

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1244 Speer Boulevard, Room 250  
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

MICA CORPORATION, and its successors,

Respondent.

OSHR DOCKET NO. 00-1125

**APPEARANCES:**

For the Complainant:

David C. Rivela, Esq., Tina Campos, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Stephen D. Harrison, Esq., Toby W. Burke, Esq., Harrison Steck Hoover & Drake, P.C., Fort Worth, Texas

Before: Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Mica Corporation, and its successors (Mica), at all times relevant to this action maintained a place of business on I-35 near marker 362, Hillsboro, Texas, where it was engaged in highway sign construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 5-6, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Mica's I-35 work site. As a result of that inspection, Mica was issued citations alleging violations of §§1926.550(a)(15)(i) and (iv) of the Act together with proposed penalties. By filing a timely notice of contest Mica brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 6, 2001, a hearing was held in Dallas, Texas. At the hearing the Secretary's motion to amend the citations to include the date of the alleged violation, a clerical error, was granted (Tr. 27). The parties have submitted briefs on the issues, as amended, and this matter is ready for disposition.

### Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.550(a)(15)(i):

(a) On or about April 4, 2000, at the jobsite; employees working around a Groves TMS 300B hydraulic crane, SN 68521 within 10 feet of a 14,400 volt power line, were exposed to the following condition, such as but not limited to, contact with energized equipment operated in close proximity to overhead power lines.

Serious citation 1, item 2 alleges:

29 CFR 1926.550(a)(15)(iv):

(a) On or about April 4, 2000, at the jobsite; a person was not designated by the employer to observe clearance of the equipment and give timely warning for all operations when employees are in close proximity to overhead power lines.

### Facts

On April 4, Jason Owens, a Mica employee, was sent to Mica's I-35 work site to pick up concrete traffic barriers [CTB] (Tr. 56, 157). Owens reported to the foreman, Jim Blalock, who assigned him to drive the crane truck on the site (Tr. 158-59, 164). Owens testified that he understood he would be receiving instructions specific to the job from Michael Grissham, the crane lift, or boom operator. Grissham was an employee of RTC Leasing, the crane's lessor (Tr. 159, 248, 270). Blalock himself was driving a trailer truck (Tr. 69-70; Exh. C-8). Stewart Kugler, the last member of the CTB crew, was marking the centers of the CTBs, and setting the clamps on the top of the barriers that were to be moved by the crane onto the trailer trucks (Tr. 58, 102; Exh. C-3, C-7). Kugler testified that although Blalock was his supervisor, and gave him general instruction relating to his duties, Grissham was in charge of the actual operation of the crane, and acted as lead man when there were no Mica foremen around (Tr. 71, 73-74, 106-07, 112-13, 121).

According to Owens, when the crane operator wants the driver to back the carrier truck up, he lifts the crane's hydraulic jacks; the driver then backs the truck chassis and crane into position to pick up the CTB to be moved (Tr. 154; Exh. C-1, C-3, C-5). Owens testified that he had only worked with Mica crane operators before (Tr. 153), and that, in those instances, the crane truck driver, who sits facing forward in the carrier's truck cab,<sup>1</sup> was directed by hand signals from a ground man (Tr. 154-55; *See also*, testimony of Stewart Kugler, Tr. 62-65, 77-78, 111). All the crane truck driver can see in his side view mirror, Owens stated, is the ground, the CTB, the outriggers and the side

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<sup>1</sup> The crane operator sits in the operator's cab facing the rear of the truck or crane carrier (Tr. 98).

of the crane. The ground man acts as the driver's eyes and ears (Tr. 154, 179). In Mica operations, a second ground man handles the CTB, placing the CTB clamps onto the barrier, and guiding the barrier onto a waiting trailer truck (Tr. 156, 165). The trailer truck driver may help place the CTB parallel with the trailer; he then pulls up, straps the CTB down, and takes it to the next location where it is to be used (Tr. 166).

Owens testified that on April 4, 2000, Grissham told him that when he had completed a lift, he would leave the back outriggers out and pick up the jacks. Once the jacks were up, Owens was to take over control of the accelerator, and back up to the center of the next CTB, leaving a three foot gap between it and the outrigger (Tr. 159, 181, 188). When Owens saw, in his side view mirror, that the outrigger was lined up with the center of the CTB, or upon Grissham's signal, *i.e.*, honking the horn, Owens would stop (Tr. 159, 170, 184, 188). Owens would then put on the parking brake, put the engine in neutral, and turn accelerator control over to Grissham (Tr. 159-60).

No signal man was assigned to the CTB crew on April 4; Owens believed Mica was short handed that day (Tr. 161-62). Kugler testified that Grissham did not want him to act as signal person, and specifically told Kugler not to help him direct the crane (Tr. 78, 93, 101, 103). Kugler's sole job was to guide the barriers onto the truck with the help of the truck's driver (Tr. 98-99, 125). Owens testified that he relied solely on Grissham to direct him when he was backing the truck (Tr. 193).

Around 11:00 a.m. on that date, after the crew finished placing a load of CTB on Jim Blalock's trailer truck, Blalock pulled away to chain down (Tr. 76, 86, 176). Owens heard the accelerator stop, and began to back up the crane carrier (Tr. 176). Owens heard Grissham blow the horn and stopped, switching over accelerator control, and placing the engine in neutral (Tr. 176). Stewart Kugler testified that he looked up and saw that the crane cable had contacted a single power line, and was sparking. Kugler saw Grissham get out of the operator's cab and walk around the back of the crane (Tr. 86-87, 90, 114). In his side view mirror, Owens saw Grissham coming around the outrigger and walking towards him. Owens looked away momentarily; when he looked back, he saw Grissham lying on the ground (Tr. 177). Owens jumped out of the crane, and saw Blalock coming towards them (Tr. 177). When he looked back at Grissham, he noticed a little flame on Grissham's pant leg (Tr. 177). Blalock grabbed Grissham by the leg; the crane became energized, and Owens was thrown to the ground (Tr. 178). Grissham and Blalock were electrocuted; Stuart Kugler also sustained electrical burns (Tr. 52, 215, 232).

Michael Hale, Director of Engineering and Operations for HillCo Electric Cooperative, testified that he was on Mica's work site immediately following the accident (Tr. 128-30). Hale testified that

one of HillCo's linemen inspected the conductor and crane cable, and found signs of arcing on both (Tr. 131). The crane cable and conductor were five inches apart (Tr. 136). The power line was clearly visible (Tr. 140). According to Hale, the affected line carried 14,400 volts (Tr. 137).

Carl Link, Mica's risk manager, testified that Mica has its own cranes and operators, but did not have a crane available on April 4, 2000 (Tr. 153, 240). Kugler testified that as the CTB crews go down the highway, they frequently go under power lines (Tr. 105). Jason Owens testified that the foreman or lead man generally inspects a new jobsite for overhead power lines (Tr. 148, 150). In addition, Kugler stated, the ground man on the Mica CTB crew usually looks out for obstacles, such as barriers or people, or hazards, such as power lines (Tr. 104, 111-12). Link testified that every employee on site has a duty to check for hazards, including power lines (Tr. 239, 252). However, Owens stated, it is up to the crane operator to decide whether or not it is safe to go under a power line (Tr. 172). Owens testified that Grissam could have reeled in either the boom or the boom cable and safely cleared the power line. He had no reason to believe that Grissam would operate the crane in an unsafe manner (Tr. 194).

James Thomas Knorpp, a safety engineer with 29 years of experience, including a stint as area director for OSHA, has operated a safety consulting service since 1994 (Tr. 342-48). Jimmy Carl Hodges, owner of Construction Safety Corporation, is an OSHA authorized safety instructor for the construction industry (Tr. 437-61). Both Knorpp and Hodges believed that because the operation of cranes is a specialty business, it was reasonable for Mica to rely on the on the crane's lessor to provide a competent operator, who was familiar with OSHA regulations, and who would comply with those regulations (Tr. 358, 428, 465-66). Specifically, Knorpp stated, the leasing company should be able to rely on the leased crane's operator to maintain the required 10 foot clearance from power lines.

Both Knorpp and Hodges testified that, in this case, RTC Leasing's employee, the crane operator, exercised complete control of the crane mechanism, its boom and cables and, through his use of audible signals, over Owen's movement of the crane's truck chassis (Tr. 352, 392-93, 462-63). Both Knorpp and Hodges testified that it was the sole responsibility of the operator to determine whether he would have difficulty in maintaining the required clearance by visual means, and to request a spotter, if he deemed one necessary (Tr. 421, 468-69). Knorpp agreed that the leasing employer, Mica, would be responsible for providing a spotter should the crane operator's ability to visually maintain the minimum operating distance be impaired (Tr. 378). Knorpp, however, believed that the crane operator could ignore or refuse to use an unwanted designated spotter (Tr. 424, 427). In any

event neither Knorpp nor Hodges saw any reason to believe that the crane operator's vision was obstructed or otherwise impaired (Tr. 360, 467).

Both experts testified that they relied on the 1994 industry standard for crawler, locomotive and truck cranes, ANSI B-30.5 (Tr. 372, 462, 475). At paragraph 5-3.4.5 the ANSI standard states:

(a) A qualified signal person shall be assigned to observe the clearance when the crane moves to within a boom's length of the limit specified in Table 1 [10 feet]. **The operator is not in the best position to judge distance between the power line and the crane or its protrudances** (sic).

(Tr. 382-83, 386-87). Hodges agreed that the ANSI language requiring a signal man or spotter whenever the crane moves to within a boom's length of the 10 foot limitation was mandatory (Tr. 479-80). Knorpp, however, maintained that the ANSI standard applies only to the movement of the crane mechanism, boom or cable. According to Knorpp, the crane is not "in operation" when the truck chassis is merely transporting the crane, and the ANSI standard, therefore, does not require a signal person under those conditions (Tr. 383, 387, 390-93). Hodges testified that Mica *did* need a spotter to direct the driver of the crane's truck chassis, however, Hodges believed that the crane operator, Grissam was fulfilling that function (Tr. 431).

### Discussion

**Section 1926.550(a)(15)(i)** provides:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

\* \* \*

(i) For lines rated 50 kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: **1.** the cited standard applies; **2.** there was a failure to comply with the cited standard; **3.** employees had access to the violative condition and; **4.** the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). The record clearly establishes that while removing CTB on Mica's work site, the cable on the cited Groves crane came within 10 feet of an energized power line. Mica's employees were exposed to the cited hazard, Mr. Kugler was injured, and Mr. Blalock was killed. Mica argues that the standard is

not applicable, however, because it neither created, nor controlled the violative condition. Mica also argues that it had no reason to know of the hazardous conditions.

**Applicability.** Mica makes much of the distinction between the operation of the crane lift, or boom mechanism versus that of the truck chassis to which the crane superstructure is affixed. As a threshold matter this judge finds that this is a distinction without a difference. The lift mechanism and the crane's truck chassis operate as a single piece of equipment. When the driver moves the truck chassis, the crane mechanism has no choice but to follow. If any portion of the crane boom comes into contact with an energized power line, the truck chassis will become energized. Moreover, *both* the crane and its truck carrier, even viewed as separate pieces of equipment, are subject to the requirements of §1926.550(a)(15). *See, Concrete Construction Co.*, 12 BNA OSHC 1174, 1985 CCH OSHD ¶27,171 (No. 82-1210)[applying sub-paragraph (a)(15) to a backhoe, citing §1926.600(a)(6) of **Subpart O-Motor Vehicles, Mechanized Equipment, and Marine Operations**, which states that “[a]ll equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters”]. According to the clear terms of subparagraph (a)(15), neither the crane mechanism nor the truck chassis may be moved, *i.e.* operated, so as to bring any portion of the integrated crane structure within 10 feet of an energized power line. The Secretary has demonstrated that the cited standard was applicable to both the crane's lift mechanism and its truck carrier. Which of the two components moved, causing the crane cable to breach the 10 foot clearance limit, is irrelevant to this particular inquiry.

The applicability of the cited standard has been established. The other elements having been established, the Secretary has made out her *prima facie* case.

