.
 2. All critical parts of the crane structure which are cracked, bent, broken or excessively corroded.
 3. Crane hooks showing defects described in 5-2.1.2-a.5 [deformations or cracks] shall be discarded. Repairs by welding or reshaping are not generally recommended.

these are “critical operating parts” that if not repaired can result in “catastrophic failure” and crushing or fatal injuries. Anyone in the “immediate working area” of the crane, including Paisley, would be exposed.

The judge noted that the gravamen of this charge is that repairs were not provided in a prompt fashion. He found that the necessity for repairs was made clear to ACR on the first day the crane was at the jobsite, October 8, but that repairs were not conducted until October 11. In the intervening period, Paisley was exposed because he was aboard the crane and in the vicinity of the crane while a load was being lifted. The judge emphasized that he was *not* finding that ACR was responsible for the exposure of Paisley while Paisley was attempting to discover a defect or make a repair. Rather, the judge reasoned that the longer a defect is allowed to exist, the more likely it is that an accident will occur. Thus, by failing to promptly correct the defective condition, ACR exposed its employee to a hazard covered by the cited standard.

The only argument ACR presents in opposition to the judge’s findings and reasoning is again that the Secretary failed to show that ACR’s employees were within the zone of danger created by the hazardous conditions. We reject this contention for the same reasons given above with respect to the location and activities of Paisley and Workman.

Accordingly, for the reasons set forth above, we affirm the judge’s decision as to each of the items here at issue.⁸

/s/ _____

⁸Although the violations in question were alleged as willful, the judge affirmed subitem 2e as a nonserious violation and subitems 3c(a) and 6a as serious violations. The judge assessed penalties of \$100, \$800, and \$1000 respectively. The characterization of the violations is not before us, and neither party contends that if violations are found, the judge’s penalty assessments are inappropriate.

Stuart E. Weisberg
Chairman

/s/
Velma Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: March 3, 1997