

Secretary of Labor,
Complainant,
v
Jensen Road Company,
Respondent.

OSHRC Docket No. **98-1017**

APPEARANCES

Oscar L. Hampton, III, Esq.
Office of the Solicitor
U. S. Department of Labor
Kansas City, Missouri
For Complainant

Lynette Rasmussen, Esq.
Jensen Road Company
Des Moines, Iowa
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Jensen Road Company (Jensen Road) is a highway construction contractor from Des Moines, Iowa. On May 13, 1998, the Occupational Safety and Health Administration (OSHA) inspected Jensen Road's bridge construction project in Lincoln, Nebraska. As a result of the OSHA inspection, Jensen Road received a serious citation on May 15, 1998, for violation of § 1926.550(a)(1). Jensen Road timely contested the citation.

The citation alleges that Jensen Road failed to comply with the manufacturer's specifications and limitations applicable to the operation of a crawler crane by installing a boom tip scaffold to hoist employees. The citation proposes a penalty of \$700.

The case was designated for EZ Trial proceedings pursuant to Commission Rules of Procedure, § 2200.200, *et. seq.* The parties stipulated jurisdiction and coverage (Tr. 5; Prehearing Conference Order).

The hearing was held in Omaha, Nebraska, on September 3, 1998. The parties filed post-hearing statements of position. Jensen Road argues that it complied with § 1926.550(a)(1), and the crane was suitable for handling a boom tip scaffold.¹ For the reasons stated, the violation of § 1926.550(a)(1) is vacated.

Background

From its offices in Des Moines, Iowa, Jensen Road is engaged in the highway construction business (Tr. 198). Jensen Road, in business since the early 1900's, employs approximately 30 employees (Tr. 83). In 1997 Jensen Road contracted to build two bridges in Lincoln, Nebraska. The general contractor was Hawkins Construction. There were approximately 10 Jensen Road employees working on the bridge project (Tr. 199).

To construct the concrete bridge decking, Jensen Road used plywood formwork. After the concrete hardened, a crawler crane with an attached boom tip scaffold was used to assist employees in removing the plywood formwork from underneath the bridge decking (Tr. 54, 200). The bridge was approximately 18 feet above a dry dirt road (Tr. 68, 92).

The boom tip scaffold made by Jensen Road had a metal platform with handrails around the perimeter (Exhs. C-1, R-3; Tr. 49, 166). The scaffold was bolted to the boom of a 50-ton Series 5299 crawler crane manufactured by the American Crane Corporation (Tr. 47, 172).

To remove the plywood formwork, the crane operator lowered the boom to allow two employees to enter the scaffold. The scaffold was then raised into position, parallel to the ground. When positioned underneath the bridge, the two employees removed the plywood formwork. After the employees removed no more than five sheets of plywood, the scaffold was lowered to the ground and the plywood taken off. The process was repeated until the formwork was removed from underneath the bridge (Tr. 170-171).

On May 13, 1998, after receiving a referral complaint alleging that employees were working from a boom tip scaffold, safety compliance officer Douglas Schneider inspected the bridge project located at 180 Project Salt Creek Bridge, Lincoln, Nebraska (Tr. 13, 43). Jensen Road was almost finished with its work on the project (Tr. 72, 199). Compliance officer Schneider did not observe

¹Jensen Road's assertion of a greater hazard defense was withdrawn (Tr. 205)

the boom tip scaffold in use (Tr. 45). He was told that the scaffold was last used a week prior to the inspection, and its use complied with a 1974 variance² from the State of Iowa (Tr. 20-21, 80).

Discussion

The Secretary has the burden of proving a violation.

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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Jensen Road does not dispute the application of § 1926.550(a)(1) to its use of the boom tip scaffold on the crawler crane (Tr. 192). Jensen Road stipulates that if a violation is found, employees were exposed to a hazard by riding in the boom tip scaffold and Jensen Road was aware of the use of the boom tip scaffold at the bridge project (Tr. 5-6; Prehearing Conference Order). Jensen Road constructed the boom tip scaffold and attached it to its crawler crane so that employees could remove the plywood formwork from underneath a bridge deck (Tr. 166, 169). The employees worked at approximately 18 feet above the ground to remove the plywood (Tr. 92).

Jensen Road agrees that the only issue to be determined is whether the terms of § 1926.550(a)(1) were violated (Tr. 9; Jensen Road's Written Statement, p. 2).

Section 1926.550(a)(1)

Section 1926.550(a)(1) requires that:

The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. Where manufacturer's specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded.

²Iowa is a state plan state pursuant to § 18 of the Occupational Safety and Health Act. Jensen Road does not argue the variance applies to its bridge project in Nebraska. A copy of the Iowa variance was not made part of the record.

Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer.

Section 1926.550(a)(1) requires an employer to comply with the manufacturer's specifications and limitations in the way its crane or derrick is used and maintained. The Secretary asserts that Jensen Road failed to follow the manufacturer's specifications and limitations when it attached a boom tip scaffold to its crawler crane. The boom tip scaffold was made by Jensen Road and was attached for use with a crawler crane manufactured by American Crane Corporation.

Jensen Road argues that it complied with the specifications and limitations of the crane and, as the manufacturer of the boom tip scaffold, its capacity, rating or scope were not exceeded (Tr. 9). Jensen Road also asserts that the third sentence of § 1926.550(a)(1) refers to the manufacturer of the attachment and not the manufacturer of the crane.

Interpreting § 1926.550(a)(1)

A safety standard is generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working conditions. A standard must be interpreted in a reasonable manner consistent with a common sense understanding and viewed in context, not in isolation. Objective criteria, including the knowledge and perceptions of a reasonable person, is used to give the regulation meaning. *American Bridge Company*, 17 BNA OSHC 1169, 1172 (No 92-0959, 1995). The Secretary's reasonable interpretation is entitled to substantial deference.

Section 1926.550 applies to the operation of cranes and derricks. It places a duty on an employer to comply with the crane manufacturer's specifications and limitations applicable to the operation of the crane. If the crane manufacturer's specifications and limitations are not available, only then is an employer permitted to rely on documented limitations determined by a qualified engineer. There is no showing that the crane's specifications and limitations were not available. Kelly Sears, Jensen Road's loss control officer, testified that if a manufacturer of a crane prohibits the use of its crane to hoist personnel and an employer uses the crane to hoist personnel, the employer violated the manufacturer's specifications (Tr. 193).

Jensen Road argues that the last sentence of § 1926.550(a)(1) regarding attachments used with cranes directs an employer not to exceed the capacity, rating, or scope recommended by the

manufacturer of the attachment. Since Jensen Road made the boom tip scaffold, it argues that it did not exceed the scope of the scaffold.

Jensen Road's argument regarding the standard's third sentence is misplaced. The Secretary does not argue that the capacity, rating or scope of the boom tip scaffold was exceeded.³ The term "manufacturer" is used three times in § 1926.550(a)(1). The standard does not define manufacturer. However, the first two times the term "manufacturer" is used, it clearly refers to the manufacturer of the crane. Even if the third sentence refers to the manufacturer of the attachment, the standard read as a whole also requires that the attachment such as the boom tip scaffold comply with the "specifications and limitations" of the crane. For the purposes of this decision, it is not necessary to interpret the third sentence and decide whether "manufacturer" refers to the crane manufacturer or the attachment manufacturer. Although the scaffold made by Jensen Road did not exceed the scaffold's "capacity, rating or scope," Jensen Road is not relieved of ensuring that the scaffold complied with the specifications and limitations set for the crawler crane by the crane's manufacturer, American Crane Corporation.

Compliance with § 1926.550(a)(1)

The Secretary asserts that the use of the boom tip scaffold is not permitted by the crane manufacturer, American Crane Corporation. The parties agree that the primary purpose of a crawler crane is material handling (Tr. 28, 100). To show that the crawler crane is not to be used to hoist personnel, the Secretary offers two notices from American Crane Corporation.⁴

The first notice, dated August 23, 1993, is a "typical" letter sent by American Crane, presumably to customers or distributors of its cranes regarding the use of the boom tip scaffold (Tr. 24-25). The letter is not addressed or signed. It appears to originate from the service department. The letter states in part that "the use of such a device [boom tip scaffold] is not the

³However, the record shows that the boom tip scaffold used by Jensen Road did not meet the design specifications for a boom tip scaffold as outlined by John Hart Engineering in 1974. Sears testified that the stop switch used to prevent employees from being crushed by the underside of the bridge was not on the scaffold and had not been affixed to the scaffold while it was used on the bridge project (Tr. 183-185). Sears agreed that the scaffold did not comply with the 1974 Iowa variance (Tr. 186).

⁴The notices were admitted into evidence despite inadequate authentication. *See John H. Quinlan, d/b/a Quinlan Enterprises*, 1994 CCH OSHD ¶ 30,422 (No. 93-817, 1994). The rules of evidence do not apply to EZ trial proceedings. However, to avoid prejudice, the record was left open for Jensen Road to supplement the record with information challenging the notices (Tr. 204, *see* Rule 803(24), Fed. R. Evid). After the hearing, Jensen Road decided not to supplement the record (Order dated Sept. 16, 1998).

intended purpose of a crane; therefore, it is not within our scope of authority to approve or disapprove of its use” (Exh. C-2). The letter concludes that “American Crane does not accept any liability derived from use of the crane with the boom tip scaffold.”

The second notice, identified as Customer Service Bulletin No. 265, dated July 22, 1991, (Exh. C-4) states in part:

WARNING!

This machine (crawler, truck, wagon and pedestal cranes) is not intended to be used as a personnel hoist! If such use is allowed by local, state or federal regulations, the owner or user is responsible for complying with such regulations and any other applicable requirements.

The warning, however, also advises the user, if the crane is used to hoist personnel, to modify or equip the crane with an over hoisting device and a single lever control.

There is no evidence that Jensen Road received or was aware of either notice. Also, there is no showing that either notice specifically related to the Series 5299 crawler crane used by Jensen Road or that Jensen Road failed to make the recommended modifications to the crawler crane.

In addition to the notices, the compliance officer testified to his conversations with Don Albert, chief engineer of American Crane Corporation (Tr. 23). Albert told the compliance officer that “he never approved one for the use of their type of equipment that he was aware of” (Tr. 63). The statement by Albert is hearsay and not given weight. His alleged statement is vague and ambiguous. It is unclear whether Albert had the authority or responsibility for approving the use of boom tip scaffolds. Albert was not called to testify or his affidavit offered into the record. Also, the compliance officer concedes that Albert’s statement is not consistent with the letter of August 23, 1993 (Exh. C-2; Tr. 62).

Based on a review of the notices and statement of Albert, the Secretary fails to show by a preponderance of the evidence that the boom tip scaffold was not within American Crane Corporation’s specifications and limitations for use of the crawler crane Series 5299. The Secretary has the burden of proving that the terms of the standard were violated.

The two notices, if read as a whole, are ambiguous and are subject to different reasonable interpretations. Although stating that its crane is not intended to be used as a personnel hoist, it appears that American Crane does recognize the use. The notices recommend modifications to be made for hoisting personnel. It was not shown which specifications and limitations were not

complied with by Jensen Road. The manufacturer's manual was not offered to show the crane's specifications and limitations.

The record is unclear whether American Crane prohibits the use of the crawler crane for hoisting personnel by a boom tip scaffold. American Crane advises against the use of its crane to hoist personnel unless the cranes are specifically modified to ensure the safety of the employees. There is no showing that the crane used by Jensen Road was not so modified. The standard does not require an employer to obtain the approval of the manufacturer. It requires that the employer comply with the manufacturer's specifications and limitations.

The two notices from American Crane Corporation do not specifically refer to the Series 5299 crawler crane used by Jensen Road in 1998. The notices were dated in 1991 and 1993 and do not identify the crane. It was not established that the notices still applied in 1998. The notices by American Crane Corporation appear not to prohibit the use of the boom tip scaffold. In the August 23, 1993, letter (Exh. C-2), American Crane states:

[I]t is our opinion that the attachment [boom tip scaffold] arrangement as shown in the photos you have supplied will not cause any damage to the crane boom itself which would render it unfit for future lifting crane service. It is not possible for us to comment on the stability margins or strength margins of cranes as they relate to the requirements for the type of equipment which you have proposed. (Exh. C-2)

Similarly, the 1991 warning notice from American Crane Corporation also suggests modifications to the crane to make it suitable for hoisting personnel (Exh. C-4). It cautions customers that "the total weight of the lifted load (including personnel) shall not exceed 50% of the crane rating with the machine equipped as above." By entering into a discussion of the specifics of the scaffold and the capacity of the crane, it is unclear whether American Crane is recognizing the use of a boom tip scaffold within the crane's scope of operation. American Crane's restrictive language relating to liability is limited to not accepting responsibility and not to the design specifications and limitations of the crane.

The Secretary does not dispute that the 50-ton crawler crane was capable of supporting the boom tip scaffold (Tr. 8). There is no argument that the boom tip scaffold's capacity and rating were exceeded. The compliance officer acknowledges that he did not inspect the boom tip scaffold by measuring its component parts or examining its physical appearance (Tr. 45-46, 49). At the time of the inspection, the compliance officer also did not know the size of the crane and did not ask about

the crane's capacity and rating. He was unaware of the crane's specifications and limitations. There is no showing that he obtained a copy of the crane's operation manual.

The Secretary also does not argue that the use of the boom tip scaffold affected the safe operation of the crane (Tr. 8). The record is unclear whether American Crane believed the use of a boom tip scaffold was outside the scope recommended for the crane. By discussing the specifics of the scaffold and crane's capacity, American Crane appears to recognize the use within the crane's operation. The Secretary did not have a representative of American Crane to testify and clarify the ambiguity. Without clarification from the crane manufacturer, the Secretary failed to meet her burden of proof.

The court, however, is concerned about the use of a boom tip scaffold on a crane manufactured to hoist material. The scaffold did not have a stop switch to prevent employees from being crushed by the underside of the bridge. However, this was not the alleged violation.

A violation of § 1926.550(a)(1) is not supported by the record.

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:

Serious citation No. 1, Item 1, alleging violation of § 1926.550(a)(1), is vacated.

KEN S. WELSCH
Judge

Date: October 13, 1998