**1926.550(a)(15)(iv)** provides:

A person shall be designated to observe clearance of the equipment and give timely warning for all operations where it is difficult for the operator to maintain the desired clearance by visual means.

**Applicability.** Mica maintains that this standard is inapplicable because the crane operator's view was clear and unobstructed. According to Mica, the crane operator should have been able to maintain the desired clearance by visual means. Nothing in the standard, however, refers to an obstructed view. The standard refers only to the operator's ability to judge clearance distances. Mica's own experts admitted at the hearing that mandatory industry standards require that a qualified signal person be assigned to observe power line clearances when a crane moves to within a boom's length of the 10 foot clearance limit, noting that the operator is not in the best position to judge the distance

between power lines and the crane or its attachments. In addition, Mica's witness, Jimmy Hodges, testified that Mica *should* have had a spotter to direct the crane's truck operator, whose view was admittedly restricted.

This record establishes that the crane industry recognizes crane operators are not in a good position to judge distances, and need a spotter, or signal man, to maintain required clearances once the crane comes within a boom's length of the 10 foot limit. In addition, a spotter was required to direct the operator of the truck chassis, whose view was restricted.

The Secretary has established the need for a signal person and the applicability of the cited standard.

**Failure to comply.** It is admitted that no spotter was designated to observe clearances for the cited equipment. Mica nonetheless argues that Grissam acted as an observer for Owens to ensure that he backed the crane carrier safely. That Grissam was in a position to see approaching power lines, and to signal Owens to stop, however, does not satisfy the standard. The Commission has held that the cited standard requires specific and positive action by the employer to inform an employee of his duty to ensure that the required clearances are maintained. *See, Halmar Corp. and Defoe Corp.*, 18 BNA OSHC 1014, 1997 CCH OSHD ¶31,419 (No. 94-2043, 1997). Because Mica did not specifically designate Grissam to act as an observer, the standard was violated. Moreover, as noted above, industry standards establish that Grissam was not in a position to accurately judge whether the required clearances were maintained between the crane boom or cable and nearby power lines. Violation of the standard is established.

**Limited Multi-employer Work-site Defense.** Mica argues that, despite the Secretary's *prima facie* showing, it should not be held responsible here because it neither created, nor controlled the violative conditions. This judge recognizes that the Commission has found that, in certain cases, an employer shall not be held liable for hazardous conditions created by other subcontractors on a multi-employer work site. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2054, 1991-93 CCH OSHD ¶29,923 (No. 90-2873, 1992). In order to avoid liability for hazards to which its employees are exposed, however, the subcontractor must show, by a preponderance of the evidence that: **1.** It did not create the violative condition; **2.** It did not control the violative condition such that it could not realistically have abated the condition in the manner required by the standard; and **3.** (a) It made reasonable alternative efforts to protect its employees from the violative condition; or (b) It did not have, and with the exercise of reasonable diligence could not have had, notice that the violative

condition was hazardous. *Lee Roy Westbrook Construction Company, Inc. (Lee Roy Westbrook)*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989).

**Control.** Mica maintains that RTC Leasing, through its crane operator, was the creating/controlling employer on site. Mica argues that Grissam, the boom operator, directed the crane driver, Owens, providing him with detailed instructions concerning the performance of the job, and signaling him with his horn. Mica's employees all agree that in operations where a crane is utilized, such as CTB removal, the crane operator acts as the foreman, and other employees taking part in the operation are there solely to assist and support the crane operator.<sup>2</sup>

Mica has not made out the second element of the defense. For purposes of establishing the multi-employer work-site defense, control is established when it is shown that an employer possessed the expertise and personnel to abate the hazard. *See Lee Roy Westbrook, supra; Union Boiler Co.*, 11 BNA OSHC 1241, 1983 CCH OSHD ¶26-453 (No. 79-232, 1983). The record establishes that Mica could realistically have abated the hazard, and so exercised sufficient control over the condition so as to be held liable for its own employees' exposure.

RTC and its employee, Grissam were hired by Mica to help Mica perform an operation which was part of Mica's regular business, which was performed at Mica's work site, and which utilized Mica's employees. Mica owned and normally operated its own cranes. Mica's crews regularly set and removed CTB in the course of their employment using Mica's own cranes. Mica had standard operating procedures for CTB crews working with cranes; those procedures included safety measures whereby overhead power lines, a common hazard, were located and avoided. Mica's standard procedures included the assignment of a dedicated spotter, or ground person, to warn the crane and/or truck operator about hazards. Though crane operation is, as noted by Mica's experts, a specialized field, Mica's personnel all possessed expertise in that field, and were capable of identifying and abating or protecting against the cited hazards.

Finally, although Mica can, and did, transfer some supervisory authority to the leased crane's operator, it may not shift its responsibility under the Act for ensuring the health and safety of its

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<sup>2</sup> In support of its argument, Mica cites *Vergona Crane Co. (Vergona)*, 15 BNA OSHC 1782, 1992 CCH OSHD ¶29,775 (No. 88-1745, 1992), in which a crane operator and oiler were found to be employees of the crane owner, rather than of the employer that leased the crane. In *Vergona* the Commission discussed the criteria for determining an employee's employer under the common law of agency. "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. . ." *Vergona* is inapposite here. RTC's employee, Grissam, was hired by Mica. The only inquiry possible under *Vergona* is whether Grissam became a Mica employee, not whether Mica's employees became agents of RTC. In any event, Mica does not maintain that the exposed CTB crew members acted as agents of RTC; it argues only that RTC's employee controlled the hazard.

employees to third parties. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). Although Grissam directed the operation of the crane on the site, Mica retained a duty to exercise reasonable diligence to discover hazards to which its employees might be exposed, and to make reasonable alternative efforts to protect those employees. Mica seems to argue that they could not force Grissam to use an observer, pointing to evidence that Grissam did not want Kugler, whom he needed to guide the CTB onto the waiting trailer truck, to act as a spotter. This judge is not persuaded, however, that Grissam would not have utilized an observer, had one been specifically designated by Mica, as was their usual practice. Nor is this judge convinced that, had a spotter been designated, Grissam would have ignored warnings that he was approaching a power line.

Mica failed to show that it lacked control over the violative conditions; the record shows it could reasonably have abated the hazard by assigning an observer to ensure that the crane did not come within 10 feet of energized power lines.

**Knowledge.** Mica argues that it was unaware of the presence of the overhead power lines. Its employees testified, however, that power lines were a recognized hazard. As they work CTB crews frequently go under lines crossing the highway. Supervisory personnel and CTB crews were all trained to check regularly for overhead lines. The cited power lines were in plain view, and could easily have been discovered by a diligent inspection of the work site. A prima facie case of actual or constructive knowledge is made out where established violations are in plain view. *Williams Enterprises, Inc.*, 10 BNA OSHC 1260, 1981 CCH OSHD ¶25,830 (No. 16184, 1981).

Mica further argues that it could not have known that RTC's crane operator would breach the required 10 foot clearance limits. It is well settled, however, that the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the conditions in their workplace; *Ormet Corp.*, 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). That the employer may not have foreseen a specific instance of violative conduct is not a defense. *Id.*

Mica has not made out the pleaded affirmative defense, and the violation will be affirmed.

### Penalty

Separate penalties of \$3,500.00 were proposed for each of the cited violations (Tr. 264, 267).

The violations were properly classified as high gravity serious, in that serious physical harm, up to and including death, could and did occur as a result of the violations. The recommended penalties reflected reductions for Mica's size, and good history (Tr. 262-67).

The Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations. *H.H. Hall Constr. Co. (Hall)*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981). Here, even though two distinct violative conditions were cited, the citations are duplicative because they require the same abatement conduct from Mica. See, *J.A. Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). The only affirmative action Mica could or should have taken was to assign an observer to ensure that required clearances were maintained. For purposes of assessing an appropriate penalty, the two violations will, therefore, be combined, and a single penalty of \$3,500.00 will be assessed.

### **ORDER**

1. Citation 1, item 1, alleging violation of 1926.550(a)(15)(i) and (iv) are AFFIRMED, and a combined penalty of \$3,500.00 is assessed.

/s/  
Benjamin R. Loye  
Judge, OSHRC

Dated: June 12, 20001