Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TNT CRANE & RIGGING, INC., Respondent.	OSHRC Docket No. 17-1872

Appearances:

Josh Bernstein, Esq., Department of Labor, Office of Solicitor, Dallas, Texas
For Complainant

Travis W. Vance, Esq. & Pamela D. Williams, Esq., Fisher & Phillips LLP, Houston, Texas
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On the second night of a two-day project to install new air conditioning units on top of the Wal-Mart store, located at 1821 S. Padre Island Dr., in Corpus Christi, Texas, Respondent's mobile crane tipped over, causing severe injuries to the operator. Complainant dispatched Compliance Safety and Health Officers (CSHOs) Stephanie Dovalina and Carlos Casas to inspect the worksite the very next morning. (Tr. 134–35). After the inspection, Complainant issued a Citation and Notification of Penalty ("Citation"), which alleges a serious violation of 29 C.F.R. § 1926.1402(b) of the Occupational Safety and Health Act, 29 U.S.C. § 659(c) (Act) and proposed a penalty of

$12,675.00 for Citation 1, Item 1(a).[1] (Ex. C-1 at 6). Respondent timely contested the Citation, bringing this matter before the Occupational Safety and Health Review Commission ("Commission").

A trial was held on December 3–4, 2018, in Houston, Texas. The following individuals testified: (1) Santos Gil, Daytime Superintendent for Better Built Enterprises, the project's general contractor; (2) Marty Campbell, Nighttime Superintendent for Better Built Enterprises; (3) Raymond Bucher, former operator/truck driver/rigger for Respondent; (4) CSHO Stephanie Dovalina; (5) [redacted], Respondent's crane operator; (6) Isidro Rodriguez, a rigger for Respondent; (7) Troy Pierce, Respondent's Vice-President of Health, Safety and Environment; and (8) Matthew Gardiner, Respondent's proffered expert.[2] Both parties timely submitted post-trial briefs for the Court's consideration.

After considering the record, the parties' respective arguments, and the law, the Court finds Respondent failed to provide adequate support for the mobile crane pursuant to the manufacturer's specifications. Accordingly, the Citation and Notification of Penalty, as amended, shall be affirmed.

II. Stipulations & Jurisdiction

The parties stipulated to jurisdictional and legal matters, which were submitted by the parties as Joint Exhibit 1.[3] Based on the parties' stipulations, the Court finds the Commission has jurisdiction over the matter pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the

1. Citation 1, 1a is the only remaining citation item from the original Citation and Notification of Penalty. The remaining citation items were withdrawn by Complainant via joint motion, which was approved by the Court on August 31, 2018. (Exs. J-2, J-3).
2. After *voir dire*, the Court determined Mr. Gardiner was only brought in to proffer his interpretation of the cited standard. The Court determined such testimony would not aid in its determination of the issues, and Respondent decided not to pursue Mr. Gardiner's testimony on the technical matters of ground pressure and standard operating procedures in the industry. (Tr. 471–485). Accordingly, Respondent withdrew Mr. Gardiner as an expert. (Tr. 485).
3. Subsequent references to the parties' Joint Stipulations will indicate the source and specific stipulation, e.g., "Stip. No. ___".

Court finds 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). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

III. Factual Background

Better Built Enterprises (BBE) was hired by Wal-Mart to install new air conditioning units on the roof of its store in Corpus Christi, Texas. (Tr. 52). BBE hired Respondent to lift the new air conditioning units to the roof and remove the old ones. (Tr. 52). According to Raymond Bucher, the lift portion of this project was scheduled to take place after midnight over the course of two nights. (Tr. 112; Ex. C-19). The scheduling was designed to minimize customer impact and because, on the second night, the crane had to be placed at the entrance to the store. (Tr. 112, 260; Ex. C-19). The crane tipped over on the second night of lifting, just outside the main entrance. (Tr. 59–60; Ex. C-7).

A. Pre-planning

Prior to conducting the lifts, Santos Gil from BBE met with a representative from the HVAC contractor[4] and a representative from Respondent to walk around the worksite, identify the air conditioning units to be replaced, and assess what kind of crane would fit the needs of the job and where it should be located for the lifts. (Tr. 39–40). After the meeting, Respondent created a preliminary lift plan, which showed where the crane should be placed and the swing radius of the boom during the individual lifts. (Tr. 43; Ex. C-19). According to Gil, he reviewed the plan Respondent sent to him and updated it with elements designed to protect the general public. (Tr. 43). Specifically, he lined out where orange fencing would be placed to prevent the public, including customers and Wal-Mart employees, from entering areas where they would be exposed

4. The HVAC contractor was A/C Tech; no one from that company testified at trial.

to the work occurring on the roof overhead. According to Gil, neither he nor anyone from TNT discussed or asked about the ground conditions at the two locations where the crane would be operating. (Tr. 40).

B. First Night

On the first night, [redacted] and his crew met at Respondent's Corpus Christi yard and traveled to Wal-Mart with haul trucks and a 265-ton Liehberr mobile crane. (Tr. 69). According to Ray Bucher, [redacted] was spotting the crane on the backside of the store, near the automotive department, when the rest of the crew pulled up in the haul trucks with all the necessary equipment. (Tr. 70). Bucher and the rest of the crew followed suit by spotting the haul trucks in the appropriate locations. (Tr. 70). Once the trucks and the crane were in position, the crew started to set up the crane for the lift. (Tr. 70).

In a nutshell, the crane is supported and balanced with a combination of counterweights, outriggers, and steel mats, each of which is roughly 6-foot by 6-foot and weighs approximately 4000 pounds. (Tr. 76, 184). The outriggers, which have "feet" or "floats" at the bottom, extend outward from the mobile crane and are set upon the mats, which distribute the load of the crane over a larger surface area to prevent the foot of the outrigger from sinking into the surface the crane is parked on. (Tr. 86). The counterweights, as the name implies, stabilize the crane by counteracting the weight and force imposed by the boom and the load being lifted.

According to Bucher, who was qualified to operate the crane at issue, the crew started by setting the crane on half outriggers without counterweights and without the crane's boom being scoped out.[5] (Tr. 73–74). Then, Bucher testified, [redacted] used the crane to offload the mats and set them beside the outriggers, which were then fully spread out and set down on the mats. (Tr.

5. Bucher referred to this set-up as running the crane "bare". (Tr. 88).

73). This was confirmed by one of the riggers, Isidro Rodriguez, who testified that [redacted] unloaded the mats with the crane, and all four were placed under the outrigger feet prior to lifting the air conditioning units. (Tr. 311).

Typically, prior to performing a lift, the crew gathers to discuss the lift and the associated safety issues to develop a Job Safety Analysis (JSA). (Tr. 305). Both Bucher and Rodriguez testified that they did not have their customary Job Safety Analysis (JSA) meeting prior to either of the lifts. (Tr. 70–71, 303). Instead, the riggers testified they discussed safety issues on their own prior to starting. (Tr. 303–304). [redacted] testified that everyone participated in the JSA discussion, even though he was the only one that signed it. (Tr. 202, 303–304; Ex. C-28)

Santos Gil, the daytime superintendent for BBE, testified that he did not observe the crew setting up the crane; instead, he just verified [redacted]'s operating license and went home. (Tr. 46–47). Marty Campbell, the nighttime superintendent, testified the crane crew was parked near the automotive center and was beginning the set-up process when he arrived. (Tr. 57). Everyone from BBE and Respondent remarked that the area where the crane was parked was a combination of asphalt and concrete; no one observed any adverse conditions, nor were they informed of any hazards hidden below the surface. (Tr. 52–53, 116, 206). During their discussions, nobody from TNT or BBE brought up the issue of ground conditions at either of the proposed lift locations. (Tr. 52).

At the end of the first night, the crew prepared for the second night by equipping the crane with a jib, which extends the reach of the crane. (Tr. 200, 312). This was necessary because the location at the front of the store was farther away from the location where the air conditioning units were to be installed. (Tr. 312–313).

C. Second Night

On the second night, the crew moved the crane and trucks to the front side of the store. (Tr. 90). Once it was parked, the crane was equipped with the jib, fully loaded with 119,000 pounds of counterweights, and sitting on half outriggers. (Tr. 88). Although the crew did not conduct a job safety analysis, they all understood that a forklift operator hired by BBE would be setting down the mats for the outriggers. (Tr. 90–91, 113, 201, 319). As the crew was setting up, the forklift operator, who was accompanied by one of Respondent's riggers, set down two of the mats near the outriggers. (Tr. 315). According to Bucher, the forklift operator and the rigger went to the back of the store to retrieve two additional mats, after which they planned on setting them underneath the outrigger feet. (Tr. 90–92). According to Rodriguez and Bucher, the forklift operator only had capacity for two mats at one time and had to make two trips in order to safely deliver the mats. (Tr. 92, 315).

[redacted], who either did not hear the forklift operator or did not understand, became impatient and decided to set the mats using the crane.[6] (Tr. 318–19). He swung the cab of the crane, which was fully loaded with 119,000 pounds of counterweights and equipped with the jib extension, to pick up the mats. (Tr. 110). As the rear of the crane traveled over the top of the rear outriggers, which were not equipped with mats, the foot of one of the rear outriggers pierced the concrete and caused the crane to tip backwards, where it came to rest on the counterweights on top of the asphalt and concrete. (Tr. 95; Exs. C-6, C-7). As it started to tip, [redacted] exited the cab in an attempt to get out before the crane rolled over and was struck by the pill ball at the end of the crane's cable and was knocked to the ground. (Tr. 393–94).

6. [redacted] testified the forklift driver told him he could not set the mats where they needed to be, so he decided to do it for himself. (Tr. 201). This is inconsistent with the overwhelming weight of the testimony and the fact that one of the rigging crew members was assisting the forklift operator with the mat retrieval. Accordingly, the Court disregards this testimony.

Both Rodriguez and Bucher expressed surprise that [redacted] decided to set the mats with the crane configured as it was; in fact, both of them expected he would set down the counterweights before swinging the cab over half-extended outriggers without adequate ground support. (Tr. 111, 320–21). Neither of them understood why [redacted] was in such a hurry, because it was before midnight, which was the designated start time, and the process for removing the weights and pinning back the jib would not have put them behind schedule, nor, for that matter, would waiting for the forklift operator to return. (Tr. 111–112, 319, 408). Bucher, who had experience operating this specific crane, said that [redacted]'s maneuver was prohibited by both the crane manual and TNT policy.[7] (Tr. 104–105).

D. Recovery Efforts and Subsequent Investigations

The recovery operation to upright the tipped crane began shortly after midnight on the second night. (Tr. 46). Respondent brought in two cranes that were placed along either side of the tipped crane. (Tr. 48; Ex. C-7 at 11). The recovery cranes were both located on the asphalt portion of the parking lot and their outriggers were placed on steel mats; neither of them experienced any issues with the ground conditions. (Tr. 116).

CSHOs Dovalina and Casas arrived at the worksite the next morning. CSHO Dovalina testified that they did not want to interfere with the recovery efforts, so they briefly collected contact information from Troy Pierce, took some photographs of the accident scene, and made contact with BBE and the HVAC subcontractor, A/C Tech. (Tr. 131; Ex. C-6). Later on, CSHO Dovalina contacted Pierce to request documents and schedule interviews with the employees that were present for the tip-over; however, due to his injuries, [redacted] was not available to be

7. [redacted] testified he has previously set mats with the crane in this configuration and was not aware it was against TNT policy or the crane manual. (Tr. 185–188).

interviewed. (Tr. 131, 253). Based on the information she gathered and research performed on cranes, CSHO Dovalina recommended and Complainant issued the following Citation item.

IV. Discussion

A. Law Applicable to Alleged Violation of Section 5(a)(2)

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

1. Citation 1, Item 1a

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

> 29 CFR 1926.1402(b): The equipment was assembled or used without ensuring that ground conditions were firm, drained, and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment were met:
>
> > On or about March 23, 2017, at this location, the employer did not ensure that equipment was assembled and/or operated on ground that could support the mobile crane structure.

See Citation and Notification of Penalty at 6.

The cited standard provides:

> The equipment must not be assembled or used unless ground conditions are firm, drained, and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met.

29 C.F.R. § 1926.1402(b).

a. The Standard Applies[8]

A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'") (internal citation omitted); *E. Smalis Painting Co*., 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009) (same); *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1202–1203 (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect*), aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished).

According to 29 C.F.R. § 1926.1400, "This standard applies to power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load. Such equipment includes, but is not limited to: . . . mobile cranes . . . ." A mobile crane, according to the standard's definition section, is "a lifting device incorporating a cable suspended latticed boom or hydraulic telescopic boom designed to be moved between operating locations by transport over the road." 29 C.F.R. § 1926.1401. Thus, at a minimum, Subpart CC, which contains 29 C.F.R. § 1926.1402(b), is applicable to the work performed by Respondent.

8. This question was also addressed by the Court in its Order on Respondent's Motion for Summary Judgment. As illustrated herein, neither the analysis nor the Court's conclusion have changed.

Although Subpart CC applies, Respondent contends the specific subparagraph cited by Complainant does not apply to it, as the crane operator. Rather, Respondent argues the requirements of § 1926.1402(b) are solely the province of the controlling entity—in this case BBE. Respondent is mistaken. When the regulations are read as a whole, the plain language of the cited standard, the surrounding standards, as well as the preamble to the final rule, all compel the conclusion Respondent, as operator, is obligated to comply with 29 C.F.R. § 1926.1402(b).

The cited standard begins with the following clause: "The equipment *must not be assembled or used* unless . . . ." *Id.* (emphasis added). In other words, the prohibition is directed at the entity responsible for using or assembling the crane, which, in most cases, is the operator. In this case, Respondent was responsible for both the assembly and operation of the crane. (Tr. 48–49, 180–81). Instead of focusing on the initial clause prohibiting use or assembly of the crane, Respondent overemphasizes the importance of the conditional clause, which indicates when the crane can be assembled or used: "unless ground conditions are firm, drained, and graded to a sufficient extent . . . ." 29 C.F.R. § 1926.1402(b). The reason for this emphasis is evident in subparagraph (c)(1), which states, "The controlling entity must [e]nsure that ground preparations necessary to meet *the requirements* of paragraph (b) of this section are provided." *Id.* § 1926.1402(c)(1) (emphasis added). Rather than supporting Respondent's argument, however, the language of § 1402(c)(1) highlights a couple of flaws in Respondent's reasoning.

First, § 1402(c)(1) indicates that there are requirements, plural, in paragraph (b). Among those requirements are: (1) no assembly or use *unless* the ground is firm, drained, and graded; and (2) that the manufacturer's specifications for adequate support and degree of level are met. *Id.* Only Respondent is responsible for the use and assembly of the crane and, consequently, is likely the only entity capable and qualified to determine whether adequate support and degree of level

are consistent with the crane manufacturer's specifications. Cranes and Derricks in Construction, 75 Fed. Reg. 47906, at 47935 (Aug. 9, 2010).

Second, when paragraphs (b) and (c) are read together, the respective obligations of operator and controlling entity are rendered more definite. In the case of the controlling entity, it is obliged to ensure that ground preparations are provided to ensure the ground is sufficiently firm, drained, and graded. In the case of the operator, it is prohibited from operating or assembling the crane until the ground conditions are sufficient to meet the manufacturer's specifications. [redacted] was setting up and operating the crane as it began to tip. Therefore, the assessment of whether conditions were adequate should have been determined prior to those engaging in those activities. Because [redacted] was operating the crane, he needed to ensure the manufacturer's specifications for adequate support and degree of level were met. *See* 75 Fed. Reg. at 47932 ("[T]he use of equipment in accordance with manufacturer specifications regarding degree of level would meet § 1926.1402(b)'s requirement because the provision permits the use of the equipment in accordance with those specifications.").

In simpler terms, and as illustrated by other sections of the standard, section 1402 establishes a framework of cooperation between operator, controlling entity, and property owner, and allocates responsibility based on their respective spheres of expertise and anticipated knowledge.[9] This understanding is reinforced by paragraph (e), which states, "If the A/D director or the operator determines that ground conditions do not meet the requirements in paragraph (b) of this section, that person's employer must have a discussion with the controlling entity regarding the ground preparations that are needed . . . ." 29 C.F.R. § 1926.1402(e). Not only does paragraph (e) envision cooperation between the controlling entity and the operator (or A/D director, if

9. In some instances, the controlling entity and the property owner may be one and the same. That is not the case here.

necessary), it supports the plain reading of § 1402(b)(1) recounted above. The operator, who would be most familiar with whether ground conditions are sufficient, is required to make the determination whether the ground conditions meet the requirements of (b) before operating or assembling. If, in the operator's estimation, those conditions are insufficient, he is not only prohibited from using or assembling the crane, but he (or his employer) is obligated to have a discussion with the controlling entity about what preparations are necessary to ensure the ground conditions are made sufficient.

The preamble to the standard only reinforces the plain language of the standard, especially the Court's reading of paragraph (e). It states:

> Under [section 1926.1402], employers must ensure that the surface on which a crane is operating is sufficiently level and firm to support the crane in accordance with the manufacturer's specifications. In addition, § 1926.1402 *imposes specific duties on both the entity responsible for the project (the controlling entity) and the entity operating the crane to ensure that the crane is adequately supported*. It places responsibility for ensuring that the ground conditions are adequate on the controlling entity, while also making the employer operating the crane responsible [sic] notifying the controlling entity of any deficiency in the ground conditions, and having the deficiency corrected before operating the crane.

75 Fed. Reg. at 47912 (emphasis added). The Court finds the foregoing passage could not be clearer in its allocation of responsibility. The controlling entity must ensure adequate ground conditions under § 1402(c), and the operator must ensure that such conditions are, in fact adequate, before it can operate or assemble the crane under § 1402(b).[10] This explanation is mirrored by the plain language of the standard. Accordingly, the Court finds the standard applies.

10. As noted in footnote 3 of the Court Order on Respondent's Motion for Summary Judgment: The way a controlling entity "ensures" proper ground conditions is a matter of context. The preamble identifies two key problems with ground condition assessment: "(1) Equipment is commonly brought on site by a subcontractor, who typically has neither control over ground conditions nor knowledge of hidden hazards, and (2) the entity that usually does have such authority—the controlling entity—may not have the expertise to know what changes are needed to make the ground conditions suitable . . . ." 75 Fed. Reg. at 47931. To address the concern inherent in (2), "the Committee developed § 1926.1402(e)", which requires the input of the crane operator or A/D director. *Id.*; *see also* 29 C.F.R. § 1926.1402(e). It is also interesting that the term "controlling entity" is not used at all in the preamble's discussion of paragraph (b). *See id.* at 47932.

b. Respondent Violated the Terms of the Standard

The basic facts about the crane tip-over are not in dispute: (1) the crane was fully loaded with 119,000 pounds of counterweights and jib extension; (2) the outriggers were only half extended and were not supported with steel mats; (3) the foot of the rear outrigger punched through the concrete sidewalk in front of the store; and (4) the crane tipped over. Instead, the dispute over whether the standard was violated has to do with what, exactly, constitutes a violation of the standard. Complainant contends the failure to use "supporting materials", as required by Liehberr, violated the ground conditions standard because the manufacturer's requirements for adequate support were not met. Respondent, on the other hand, argues the standard can only be violated "if the ground conditions are insufficient to operate the crane with the use of the crane's supporting materials, as recommended by the crane's manufacturer." *Resp't Br.* at 20.

Ultimately, Respondent contends Complainant is improperly using a ground condition standard to cite Respondent for its failure to use required supporting materials. In support of this argument, Respondent points out that, in addition to the standard at issue, Complainant initially cited Respondent pursuant to § 1404(h)(2), which provides that the "size, amount, condition and method of stacking the blocking must be sufficient to sustain the loads and maintain stability." 29 C.F.R. § 1926.1404(h)(2). Complainant ultimately dismissed that citation item. Respondent argues it is § 1404(h)(2), not the cited ground condition standard, that requires the use of supporting materials sufficient to operate a crane in a safe manner. The Court disagrees for the following reasons.

Regarding the applicability of § 1926.1404(h)(2), the Court will not opine on why Complainant opted to withdraw the citation item; however, it will discuss why that provision is not applicable to the condition at issue in this case. Since 2014, Complainant has consistently

distinguished the assembly/disassembly (A/D) process from the process of equipment set-up. *See* Compliance Directive for the Cranes and Derricks in Construction Standard, CPL 02-01-057 at p. 20 (October 17, 2014). In its discussion of A/D, the directive makes clear that sections 1926.1403 to 1926.1406 "**do not** apply to equipment set up." *Id.* (emphasis in original). Rather:

> Set-up consists of procedures conducted to deploy an assembled crane. For example, if the equipment operator merely unfolds and pins the boom of a fully assembled truck crane it would be inappropriate to apply A/D requirements. *Another example of typical set-up operations is the deploying of outriggers and leveling the equipment*. Note that Subpart CC does have some requirements for set-up, such as § 1926.1402(c)(2), requiring that the user be informed of hazards beneath the set-up area, and § 1926.1431(c), requiring level ground conditions and use of any outriggers or stabilizers.[11]

Id. (emphasis added). According to Pierce, [redacted] was in the set-up phase of operation when the accident occurred. (Tr. 422–23). Specifically, he stated, "The phase of work he was in was setting up. Setting his mats so that he could go to work lifting the air conditioners." (Tr. 423). When asked by the Court whether that would be considered "assembly", Pierce stated, "No, sir, it would not be. . . . Setting up is separate from assembly." (Tr. 422). Because Respondent, by its own admission, was in the process of set-up, the Court rejects Respondent's argument as to the applicability of § 1404(h)(2).

The Court finds § 1402(b) requires more than assuring the ground is firm, drained, and graded. As noted above, under § 1402(c)(1), the controlling entity is required to ensure preparations necessary to meet "the requirements" of paragraph (b) are provided. *See* 29 C.F.R. § 1926.1402(c)(1). That standard, as described in the preamble, appears to combine both the requirements of the crane and the conditions of the ground under the umbrella term "requirements":

11. It should be noted that § 1926.1431(c) is not applicable to this case, because it applies to personnel hoists. Further, the use of the phrase "such as" indicates a non-exhaustive list of representative set-up standards, including the one at issue.

> [P]aragraph (c)(1) provides that the controlling contractor is responsible for "ensuring" that these ground conditions are provided. In other words, if the controlling contractor is not familiar with the crane's requirements or with the ground conditions at the particular site, then it must make sure that someone who is familiar with those requirements and conditions provides what is required by § 1926.1402(b).

75 Fed. Reg. at 47934. This makes sense because, in reality, one would not be able to determine whether the requirements of the standard were satisfied without resort to an evaluation of the equipment specifications for adequate support and degree of level, because each crane has different requirements. The manufacturer's specifications, therefore, become the baseline measurement of whether, under the conditions, the ground is sufficiently firm, drained, and graded.

The hang-up between Complainant and Respondent is the clause: "in conjunction (if necessary) with the use of supporting materials . . . ." 29 C.F.R. § 1926.1402(b). Complainant argues that, because the concrete crumbled and the crane tipped over, the ground was not sufficiently firm under the conditions in which [redacted] set-up and operated the crane, i.e., half-outriggers with no mats and fully loaded with counterweights and jib extension. Therefore, the crane's specifications for adequate support could not have been met. Thus, [redacted], as competent person and operator, failed to appropriately determine that mats were necessary for the conditions prior to using the crane. Respondent, however, sees the disputed clause not as a requirement, but as a hypothetical, so to speak. In other words, Respondent argues the ground conditions at Wal-Mart, on their own, were sufficient had [redacted] used the steel mats; whether he did or did not is irrelevant to whether [redacted] made an appropriate assessment of whether the ground conditions were sufficient. The standard requires more than such hypothetical considerations; rather, the final clause of the standard states, "so that . . . the equipment manufacturer's specifications for adequate support and degree of level of the equipment *are met*. *Id.* (emphasis added). [redacted] failed to make such a determination.

According to the compliance directive, Complainant indicates it will issue a citation pursuant to § 1402(b) if the CSHO determines the crane or other hoisting equipment is out of level. CPL 02-01-057 at p. 16–17. In other words, a violation of the standard follows from a failure to ensure the specifications are met, not that it is hypothetically the case that they will be. Depending on the CSHO's observations, this could be because the ground is neither sufficiently firm, nor drained, nor graded for the manner in which a particular type of crane is being operated or being set up, which includes a determination of whether supporting materials were necessary.[12] *See Piedmont Mechanical, Inc.*, 24 BNA OSHC 1153, 2013 WL 5505282 at *12 (No. 11-2562, 2013) (ALJ Welsch found failure to place pads under outriggers of crane given the ground conditions presented constituted a violation of 29 C.F.R. § 1926.1402(b)).[13]

Bucher and [redacted] testified that determining whether supporting materials were necessary is dictated by the crane's load charts (manufacturer's specifications). (Tr. 83, 163–64, 189). According to Bucher, there is no load chart that allows you to use a crane—fully loaded with counterweights, jib extended, on half outriggers—to set support mats; however, he noted there was a load chart available for setting mats without the counterweights attached. (Tr. 88–89, 105–106). This is consistent with the manual's repeated warnings against operating the crane without the use of support pads, as well as an additional warning that "the support force, due to the counterweight, can be higher without a load than with a load." (Ex. C-32 at 6). [redacted] was less certain in his knowledge of what the crane manual load charts permitted. Over the course of three pages of testimony, he went from saying that the manual does not give specifics of the procedure for setting

12. As indicated by many of Respondent's witnesses, there are some instances in which supporting materials may not be necessary, such as placing mats with the crane when it is not fully loaded with counterweights and jib extension while resting on concrete.

13. This case was appealed to the Commission and remanded to the ALJ on the separate issue of knowledge. *See Piedmont Mechanical, Inc.*, 24 BNA OSHC 1153. That issue was reaffirmed by the ALJ in a separate opinion. 24 BNA OSHC 2144, 2014 WL 702321 at *3.

the mats "rigged" up to stating that the manual does show how to set the mats with the crane "I would assume bare" to stating that the load chart permits the operator to use the crane to set the mats with half outriggers and a fully loaded crane. (Tr. 186–189). Compared to the certainty repeatedly expressed by Bucher, [redacted] responded to questions about whether the crane's configuration was permitted by the manual with "I believe so", "I believe it does", "I'm sure it does", and "I'm assuming . . . .". (Tr. 187–189). In the estimation of his colleagues and superiors that testified, [redacted] used the crane in a configuration that caused it to tip over and/or crush the concrete beneath the half-extended outrigger foot, which they believe would not have happened if he dropped the counterweights, removed the jib extension, and/or permitted the forklift operator to finish setting down the mats. Accordingly, the Court finds [redacted] improperly determined (if at all) that the manufacturer's specifications were met.[14]

In this case, the Court's determination that the manufacturer's specifications for adequate support and degree of level were not met is aided by the fact the crane's foot crushed through the concrete. It is unclear whether this was the result of the crane tipping and crushing through the concrete, or because the foot crushed the concrete and caused the crane to tip over,[15] but the conclusion is still the same: ground conditions were not adequate for the configuration and supporting materials were necessary. Thus, [redacted] should not have used or set-up the crane in the manner that he did, because he did not ensure that the manufacturer's specifications for adequate support and degree of level were met. Accordingly, the Court finds Respondent violated the terms of the standard.

14. While [redacted] said he had set his own mats in this configuration and under similar conditions before, such an assessment, so called, hardly complies with the requirements of § 1402(b).
15. Respondent brought up this concern during CSHO Dovalina's testimony. (Tr. 250).

c. Complainant Was Not Required to Prove the Existence of a Hazard

Respondent also argues Complainant failed to prove the existence of a hazard and, thus, cannot establish the existence of a violation. Respondent is mistaken both as to the law and as to the impact of the facts. *See Joseph J. Stolar Constr. Co*., 9 BNA OSHC 2020, 2024 n.9 (No. 78-2528, 1981) ("The Commission has held that, when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated."). When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc*. 6 BNA OSHC 1335, 1337 (No. 15983, 1978). Where a standard presumes a hazard, however, the Secretary need only show the employer violated the terms of the standard. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993). *See also Sanderson Farms, Inc. v. Perez*, 811 F.3d. 730 (5th Cir. 2016) ("[H]azard is generally presumed unless the regulation requires the Secretary to prove it.").

Therefore, according to the Commission, "Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one." *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *see also Pyramid Masonry Constr.*, 16 BNA OSHC 1461, 1464 (No. 91-600, 1993) (if standard presumes that hazard exists when its terms are not met, Secretary need not prove existence of hazard). The cited standard proscribes certain conduct under certain conditions; namely, it prohibits the use of a crane unless the ground conditions are such that the manufacturer's specifications for adequate support and degree of level are met. Failure to comply with those conditions establishes the existence of a

hazard.[16] Further, the fact the crane tipped over because those requirements were not met is strong evidence that a hazard existed.

d. Respondent Had Knowledge of the Violation

Complainant asserts Respondent had knowledge of the violation through its crane operator and competent person, [redacted]. Respondent contends it did not have knowledge of the violation because [redacted] was not designated as a supervisor, did not possess the traditional powers and duties of a supervisor, and that his conduct was not foreseeable. The Court finds the evidence shows [redacted], as the on-site competent person, was responsible for ensuring the crew performed the work safely and in conformity with the Act, which the Commission has held is sufficient for characterizing an employee as a supervisor. Further, the Court also finds his knowledge is properly imputable to Respondent because the rules/policies governing his conduct were insufficient and there is no evidence that audits/inspections were performed to identify violations.

i. The Crane Operator was a Supervisor

The Commission has repeatedly held that "job titles are not controlling and that the power to hire and fire is not the *sine qua non* of supervisory status . . . ." *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003). Instead, the key question is whether the individual in question "was vested with some degree of authority over the other crew members assigned to carry out the specific job involved." *Iowa Southern Utilities Co.*, 5 BNA OSHC 1138 (No. 9295, 1977). This includes, amongst other things: the power to order that necessary steps be taken to do the job properly, ensuring that work will be done in a safe manner, ensuring compliance with OSHA

16. An example of a standard that does not presume the existence of a hazard is 29 C.F.R. § 1910.94(d)(9)(v), which states, "*Whenever there is a danger of splashing* . . . .the employees so engaged shall be required to wear . . . goggles or an effective face shield." *See Anoplate Corp.*, 12 BNA OSHC 1678 (No. 80-4109, 1986) (emphasis added) (discussing 29 C.F.R. § 1910.94(d)(9)(v)).

regulations, and identifying and implementing corrective measures to eliminate hazards. *Rawson*, 20 BNA OSHC 1078, *Iowa Southern*, 5 BNA OSHC 1138; *see also Kerns Bros. Tree Svcs.*, 18 BNA OSHC 2064 (No. 96-1719, 2000) (crew leader responsible for seeing work done safely and properly based on written work order); *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999) (finding persuasive fact that lead person could not directly fire or discipline, but could report violative behavior to her formal supervisor).

In *Rawson*, the Commission was persuaded by and found "decisive significance" in the fact that the foreman (not supervisor) was the company's designated competent person at the worksite, meaning he was responsible for compliance with OSHA regulations. *Rawson*, 20 BNA OSHC 1078. As discussed above, the Commission also found other indicia of authority, such as supervising the work activities of his crew, taking necessary steps to complete job assignments, and ensuring work was being completed safely. *Id.* The Commission was not persuaded by the company's arguments the foreman was not officially designated as a supervisor or that he could not hire or fire employees. *Id.*

While [redacted] was not a "designated" supervisor, the Court finds he possessed many of the indicia of authority discussed by the Commission. [redacted] participated in a walkthrough of the worksite with the representatives of the general contractor and subcontractors to personally inspect the areas where the crane would be set-up; supervised the assembly of the crane; and completed the lift plan, crane inspections, and field ticket on TNT's behalf. (Tr. 166–70; Ex. C-28, C-29, C-30, R-6, R-7). Equally persuasive is the fact that both Bucher, who is a crane operator, and Rodriguez both testified they recognized [redacted] as their supervisor during the Wal-Mart project and explained why. Specifically, Bucher stated, "TNT instructs everybody that's operating—the crane operator, they are the supervisor, they are in charge of that job. Whatever job

they send you to, it's the responsibility of the crane operator. If there is no safety or supervisor out, then, yes, it is the crane operator's job." (Tr. 98–99). Likewise, Rodriguez testified, "[H]e is not an actual supervisor, no. He's an opera—he's the one controlling everything that night. . . . I was working for him, yes, that night. I can call him supervisor. I can call him an operator. But I'm working under him." (Tr. 306–308). Rodriguez and Bucher also noted an operator can refer problematic employees to dispatch or his immediate supervisor. (Tr. 100, 308–309).

Like the companies in the cases discussed above, Respondent places a lot of stock in the fact that [redacted] was not designated as a supervisor, could not hire or fire, and did not possess disciplinary authority over other employees. *See Resp't Br.* at 23. Respondent also attempts to distinguish *Rawson* by arguing that the person in that case was designated as a "foreman" and that he was assigned to supervise the work activities of his crew, whereas [redacted] was neither a foreman, nor was he designated to supervise the crane crew. Although [redacted] did not have an official title of "foreman" or "manager" or "supervisor", both Rodriguez and Bucher testified convincingly that [redacted] supervised the set-up of the crane and assessed the conditions of the worksite to ensure that work would be done safely and complied with the plan developed by each of the contractors. The fact that they recognized [redacted] as their *de facto* supervisor only solidifies the Court's conclusion that [redacted] was their supervisor for the purposes of establishing knowledge. Likewise, Respondent's own policy defines a competent person as an "employee capable of identifying existing and predictable hazards in the surroundings or working conditions that are unsanitary, hazardous, or dangerous to all personnel and *who has authorization* to take prompt corrective measures to eliminate them." (Ex. R-27). *See Rawson*, 20 BNA OSHC 1078 (discussing indicia of authority, including duty to identify and take prompt corrective measures to eliminate hazards).

ii. The Crane Operator's Knowledge is Imputable to Respondent under *W.G. Yates*

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). The Fifth Circuit views imputing the knowledge of a supervisor that engaged in misconduct to be tantamount to imposing a strict liability standard, "which the Act neither authorizes nor intends." *W.G. Yates & Sons Constr. Co.*, 459 F.3d 604, 607 (5th Cir. 2006) (citing *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir. 1976)). Thus, the court held a "supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Id.* at 608–609. *See also Kerns Bros. Tree Svc.*, 18 BNA OSHC 2064 (measuring foreseeability in the Third Circuit by analyzing a company's training, safety policy, site inspections, and discipline). Because knowledge is an element of Complainant's *prima facie* case, the Fifth Circuit held it is Complainant's burden to establish the supervisor's misconduct was foreseeable. *Id.*

The Court finds Complainant established [redacted]'s actions were foreseeable on two separate bases: (1) the rules governing the use of a crane to set the steel mats were contradictory and insufficiently descriptive, and (2) Respondent's audit and supervision policy were insufficient to identify and correct problems such as this.

As to Respondent's rules and safety policy, the Court was convinced by the work rules governing the use of outriggers and supporting materials and the equivocal testimony of

Respondent's VP of HSE, Troy Pierce, on the issue. Under the Standard Operating Procedure for Cranes, there are two rules that appear to be in contradiction regarding the use of supporting materials. The SOP states, "Steel plates, pads, or timber mats shall be used under the outriggers of all cranes no exceptions." (Ex. R-19 at 1). Immediately following, another rule states, "In the event that the crane is on stable ground it is permissible to utilize the crane to place plates and mats only." (Ex. R-19 at 1). Although the second provision appears to be an exception to the very clear "no exception" rule immediately preceding it, Pierce attempted to explain the first rule applies to "lifting mode", whereas the second rule applies to "set-up mode". (Tr. 421). Pierce clarified this did not refer to any specific mode of the crane; rather, that "set-up" and "lifting" were separate phases of work. (Tr. 422–23). In either case, such a distinction is not found in the Standard Operating Procedures or anywhere else in the policies introduced into evidence. For that matter, the Court finds Pierce's explanation of the difference only confused the matter further.

The SOPs do not discuss whether an operator can set his own mats when the crane is fully loaded with counterweights, nor do they dictate whether or how outriggers should be set up under such circumstances. (Tr. 185, 420, 424–25). In fact, according to [redacted], he noted he had moved cranes rigged with the jib and counterweights numerous times, set the mats with the crane in that configuration before, and the operating chart for the Liehberr crane has a chart for the crane to operate in that configuration. (Tr. 186). At a minimum, the Court finds Respondent's rules were insufficiently specific to govern the conduct complained of in this case. If the head of health and safety was not capable of clearly explaining the distinction—not to mention he admitted it was poorly written—it is certainly foreseeable an employee would have similar difficulties understanding and implementing the rule. *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1815 (No. 87-692) ("[T]he real problem was that Pride had failed to formulate and implement adequate

work rules and training programs to ensure that [the employee] had been informed of the appropriate safety considerations.")

Further, the Court finds there was a lack of oversight and subsequent discipline with respect to Respondent's safety policy. Some employees testified that audits and inspections occurred; however, there was no documentation of these audits/inspections even though documentation was requested by Complainant. (Tr. 240–41). Thus, although lip service was paid to the policy of conducting audits and worksite inspections, the lack of any documentary evidence of these audits/inspections is telling. (Tr. 125, 197, 240–241, 437–438; Ex. R-25). According to Pierce, unless a member of management or a supervisor is at the worksite, then daily and/or weekly inspections will not be performed. (Tr. 441). In other words, the implementation of the policy is contingent upon whether Respondent opts to send a member of its management team to a particular worksite. Further, without evidence indicating how such audits/inspections are conducted, their scope, or their frequency, the Court is left to guess as to their efficacy and whether the policy is executed as written. *See, e.g., Dover Elevator Co.*, 16 BNAOSHC 1281, 1287 (No. 91–862, 1993) ("In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects"). As a testament to this fact, [redacted] testified he had never been disciplined—nor told it was a violation of policy—for using a fully loaded crane to set his own supporting mats.

Given the lack of clearly defined rules governing [redacted]'s conduct, the lack of evidence indicating Respondent performed audits/inspections of its worksites and the quality of those inspections, and [redacted]'s own testimony that he had not been disciplined or at least informed that utilizing the crane in such a manner was a violation, the Court finds [redacted]'s actions at the

Wal-Mart worksite were foreseeable. Accordingly, the Court finds [redacted]'s knowledge is properly imputable to Respondent.

e. Respondent's Employees Were Exposed to a Hazard

In order to establish exposure, Complainant must show that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). In this case, there is no serious dispute about any of the crew members' exposure. Both Bucher and Rodriguez were in proximity to the crane as it tipped over. (Tr. 237). Further, [redacted] was seriously injured when he attempted to exit the crane as it was tipping and was struck by the pill ball attached to the cable. Accordingly, Complainant established employee exposure.

f. Respondent Failed to Establish Affirmative Defense of Unpreventable Employee Misconduct

Under Commission precedent, to establish unpreventable employee misconduct, an employer must prove by preponderance of the evidence that it has: (a) established work rules designed to prevent the violation, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations, and (d) effectively enforced the rules when violations were discovered. *See American Sterilizer Co. ("AMSCO"),* 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). As previously discussed with respect to the question of whether [redacted]'s misconduct was foreseeable, the Court finds Respondent failed to have adequate work rules designed to prevent the violation and failed to take steps to discover violations of its own policy or the Act. As far as the evidence is concerned, Respondent has a program that looks good on paper, but is not carried out in practice. There is no evidence of audits or inspections that took place, which would identify how violations such as this are discovered and remedied. Nor, for that matter, is there any

evidence of disciplinary actions coming from the Corpus Christi yard, where this crew was stationed. Instead, there are a handful of disciplinary actions from San Antonio and one from Marshall, most of which deal with PPE violations and motor vehicle issues. (Ex. R-30). Respondent failed to prove the affirmative defense; thus, Respondent's affirmative defense is rejected.

g. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability that an accident would actually occur; he need only show if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The cited standard is designed to protect against the possibility of a crane tipping over, which unfortunately happened in this case. As noted in the preamble to the final rule, "Crane tip-over incidents caused by inadequate ground conditions are a significant cause of injuries and fatalities." 75 Fed. Reg. at 47931. [redacted]'s permanently disabling injury, which resulted from being struck by the pill ball and knocked to the ground from the tipped-over crane, illustrates this fact. Accordingly, the Court finds the violation was serious.

h. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number

of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent is a large employer, with over 1300 employees. (Tr. 238). This incident resulted in a serious injury to one of its employees and exposed at least two others to equally serious, if not life-threatening, injury. The evidence shows Respondent has been inspected in the recent past and was issued serious citations for violations discovered in those inspections. (Tr. 237). Therefore, the Court gives no discount for size or history. Although Respondent pointed to its partnership with OSHA in the ABC OSHA Cooperative Safety program as justification for discounted penalties, the Court is not bound by such considerations as it determines penalties *de novo*. (Tr. 341–42). Given the seriousness of the injuries that resulted from this violation and the potential for other injuries to occur, the Court finds the penalty of $12,675.00, as proposed by Complainant, to be appropriate. A penalty of $12,675.00 will be assessed.

ORDER

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

1. Citation 1, Item 1a is AFFIRMED as a Serious citation, and a penalty of $12,675.00 is ASSESSED.

SO ORDERED

/s/
Patrick B. Augustine
Judge, OSHRC

Date: July 30, 2019
Denver, Colorado