United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speed Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. EQUIPMENT HOLDING, INC., and its successors, Respondent.	OSHRC DOCKET NO. 97-1099

APPEARANCES:

For the Complainant:
David C. Rivela, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:
Robert J. Killeen, Jr., Taylor S. Linkfield, Killeen & Fierro, P.L.C., Houston, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Equipment Holding, Inc., and its successors (Equipment Holding), at all times relevant to this action maintained a place of business at Port of Houston, Houston, Texas where it leased cranes for longshoring and stevedoring. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 9, 1997, following a report of an accident involving one of Equipment Holding's cranes, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the crane at the Port of Houston. As a result of that inspection, Equipment Holding was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Equipment Holding brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 15-16, 1998, a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Employer/Employee Relationship

Equipment Holding maintains that OSHA erroneously issued the citations in the above captioned matter, in that Port Cooper/T. Smith Stevedoring Company (Cooper), rather than Equipment Holding was the controlling employer of the subject crane and its operator at the time of the accident.

Facts

On February 8, 1998, Rodney Wright, manager of the crane and gear department for Cooper (Tr. 33), called, Jerry Godwin, crane manager for Equipment holding (Tr. 260), and told him he needed a crane (Tr. 33-34). Wright testified that he told Godwin that he needed Equipment Holding's 200 ton American crane for pulling coils on City Dock #26; Godwin testified that Wright did not say what the crane would be used for (Tr. 38-40, 301-304).

There was no written contract; both Wright and Godwin testified that Cooper had done business for several years, and understood the rental conditions (Tr. 34-36, 55, 302-04). Godwin testified that the renting stevedoring company tells him the crane size and number of part lines they want, when they want it and what dock they want it on; he picks the operator, who takes it to the work site (Tr. 326-29). Wright testified that the rental includes not only the crane, but an Equipment Holding operator who is solely responsible for the crane, and its operation (Tr. 41). The operator moves the crane into position, sets the crane up, levels it and performs the lifts (Tr. 36-37, 39, 57).

Cooper directs the operation insofar as telling the operator which hatch he will be working out of (Tr. 41, 70). Cooper's longshoremen hook the gear and block up to the hook for the operator (Tr. 57), and its flagman on the ship will signal the operator, letting him know how far to lower the block into the hold (Tr. 58, 71). Once the load comes up, however, the operator is in control of the lift (Tr. 58). Wright stated that once the load is engaged, only the operator can ascertain how much weight is on the hook, and refer to his charts in order to determine what boom angle is safe for the lift (Tr. 59). Godwin agreed that the number part lines determine a crane's capacity, but only the operator can figure the appropriate boom configuration, after referring to the load charts (Tr. 330).

Wright testified that Equipment Holding is responsible for securing a P-number for its cranes, by submitting the cranes' certification to the Port of Houston Authority, which issues the P-number, clearing the crane for longshoring work at the port (Tr. 86). Wright testified that he checked the P-number on the American crane before sending it down to Dock #26 (Tr. 66).

Equipment Holding performs all the maintenance on its own cranes (Tr. 64). Cooper provides no maintenance for the cranes, and any problems are reported by the operator to Equipment Holding (Tr. 42-43). Godwin testified that it was the policy of Equipment Holding to inspect its cranes every morning before starting work on a ship (Tr. 306). The inspections were to be performed by him and/or the operator assigned to the crane (Tr. 308-09). If the operators found any deficiencies they were to note them in a log. The operator was instructed not to run a crane with deficiencies (Tr. 310, 312-13). Godwin stated that if any problems with a crane arose during the work day, the operator was to shut it down and notify him (Tr. 324). Sometimes the operator would call an Equipment Holding mechanic directly to perform repairs on a breakdown (Tr. 324-25).

