



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. :
 :
 NAPORANO IRON & METAL :
 COMPANY, :
 :
 Respondent. :

OSHRC DOCKET NO. 95-1133

APPEARANCES:

Nancee Adams-Taylor, Esquire
 New York, New York
 For the Complainant.

Ronald H. DeMaria, Esquire
 Newark, New Jersey
 For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a Port Newark, New Jersey scrap metal facility operated by Respondent Naporano Iron & Metal Company (“Naporano”) on February 13 and March 3, 1995; as a result, Naporano was issued one serious and one “other” citation.¹ Naporano contested only the serious citation, which alleges violations of 29 C.F.R. §§ 1918.74(a)(9) and 1918.74(a)(10). The hearing addressing this matter was held on April 10 and 11, 1996, and both parties submitted post-hearing briefs.

Background

¹The initial inspection took place after an accident involving one of Naporano’s employees, while the one on March 3 was due to OSHA’s decision to expand the inspection to the entire facility; however, the citations issued were unrelated to the accident.

Naporano has operated its scrap metal facility since 1980. Part of the operation consists of loading scrap metal onto vessels, and, occasionally, unloading steel rails from vessels, by means of two cranes which are mounted on separate barges; the barges are tied to the pier, while the vessel being loaded or unloaded is tied to the barge housing the crane performing the operation, and employees access the barges and the vessels via gangways going from the pier to the barges and the barges to the vessels, respectively. The scrap metal which is loaded is delivered to the pier by truck and dumped into a pan, after which the crane raises the pan and dumps its contents into the cargo hold of the vessel; the scrap metal consists of either shredded metal or heavy melting scrap (“HMS”), and although both may be placed in the same cargo hold they are stored and loaded separately. The steel rails are unloaded in bundles by means of employees in the cargo hold of the vessel putting lifting slings around the bundles and then radioing the crane operator to lift the load.²

When OSHA compliance officer (“CO”) William DuComb inspected the site he determined neither crane had a load indicating device (“LID”) as required by 29 C.F.R. 1918.74(a)(9), and that one of them was not guarded while operating as required by 29 C.F.R. 1918.74(a)(10). Naporano contends Part 1918 does not apply as it is a marine terminal operator governed by Part 1917 and has moved to dismiss the citation. It also contends that even if Part 1918 does apply, 1918.74(a) is not applicable to its cranes. Finally, it contends it used an alternative as effective as an LID and that a “device” is not required, and that employees were not exposed to the crane when it was operating.

Whether Part 1918 Applies to Naporano’s Cranes

Part 1918, the OSHA regulations applying to longshoring, has been in effect since 1974. “Longshoring operations” mean the “loading, unloading, moving, or handling of cargo, ship’s stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.” 29 C.F.R. 1918.3(I). “Vessel” includes “every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water, including special purpose floating structures not primarily designed for or used as a means of transportation on water.” 29 C.F.R. 1918.3(e). 29 C.F.R. 1918.74(a) applies to the use of cranes, “whether hoisted aboard a vessel for use thereon or used to service a vessel from the dock, shore, or another vessel, and in the use of any

²Naporano has unloaded steel rails only four or five times, all since mid-1994, pursuant to a special order.

other crane or derrick not a part of a vessel's permanent equipment, but used in longshoring operations." Part 1917, the regulations applicable to marine terminals, has been in effect since 1983. Part 1917, pursuant to 29 C.F.R. 1917.1(a), applies to "employment within a marine terminal as defined in § 1917.2(u), including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal or into or out of any land carrier, holding or consolidation area, or any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment." 29 C.F.R. 1917.2(u) defines "marine terminal" as "wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures associated with the primary movements of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidation and loading or delivery of waterborne shipments and passengers, including areas devoted to the maintenance of the terminal or equipment."

CO DuComb, the regional maritime specialist in his region at the time of the inspection, testified that while Part 1917 applied to Naporano's terminal operations it did not apply to the cranes because they were sitting on barges berthed at the terminal and 1917 ends at the edge of the pier, or the foot of the gangway. (Tr. 8-14; 64-67; 108-10). Paul Rossi, a specialist in OSHA's Office of Maritime Safety Standards, agreed. He testified that 1918 is a water-based standard, while 1917 is a land-based standard, and that Naporano's operations were covered by both; the cranes on the barges were covered by 1918 because they were on water, and Naporano's land operations, such as those involving its trucks and scrap piles, were covered by 1917. (Tr. 112-20; 176-88).

In addition, the Secretary notes the preamble to the final rule covering Part 1917 states that:

The coverage of Part 1917 includes all shoreside activities within a marine terminal -- except those which are specifically exempted in the standard, as outlined in greater detail below. In clarifying the boundary between Part 1917 and Part 1918, OSHA's shipboard longshore regulations, the Agency has set the foot of the gangway to mark the limit to which Part 1918 may be applied landward. Similarly, Part 1917's jurisdiction extends out to the ship no further than this point of the gangway.

48 Fed. Reg. 30,891 (1983).

Based on the foregoing, I conclude Part 1918 applied to the cranes. In so concluding, I have noted Naporano's assertion that there is no clear demarcation between the two parts. I have also noted the administrative law judge decision cited by Naporano, in which the judge found the

demarcation between the two parts ambiguous and vacated the citation for that reason.³ However, the facts there were very different from those presented here, and, in any case, administrative law judge decisions have no precedential value. Regardless, the excerpt from the preamble to Part 1917 along with the facts of this case and the language of Parts 1917 and 1918 above convince me that Naporano's barges were vessels within the meaning of 1918.3(e), that the edge of the pier, or the foot of the gangway going from each barge to the pier, was the demarcation point between Parts 1917 and 1918, and that Part 1918 applies in this case.⁴ I am also persuaded Naporano had fair notice of the applicability of Part 1918 and of the cited standards, particularly since Part 1917 has essentially the same standards. *See* 1917.45(I)(2) and 1917.46(a)(1). Naporano's motion to dismiss is denied.

Whether 1918.74(a) Applies to Naporano's Cranes

Naporano's contention that 1918.74(a) does not apply to its cranes is based on the language of that paragraph, set out above, which indicates that cranes that are permanent parts of vessels are not covered by the standard. Naporano asserts the cranes are permanent parts of the barges as they are never removed and the barges were custom built to hold them. (Tr. 210). However, the record shows the cranes did not come with the barges but were hoisted onto them and that the cranes sit on 12-inch-high mats on which they can move fore and aft. (Tr. 94-95; 211; 241-42). I conclude the cranes are not permanent parts of the barges and that 1918.74(a) applies to them.

Citation 1, Item 1

This item alleges a violation of 1918.74(a)(9), which provides in pertinent part as follows:

Unless exempted by the provisions of paragraph (a)(9)(viii) of this section, every crane used to load or discharge cargo into or out of a vessel shall be fitted with a load indicating device or alternative device in proper working condition which shall meet the following criteria: (i) The type or model of any load indicating device which is used may be such as to provide (a) a direct indication in the cab of actual weight hoisted or a means of determining this by reference to crane ratings posted and visible to the operator, except that the use of a dynamometer or simple scale alone will not meet this requirement; or (b) an automatic weight moment device or computer

³This decision, *Boston Towing and Transp. Co.* (No. 93-2035, 1995), is digested at 17 BNA OSHC 1327.

⁴The excerpt from the preamble is Appendix B to the Secretary's brief. OSHA Instruction STP 2-1.112, which is Exhibit A to Naporano's brief, contains similar language.

providing indications in the cab according to the radius and load at the moment; or alternatively (c) a device may be used which shall prevent an overloaded condition.

It is undisputed Naporano did not have LID's on its cranes and that it did not meet any of the standards's exemptions. However, as noted above, Naporano contends that an actual device is not required and that it used an alternative system as effective as an LID. As to its first contention, Naporano notes the language of 1917.46(a)(1), which states, in pertinent part, as follows:

Except as provided in paragraph (a)(1)(viii) of this section, every crane after October 3, 1984 shall be fitted with a load indicating device or alternative device in proper working condition which shall meet the following criteria: (i) The type or model of any load indicating or alternate device which is used shall provide: (A) A direct indication in the cab of actual weight hoisted or a means of determining this by referencing a weight indication to crane ratings posted and visible to the operator, except that the use of a dynamometer or simple scale alone will not meet this requirement; or (B) Indications in the cab according to the radius and load at the moment; or (C) A direct means to prevent an overload from occurring.

Naporano asserts the purpose of both standards is to prevent overloads and that a fair reading of them shows they require either an LID or some alternate means, not necessarily a device, of preventing overloads. While I agree the purpose of the standards is identical, I disagree a specific device is not required; in my view, the language of the standards makes it clear a device is required. This conclusion is supported by the paragraphs following the standards, which further detail the requirements of LID's or alternate devices. *See* 1917.46(a)(1) (ii)-(vii) and 1918.74(a)(9)(ii)-(vii). It is also supported by the testimony of CO DuComb, whose extensive experience in the maritime industry includes familiarity with crane safety requirements, and Paul Rossi, who graduated from the U.S. Merchant Marine Academy and had six years of experience in the maritime industry before joining OSHA's Office of Maritime Safety Standards, where he has worked for over ten years; they testified that the standards require an actual device that tells the operator the weight of the load and/or prevents an overload by cutting off the crane's operation. (Tr. 8-14; 37-40; 59-64; 102-03; 112-28; 159-61; 172-76). Naporano's contention is accordingly rejected.⁵

⁵In so doing, I have noted Naporano's assertion that the International Cargo Gear Bureau ("ICGB"), the agency that certified its cranes each year, advised it that LID's were not required. As I read them, the certificates indicate only that the cranes were not fitted for LID's and that their accuracy was therefore not applicable. *See* C-7-10, OSHA Forms 71. Moreover, CO DuComb and
(continued...)

As to Naporano's second contention, the record shows that during crane operation there was radio communication between the operator and the lead man and that in each crane's cab there was a load chart, boom angle indicator and an alarm that sounded if the boom went below a specified angle. The testimony of CO DuComb and Paul Rossi was that all these measures but the alarm were required by other standards and that they were in any case inadequate to prevent an overload as they did not tell the operator the weight being lifted; they also testified that while they knew of no overloads occurring during Naporano's operations they believed it was possible the cranes' capacity could be exceeded and that serious injury could result. (Tr. 32-43; 58-62; 67-69; 73-82; 97-100; 104-05; 108; 121-76; 180-85). Naporano asserts the above measures together with the way in which loading and unloading was done prevented the possibility of overloads as effectively as an LID.

Michael Henderson, the facility's terminal manager for over ten years, testified the rails were unloaded with a maximum of four bundles per lift, which was 28 metric tons, and that the average lift for rails was 17 metric tons.⁶ He said the lead man selected the bundles to be lifted out of the hold, and, once the lifting slings were in place, radioed the operator to lift the load; he also said the cranes were operated at the maximum boom angle of 65 degrees for unloading, that unloading was not possible at a lesser angle due to the 70-foot width of the vessels and the location of the hold in approximately the middle of the vessel, and that the cranes' capacity at 65 degrees was 75,000 pounds. Henderson further testified that shredded metal and HMS, while kept in separate piles and loaded separately, were both handled the same way; an excavator picked up a maximum of five grapples of material and put it in a dump truck for delivery to the pier, the truck dumped it into a pan, and the crane lifted the pan and dumped the metal into the hold of the vessel. He noted the grapples used held 148 cubic feet each, that shredded metal and HMS weighed 70 and 45 pounds per cubic foot, respectively, and that the maximum weights of shredded metal and HMS loads were

⁵(...continued)

Paul Rossi testified that ICGB only tests the devices which are on the cranes it certifies and does not advise employers whether their cranes meet all applicable OSHA requirements. (Tr. 84; 250).

⁶These lifts would equal 62,720 and 38,080 pounds, respectively.

51,975 and 33,400 pounds, respectively.⁷ He also noted the pans used for shredded metal weighed 21,000 pounds while those used for HMS weighed 28,000 pounds, that the crane booms operated at 65 degrees for loading shredded metal and from 63 to 65 degrees for HMS, and that the cranes' capacity at 63 degrees was 69,500 pounds. Henderson said the grapples, trucks and pans prevented the possibility of overloads as the maximum capacity of the trucks was 800 cubic feet and 70,000 pounds and the pans could only hold five grapples of material, and that there had been no overloads during any of Naporano's loading or unloading operations. (Tr. 197-208; 213-23; 227-41).

In view of the record, Naporano's system was not as effective as an LID in preventing the possibility of an overload. Henderson's own testimony was that the weight of a maximum load of shredded metal plus the weight of the pan would total almost 73,000 pounds, and he conceded a cubic foot of shredded metal could weigh more than 70 pounds. Further, while Henderson testified that shredded metal was loaded with a boom angle of 65 degrees, he said HMS was loaded with the boom angle from 63 to 65 degrees and that the boom angle alarm was set to go off at 63 degrees. Finally, Henderson said that the boom angle had to be 65 degrees to unload from a 70-foot-wide vessel because otherwise the boom would not be over the hold, and that while the vessels into which shredded metal and HMS were loaded averaged 100 feet in width they had been up to 120 feet wide. (Tr. 204-08; 216-17; 220; 228-41). This indicates the boom had to have been less than 65 degrees when loading shredded metal and HMS in order to reach the holds of the wider vessels and that due to the weight of the shredded metal loads an overload could have resulted.⁸ An overload could also have resulted during the unloading of the rails, since, as CO DuComb testified, the load could have gotten hung up on the coaming of the vessel's cargo hold as it was being raised; he also testified that

⁷By my calculation, 148 times 5 times the per pound weights of shredded metal and HMS actually equal 51,800 and 33,300, respectively.

⁸Henderson indicated the boom did not have to be over the hold because the pans tipped to unload their contents and could therefore be some distance from the hold. However, it seems clear the scrap metal could not be loaded into the holds of the wider vessels with the boom angle at 65 degrees, and Henderson himself said HMS was loaded with the boom angle from 63 to 65 degrees. Also, while Henderson indicated loads were regulated by the amount of material making up each load, there was no evidence of a procedure to ensure shredded metal loads were within the cranes' capacity when the boom angle was less than 65 degrees. (Tr. 238-41).

although the lead man in the hold could radio the operator in this situation the lead man might not be paying attention, while an LID would give the operator a direct readout of the load weight. (Tr. 62; 67-69; 99-100). This citation item is affirmed as a serious violation.

The Secretary proposed a penalty of \$2,750.00 for this item. CO DuComb initially recommended a penalty of \$5,000.00 because of the severity of the hazard, the number of persons exposed to it, and the frequency of the exposure; however, reductions of 20 percent, 15 percent and 10 percent were given in consideration of the company's size, good faith and history, resulting in a reduced penalty of \$2,750.00. (Tr. 47-48; 51-53; C-13). Based on the record, the proposed penalty is appropriate and is accordingly assessed.

Citation 1, Item 2

This item alleges a violation of 1918.74(a)(10), which provides as follows:

Accessible areas within the swing radius of the outermost part of the body of a revolving crane shall be temporarily guarded by ropes or other suitable means during cargo operations, so as to prevent an employee being in a position to be caught between the body of the crane and fixed parts of the vessel or of the crane itself.

CO DuComb testified that during his inspection he saw an individual on one of the barges while the crane was swinging around; the person's location was such that he was exposed to the hazard of being struck by the crane or being caught between the counterweight and the crane body. The CO pointed out the condition to Michael Henderson, who indicated the person was a Naporano employee and then agreed to put up barricades to guard the swing radius of the crane. (Tr. 48-51; 88-91). Michael Henderson testified that during normal operations no one was on the barge but the crane operator and that the only person who got within the swing radius of the crane while it was operating was the mechanic; he said the mechanic had to be there to grease a gear, that this job had to be done from time to time and could only be done while the crane was turning slowly, and that the mechanic was aware the crane was turning and was also in radio contact with the operator. Henderson also testified employees used the barge to go to and from the pier and the vessel and that the worker the CO saw was picking up scrap metal spillage, which occurred periodically, but that the crane did not operate at these times. (Tr. 211-13; 224-27; 242-45).

Naporano's contention, as noted above, is that employees were not exposed to the cited condition. However, the CO was emphatic that the crane was operating and that the employee he

saw was exposed to the hazard of being struck by the crane or caught between the counterweight and the crane body. (Tr. 49; 89-90). Further, notwithstanding his testimony set out above, Henderson essentially conceded that the employees who picked up spillage were occasionally exposed to the cited hazard and that the foreman, who he said went constantly to and from the pier and the vessel during loading operations, was also exposed to the condition. (Tr. 224-47; 243-45). This item is affirmed as a serious violation, and the proposed penalty of \$1,925.00 is assessed.⁹

Conclusions of Law

1. Respondent, Naporano Iron & Metal Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1918.74(a)(9) and (a)(10).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 2 of serious citation 1 are affirmed, and penalties of \$2,750.00 and \$1,925.00, respectively, are assessed.

Irving Sommer
Chief Judge

Date:

⁹The CO's initially-recommended penalty of \$3,500.00 was reduced to \$1,925.00 upon his consideration of the same factors noted *supra*. (Tr. 50-51; C-13).