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. TRACORP CONSTRUCTION and its successors, Respondent.	OSHRC DOCKET NO. 98-0775

APPEARANCES:

For the Complainant:
Connie M. Ackermann, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Richard Irby, TraCorp Construction, Como, 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, TraCorp Construction (TraCorp), is an employer engaged in construction, a business affecting commerce (Tr. 63), and is subject to the requirements of the Act. On December 30, 1997, The Occupational Safety and Health Administration (OSHA) received a report of a fatality which occurred on December 1, 1997, at a work site at County Road 1166, west of Highway 19, near Sulphur Springs (Tr. 54). OSHA instigated an accident investigation, and found TraCorp working at the site. As a result of the OSHA investigation, TraCorp was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest TraCorp brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 14, 1998, a hearing was held in Dallas, Texas. The time allotted for submission of briefs has expired, and this matter is ready for disposition.

Facts

James Wright, an investigator with the Hopkins County Sheriff's Office, testified that he arrived at the Sulphur Springs work site on the morning of December 1, 1997 (Tr. 12-13). Wright was told that the workers were hoisting a truss when the hoist cable broke (Tr. 15, 18-19). The truss fell, crushing Jesus Medrano under it (Tr. 13, 16; Exh. C-6).

Wright testified that at the time of his investigation, Medrano was wearing a welding helmet; a welding cable led up to Medrano, and the welding stringer was embedded into his head (Tr. 19). Wright deduced that Medrano was working under the truss, welding a rod onto an upright when the cable broke (Tr. 19).

Wright testified that the property where the accident occurred was owned by Dale Weatherford (Tr. 23). Weatherford was having a large free-span building constructed on the property (Tr. 13-14). Wright knew that Richard Irby Construction builds buildings and so assumed Irby was in charge of the project (Tr. 15-16, 23-24). Wright testified that Irby told him that Jesus Medrano was working for him (Tr. 22).

Dale Weatherford testified that he had no formal contract with Richard Irby, but that Irby's crew was putting up the free-span building, which was to be used as an arena (Tr. 26-27). Weatherford intended to pay Irby for his crew's labor after the completion of the project (Tr. 27-28). At times he paid Juan Tinejaro, one of Irby's employees, directly (Tr. 27), when Tinejaro did jobs for Weatherford on his own rather than as part of Irby's crew (Tr. 27-28).

Irby was on the work site on the day of the accident (Tr. 30). Juan Tinejaro believed that he and the deceased, Jesus Medrano, were working for Richard Irby (Tr. 35-36). Tinejaro testified that it was Irby who first instructed him to go to the Sulphur Springs work site to build the arena, and that Irby was in charge of the work site (Tr. 37, 40). Richard Irby paid Tinejaro's and Medrano's wages; pay stubs were introduced into evidence (Tr. 36, 41-42; Exh. C-14 through C-21). The equipment in use, with the exception of the crane and one welder of Weatherford's, belonged to Irby (Tr. 30, 37). Larry Bozeman, who owned the crane, told Weatherford and Irby that he had no insurance, and that Irby would have to take responsibility for any accidents that might occur involving the crane (Tr. 71-72, 98).

Guadelupe Tinejaro also testified that Richard Irby was his employer (Tr. 44). Irby sent him to work on the arena, supplied his tools, and paid his wages (Tr. 45).

Irby admitted that he was in the business, and had bid on and built barns before, and that he had arranged for his crew to work on Weatherford's barn (Tr. 114, 119, 121).

Debra McDavid, an OSHA compliance officer (CO), testified that, based on her interviews with the work crew and with Richard Irby, she determined that Irby was the only employer on the work site (Tr. 64-65).

Employer/Employee Relationship

Richard Irby, TraCorp's owner, maintains that he was not the employer of the workers at the Sulphur Springs site. Irby claims that he loaned his employees and equipment to Dale Weatherford, who was a friend (Tr. 110-13).

The Commission has held that:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are 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; 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.

Vergona Crane Co., 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD ¶29,775, p. 40,496-97 (No. 88-1745, 1992).

In ascertaining an employee's employer, the Commission has primarily relied upon its determination of who has control over the work environment such that abatement of hazards can be obtained. *See, Abbonizio Contractors Inc.* 16 BNA OSHC 2125, 1994 CCH OSHD ¶30,615 (No. 91-2929, 1994);

In this case, it is clear that Richard Irby exercised the only control over the work site, and that he was the workers' employer for purposes of coverage under the Act. Irby was in the business of building barns, supplied most of the equipment and tools on the work site, and directed the work on the barn. The crew working on the barn worked for Irby before, and believed they were working for Irby on this project. Irby had assigned them to this project, and it was he who paid their wages. Only Irby was in a position to insure the abatement of hazards on the work site.