Cooper has no right to use, and has never provided its own crane operator (Tr. 60, 326). Moreover, it has no power to hire or fire the Equipment Holding operator; if an operator is unsatisfactory, Jerry Godwin is notified and asked to replace him (Tr. 42-43, 70). Godwin testified that he would evaluate any complaints and decide whether to act on them (Tr. 325). Equipment Holding hires operators for its cranes (Tr. 264), certifies the competence of each crane operator, checking his history, taking him through the operating procedures of the cranes, and authorizing his use of the crane (Tr. 308-09). Randy Taylor, an Equipment Holding employee (Tr. 93, 265), was operating the crane during the relevant periods on February 8, 1998 (Tr. 61).

Discussion

The Commission has reached the issue raised by Equipment Holding in *Vergona Crane Co.*, 15 BNA OSHC 1782, 1992 CCH OSHD ¶29,775 (No. 88-1745, 1992). In *Vergona*, the Commission found that the company which owned the cited crane, and not the company which leased the crane, was properly cited as the employer of the crane operator. The Commission noted that in determining an employee's employer, the court must look to the party which has the right to control the manner and means by which the work is accomplished, taking into account (*inter alia)*:

> . . .the skill required; the source of the instrumentalities and tools, the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 1784, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

As in *Vergona*, in this case the work to be performed was of a temporary nature. Cooper rented not only the crane belonging to Equipment Holding, but the abilities of Equipment Holding's operator,

in this case, Randy Taylor. Cooper had no choice in the assignment of operator, and no right to assign additional work to Taylor without re-negotiating with Equipment Holding. Taylor had specialized skills, training and/or experience provided or certified by Equipment Holding. Cooper gave Taylor no instruction except what loads to move and where to move them. Taylor alone could determine how to perform the lift and how to configure the boom. Taylor had authority to refuse to perform a lift if he believed there was a problem with the crane. Maintenance of the crane was performed solely by Equipment Holding; Cooper neither paid for nor provided any routine maintenance or repairs. Equipment Holding was solely responsible for ensuring the rental crane's compliance with the regulations of both the Port of Houston and OSHA.

It is clear that Cooper had no control over either the crane itself, or the manner in which Taylor operated it, and that Equipment Holding was properly determined to be Taylor's employer. Moreover, Cooper was properly cited for the observed violations, in that it retained control over the certification[1] and maintenance of the crane, as well as ascertaining the experience and training of its operators and so was in the best position to obtain abatement of the cited hazards. *Id.* At 1786.

Equipment Holding was properly cited.

Alleged Violation of §1918.74(a)(2):

Citation 1, item 1 alleges:

29 CFR 1918.74(a)(2): Crane(s) not part of vessel's gear used in longshoring operations were not equipped with a rating chart which included all operating radii for all permissible boom lengths and jib lengths as applicable, with and without outrigger(s) which may have been fitted, and alternate rating(s) with optional equipment effecting such rating(s) and necessary precaution(s) or warning(s):

a) An ocean going vessel, M/V Grate Lake (sic), Port of Houston, TX, City Dock #26, starboard side to wharf. American mobile truck crane, Model #9520, Serial #GS17050, Max. Capacity 400,000 lbs. Hazard: Overloading causing crane to turnover on its side - broken bones and/or death.

The cited standard provides:

> All types of cranes shall be equipped with a durable rating chart visible to the operator, covering the complete range of the manufacturer's (or design) capacity ratings and for which they are certificated, where required. The rating chart shall include all operating radii for all permissible boom lengths and jib lengths as applicable, with and without outriggers which may be fitted, and

[1] Equipment Holding points out that under OSHA Instruction CPL 2-1.3B (Exh. R-6) an employer is prohibited from using uncertified cargo gear, regardless of its ownership, and suggests that Cooper should have been cited (*See,* testimony of Phillip Nessler, Tr. 356-58). Cooper's responsibilities, however, are not at issue here and, in any event, do not affect Equipment Holding's own liability under the Act, which has been clearly established.

alternate ratings with optional equipment affecting such ratings. Necessary precautions or warnings shall be included.. . .[2]

Facts

It is admitted that the cited crane was not equipped with the required durable rating chart. Rather Equipment Holding's operators had pocket charts, which reproduced the portions of the manufacturer's rating chart that governed the single boom length, 140 feet, that Equipment Holding intended the cited crane to be equipped with (Tr. 275; Exh. C-12, C-13). Jerry Godwin stated that Equipment Holding did not include "free" on its charts, because its operators were not allowed to make lifts without the outriggers extended (Tr. 277). Godwin stated that no precautions or warnings were included on the charts because they were common knowledge (Tr. 279).

Godwin admitted that in order to obtain a P-number for the subject American crane, he signed off on a document provided by the Port of Houston Authority stating that he had read and agreed to the port's rules and regulations (Tr. 289; Exh. C-22). Regulation 3 requires that "[a]ll cranes must meet all Bureau of Labor Standards requirements as called for in *Federal Register,* Volume 33, Number 152, Part II and *Federal Register,* Volume 34, Number 42, Part II. . .. Godwin testified that those standards require, *inter alia,* that all cranes be equipped with load-indicator charts (Tr. 292; Exh. C-23).

CO Harrison testified that Equipment Holding's failure to post a complete load ratings chart in the cited crane could lead to overloading and overturning the crane (Tr. 141-42). Phillip Nessler, a certified safety consultant in the state of Texas (Tr. 346), testified that the violation of the cited standard was *de minimis,* in that the absence of load charts did not affect safety so long as the crane was operated within the parameters of the chart (Tr. 375).

Discussion

The violation is admitted.

A penalty of $5,000.00 was proposed.

It is clear that the violation was properly classified as "serious." Overloading and overturning of the crane can lead to serious injury up to and including death, as was demonstrated in this case. Equipment Holding's operators carry pocket charts which cover the expected operating parameters of the American crane, making the probability of an accident resulting from the truncated load chart remote. Equipment Holding had one employee exposed to the cited hazard, Larry Taylor.

---

[2] On November 5, 1997, Complainant's motion to amend the Complaint to allege, in the alternative, a violation of §1917.45(b)(1) was granted. Because Equipment Holding is found to have violated the originally charged item at §1918.74(a)(2), discussion of the alternative allegation is unnecessary.

Taking into account the relevant factors, including Phillip Nessler's testimony, I conclude that a penalty of $500.00 is appropriate under the circumstances of this case.

Alleged Violation of §1918.74(a)(6)

Citation 1, item 2 alleges:

29 CFR 1918.74(a)(6): Counterweights in excess of manufacturer's (or design) specifications were fitted on crane(s) and derrick(s) which were not part of the vessels cargo gear:

a) M/V Grate Lake (sic), Port of Houston, TX, City Dock No. 26, American mobile truck crane, Model #9520, Serial #GS17050, Max. Capacity 400,000 lbs. Hazard: Additional counter-weighing of truck crane shall not be done unless approved by the crane manufacturer.

The cited standard provides:

> No counterweights in excess of manufacturer's (or design) specifications shall be fitted. All equipment shall be used in accordance with manufacturer's (or design) specifications and recommendations.[3]

Facts

James Pritchett, a California board certified crane inspector, and president of Crane Inspection Services, a company accredited to perform crane and derrick inspections (Tr. 182-84), testified that he examined the specifications for the subject crane's counterweight in the manufacturer's manual (Tr. 193). Pritchett ascertained that the American crane's specifications call for 75,000 pound rear RTU counterweight (Tr. 199, 241; See also testimony of CO Harrison, Tr. 131; Exh. C-14). The manual specifies a 10,000 pound front bumper counterweight for boom assist when a 240-260 foot boom is in use, and at no other time (Tr. 193, 195, 199, 217).

Although OSHA Compliance Officer (CO) Douglas Harrison testified that he was unable to ascertain how much counterweight was being used at the time of the accident because some sections of the crane's superstructure had fallen into the water with the rear counterweight (Tr. 131), photographs of the subject crane show a front bumper counterweight (Tr. 192; Exh. C-11). James Pritchett stated that the bumper counterweight on the subject crane looked nothing like the bumper counterweight manufactured by American for its 200 ton crane (Tr. 195-96). Pritchett contacted American to confirm that the front bumper counterweight on the subject crane was not manufactured or sold by American (Tr. 193).

---

[3] Discussion of Complainant's November 5, 1997 amendment, alleging, in the alternative, a violation of §1917.45(f)(6), is unnecessary, as Equipment Holding is found to have violated the originally charged item at §1918.74(a)(6).

Jerry Godwin, who was involved in the purchase of the American crane in October 1997 (Tr. 262, 269), testified that the crane was purchased from the original owner equipped with the front bumper counterweight; Godwin believed that the bumper weight was a standard factory counterweight (Tr. 270, 332). The front bumper counterweight was not included on the manufacturer's inventory of equipment included with the crane at its original purchase (Tr. 282-83; Exh. C-19).

Godwin admitted that the portion of the manufacturer's rating chart reproduced on his operator's pocket charts calls for 75,000 pounds of counterweight on the upper rotating assembly at the rear of the crane (Tr. 280-81). Those charts do not anticipate front bumper counterweights (Tr. 281). Godwin stated that the front bumper weight was never used for calculations using the load ratings charts (Tr. 272).

Pritchett testified that the front bumper counterweight would give the operator a false sense of security, without providing any additional stability to the crane (Tr. 194-95). CO Harrison stated that he doubted that the front bumper counterweight would cause a crane failure in this case (Tr. 143).

Discussion

The evidence establishes that when the cited crane is configured with a 140 foot boom, outriggers extended, as it was at the time of the accident, the manufacturer's specifications call for 75,000 pounds of counterweight on the upper rotating assembly at the rear of the crane. No front bumper weights are recommended. The front counterweight was not used in accordance with the manufacturer's specifications, and the violation is established.

Penalty

A penalty of $5,000.00 was proposed.

As noted above, overloading and overturning of the crane can lead to serious injury, and the violation is properly classified as serious. The gravity of the violation is overstated in this case, however. Jerry Godwin testified, without contradiction, that the front bumper weight was never taken into account in calculating boom settings. The CO testified that it was unlikely the counterweight would affect the crane's operation here. Given the counterweight's minor impact on safety, I find that the proposed penalty is excessive. A penalty of $500.00 will be assessed.

Alleged Violation of §1918.74(a)(9)

Citation 1, item 3 alleges:

19 CFR 1918.74(a)(9): Cranes used to load or discharge cargo into or out of a vessel were not fitted with load indicating devices or alternative devices in proper working condition meeting the criteria of this section:

a) American mobile truck crane, Model #9520, Serial #GS17050, Max. Capacity 400,000 lbs. Hazard: Overloaded/turn over, resulting in employees injury such as broken bones and/or death. Cranes were not fitted with load indicating devices or alternative devices.

The cited standard provides, in relevant part:

> . . .every crane used to load or discharge cargo into or out of a vessel shall be fitted with a load indicating device or alternative device in proper working condition. . ..[4]

Facts

That the cited American crane had no load indicating device is uncontested (Tr. 125, 273, 316). Randy Taylor requested a load indicator device; Jerry Godwin, however, did not believe that load indicators were accurate, and did not want his people depending on them (Tr. 274, 323). Godwin testified that the operator asks the stevedoring company renting the crane: "What is the heaviest piece we're going to be lifting?" and sets the boom angles based on what he's been told (Tr. 336).

Randy Taylor, in his statement to the CO, noted that the coils he was lifting at the time of the accident were marked at 85,583 pounds. Taylor stated that no one told him he would be pulling more than 60,000 pounds, the weight his rig was set for (Exh. C-16).

Discussion

The violation is admitted. Equipment Holding fails to set forth any evidence constituting an affirmative defense, and the violation will be affirmed.

A penalty of $5,000.00 is proposed.

The violation was properly classified as "serious." Overloading and overturning of the crane can lead to serious injury up to and including death, as was demonstrated in this case. Equipment Holding's crane should have been equipped, as requested by Taylor, with the load indicating devices required by the cited standard.

The proposed penalty is appropriate and will be assessed.

Alleged Violation of §1918.72(a)

Citation 1, item 4, as amended, alleges:

29 CFR 1919.72(a): Crane not examined by an accredited person or his authorized representative in conformance with the requirements of 29 CFR §1919.71(d).

[4] Discussion of Complainant's November 5, 1997 amendment, alleging, in the alternative, a violation of §1917.46(a)(1), is unnecessary, as Equipment Holding is found to have violated the originally charged item at §1918.74(a)(9).

Certificate of test and examination of an American mobile truck crane, Model #9520, S/N 17050 and its accessory gear was not carried out, before being taken into use. (a) Port of Houston, TX, City Docks No. 20 and No. 26. Hazard: Overloading and/or tipping over crane - broken bones and/or death

The cited standard provides:

> In any year in which no quadrennial unit proof test is required, an examination shall be carried out by an accredited person or his authorized representative. Such examination shall be made not later than the anniversary date of the quadrennial certification and shall conform with the requirements of §1919.71(d).

Facts

Rodney Wright testified that Cooper anticipates that the cranes it rents from Equipment Holding will have a valid P-number, *i.e.* authorization from the Port of Houston to operate on the docks (Tr. 56). Wright testified that such authorization is issued only to cranes with a current marine certification (Tr. 56).

Donald Dolan, a surveyor for Dixon Equipment Services, testified that he conducted an inspection of the American crane which is the subject of this matter (Tr. 10). Dolan testified that he was unable to do a complete maritime inspection on the crane, because the maritime inspection includes a load test, and the American crane was not completely assembled (Tr. 12-13). Dolan stated that upon completion of a maritime inspection, a decal with an expiration date is applied to the cab of the crane; Dolan did not certify the cited crane for maritime work, and did not apply a decal (Tr. 14-15, 19). Nonetheless, an acknowledgment of attendance was issued to J.J. Flannagan Stevedores stating that operational testing had been completed and the cited crane certified for operation in compliance with OSHA regulation §1926.550 (Tr. 16-17; Exh. C-1, R-9). Dolan testified that the certification of the crane must have been an "oversight," and in any event indicated only that the crane was certified under the construction standards, which do not require a load test (Tr. 18). Dolan testified that, in order to be certified for loading and unloading cargo at the Port of Houston, a crane must be inspected in accordance with the relevant marine standard at §1918.13, and must be subjected to a load test (Tr. 19, 21).

CO Harrison testified that Jerry Godwin told him he wanted to get the American crane into the Port of Houston so he could work on it there, and had gotten the construction certification in order to get the crane into the port (Tr. 133).

Godwin admitted that he was responsible for acquiring the P-number on the American crane (Tr. 285). Godwin knew that the crane had to have a current marine certification before a P-number would

be issued, and that the marine certification included operational lift testing (Tr. 285-86). Godwin, however, stated that he was not aware of any difference between the construction standards and marine standards, and did not realize that the American crane was not certified for stevedoring until after the accident (Tr. 286, 295-96, 316, 334). Godwin believed that Dixon was ultimately responsible for ensuring that the crane was properly inspected (Tr. 337).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The Secretary failed to show, by a preponderance of the evidence, that Equipment Holding knew that the cited crane had not been certified. Equipment Holding arranged for the inspection of the cited American crane by a certified inspector, who provided an acknowledgment of attendance indicating that operational testing had been conducted and certifying the crane for operation in compliance with OSHA regulations. Viewing that acknowledgment, I cannot find that Equipment Holding's belief that the requested certification had been obtained was unreasonable, or that it should have known the certification was insufficient.

For the reasons set forth above, citation 1, item 4 is VACATED.

ORDER

1. Citation 1, item 1, alleging violation of §1918.74(a)(2) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

2. Citation 1, item 2, alleging violation of §1918.74(a)(6) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

3. Citation 1, item 3, alleging violation of §1918.74(a)(9) is AFFIRMED, and a penalty of $5,000.00 is ASSESSED.

4. Citation 1, item 4, alleging violation of §1918.72(a) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: