UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TNT CRANE & RIGGING, INC., Respondent.	DOCKET NO. 16-1587

Appearances:

Christopher Lopez-Loftis, Esq. U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Collin G. Warren, Esq. & Travis W. Vance, Esq., Fisher & Phillips, LLP, Houston, Texas
For Respondent[1]

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER ON REMAND

Procedural History

This matter is before the undersigned on remand from the Occupational Safety and Health Review Commission. This Court originally determined, on September 14, 2018, that Complainant failed to prove the cited regulations in the above-captioned matter applied to the work performed by Respondent's crew at the time of a crane accident which seriously injured an employee. On March 27, 2020, the Commission reversed and determined the cited regulations did apply to the work being performed. In light of the Commission's decision, this Court must now determine

1. Mr. Warren, who appeared at trial, apparently did not participate in the supplemental post-trial brief, which was signed by Mr. Vance and Pamela D. Williams from Fisher & Phillips' Houston Office. Since Mr. Warren participated in the trial, his name will remain in the caption, but the Court thought it appropriate to note the change.

whether Complainant proved the remaining *prima facie* elements of Respondent's alleged violations of 29 C.F.R. § 1926.1407(b)(3) and 29 C.F.R. § 1926.1407(d). Ultimately, as discussed below, this Court finds Complainant failed to prove a violation of the cited standards because it did not establish that the violative conduct of the crane operator was foreseeable.

On May 15, 2016, one of Respondent's employees was seriously injured while holding onto a crane hoist cable as the crane operator swung it into an adjacent power line. The injury was reported to Complainant, who dispatched Compliance Safety and Health Officer ("CSHO") Darren Beck to conduct an inspection. Based on what he discovered, CSHO Beck recommended, and Complainant issued to Respondent, a *Citation and Notification of Penalty* ("Citation"), which alleged two serious violations of the regulations found at 29 C.F.R. § 1926.1407. Complainant proposed a total penalty of $24,942 for the violations. Respondent timely contested the Citation, which brought the matter before the Commission.

This Court did not conduct any further evidentiary hearings upon remand. Rather, the Court continues to rely on the testimony and evidence received into the record during the trial on December 20–21, 2017. However, on July 10, 2020, both parties submitted supplemental post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 18). The parties also stipulated that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 18–19). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

On May 15, 2016, Respondent's employees Jeff Benson and Mark Ryan were completing a week-long project to install new antennas on top of a communications tower in Georgetown, Texas. (Tr. 58, 313, 529). Mr. Benson, Respondent's Crane Operator, was operating a Grove GMK 5275 all-terrain 275-ton mobile crane to perform the work. (Tr. 320; Exs. C-16, C-17). About 9:00 a.m. that day, employees J.L. and Freddie Ray, who were detailed from Respondent's San Antonio office, arrived at the worksite to assist in disassembling the mobile crane once the job was completed. (Tr. 202–203, 254).

Once finished, the crew needed to dismantle the crane and re-load it back on the semi-truck trailer used to transport it. (Tr. 96, 254). Before starting that process, Benson created a job safety analysis (JSA) and discussed with the crew his plan for lowering and disassembling the boom of the crane, including the need to avoid the nearby power lines. (Tr. 203–206; Ex. R-4). Though J.L. and Mr. Ray expressed reservations about the plan, Mr. Benson informed them he had assembled the crane in the exact location where he proposed disassembling the crane, which included a buffer zone of 20 feet from the power line.[2] (Tr. 214). Based on the plan Benson created, and his representation that the plan was safe, J.L. and Mr. Ray agreed. (Tr. 216).

On this particular crane model, the operator's cabin sits on a turntable on the truck, which allows it to rotate left and right. (Tr. 207, 320). Affixed to the turntable is a telescoping boom, which extends and retracts by way of a hydraulic cylinder. (Tr. 207; Ex. C-17). The disassembly plan called for Mr. Benson to first reposition the crane near the semi-truck trailer; then to lower the boom while J.L. removed the block from the becket on the end of the hoist line. (Tr. 88). The

2. The power line voltage was 14,400 volts, requiring a minimum encroachment distance of 10 feet per Table A at 29 C.F.R. §1926.1408. Respondent's employees testified that they tried to implement a larger buffer distance. (Tr. 259).

block is the end mechanism on a crane, where rigging is attached to pick up whatever items the crane is lifting. (Tr. 199, 328; Ex. C-16 at TNT 102, C-17 at DOL 187). The becket is a metal connection device at the end of the hoist line, where the block is connected. (Tr. 209, 328). Then, while J.L. physically held the becket to keep the hoist line taught, Benson would reel the line onto the coil.[3] (Tr. 209, 211, 315). Mr. Ray worked with Mr. Ryan to position the flatbed truck for Benson to lay down the boom. (Tr. 210–11).

After the block was removed and the hoist line retracted, the *plan* was to further lower the boom, use a separate helper crane to begin taking off sections of the jib, and place them on the trailer. (Tr. 227, 262, 315, 486-487, 553; Ex. R-4). However, despite this disassembly plan, the crew never progressed past the removal of the block and the beginning of the retraction of the hoist line. As Benson was lowering the boom and retracting the hoist line, he contacted a nearby power line, sending 14,000 volts of electricity through the hoist line to J.L. (Tr. 108, 211–212). Mr. Ray, who was in the cab of the semi-truck, started receiving confusing signals from Mr. Ryan and exited the cab. (Tr. 211–212). As he got out of the truck to inquire, Mr. Ray saw a flash at the base of the crane, ran over to the other side, and found J.L., who was laying on the ground. (Tr. 211–212). As he ran over to assist J.L., Mr. Ray noticed the tip of the boom was over the power line. (Tr. 213).

After emergency responders arrived and had the original crew move the crane and other equipment for access purposes, the entire crew was sent home. (Tr. 268). Respondent had a different crew come to the site a day later to disassemble the crane and remove it from the property. (Tr. 381). As a result of the accident, J.L. experienced a severe electrical shock, serious injuries,

3. Mr. Ray testified that removing the block was an unnecessary step in the process that actually increased the likelihood of an accident. The block in question weighed nearly 500 pounds, which would have maintained adequate tension on the hoist line while it was retracted, eliminating the need for J.L. to hold the line. (Tr. 231–233).

and hospitalization. (Tr. 213, 379–80). Benson was not injured. Respondent reported the accident and employee hospitalization to OSHA within 24 hours, which prompted the investigation.

By the time CSHO Beck arrived at the worksite, the equipment and parties involved in the incident were no longer there. (Tr. 57). He also testified that he was unable to enter the locked property. (Tr. 138). Therefore, instead of performing an inspection at the location of the accident, CSHO Beck traveled to Respondent's Houston, TX office, to interview witnesses; and to Respondent's Marshall, TX yard, where the crane was being stored. (Tr. 57).

In addition to interview statements, CSHO Beck took photos of a not-to-scale model of the worksite prepared by Mr. Ray and a member of Respondent's safety team, and took photographs of the crane as it set in the Marshall, TX yard. (Tr. 95, 243-44; Ex. C-21). None of the photographs entered into the record accurately reflect the condition, configuration, or position of the crane at the time of the accident. (Exs. C-16, C-17). Based on his investigation, CSHO Beck concluded that Respondent failed to comply with two regulatory requirements for crane disassembly, and OSHA issued the two violations at issue in this case.

Discussion

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited regulation applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

The Commission determined that the regulations cited in Citation 1, Items 1 and 2, applied, so this decision only addresses the remaining elements of Complainant's *prima facie* case. *See TNT Crane & Rigging*, 2020 WL 1657789 (No. 16-1587, 2020).

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.1407(b)(3): Additional measures were not in place to prevent encroachment of power lines.
>
> On or about May 15, 2016, the employer did not use at least one of the measures required to prevent encroachment or contact with the power lines while disassembling the crane, exposed employees to the hazard of electrical shock.
>
> Note: The additional measures are:
>
> i) Use a dedicated spotter who is in continuous contact with the equipment operator.
> ii) A proximity alarm set to give the operator sufficient warning to prevent encroachment.
> iii) A device that automatically warns the operator when to stop movement, such as a range control warning device.
> iv) A device that automatically limits range of movement, set to prevent encroachment.
> v) An elevated warning line, barricade, line of signs, in view of the operator, equipped with flags or similar high-visibility markings.

See Citation and Notification of Penalty at 6.

The Standard Was Violated

Complainant contends Respondent violated 1926.1407(b)(3) in three respects: (1) as evidenced by the accident, the measures employed by Respondent to prevent encroachment were ineffective; (2) J.L. was not a *dedicated* spotter as defined by the regulations; and (3) Respondent failed to employ any "additional measures". In response, Respondent argues it was not required to employ additional measures because it determined no part of the crane would come within 20 feet of the power lines, in compliance with 1926.1407(a). The Court finds Respondent

misconstrued its obligation under 1926.1407(a), as well as its supplemental/complementary obligation under 1926.1407(b).

According to 1926.1407(a), "Before assembling or disassembling equipment, the employer must determine if any part of the equipment, load line, or load (including rigging and lifting accessories) *could* get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process." 29 C.F.R. § 1926.1407(a) (emphasis added). If such a determination is made, Respondent must implement the requirements of Option 1, 2, or 3 of the section. *Id.* Option 1 was not at issue here because the line remained energized, so Respondent was bound by Options 2 or 3. *Id.* As such, Respondent was also bound by the requirements of paragraph (b), which was cited by Complainant. See *id.* §§ 1926.1407(a)(2), (3).

Respondent argues that no part of the crane would have come within 20 feet of the power line insofar as its plan was followed. The problem for Respondent, however, has nothing to do with the adequacy of its plan. According to the plain language of the standard, the employer must determine if any part of the equipment *could* get closer than 20 feet; not whether the employer has a plan to prevent such encroachment. Indeed, the whole point of paragraph (b) is to employ administrative or engineering controls that will prevent accidental encroachment and human error. *See id.* § 1926.1407(b). If there was no possibility of contact, there would be no need for a spotter, electronic warning system, range limiter, or barricade. *Id.*

The preamble to the final rule illustrates the contours of a proper assessment, which requires the employer to consider "the area under and around the boom's path as it is lowered" and "other areas radiating from the initial area, both horizontally and vertically, that will be occupied as the equipment components are added, removed, raised, and lowered during the

assembly/disassembly process." Cranes and Derricks in Construction, 75 Fed. Reg. 47906, 47946 (August 9, 2010). The following example provides further clarity:

> As stated in the preamble to the proposed rule, "direction" includes the direction that, for example, the boom will move as it rises into the air after the boom has been assembled on the ground. For example, the boom, when fully assembled on the ground, may be more than 20 feet from a power line. However, when raising it from the ground, it may get closer than 20 feet. Accordingly, under this language, the "direction" that the boom will travel as it is raised must also be evaluated for proximity to power lines.

Id. Based on this understanding, the Court finds Respondent's argument incorrectly interprets 1926.1407(a), concluding that the secondary protections in 1926.1407(b) did not apply. It was clearly *possible* for equipment to approach/contact the power line within the 20-foot distance boundary, because that actually occurred. In fact, even without the unfortunate accident, the record clearly established that the crane equipment could have easily come into contact with the power line. Therefore, Respondent's argument that the secondary/complementary protections of 1926.1407(b) were not applicable is rejected.

Despite Respondent's current argument on that point, the record establishes that Benson and his crew actually considered secondary precautions to ensure encroachment within 20 feet would not occur. Specifically, Mr. Ray and Mr. Benson both testified J.L. was serving as a spotter. (Tr. 340, 254). Considering the power line's proximity to the crane, both J.L. and Mr. Ray expressed reservations about the plan to disassemble the crane in the location suggested by Mr. Benson. (Tr. 216). Thus, at the very least, the crew *acted* as if encroachment *could* happen. This is also supported by Respondent's expert report, which indicated potential minimum clearances of 14.6- to 16-feet, depending on where the jib was set on the trailer. (Ex. R-36 at TNT000409). Thus, the Court finds Respondent was required to comply with 1926.1407(b)(3).

In order to comply with 1926.1407(b)(3), Respondent needed to implement one of the five additional options listed under the standard (and reproduced above). The only option mentioned at

trial was (i), which requires a dedicated spotter.[4] Any argument that J.L., who was holding the becket, was the dedicated spotter for the crane must fail. A dedicated spotter's "sole responsibility is to watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum approach distance is not breached." 29 C.F.R. § 1926.1401. J.L. did not have the sole responsibility of watching equipment; he was also responsible for maintaining tension on the hoist line. This additional responsibility interfered with his ability to communicate with the operator, as evidenced by Ray's testimony that spotters/riggers use hand signals to communicate and Benson's testimony that he could not hear J.L. yelling at him to "swing" the boom away from the power line. (Tr. 200, 331). In fact, despite Ray's and Benson's post-accident assertions, J.L. and Mr. Ryan told CSHO Beck there was no dedicated spotter at the time of the accident. (C-20 at DOL 00204, 00207).

Based on the foregoing, the Court finds Respondent violated the terms of the standard because it failed to employ additional measures when the crane and its associated equipment could get within 20 feet of an energized power line.

Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1926.1407(d): Assembly/disassembly inside Table A clearance prohibited. Part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, was closer than the minimum approach distance under Table A (see 1926.1408) to a power line.
>
> On or about May 15, 2016, employees attempted to disassemble the 275-ton crane to place the boom on a flatbed truck parked below a 14,400 volt energized power

4. Benson testified the crew did not employ any of the other options. (Tr. 332).

line. The load line came in contact with the power line, exposing employees to the hazards of electrical shock.

Note: Disassembling cranes under power lines is prohibited under 1926.1407(c) of this section.

See Citation and Notification of Penalty at 7.

The Standard Was Violated

There is no serious dispute about whether this standard was violated.[5] The requirements of 1926.1407(d) are straightforward: no part of a crane, load line, or load is allowed closer than the minimum approach distance under Table A unless the employer has confirmed the power line has been deenergized and grounded. 29 C.F.R. § 1926.1407(d). The power line at issue was neither deenergized nor grounded. Thus, Respondent had to ensure no part of the crane came within the distance provided in Table A. Unfortunately for J.L., as Benson lowered the boom, he failed to swing it over according to the agreed-upon plan and contacted the power line with the hoist line of the crane.[6] (Tr. 93, ; Ex. R-36; C-16 at DOL00182). Because Benson contacted the line as he was booming down, he violated the minimum clearance distance mandated by Table A.[7] Accordingly, the Court finds Respondent violated the terms of the standard.

Respondent's Employees Were Exposed to a Hazard

For Complainant to establish this element, he must show Respondent's employees were exposed to, or had the potential to be exposed to, the zone of danger. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). There is no question J.L. and Benson occupied the zone of danger, as they were both in physical contact with the equipment that contacted the power line.

5. Respondent does not address the requirements of 1926.1407(d) in either its original or supplemental post-trial brief.
6. Benson insisted the hoist line did not touch the power line; however, Respondent's expert identified the point on the hoist line where contact was made. (Tr. 582-583).
7. Respondent was working near a 14-kilovolt line, which requires a minimum clearance distance of 10 feet. *See* 29 C.F.R. § 1926.1408, Table A.

Respondent's employees were about to disassemble the crane in an area where portions of the crane could have (and did) contact the power lines. The process of disassembly required Benson to first swing the boom of the crane 90 degrees from the position it was in after removing the block. (Ex. R-4; R-36 at TNT000408-409). By swinging the boom 90 degrees to the right, the boom was supposed to point toward an adjacent field, away from the power line. (*Id.*). The power line was located towards the rear of the crane truck and in front of the flatbed where Benson was supposed to lay down the jib for removal. (Tr. 206). After that, Benson was supposed to "boom down" the crane to its lowest possible point and then swing it back over the flatbed truck for disassembly. (Tr. 206). Mr. Ray drove the flatbed and was directed by Mr. Ryan, who positioned himself at the back of the flatbed to assess where the truck needed to be parked to receive the jib. (Tr. 206).

Given that the boom and cable were located directly overhead of Mr. Ray and Mr. Ryan when the cable contacted the power line, the Court finds they were also within the zone of danger. According to Respondent's expert, the flatbed was roughly 10 feet from the power line, and the boom, had it been set down, would have been roughly 16 feet away. (Ex. R-36 at TNT000409). This was clearly within the 20-foot buffer zone identified in 1926.1407(a), which required the use of additional protective measures. According to Benson, the crane was not equipped with a warning/shutdown system, and both J.L. and Mr. Ryan told CSHO Beck the crew did not have, nor did they discuss, the use of a dedicated spotter. (Tr. 331; Ex. C-20). In light of these conditions, and Respondent's failure to properly address them, the Court finds all crew members were exposed to the hazard of electric shock as a result of the violative conditions described in Citation 1, Items 1 and 2.

Complainant Failed to Prove Respondent Had Knowledge of the Condition

Complainant contends Respondent knew or could have known of the above-discussed violations under two theories: (1) Benson was a supervisor, and knowledge should be imputed to Respondent through him according to Commission precedent; and (2) Benson's conduct was foreseeable due Respondent's failure to train, supervise, and discipline, and thus imputable under Fifth Circuit precedent.[8] Respondent, on the other hand, contends Benson was not a supervisor, because he was not designated as such by Respondent, nor did he exercise responsibilities consistent with that role. Further, Respondent argues Benson was adequately trained and supervised such that his actions on the day of the accident were not foreseeable. While the Court finds Benson was a supervisor for the purposes of the Act, it also finds Complainant failed to prove his actions were foreseeable. Thus, the Court finds Complainant failed to establish that Benson's knowledge of the violations should be imputed to Respondent.

Benson Was Acting as a Supervisor

Respondent disputes Complainant's determination that Benson was acting as a supervisor at the time of the accident. Specifically, Respondent argues its crane operators are not designated as supervisors; do not have the ability to hire, fire, or discipline; and that Benson was not treated as a supervisor by CSHO Beck during the inspection. According to the Commission, neither formal titles nor the ability to hire and fire control the determination of whether an employee is acting as a supervisor. *See Rawson Contractors*, 20 BNA OSHC 1078 (No. 99-0018, 2003). Instead, supervisory status "can be established on the basis of other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf." *Id.* Such indicia

8. Because this case took place within the boundaries of the Fifth Circuit, the Court is obliged to apply Fifth Circuit precedent. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794–95 (No. 90-998, 1992) (holding that Commission typically applies precedent of circuit to which a case is "highly probable" to be appealed, even though it may differ from Commission precedent).

include supervising work activities, taking all necessary steps to complete assignments, and ensuring work is performed in a safe manner. *Id. See also Kern Bros. Tree Service*, 18 BNA OSHC 2064 (No. 96-1719, 2000) (knowledge of crew leader who was responsible for seeing that the work was done safely and properly was imputed to employer even though he had no authority to actually discipline an employee). Supervisory status can also be delegated, or exercised, on a temporary basis. *Id.*

According to the crane operator job description, even though an operator has no "direct reports", his duties include "ensur[ing] safety first, along with safe lifting of the load"; "determin[ing] signal person understands and performs proper hand signals"; and completing field tickets to be turned into the branch office, including determinations of additional charges to clients. (Ex. R-11 at TNT000170, 171). According to Troy Pierce, Respondent's VP of Health, Safety, and Environment (HSE), although crane operators are not officially designated supervisors, they can report employees to dispatch or branch managers to have the non-compliant employee removed from a worksite. (Tr. 387). This is a marked difference from riggers and rigger drivers, who are supposed to "assist the crane operator on job tasks during the operation of the crane . . . ." (Ex. R-11 at TNT000174). The fact that operators are expected to ensure worksite safety and assess employee understanding of work plans and practices indicates some delegation of supervisory authority, especially in the absence of other supervisory personnel.

As it relates to this worksite, Benson created the work plan and job safety analysis (JSA), and dictated to the crew how the disassembly work would be carried out. (Tr. 214–17). Additionally, Benson himself came to understand he was acting as the on-site supervisor (Tr. 317, 336). While that fact alone is not conclusive, it is consistent with his actions, the crew's actions, and the delegation of crane operator authority in Respondent's policies described above.

Accordingly, the Court finds Benson was serving as a supervisor on this jobsite for the purposes of the Act.

Foreseeability Under *Yates*

For Complainant to prevail, he must prove that Benson's knowledge of the violative conditions should be imputed to Respondent. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (No. 86-360 *et. al.*, 1992) (holding actual or constructive knowledge of a supervisor can be imputed to the employer). According to Commission precedent, Complainant establishes this element by showing a supervisor had actual or constructive knowledge of a subordinate's, or in this case, his own conduct. *See A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2007 (No. 85–369, 1991); *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (noting that under Commission precedent, a supervisor's knowledge of his own misconduct is imputed to the employer). In the Fifth Circuit, however, Complainant must show the supervisor's misconduct was foreseeable. *See W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006) (finding Commission precedent imputing supervisor's knowledge of his own misconduct impermissibly shifts burden of proof away from Secretary and, therefore, constitutes strict liability). To prove a supervisor's misconduct was foreseeable, Complainant must show the employer's safety policies, training, and disciplinary practices were deficient. *Id.* at 608–609). The Court finds Complainant failed to make such a showing.

First, Complainant attempts to argue *Yates* does not apply to the circumstances of this case. In *Yates*, the Fifth Circuit noted it did not intend to alter the analysis of the "ordinary case", wherein a supervisor's knowledge of his subordinate's misconduct is imputable to the employer without further analysis (at which point the burden shifts to the employer to prove unpreventable employee misconduct). *See id.* at n.7; *see also Calpine Corp. v. OSHRC*, 774 Fed. App'x. 879 (5th Cir. 2019)

(unpublished) (reiterating the rule in the ordinary case but also noting hazardous condition did not arise from supervisory misconduct). Refining that point, the Eleventh Circuit held the knowledge of a supervisor, who is both engaged in misconduct and observes a subordinate employee engaged in the same misconduct, is imputable to the employer because it constitutes the "ordinary case" discussed in footnote 7 of *Yates*. *See Quinlan d/b/a Quinlan Enters. v. Secretary, U.S. Department of Labor*, 812 F.3d 832 (11th Cir. 2016). It is this distinction Complainant latches onto in support of its argument that *Yates* does not apply. This Court disagrees for two reasons.

First, the Fifth Circuit did not discuss the proper analysis for when both supervisor and subordinate are simultaneously engaged in the same misconduct. Indeed, as noted by the Eleventh Circuit in *Quinlan*, the facts in *Yates* were different than those before the Eleventh Circuit: the supervisor in *Quinlan* was engaged in the same misconduct as his subordinate, whereas the supervisor was engaged in different misconduct than his subordinates in *Yates*. As noted by the *Quinlan* court, the Fourth Circuit was confronted with a situation where the supervisor and subordinate were both engaged in the same misconduct and nonetheless held imputation of the supervisor's knowledge of his misconduct in that circumstance was improper without further analysis. *See Quinlan*, 812 F.3d at 840 (citing *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir.1998)). Thus, this Court refuses to extend the rationale of the Eleventh Circuit to the clear rule laid down by the Fifth Circuit in *Yates*.

Second, regardless of whether the Fifth Circuit would adopt the Eleventh Circuit's rationale, this Court does not find it applicable to this set of facts. Benson, acting as a supervisor, planned the process of disassembly and dictated to the other employees how it would be carried out, from where the crane and trucks would be located to having J.L. hold the becket at the end of the hoist cable while he moved the boom into position. Subsequently, it was Benson who failed to

comply with the plan when he lowered the boom before swinging it over the adjacent field, which sent the hoist cable into the power lines. As noted in Respondent's own position description, the operator is responsible for "ensur[ing] safety first, along with safe lifting of the load", which presumably includes identifying additional protective measures when working within 20 feet of an energized power line. Likewise, the only person capable of preventing encroachment into the minimum approach distance was the crane operator, Benson, who was at the controls of the crane and should have been paying attention to his signal man. As such, the only individual engaged in violative conduct here was Benson. Complainant established that other employees were *exposed* to the hazard caused by the violation, but presented no evidence to suggest any other employee was engaged in the violative conduct identified in the Citation. Complainant's argument that *Yates* is not applicable to this case is rejected.

Benson's Actions Were Not Foreseeable

As noted above, Complainant must show a deficiency in Respondent's safety policy, training, or discipline in order to prove Benson's actions were foreseeable. Complainant argues Respondent's safety program is little more than a paper program, which says more than it actually does. Specifically, Complainant argues: (1) Respondent's rules are nothing more than a rote reproduction of the OSHA standards; (2) Respondent failed to provide Benson with appropriate training; and (3) Respondent did not appropriately audit worksite practices or punish transgressions when identified. Respondent contends it had a robust written safety program that is communicated through weekly and periodic trainings and is enforced through workplace audits and disciplinary action. Based on the evidence presented, the Court finds Complainant failed to prove Respondent's safety policies, training program, or disciplinary actions were deficient.

Respondent's safety policy is extensive and has rules that specifically govern the conduct identified in the Citation. The policy tracks the language of the standard's requirements but does not merely reproduce the standards themselves—it is specific so as to guide employee behavior. *See Mosser Construction Co.,* 15 BNA OSHC 1408, 1415 (No. 89-1027, 1991) (holding a work rule must be clear enough to eliminate employee exposure to the hazard). Specifically, it indicates what the minimum approach distance is for power lines, requires supplemental requirements for any activities occurring within 20 feet, and identifies what those requirements are. (Ex. R-2 at TNT000132). Complainant failed to present sufficient evidence for this Court to conclude that Respondent's rules governing crane operation near power lines were insufficient.

Regarding training, Complainant argues Respondent failed to show it provided Benson with training that covered operating a crane near power lines. For the most part, Complainant relies on Benson's testimony, wherein he claimed he did not receive such training from Respondent. This line of argument is problematic for two reasons: (1) it does not properly characterize Benson's testimony; and (2) Respondent's reliance on third-party training does not translate to a failure to meet its obligation to ensure Benson was properly trained.

Benson initially testified he did not receive high power line training from TNT and that he never received a safety manual at any point. (Tr. 343). On the very next page of the transcript, however, Benson clarified he received power line training while he worked for TNT, albeit through the Houston Area Safety Council. (Tr. 344; Ex. R-41 at TNT000777). He also noted he had received similar training through his previous employer and understood and was able to comply with TNT's policy, which requires maintaining a 20-foot distance from power lines while operating a crane. (Tr. 345). Benson was also an actively certified NCCCO crane operator. (Tr. 341).

In addition, subsequent testimony by four company representatives contradicted Benson's testimony that he did not receive training from Respondent. Mr. Pierce testified Benson received company handbooks, including safety manuals, during his orientation and provided evidence to that effect. (Tr. 407; Ex. R-47 at TNT000233). Further, Pierce testified Respondent also tested the competencies of all new employees to ensure they possessed the skills and qualifications they claimed to have. (Tr. 412-414). This included a field test on a crane in the yard, as well as a written test, both of which had to be satisfactorily completed prior to operating a crane in the field. (*Id.*; Ex. R-2) Jamie Arnold, the Marshall branch manager, testified that he verified Benson's certifications, including the training he received through the safety council, which covered power line training. (Tr. 589). Mr. Arnold also testified he was familiar with Benson's skills and abilities before he started with Respondent. (Tr. 588). Third, Jeff Bonner testified he conducted the onboard training of Benson, which included power line safety and encroachment distances. (Tr. 596). Though Complainant challenged his testimony, based on his inability to recall the time of such training, Bonner specifically recalled training Benson, which the Court found credible. (Tr. 597-598). Finally, Mr. Ray also testified that Respondent provides employees with power line training. It was one of the first sessions he received "because we're around power lines so much." (Tr. 248).

The Court is convinced the foregoing illustrates Respondent met its obligation to ensure Benson was properly trained and understood company policy regarding operating a crane near power lines. Not only did Respondent verify Benson's prior experience and training through testing, it also ensured Benson continued to receive training either through weekly training presentations or through a verified third-party provider. (Tr. 589). *See LJC Dismantling Corp.*, 24 BNA OSHC 1478 (No. 08-1318, 2014) (holding that adequacy of instruction, training, and supervision should be assessed in light of prior work history and training and that it is Secretary's

burden to show deficiency and additional training that would be required); *S.J. Louis Construction of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016) (same). Complainant did not prove Respondent failed to ensure adequate instruction or communicate its safety policy regarding operating a crane near power lines.

Finally, Complainant contends Respondent's audit and disciplinary program were also deficient. Complainant's evidence in this regard is equally scant. Specifically, Complainant argues that because Respondent failed to audit the worksite where the accident happened, its audit program was deficient. Mr. Pierce testified Respondent deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites. (Tr. 416). He also introduced samples of audits performed at those worksites. (Ex. R-49). Mr. Ray, who works in the field, testified that jobsite audits occurred regularly. (Tr. 266-67). *See also S.J. Louis*, 25 BNA OSHC 1892, *supra*. (program was sufficient which consisted of a full-time safety director and five field safety supervisors that conducted random and scheduled field safety audits). Simply because one worksite was not audited over the course of a one-week project (that was originally scheduled to be completed in one day), does not mean the audit program, as a whole, was deficient. Without more, the Court finds Complainant's evidence failed to establish the insufficiency of Respondent's audit program.

Similarly, the Court finds Complainant failed to prove Respondent's disciplinary program was insufficient. Again, Complainant relies on the lack of audits at this particular worksite as its sole evidence that Respondent's disciplinary program was insufficient. Absent a specific reason why Respondent should have sent an audit team to review Benson's work performance, the Court finds this line of argument unpersuasive. Respondent submitted a sample of disciplinary actions taken in response to violations of company rules, including Benson's ultimate termination. (Ex. R-

27, R-29). These actions are consistent with the progressive disciplinary policy laid out in Respondent's orientation packet. (Ex. R-12 at TNT00055).

Based on the foregoing, the Court finds Complainant failed to prove Benson's violative conduct was foreseeable. Accordingly, the Court finds it is improper to impute Benson's knowledge of the violative conditions to Respondent.

Conclusion

Complainant failed to establish that Respondent knew, or with the exercise of reasonable diligence, should have known of the violative conditions cited in Citation 1, Items 1 and 2. Complainant failed to prove that Respondent should have foreseen Benson would violate the cited regulations, and company policy, by failing to maintain adequate clearance from overhead power lines as the crew began the disassembly process. Accordingly, Citation 1, Items 1 and 2 will be vacated.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED; and
2. Citation 1, Item 2 is VACATED.

/s/ Brian A. Duncan

Date: October 15, 2020
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission