

**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

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On May 15, 2016, Respondent's employees were installing new antennas on a communications tower using a 275-ton mobile crane in Georgetown, Texas. An employee was on the ground holding the end of the crane's hoist line, while the crane operator was lowering the boom, when it contacted a nearby electric line. The employee was seriously injured by the electrical shock, and hospitalized. Four days later, on May 19, 2016, OSHA assigned Compliance Safety and Health Officer (CSHO) Darren Beck to begin an investigation of the incident. (Tr. 59). As a result of his investigation, OSHA issued a *Citation and Notification of Penalty* to Respondent

alleging two violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”).

OSHA alleged a serious violation of 29 C.F.R. §1926.1407(b)(3) for failing to prevent the encroachment of power lines during crane disassembly; and a serious violation of 29 C.F.R. §1926.1407(d) for failing to maintain minimum approach distances from power lines during disassembly, with total proposed penalties of \$24,942.00. Respondent timely contested the *Citation*, which brought the matter before the United States Occupational Safety and Health Review Commission (“Commission”) pursuant to Section 10(c) of the Act.

A trial was conducted in Houston, Texas on December 20–21, 2017. Seven witnesses testified at trial: (1) CSHO Darren Beck; (2) Freddie Ray, a driver and rigger for Respondent; (3) Jeff Benson, a crane operator and former employee of Respondent; (4) Troy Pierce, Respondent’s Vice President of Health Safety and Environment; (5) Matt Gardiner, Respondent’s designated crane expert; (6) Jamie Arnold, Respondent’s Branch Manager of the Marshall, Texas yard; and (7) Jeff Bonner, one of Respondent’s safety managers. Both parties timely submitted 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 Slingsluff 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 [Redacted] 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, the crew conducted a job safety analysis (JSA) and discussed a 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 [Redacted] 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, and the plan included a buffer zone of 20 feet from the power line.¹ (Tr. 214).

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). According to Mr. Ray, the boom remains permanently affixed to the crane. (Tr. 207). There was also a jib on the crane, which consisted of extension sections that attach to the end of the boom for more reach. (Tr. 208; Ex. C-16). In contrast to the boom, the jib is not permanently affixed to the crane. Instead, the jib sections are connected by a series of pins during the assembly process, and then removed during the disassembly process. (Tr. 207; Ex. C-16). The jib pins are substantial pieces of steel

1. Because the voltage of the power line was 14,400 volts, the required minimum distance was 10 feet per Table A of 29 C.F.R. §1926.1408. Respondent's employees testified that they aimed for a larger buffer area. (Tr. 259).

bar which are inserted and removed with a hammer. (Tr. 207).

The disassembly plan called for Mr. Benson to first reposition the crane near the semi-truck trailer; then to lower the boom while [Redacted], the spotter, removed the block from the beckett on the end of the hoist line. (Tr. 88). The block is the end mechanism on a crane, where rigging is attached to pick up whatever items the crane is lifting. (Tr. 199, 328; Exs. C-16 (TNT 102), C-17 (DOL 187)). The beckett is a metal connection device at the end of the hoist line, where the block is connected. (Tr. 209, 328). Then, while [Redacted] physically held the beckett to keep the hoist line taught, it was to be retracted onto the coil.² (Tr. 209, 211, 315). From operators to the expert, all of Respondent's witnesses testified that simply lowering the boom and disconnecting the block, are normal operations that can occur multiple times over the course of a single day. (Tr. 224, 264, 536).

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). Disassembly of this crane is a progressive process, which involves raising/lowering the boom after each successive section of the jib had been removed and set on the trailer. (Tr. 207–208). This description of the process was echoed by Matthew Gardiner, Respondent's expert. (Tr. 538–539). Mr. Gardiner, Mr. Pierce, and Mr. Ray testified at trial that the actual removal of the first section of jib is when crane "disassembly" actually begins. (Tr. 207-208, 467, 540-541).

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. Neither the boom or jib was ever laid

2. 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 [Redacted] to hold the line. (Tr. 231–233).

onto the trailer, no sections of jib were removed, and no jib section pins were knocked out. (Tr. 261-262). As the crane operator was lowering the boom and retracting the hoist line, it contacted a nearby power line, sending 14,000 volts of electricity through the hoist line to [Redacted]. (Tr. 108, 211–212). Mr. Ray, who was in the cab of the semi-truck awaiting instructions from Mr. Ryan, quickly ran over to [Redacted]’s location. (Tr. 211-212). 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).

[Redacted] experienced a severe electrical shock, serious injuries, and hospitalization. (Tr. 213, 379–80). The crane operator 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). The Court notes that this was CSHO Beck’s first crane accident inspection. (Tr. 54).

When CSHO Beck spoke with members of the crew, they apparently used phrases like “began to disassemble” and “started breaking down the crane,” which led him to conclude they were engaged in crane disassembly at the time of the accident. (Tr. 88-94). CSHO Benson’s conclusions were wholly reliant upon witness interviews. He did not actually know whether the crane was fully assembled, partially disassembled, or completely disassembled at the time of the accident. (Tr. 133). When asked during the trial how he knew the crew was actually disassembling

the crane at the time of the accident, CSHO Beck testified that "...whenever you start getting close to power lines, that's when the disassembly starts to occur. If they weren't disassembling the crane, then what else were they doing?" (Tr. 153).

The facts presented at trial, however, clearly established that disassembly of the crane was *about* to begin, but had not actually started. To reiterate, neither the boom or jib had been set on the trailer, the crane boom and jib were still suspended and under tension, none of the sections of jib had been removed, and none of the pins connecting each jib section had been knocked out. The crane was fully intact and operational, except for the removal of the block at the end of the hoist line. (Tr. 264).

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 standard 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 first (and primary) issue here is whether the regulation cited in both alleged violations, 29 C.F.R. §1926.1407, applied to the work being performed by Respondent’s crew at the time of the accident. Even CSHO Beck acknowledged during the trial that if Respondent’s crew was not engaged in “disassembly,” then the *Citations* issued to Respondent were improper. (Tr. 134). The regulation cited here falls under the category of “Cranes and Derricks in Construction” and is entitled “Power line safety (up to 350 kV)—assembly and disassembly.” 29 C.F.R. §1926.1407 *et seq.*

Complainant argues that the process of crane “disassembly” began in this case when the block at the end of the hoist line was removed, and the boom began to be lowered. *Compl’t Br.* at 11. According to Complainant, once the crew discussed the disassembly plan, then took their first physical steps toward accomplishing that plan, their actions were covered by the disassembly regulations. Respondent argues in opposition, that “disassembly” is not defined in the regulations, and that the simple act of lowering the boom and removing the block at the end of the hoist line is a common practice during normal operation of this and other cranes. (Tr. 264, 466). For a Court to conclude that lowering the boom and removing/changing a block, constitutes crane disassembly would have far-reaching implications in the crane industry, and is contrary to the regulations. Respondent does not dispute that the crane was *about to be* disassembled at the time of the accident, but that *actual* disassembly had not yet begun when the accident occurred.

Plain Language of “Assembly/Disassembly”

To determine a standard’s meaning, “the Commission must first look to its text and structure.” *Seward Ship’s Drydock, Inc.*, 26 BNA OSHC 2303 (No. 09-1901, 2018) (citations omitted). If the language of the standard is unambiguous, then the plain meaning shall govern,

irrespective of what definition the Secretary may propose. *Id.* According to the definition section of Subpart CC—Cranes and Derricks in Construction, “Assembly/Disassembly” means:

the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, “erecting and climbing” replaces the term “assembly” and “dismantling” replaces the term disassembly.” Regardless of whether the crane is initially erected to its full height or is climbed in stages, the process of increasing the height of the crane is an erection process.

29 C.F.R. §1926.1401.

The first sentence in the definition is circular, and provides no clarification, because it uses the term “disassembly of equipment” to define the term “disassembly.” Even CSHO Beck agreed that “disassembly” is not clearly defined in the regulation. (Tr. 174). The next two sentences, however, provide some texture to its meaning. Specifically, the assembly process for tower cranes (not the type used here), involves “the process of increasing the height of the crane.” Conversely, logic dictates that decreasing the height of the crane would constitute disassembly. Unfortunately, with regard to the mobile crane used in this case, the definition does not explain how assembly/disassembly would differ from normal crane operation, during which the boom is raised and lowered repeatedly.

Notwithstanding the vagueness of the term “assembly/disassembly” in the standard, OSHA created, in promulgating the regulations, an intentional dividing line between assembly/disassembly and normal crane operation. There are four other subsections of subpart CC that address the assembly/disassembly process. *See id.* §§1926.1403–.1406. The one standard specifically applicable to disassembly—§1926.1405—seems to further clarify that dividing line. In each subsection of §1926.1405, employers are admonished that “none of the pins” on various sections of the crane boom or pendants can be removed without adequate support or while the components are under tension. *See id.* §1926.1405(a)–(d). The previous section, after discussing the prerequisites for supervision and procedures, also highlights the removal of pins as part of the

disassembly process. *See id.* §1926.1404(f). The language contained in §1926.1405 seems to support Respondent’s argument that crane disassembly does not begin until the first connective pin is removed.

Regulatory History and Prior Interpretations

Because the plain language of the term “disassembly” is ambiguous in the cited standard, the Court will typically defer to Complainant’s interpretation so long as it is reasonable. *See Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144, 151 (1991) (citing *Ehlert v. United States*, 402 U.S. 99, 105 (1971)). In other words, so long as the Court determines the interpretation “sensibly conforms to the purpose and wording of the regulation”, while also taking into account “whether the Secretary has consistently applied the interpretation embodied in the citation”, “the adequacy of notice to regulated parties”, and “the quality of the Secretary’s elaboration of pertinent policy considerations”, then Complainant’s interpretation will be upheld. *See Seward Ships Drydock, Inc., supra; CF&I, supra*). Complainant’s interpretation in this case, however, does not hold up to such scrutiny.

According to the Commission, if “a standard is susceptible to different interpretations, the Commission will consider statements made in the preamble to the standard as the most authoritative guide to the standard’s meaning.” *Safeway Store No. 914*, 16 BNA OSHC 1504, 1511 (No. 91-373, 1993) (citing *Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992)). The preamble to the final rule, as well as other interpretive documents issued by Complainant, provide additional clarification regarding the issue of when assembly/disassembly operations begin and serve to further undermine Complainant’s position that removal of the block and lowering of the boom constituted disassembly.

At the beginning of the preamble’s discussion of the assembly/disassembly standards found at §1926.1403–.1406, the Secretary notes:

Irrespective of whether the crane is initially erected to its full height, or is ‘jumped’ in stages, the process of increasing the height of the crane is an assembly/erection process. Sections 1926.1403 through 1926.1406 apply whenever the crane’s height is modified. To ensure that this intent is reflected in the standard, OSHA has added a sentence to the definition of “assembly/disassembly” in §1926.1401 to this effect.

75 Fed. Reg. at 47936. Thus, as discussed earlier, the assembly/disassembly standards apply whenever the structural height of the crane is modified. This is further clarified in the preamble’s discussion of §1926.1405, which addresses the removal of pendant, boom, and jib pins and the hazards associated therewith. *Id.* at 47944. Specifically, the preamble notes that the standard applies whether a crane is being disassembled or whether the length of the boom/jib is being modified. *Id.* The language focuses on the addition or removal of *structural* components, i.e., pins, and provides a strong indication that mere removal of the block and lowering of the boom is insufficient for application of the cited standards. Merely extending or retracting the boom, would not constitute such a structural change. Indeed, Complainant’s own *Compliance Directive* indicates that a mobile truck crane with a fully assembled boom, which only needs to be unfolded and pinned, does not even go through the assembly/disassembly process covered by the cited regulations. (Ex. R-34, p. 20 “Equipment Set-up...if the equipment operator merely unfolds and pins the boom of a fully assembled truck crane, it would be inappropriate to apply [assembly/disassembly] requirements.”).

Case Law

Both parties cite to a single case on crane disassembly, albeit with different interpretations. Though it is not a Commission decision, and was issued prior to the promulgation of these crane regulations, the Court finds it relevant and persuasive. In *Steel Constructors, Inc.*, an ALJ was presented with an issue similar to the one at bar: whether, at the time of a crane accident, the

employer was disassembling the crane. *Steel Constructors, Inc.*, 8 BNA OSHC 2146 (No. 78-3839, 1980) (ALJ Bobrick). In that case, the jib of a crane had been removed, and preparations were being made to dismantle the boom. *Id.* The boom was suspended 5-6 feet above the ground in a horizontal position. *Id.* Meanwhile, the motor was shut down and the controls were locked out to allow the crew to gather the necessary tools for dismantling the boom. Around that time, one employee unexpectedly began knocking out connection pins, which caused the boom to collapse.

The employer was cited under the general duty clause for failing to securely block or support the boom during dismantling operations. The *Steel Constructors* ALJ ultimately concluded that the employer was not engaged in crane disassembly at the relevant time. In vacating the citation, the ALJ was persuaded by the fact that the crane controls were locked out; that it was in an elevated, suspended position; that preparations were still being made for the eventual dismantling of the boom; and because it was the regular practice of Respondent to dismantle the boom while it was resting securely on the ground. *Id.*

Although certain facts are distinguishable, the Court agrees with Respondent's interpretation and application of *Steel Constructors*. The record establishes that Respondent, in the present case, was merely in the process of setting up and positioning its equipment to *begin* the process of disassembling the crane. Respondent, in the present case, had not gone nearly so far down the road towards disassembly as the *Steel Constructors* employer, which had already removed the jib from the boom. Respondent, in the present case, simply had not begun to alter the structure of the crane.

Conclusion

The Court finds Complainant failed to establish the first *prima facie* element required to provide each of the alleged violations: applicability of the cited standard. Complainant's

interpretation of the standard, at least as expressed in this case through the *Citation*, unreasonably attempts to expand the scope of 29 C.F.R. §1926.1407; is inconsistent with the preamble and language of the crane disassembly regulation; and is inconsistent with Complainant's own interpretive guidance. Since Complainant failed to establish that the cited regulation applied to the work being performed, the Court declines to address the other claims and defenses argued by the parties in their post-trial briefs.

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.

Date: September 14, 2018
Denver, Colorado

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