I find that TraCorp was the employer of the workers at the job site at issue on December 1, 1997.

Alleged Violations

Serious citation 1, item 1a, as amended, alleges:

29 CFR 1926.251(c)(4)(iv): Wire rope(s) were used in which the rope(s) showed signs of defect(s).

a. On or about December 1, 1997, wire rope used to lift the steel truss had permanent kinks throughout the rope. The kinks were deformed by the overloading and excessive use of the wire's lifting capacity.

The cited standard provides:

Wire rope shall not be used if, in any length of 8 diameters, the total number of visible broken wires exceeds 10% of the total number of wires, or if the rope shows other signs of excessive wear, corrosion, or defect.

Facts

CO McDavid testified that, based on the photographic evidence, she determined that the wire rope in use prior to the December 1, 1997 accident was defective (Tr. 69). McDavid pointed to kinks in the wire rope, which she stated showed that the rope had been used over its lifting capacity many times (Tr. 66-68; Exh. C-1 through C-3). McDavid also pointed to rust and fraying on the wire in the area of the break, indicating excessive wear (Tr. 69, 107; Exh. C-4).

James Wright, who examined the cable after the accident, found it had been frayed for some time prior to the accident (Tr. 20). Wright stated that approximately 25% of the cable had been frayed long enough to rust; 75% of the cable was shiny and appeared recently broken (Tr. 20).

McDavid testified that Richard Irby helped attach the cables to the truss, and so should have been aware of the condition of the cables.

Discussion

The record shows that the cited standard was violated, in that wire ropes showing signs of excessive wear and corrosion were used to hoist a steel truss on December 1, 1997. Because the defects were obvious and the employer had a duty to ensure that the wire ropes had been inspected, see §1926.550(b)(2), cited at item 1(c), TraCorp should have been aware of the violative conditions.

The cited violation has been established.

Alleged Violation of §1926.251(c)(9)

Serious citation 1, item 1b, as amended, alleges:

29 CFR 1926.251(c)(9): Slings shall be padded or protected from the sharp edges of their loads.

b. On or about December 1, 1997, the wire rope that was attached to the load was not padded or protected by any means as to prevent damage from the sharp edges of metal located on top of the truss.

Facts

Guadelupe Tinejaro testified that he and Irby wrapped the wire cables around the truss to be hoisted (Tr. 39). Tinejaro and Irby both admitted that they did not put any padding between the wire cable and the truss (Tr. 40, 119-20).

CO McDavid testified that Irby admitted that the wire slings were not padded (Tr. 74). McDavid stated that without a pad the tensile strength of the cable is decreased, and the probability of a break is increased (Tr. 73-74).

Discussion

The cited violation is admitted and will be affirmed.

Alleged Violation of §1926.550(b)(2)

Serious citation 1, item 1c, as amended, alleges:

29 CFR 1926.550(b)(2): Section 5-2.4.1 American National Standards Institute B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes adopted by 29 CFR 1926.550(b)(2): A thorough inspection of + all ropes in use was not made at least once a month (sic):

> c. On or about December 1, 1997, wire rope used to lift the steel truss had not been visually inspected at least once every working day.

The cited standard provides that:

> All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for . . . inspection . . . as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.. . . [T]he employer shall prepare a certification record which includes the date the crane items were inspected; the signature of the person who inspected the crane items; and a serial number, or other identifier, for the crane inspected.

Facts

ANSI B.30.5-1968 §5-2.4.1 requires that all running ropes in continuous service should be visually inspected once every working day. It also requires that a thorough inspection of all ropes in use be made at least once a month (Exh. C-22).

CO McDavid testified Larry Bozeman had no inspection records for the crane and that he told her that he had not changed, or checked the cables in ten years (Tr. 69, 97). As noted above, Bozeman told Irby that Irby would have to take responsibility for any accidents that might occur (Tr. 71-72, 98).

CO McDavid testified that Irby and his employees told her that the wire rope used to lift the steel truss had not been visually inspected (Tr. 76). Irby stated that he was not a crane inspector; he looked at the cable after it broke, and it looked good to him (Tr. 94). Irby believed that the line was capable of handling the attached load, and would not have used the line if he knew it was defective (Tr. 115-16).

Discussion

TraCorp's employees were exposed to the hazard posed by the uninspected crane. Yet, the record establishes that TraCorp failed to inspect the wire rope prior to its use, or to ask for records certifying that required routine inspections were made by the crane owner, despite the crane owner's disavowal of any responsibility for accidents which might be caused by the crane.

TraCorp failed to ascertain that the crane met the applicable inspection requirements. The citation will be affirmed.

Penalty

A combined penalty of $2,000.00 was proposed for the violations at items 1(a), (b) and (c).

The gravity of the violations is high, in that failure to properly inspect, pad, and/or remove a damaged sling from use may result in the sling breaking and the load falling, injuring employees nearby, perhaps fatally (Tr. 72, 74). Nonetheless, I find that the minimal penalty is appropriate given TraCorp's size. A combined penalty of $2,000.00 will be assessed.

Alleged Violation of §1926.550(a)(19)

Serious citation 1, item 2, as amended, alleges:

29 CFR 1926.550(a)(19): All employees shall be kept clear of loads about to be lifted and of suspended loads.

> a. On or about December 1, 1997, no means by the employer were taken to enforce and ensure that employees were not allowed to work, walk, stand, etc. under loads to be lifted or suspended loads.

Facts

The existence of the violative condition is undisputed in that the deceased, Jesus Medrano, was not kept clear of the suspended truss, despite the presence of Richard Irby, who testified that the reason he was on the job site that day was to watch his employees and communicate between them and the crane operator, and who was holding the load's tag line at the time of the accident (Tr. 112).

Irby testified that he could not see Medrano from his position (Tr. 96). Guadelupe Tinejaro testified that he had been told not to work under the crane's load (Tr. 50-51). CO McDavid testified that Juan Tinejaro told her that he had also been instructed not to walk under loads by Richard Irby (Tr. 95).

Discussion/Penalty

The underlying violation is established. The testimony of Guadelupe and Juan Tinejaro fails to establish the affirmative defense of employee misconduct because TraCorp failed to introduce any evidence showing that it had taken reasonable steps to discover violations of the rule prohibiting

working under suspended loads. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶ (91-2897, 1995).

Although TraCorp technically failed to prove the employee misconduct defense, the record establishes that it did make some attempt to protect its employees, instructing them not to work under suspended loads. Any precautions taken to prevent employee injury should be taken into account in mitigation of the gravity based penalty. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Taking into account the relevant factors, I find that a penalty of $500.00 is appropriate and will be assessed.

Alleged Violation of §1904.8

Other than serious citation 2, item 1, as amended, alleges:

29 CFR 1904.8: An oral or written report of an employment accident resulting in a fatality was not made within 8 hours after the occurrence to the nearest Area Office of the Occupational Safety and Health Administration:

> a. The employer failed to report the accident relating to the death of an employee, Juan Medrano. The accident occurred on 12/01/97 on County Rd. 1166, West of Hwy 19 in Como, Tx.

Facts

CO McDavid testified that OSHA learned of the fatality at TraCorp's work site for the first time on December 30, 1997, from a third party (Tr. 86). McDavid testified that the late report hindered OSHA's investigation of the accident. By the time McDavid inspected the site, the wire rope had disappeared; McDavid had to rely mainly on the Hopkins County Sheriff's report and photographs (Tr. 87).

Discussion/Penalty

The violation is undisputed. The record does not support the $2,000.00 penalty proposed for this item, however. The Secretary seeks to assess the same amount for this citation, a reporting violation cited as "other than serious," as she has assessed for the three "serious" violations cited in citation 1, items 1a, 1b and 1c. Because TraCorp's failure to report the accident was likely to result in harm to any employee, I find that a penalty of $100.00 is appropriate.

Alleged Violation of 1926.50(b)

Other than serious citation 2, item 2, as amended, alleges:

29 CFR 1926.50(b): Provisions were not made prior to commencement of the project for prompt medical attention in case of serious injury:

a. On or about December 1, 1997, the employer failed to make arrangements prior to commencement of the project, located on County Rd. 1166, West of Hwy. 19 in Como, TX., for prompt medical attention.

Facts

McDavid testified that Richard Irby admitted that he had not made any arrangements for his crew to receive prompt medical attention prior to the accident (Tr. 89).

Discussion

This violation is undisputed, and will be affirmed, without penalty, as proposed.

ORDER

1. Serious citation 1, items 1a, 1b and 1c, alleging violation of §§1926.251(c)(4)(iv), (c)(9), and 1926.550(b)(2) are AFFIRMED, and a penalty of $2,000.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.550(a)(19) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

3. Other than serious citation 2, item 1, alleging violation of §1904.8 is AFFIRMED, and a penalty of $100.00 is ASSESSED.

4. Other than serious citation 2, item 2, alleging violation of §1926(b)(b) is AFFIRMED without penalty.

Stanley M. Schwartz
Judge, OSHRC

Dated: