

**United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

STIS, INC dba SOUTHEAST TEXAS
INDUSTRIAL SERVICES,

Respondent.

OSHRC Docket No. 24-0702

Appearances:

Matthew Finnigan and Samantha Cohen, Department of Labor, Office of Solicitor, Denver, Colorado,
For Complainant

Anthony Stergio, Bryan Acklin, and James Wimberley, Andrews Myers, P.C. and Law Offices of James Wimberley, Houston, Texas,
For Respondent

Before: Judge Christopher D. Helms – U.S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On October 20, 2023, a crane operator attempted a lift of four pipes, each weighing approximately 800 pounds, with a Manitowoc Grove YB5518 carry deck crane. During the lift, the crane tipped over, resulting in the crushing death of the crane operator. Within hours of the accident, the Occupational Safety and Health Administration (“OSHA”) initiated an inspection of Respondent STIS, Inc.’s (“STIS”) worksite. As a result of that inspection, the Secretary of Labor (“Secretary”) issued a Citation and Notification of Penalty (“Citation”) to STIS, alleging two serious violations of OSHA’s regulations for cranes and derricks in construction, 29 C.F.R.

§ 1926.1417(o)(1) (operating a crane in excess of its rated capacity) and § 1926.1427 (failing to ensure each operator was qualified to operate a crane), with a total proposed penalty of \$29,036.

On May 6, 2024, STIS filed a timely notice of contest, thereby bringing the matter before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (the “Act”). A trial was held from April 30, 2025 to May 1, 2025, in Denver, Colorado. The following individuals testified at trial: (1) Ralph Werner, STIS General Foreman; (2) Carlos Lanza, STIS Manager and Acting Foreman; (3) Rob Blomster, Occupational Safety and Health Specialist; (4) Shane Lane, Compliance Safety and Health Officer (“CSHO”); (5) Henry Ware, Safety Specialist for STIS; (6) DeLond Gould, Site Safety Manager for STIS; and (7) Gene Pickering, Safety Superintendent for STIS.

Both parties timely filed post-trial briefs, which were considered by the Court in reaching its decision. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. For the reasons discussed, both Citation Items are affirmed.

II. Stipulations & Jurisdiction

The parties stipulated to various facts, including several jurisdictional details. *See* Joint Stipulation Statement (J. Stip) (filed Apr. 18, 2025). Rather than set forth the parties’ stipulations in their entirety, the Court cites to them as is relevant and appropriate.

The Commission obtained jurisdiction over this matter under section 10(c) of the Act upon STIS’s timely filing of a notice of contest. 29 U.S.C. § 659(c). Moreover, the Court also finds—based on the Joint Stipulation Statement—that STIS 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(3), (5).

III. Factual Background

A. STIS & the Worksite

STIS is a company that was hired as a subcontractor by EVRAZ North America (“EVRAZ”) to perform construction work at a steel mill located at 2100 South Freeway, in Pueblo, Colorado (“Worksite”). (J. Stip. 7, 12; Ex. C-2; Tr. 198). The Worksite included a laydown yard (“Laydown Yard”), which was essentially a staging area where construction equipment and materials were stored until they were needed at the active construction site. (Tr. 207, 372). STIS had at least two cranes at the Worksite: a smaller 18-ton Manitowoc Grove YB5518 carry deck crane (“smaller crane” or “18-ton crane”) and a larger 80-ton crane.¹ (Tr. 35-36, 94).

The maximum rated capacity for the smaller crane with extended outriggers was 36,000 pounds. (Ex. C-12 at 14). The maximum rated capacity for the smaller crane without its outriggers extended was 16,000 pounds if the crane was picking up a load from the front of the crane with the boom remaining between the front two wheels/tires (i.e. “between the rubbers”), and 10,900 pounds if picking up a load from the side of the crane. (Ex. C-12 at 14). This maximum rated capacity was based on the crane’s particular configuration, such as the angle of the boom, whether the boom was extendable, the boom length, and the radius. (Tr. 140).

RMS Cranes owned the cranes at the Worksite and rented them to STIS. (Tr. 199). STIS employed seven or eight crane operators at the Worksite. (Tr. 36, 227). RMS Cranes also provided one crane operator to perform various duties at the Worksite. (Tr. 199).

¹ There is some inconsistency as to how the witnesses refer to the cranes. Werner testified that there were three cranes at the Worksite: a 35-ton smaller crane, an 80-ton larger crane, and a 100-ton crane. (Tr. 36). Lanza similarly testified that the smaller crane was a 35-ton crane. (Tr. 94). However, they are not certified crane operators, and the CSHO testified that the smaller crane was an 18-ton crane. (Tr. 175). Moreover, the daily inspection reports for the Manitowoc Grove YB5518 carry deck crane identify it as an 18-ton crane. (*See* Ex. R-1). Based on the record, the Court concludes the Manitowoc Grove YB5518 carry deck crane was an 18-ton crane and will refer to it as such.

B. STIS Safety Policies & Procedures

STIS's general safety program was largely set forth in its Policy Manual (Ex. R-8), Employee Policy Manual (Ex. R-9), and Safety and Health Execution Plan (Ex. C-1). The Employee Policy Manual set forth certain "Prohibited Conduct," which included: (1) "Inefficient, intentional or careless performance of duties;" (2) "Deliberate or careless damage to materials, products, or other business property;" and (3) "Conduct endangering life, safety, or health of employees or others." (Ex. R-8 at 77). The Employee Policy Manual also provided: "Employees must not operate machinery, tools, and/or equipment, unless trained and authorized." (Ex. R-9 at 73).

The STIS Safety and Health Execution Plan identified the project manager and job foreman as the persons responsible for coordinating all safety and health activities, and it required them to conduct daily inspections of all worksites to ensure the employees had been briefed on the safety aspects of their jobs and that all equipment was maintained and operated in a safe manner. (Ex. C-1 at 14). The project manager and job foreman were also responsible for "ensuring that job specific safety procedures are prepared as required for all critical jobs involving safety risks." (Ex. C-1 at 14).

STIS required its employees to attend weekly safety meetings (which covered general safety topics, new procedures, and other training) and daily toolbox safety meetings (which occurred at the beginning of each shift and discussed specific safety aspects of the work that was to be done that shift). (Ex. C-1 at 23). Additionally, "[a]ll STIS employees [were] responsible for conducting a Job Safety Analysis as per [STIS] Policy Procedure." (Ex. C-1 at 23). The Job Safety Analysis identified potential hazards and their mitigation. (Ex. C-1 at 23). Cranes had to be inspected on a regular basis, including upon the crane operator's arrival at the jobsite and before

use of the crane by the operator. (Ex. C-1 at 28). STIS required all crane inspection reports to be maintained in the project manager's office. (Ex. C-1 at 28).

STIS also had a policy in place that gave every worker "Stop Work Authority." (J. Stip. 29). This meant that all workers at a jobsite had the authority to stop a task if it appeared to be hazardous or simply "look[ed] wrong" or "[didn't] look right." (Tr. 40-41, 59, 351; J. Stip. 9).

Lastly, STIS had standard operating procedures for mobile cranes. (Ex. C-15 (Mobile Cranes SOP)). It only permitted "employees authorized and trained in the safe operation of mobile cranes...to operate such equipment." (Ex. C-15 at 2 (SOP 4.1.1)). It also required operators to follow all manufacturer's instructions and procedures. (Ex. C-15 at 2 (SOP 4.2.2)). Site supervisors had to perform a pre-operation hazard assessment, and it was the supervisor's responsibility to establish a safe work zone for the mobile crane. (Ex. C-15 at 3 (SOP 4.3.2)). However, the policy explicitly stated: "The mobile crane operator shall be responsible for those operations under their direct control" and "Whenever there is any doubt as to safety, the mobile crane operator shall stop the operation, and not resume until all safety concerns have been addressed." (Ex. C-15 at 3 (SOP 4.4.1)).

STIS's progressive disciplinary policy was set forth in its Policy Manual. (Ex. R-8 at 63-64). A first infraction resulted in an informal verbal discussion. (Ex. R-8 at 63). Then, there was a written warning, which involved more formal documentation of performance, conduct, or attendance issues and consequences. (Ex. R-8 at 64). If the conduct continued, STIS management would suspend the employee. (Ex. R-8 at 64). As a last resort, STIS management would issue a final written warning and termination of employment for performance, conduct, or attendance

issues. (Ex. R-8 at 64). Documented discipline was kept in the employee's personnel file. (Ex. R-8 at 64; Ex. R-4 (documentation of disciplinary actions)).²

C. STIS New Hire Procedures for Crane Operators

Generally, new STIS hires had to undergo safety and health orientation training and an evaluation. (Ex. C-1 at 15-16). They were also given the necessary client site-specific paperwork. (Ex. C-1 at 16). Once they reached their assigned jobsites, they received job-specific orientation training by the project manager or the foreman, including an explanation of work assignment rules, general project administrative policies, an explanation of the project, STIS's general safety and health policies, procedures, and work practices (including use of personal protective equipment), the disciplinary policy, Job Safety Analysis requirements, and client-specific safety and health guidelines. (Ex. C-1 at 16; Tr. 407). The new hires were given the safety execution plan, and "[e]quipment operators [were] qualified onsite by the Safety Representative on site." (Ex. C-1 at 17). The new hires were trained on Stop Work Authority and accompanying responsibilities. (Ex. C-1 at 17; Ex. R-7 at 3). In fact, STIS management provided each of its employees with a physical Stop Work Authority card to be carried with them at the Worksite. (Tr. 389).

Crane operators were trained and given orientation like any other new hire. (Tr. 409). Then, in addition, new crane operators had to undergo an "Equipment Operator Qualification." (See Ex. C-1 at 20; Tr. 409). Specifically, the STIS Safety and Health Execution Plan provided:

Only designated, trained employees are permitted to operate equipment. To be designated, the employee must show satisfactory evidence of qualification and experience. Operators shall be required to pass a written or oral examination and practical operating examination.

² In addition to STIS's work rules, EVRAZ had its own safety rules that STIS employees had to follow. (See Ex. R-7 at 3). Those policies included "Stop Work Authority" and proper crane maintenance. (Ex. R-7).

(Ex. C-1 at 20). Usually, the equipment foreman and a member of the safety team conducted the qualification and examination on the job, and that evaluation was documented on the STI Group Mobile Crane Operators Practical Exam form. (Tr. 409; Exs. C-1 at 20, C-15 at 9 (Mobile Crane SOP), R-6 (Mobile Crane Operators Practical Exam forms)). The evaluation required the crane operators to demonstrate they had reviewed the equipment's operating manual, knew all hand signals, understood the load chart, were able to set up a crane properly, and understood how to check the equipment's configuration. (Ex. C-22). The operators had to successfully demonstrate depth perception and control coordination while operating the crane. (Ex. C-22). And, the operators had to understand how to operate the crane within its "rated capacity," a term which refers to a crane's maximum working load or limit. (Tr. 140). The rated capacity was based on the type of crane and its configuration, which included the angle of the boom, whether the boom was extendable, the boom length, and the radius. (Tr. 140).

Per STIS policy, crane operators would not be allowed to work until they (1) passed the evaluation and (2) the evaluator gave the completed practical exam form to the STIS Safety Office. (Tr. 348, 412). That form was kept in the crane operator's personnel file.³ (Tr. 412; Ex. C-15 at 9). After that, the foreman at the Worksite would be notified that the crane operator was cleared to work. (Tr. 413).

D. [redacted]

On September 18, 2023, STIS hired [redacted] as a crane operator to work at the Worksite. (J. Stip. 13; Ex. C-3 (Report to Hire Form)). [redacted] was given a copy of the STIS Employee Manual, the STI Group Business Conduct and Ethics Code, and various other new hire documentation. (*See* Ex. R-5 ([redacted]'s Personnel File)). His personnel file also reflected that

³ The standard operating procedures also noted that the form would be "entered into the SDI1 database." (Ex. C-15 at 9; Tr. 173). The testimony did not, however, reveal what that database was or how it was used.

he had his crane operation certification from the National Commission for the Certification of Crane Operators. (J. Stip. 19; Ex. R-5 at 4). However, STIS had no documentation that [redacted] completed the mobile crane operators practical exam. (Jt. Stip. 16; *cf.* Ex. R-6 (practical exam forms for other crane, forklift, and aerial lift operators at the Worksite)). Although his direct supervisor at the Worksite in October 2023 was Matt Dessel, Dessel had not yet been hired when [redacted] joined STIS, so he had not conducted [redacted]'s new hire evaluation. (Tr. 226).

Henry Ware, an STIS Safety Specialist, testified at trial that he had evaluated [redacted]'s operation of a crane “a few times.” (Tr. 334-35). He observed [redacted] operate the 18-ton crane, stressing [redacted] “did a great job.” (Tr. 334). He also noted that [redacted] had completed a pre-operation inspection of the crane and appeared to follow proper procedures. (Tr. 373). However, Ware’s evaluations were not conducted when [redacted] was a new hire.⁴ (Tr. 333-34, 363-64). Moreover, Ware admitted he was not a certified crane operator, and he did not have any documentation evidencing his evaluations of [redacted]. (Tr. 359).

E. The Accident

On October 20, 2023, Werner, the General Foreman, needed to have some pipes moved from the Laydown Yard to another location at the Worksite. (Tr. 41; Jt. Stip. 13). At the morning’s toolbox meeting,⁵ Werner delegated the task to Lanza (a Manager and acting Foreman) and his crew, which consisted of [redacted] and [redacted].⁶ (Tr. 42; Jt. Stip. 14). Werner went over the

⁴ Ware testified that he evaluated [redacted] to protect [redacted] from retaliation related to a conflict between two foremen at the Worksite. (Tr. 363). He also testified that Kenneth Gentile or Mark Curtis would have conducted the formal evaluation at the time of hiring [redacted]. (Tr. 364). Those individuals did not testify at trial, nor were they otherwise mentioned by any other witnesses.

⁵ The toolbox meeting is a daily safety meeting in which the supervisors and workers discuss the plan for the day, allocate the tasks for the day, discuss the safety hazards associated with those tasks, and mitigation of safety hazards. (Tr. 65).

⁶ On the Job Safety Analysis, [redacted] signed his name “[redacted].” (Ex. C-14 at 1). This caused some confusion at trial, and the different last names were never explained. (Tr. 118). Nevertheless, references to “[redacted]” and “[redacted]” refer to the same individual.

safety hazards associated with moving the pipes, which measured six inches in diameter and weighed approximately 800 pounds each. (Tr. 42; Ex. C-6 (photograph of pipe weight specification), C-14 (Job Safety Analysis)). Werner identified “lines of fire,” “blind spots,” and “heavy items” among potential hazards. (Ex. C-14 at 1). He recommended the following hazard avoidance measures: “do not stand under load” and “use a spotter.” (Ex. C-14 at 1).

[redacted] was assigned to the job as the crane operator responsible for moving the pipes.⁷ (Tr. 62). Crane operators were generally given specific instructions for a task and the operation of their equipment at the daily toolbox talks. (Tr. 457-58). However, Werner could not remember whether [redacted] attended that morning’s meeting, and [redacted]’s name did not appear on the Job Safety Analysis. (Tr. 41; Ex. C-14). Lanza initially testified that [redacted] was present at the meeting, but he later changed his testimony to say [redacted] was never at those meetings because he was in a “different group.” (Tr. 96-97). In any event, Werner recommended to Lanza that the crane operator use the larger, 80-ton crane for the job. (Tr. 42, 99). At trial, Werner explained that he recommended the larger crane because “it had more reach, and we had different areas these loads pulled from.” (Tr. 43).

Lanza conveyed to [redacted] that Werner recommended the 80-ton crane for the job, but [redacted] decided to use the smaller, 18-ton crane. (Tr. 112-13). Lanza did not know why [redacted] made that decision, nor did he challenge it, explaining “he’s the one that makes the final decision about what crane to use because he’s the crane operator. So he knows what he is capable of doing”. (Tr. 101). Lanza was not a certified crane operator nor a certified rigger. (Tr. 87-88). He said at trial that he knew “nothing” about cranes, although he was familiar with them because he worked with or around cranes almost every day. (Tr. 88, 97).

⁷ It is unclear from the record who precisely assigned [redacted] to this job. According to Werner, [redacted] was the only available crane operator near the Laydown Yard that day. (Tr. 62).

The task of moving the pipes was initially delayed because the trailer into which the pipes would be loaded was not in position, and there were no truck drivers available to move it. (Tr. 44). So, Werner returned and moved the trailer into position himself. (Tr. 44). Although he did not see that [redacted] had chosen the smaller crane at that time, he later saw [redacted] in the smaller crane. (Tr. 44-45). The crane was not in operation at that time, and Werner recalled the outriggers were not extended. (Tr. 46). Werner did not ask [redacted] why he chose the smaller crane, nor could he remember asking Lanza why the smaller crane was being used. (Tr. 45).

After Werner put the trailer in place, he left the area to check on the truck drivers and forklift operators. (Tr. 46). Meanwhile, Lanza and his team began to work on loading the pipes. (Tr. 47). [redacted] rigged three pipes for the first lift. (Tr. 102). [redacted] did not use the crane's outriggers. (Tr. 101-02). He moved the crane forward, lifted the pipes, and loaded the pipes onto the trailer without "mov[ing] the boom very much." (Tr. 121). In other words, [redacted] did not swing the boom (or the pipes) beyond the crane's front tires (also called going "beyond the rubbers"). (Tr. 121). According to Lanza, "all went well." (Tr. 102).

For the second lift, [redacted] told [redacted] to rig four pipes rather than three. (Tr. 103). When Lanza saw [redacted] attempting to lift four pipes, he stood on the pipes and told [redacted] to lift fewer because "we have all of Friday, Saturday and part of Monday to lift this order." (Tr. 103). In other words, there was no rush to get the job done and, in fact, Lanza wanted [redacted] to slow down because he wanted to give the crew "a full day's work." (Tr. 103-04). [redacted] told Lanza to get off the pipes because [redacted] "knew what he was doing." (Tr. 103-04, 106). Lanza testified that he then asked [redacted] if there were any warning lights or sensor lights in the crane, and [redacted] said everything was fine. (Tr. 102, 104). So, Lanza deferred and moved out of the way. (Tr. 106). Lanza testified at trial that he had no supervisory authority over [redacted], nor

was he a certified crane operator. (Tr. 98). [redacted] said he knew what he was doing, and Lanza did not overrule him. (Tr. 98, 106).

Lanza walked behind the crane as [redacted] lifted the pipes. (Tr. 122). [redacted] remained where he was after rigging the load, and [redacted] was on the trailer ready to guide the load onto the back of the trailer. (Tr. 123-24, 212). [redacted] lifted the load, backed up, and extended and swung the boom toward the trailer. (Tr. 121-22). In doing so, [redacted] swung the load “beyond the rubbers.” (Tr. 185-86). The weight of the pipes combined with the angle of the boom and its location “beyond the rubbers” caused the crane to tip over. (Tr. 106, 136; Jt. Stip. 5). As [redacted] tried to exit the cab of the crane, the crane shifted and crushed [redacted]. (Jt. Stip. 8, 29). He did not survive his injuries. (Tr. 201-02).

F. OSHA Inspection & Citation

STIS notified OSHA of the accident, and CSHO Lane was promptly sent to the Worksite. (Tr. 198). The witnesses to the accident had been allowed to go home before CSHO Lane arrived. (Tr. 200). First responders, local law enforcement, and paramedics had also been at the accident site before CSHO Lane arrived. (Tr. 201).

CSHO Lane conducted an opening conference with the employers at the worksite: STIS, EVRAZ, and RMS Cranes. (Tr. 198). He immediately saw the crane in its tipped-over position, as well as four pipes that were still attached to the cabling system for the crane. (Tr. 199). He took pictures and videos of the site while representatives from EVRAZ and STIS conducted their own internal investigations. (Tr. 200). He did not conduct any interviews that day. (Tr. 201).

CSHO Lane did eventually interview Werner (who was identified as the general foreman), Lanza (who was identified as the foreman in charge of that task that day), Dessel ([redacted]’s direct supervisor), [redacted] (a crew member and witness to the accident), and an individual

named Mr. Abney.⁸ (Tr. 202-03). During those interviews, CSHO Lane learned that [redacted] was a relatively new crane operator who had obtained his certification in 2022. (Tr. 206). He learned that Lanza and Werner had worked together for decades, and Lanza “was identified as a [competent] person by members of management from STIS.” (Tr. 210). However, based on his interviews with management, he learned that Lanza was not [redacted]’s direct supervisor. (Tr. 211). On the day of the accident, Dessel—[redacted]’s direct supervisor—was off work, so he was not at the Worksite. (Tr. 211). The CSHO was not told who supervised [redacted] in Dessel’s absence. (Tr. 211). Moreover, the CSHO was unable to determine who, if anyone, had given [redacted] his crane operator evaluation when he started his employment with STIS. (Tr. 236-40, 260-61). And, based on the documentation provided by STIS, the CSHO determined that some, but not all, crane operators had documented evaluations. (Tr. 254-55).

CSHO Lane recommended issuing a Citation to STIS alleging serious violations of 29 C.F.R § 1926.1417(o)(1) (operating a crane in excess of its rated capacity) and 29 C.F.R § 1926.1427(f)(1)(i) (failing to ensure each operator was qualified to operate a crane). The CSHO proposed a penalty of \$14,518 for each Citation Item, totaling \$29,036.

IV. Discussion

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at * 6 (OSHRC, Dec. 5, 1994). The Secretary

⁸ Mr. Abney’s position title was not clear from the record. He seems to be a member of STIS management. (Tr. 204).

has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *5 (OSHRC, Sept. 15, 1995).

A. Citation 1, Item 1: Lift Exceeded Rated Capacity

The Secretary alleged a serious violation of 29 C.F.R. § 1926.1417(o)(1), which prohibits a crane used in construction from being operated in excess of its rated capacity. The Secretary described the violation as follows:

29 CFR 1926.1417(o)(1): The equipment was operated in excess of its rated capacity.

(a) On or about October 20, 2023, employees were exposed to crushing hazards created by lifting four pipe spools weighing in excess of 3,112 pounds over the side of a Grove YB-5518 crane, without the outriggers being extended and in use. This condition exceeded the rated capacity of the crane, causing the crane to overturn, crushing the operator and resulting in fatal injuries.

(Citation at 6).

a. Application & Violation

STIS does not dispute that the standard applies and was violated. (Resp't Br. 8-9). Nevertheless, the Secretary must prove these elements. *Astra Pharm. Prods., Inc.*, No. 78-6247, 1981 WL 18810, at *4 (OSHRC, July 30, 1981), *aff'd in part*, 681 F.2d 69 (1st Cir. 1982). Here, the standard at issue appears within Part 1926, which contains safety and health regulations for construction, and Subpart CC, which applies to cranes and derricks in construction. Subpart CC's regulations apply to "power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load." 29 C.F.R. § 1926.1400(a). That includes mobile cranes and industrial (carry deck) cranes. *Id.* [redacted] was operating a Manitowoc Grove YB5518 carry deck crane on the day of the accident, and he was engaged in construction work. (Jt. Stip. Nos. 4, 5, 7). Accordingly, the standard applies.

And, the standard was violated. A crane's "rated capacity" means "the maximum working load permitted by the manufacturer under specified working conditions. Such working conditions typically include a specific combination of factors such as equipment configuration, radii, boom length, and other parameters of use." 29 C.F.R. § 1926.1401. Here, the crane's boom was extended 42.5 feet. (Tr. 148; Ex. C-12 at 13 (Range Diagram)). The load to be picked up was approximately 3,200 pounds. (Tr. 161). According to the crane's Load Moment Indicator ("LMI"),⁹ [redacted] elected to not use outriggers, but instead planned to pick the load off the front of the crane, i.e., "between the rubbers." (Tr. 134, 149; Ex. C-11 (LMI reading)). The LMI also identified a maximum operating radius of 39.4 feet. (Tr. 148; Exs. C-11, C-12 at 13). This meant the boom was approximately 14 to 16 feet off the ground. (Tr. 155). If an operator exceeded the load limits, the LMI would give a warning. (Tr. 150).

According to the crane's load chart, a lift from the front of the crane with a boom measuring 42.5 feet and a radius of 39.4 had a maximum weight limit of 1,450 pounds. (Ex. C-12 at 14 (Main Boom on Rubber Chart); Tr. 158). If the crane operator were to swing that load "beyond the rubbers," the maximum weight limit for the lift would decrease to 775 pounds. (Ex. C-12 at 14; Tr. 158). [redacted] attempted to lift a 3,200-pound load with a crane configured to lift, at most, 1,450 pounds "between the rubbers." If that load were to be lifted from the side of the crane, the load capacity would decrease to 775 pounds. In short, [redacted]'s second lift substantially exceeded the rated capacity of the crane as it was configured in that moment.¹⁰

⁹ An LMI is a safety device that gives crane operators more information that is easier to access. (Tr. 144). It provides the operator with data in real time, giving the operator information about what the boom angle and radius is in relation to a load. (Tr. 144). It also gives an operator a warning if the load capacity is exceeded. (Tr. 144).

¹⁰ Even if [redacted] had only lifted one pipe weighing 800 pounds during the second lift and swung it to the side, he would have exceeded the crane's rated capacity. (Tr. 167; Ex. C-12 at 14 (Main Boom on Rubber Chart)).

Pickering, STIS's Safety Superintendent, conducted STIS's accident investigation and testified that [redacted] failed to properly configure the crane by failing to use outriggers to lift the load. (Tr. 460). Had the outriggers been extended, [redacted] could have lifted a load up to 3,900 pounds. (Ex. C-12 at 14 (Main Boom Load Ratings on Outriggers Chart)). [redacted] clearly exceeded the rated capacity of the crane during the second lift.¹¹ The standard was violated.

b. Exposure

STIS argues that the Secretary failed to prove "[redacted]'s improper operation of the Crane yielded reasonably predictable employee exposure to a hazardous condition." (Resp't Br. 9). The Secretary maintains that exceeding a crane's rated capacity could result in numerous hazards, including crane collapse or broken booms, to workers nearby. (Sec'y Br. 18-19). The Secretary argues that [redacted], Lanza, [redacted], and [redacted] were all in the zone of danger and exposed to a hazardous condition.

"The test for determining whether employees are exposed to a hazard is whether it is 'reasonably predictable' that employees would be in the zone of danger created by a noncomplying condition." *Anthony Crane Rental, Inc.*, No. 91-556, 1997 WL 93942, at *2 (OSHRC, Mar. 3, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, No. 91-2107, 1995 WL 242609, at *5 (OSHRC, Apr. 24, 1995).

The cited standard was intended to prevent crane tip-over caused by overloading or improper use of outriggers. *Cranes and Derricks in Construction*, 75 Fed. Reg. 47906-01, 47911 (Aug. 9, 2010) (to be codified at 29 C.F.R. pt. 1926). OSHA recognized that "[o]verloading a crane

¹¹ The Court notes that although not cited by the Secretary, the first lift also appeared to have exceeded the crane's rated capacity. The first lift totaled 2,400 pounds. However, the lift capacity for picking off the front of the crane was 1,350 pounds. (Tr. 158; Ex. C-12 at 14).

or derrick can cause it to collapse, with potentially catastrophic consequences” that include construction worker deaths. *Id.* at 47992, *47943. Here, Lanza and his crew worked in close proximity to the crane operated by [redacted]. They rigged the pipes and assisted with loading the pipes onto the trailer. They were sufficiently close to the crane to be exposed to any unsafe condition, such as the crane lifting a load in excess of its rated capacity and collapsing. Thus, it is foreseeable that Lanza and his crew would be exposed to dangers associated with an overloaded crane. *Williams Enter., Inc.*, No. 14748, 1979 WL 8408, at *3 (OSHRC, Jan 16, 1979) (finding exposure to the swing radius of a crane where respondent’s employees were as close as ten to twenty feet from the crane itself, and it was likely an employee could move into the crane’s swing radius where there was no physical barrier).

Moreover, [redacted] was actually exposed to the hazardous condition. It is reasonably predictable that loading a crane in excess of its rated capacity would result in the crane tipping over and harming the crane operator. The Secretary proved employee exposure to a hazardous condition.

c. Knowledge

To establish knowledge, the Secretary must prove that STIS “knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.” *Am. Eng’g & Dev. Corp.*, No. 10-0359, 2012 WL 3875599, at *2 (OSHRC, Aug. 27, 2012). “Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not . . . be shown that the employer understood or acknowledged that the physical conditions were actually hazardous.” *Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995) , *aff’d without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

Under Commission precedent, the knowledge of a supervisor can be imputed to a corporate employer. *See Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (applying long-standing principle of agency law that a corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997); *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Similarly, the Tenth Circuit, where the violation occurred, has held: "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *Mountain States Tele & Tele. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980); *see also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (holding the Commission has generally applied the precedent of the circuit where a case may be appealed, including where the violation occurred).

STIS argues the Secretary did not—and cannot—prove actual or constructive knowledge that the crane was operating beyond its rated capacity. It maintains that [redacted]'s operation of the crane beyond its rated capacity could not be readily observed or understood by anyone at the Worksite that day. (Resp't Br. 12-13). STIS further contends it was reasonably diligent in discovering and enforcing violations of its rules relating to crane inspection and operation. (Resp't Br. 11). STIS believes the blame rests solely on [redacted] for his improper operation of the crane, and it maintains the accident was the result of unavoidable employee misconduct.

The Secretary, however, argues STIS supervisors had actual knowledge of the violative condition: "Werner and Lanza saw the conditions that decrease a Crane's rated capacity; they knew the working conditions were unsafe; and that the conditions could have destabilized the Crane." (Sec'y Br. 20). Specifically, the Secretary points to the following to support that Lanza and Werner

knew working conditions were not safe, as follows: (1) the crane's outriggers were not being used despite both men noting outriggers were always used on STIS worksites; (2) a crane lifting more than one pipe was an infrequent occurrence, according to Werner; (3) Lanza reminded [redacted] to complete the task "safely" before the second lift; and (4) the crane's boom was extended to more than 42 feet, which would have been a visible sign of a reduced load capacity. (Sec'y Br. 20-21).

Here, the condition constituting the violation was the precise configuration of the crane. The testimony elicited at trial demonstrates the crane could have been configured to lift the second load. For example, [redacted] could have used the outriggers. However, when [redacted] lifted the second load and swung the boom "beyond the rubbers," the crane was operating well beyond its rated capacity. In other words, the crane's configuration constituted a violation of the cited standard. *See Phoenix Roofing, Inc.*, 1995 WL 82313, at *3 ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not, as Phoenix argues, be shown that the employer understood or acknowledged that the physical conditions were actually hazardous.").

To show actual knowledge, the Secretary would have to prove that Lanza or Werner knew the crane's precise configuration (i.e., the conditions constituting the violation) during the second lift. The Secretary cannot do so here. Although the lack of outriggers and the angle of the boom were both visible to them, the Court credits Gould's testimony at trial that it is impossible to tell whether a crane is properly configured just by looking at it. (Tr. 441). Given the evidence presented at trial, the only way to know for certain whether a crane is configured correctly is by inputting figures into the crane's LMI (located in the cab of the crane) or using the load charts in the crane's operating manual. (Tr. 441). Laborers who might have seen [redacted] operate the crane would not know how to read an LMI or load chart, let alone identify issues with a crane's configuration. (Tr.

187-88). Likewise, there is no evidence that Lanza or Werner had any knowledge of the crane's precise configuration on the day of the accident or even how to properly configure a crane. Thus, there is no actual knowledge here.

However, Werner and Lanza should have known that [redacted] was an inexperienced crane operator, thus triggering additional supervisory duties. [redacted] received his crane operator license in 2022 and had been hired by STIS about a month before the accident occurred. CSHO Lane was unable to get much information from management concerning [redacted]'s work history before arriving at the Worksite, noting: "I'm sure with his around a year of having his certification I think he was a relatively inexperienced operator." (Tr. 291). STIS did not offer any evidence about [redacted]'s work experience before joining STIS beyond having operated a crane before. Thus, the Court concludes, based on [redacted]'s date of certification and the CSHO's testimony at trial, that [redacted] was an inexperienced crane operator on the date of the accident, and Werner and Lanza should have known that he was inexperienced.

Werner and Lanza also knew or could have known that [redacted]'s direct supervisor (with specific expertise in cranes) was not at the Worksite on October 20. (Tr. 50, 93). It is unclear who was supervising [redacted] on the date of the accident. (Tr. 39, 93). At trial, Werner and Lanza both distanced themselves from any supervisory responsibility over [redacted]—or any crane operator for that matter. For instance, when asked whether he could tell a crane operator what to do, Werner responded: "I can request what I needed done, but I couldn't directly order them what to do." (Tr. 39). Similarly, when Lanza was asked whether he could give direct orders to a crane operator, he stated "No." (Tr. 93).

The Court acknowledges there is nothing in the record reflecting that Lanza or Werner actually knew [redacted] was inexperienced. Nevertheless, the Court concludes Werner and Lanza

were supervising [redacted], and they knew and understood they had a duty to ensure the task of loading the trailer was completed safely on October 20, 2023. Werner was the Worksite's general foreman who assigned tasks, held the toolbox safety talks in the morning, and outlined the potential hazards of the job. Lanza was the task manager responsible for ensuring the pipes were loaded onto the trailer. By extension, they had a duty to ensure [redacted] could complete the task safely and, more specifically, that [redacted] had the requisite experience as a crane operator to safely complete the task without his direct supervisor onsite. *See Archer-W. Contractors, Ltd.*, No. 87-1067, 1991 WL 81020, at *5 (OSHRC, Apr. 30, 1991) (“[I]t is the supervisor’s duty to protect the safety of employees under his supervision.”), *aff’d*, 978 F.2d 744 (D.C. Cir. 1992). Yet, they relied on [redacted]’s “expertise” in all aspects of the crane’s operation. Werner deferred to [redacted]’s judgment when [redacted] chose a smaller crane over Werner’s recommendation that a larger crane be used for the task. Neither Werner nor Lanza questioned [redacted] about his decision to not use outriggers for the lifts, even though they both testified it was unusual to see a crane operating without them. Lanza did not question the safety of [redacted]’s decision to lift more than one pipe at a time; instead, Lanza emphasized to [redacted] that the job should not be rushed, which [redacted] dismissed. In short, Werner and Lanza should have known that [redacted] was inadequately supervised. *Pride Oil Well Serv.*, No. 87-692, 1992 WL 215112, at *8 (OSHRC, Aug. 17, 1992) (holding an employer “cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge of their dangerous working practices”).

Werner and Lanza’s deference to [redacted] violates Commission precedent: supervisors at a worksite are not justified in relying on the judgment of an inexperienced employee. *See Acchione & Canuso, Inc.*, No. 16180, 1980 WL 10735, at *4 (Jan. 23, 1980) (finding respondent should have known of the violative condition based on crane operator’s inexperience); *cf. Conn.*

Light & Power Co., No. 85–111, 1989 WL 223325, at *5 (OSHRC, Apr. 26, 1989) (holding “the company was justified in relying on this skilled and practiced crew to discover the hazard and take proper precautions”). Although employers do not have an absolute obligation to guarantee safety at its jobsites, they do have a duty to have “adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.” See *Precision Concrete Constr.*, No. 99-0707, 2001 WL 422968, at *4 (OSHRC, Apr. 25, 2001) (emphasis added); see also *Pride Oil*, 1992 WL 215112, at *8 (holding an employer “cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge of their dangerous working practices”).

STIS management failed to ensure [redacted] was properly supervised and thus failed to exercise reasonable diligence in anticipating potential hazards and discovering noncomplying conditions. This is true even though [redacted] made a decision to swing the boom “beyond the rubbers,” exceeding the crane’s rated capacity in that moment. STIS should have anticipated that an inexperienced operator might make a mistake in configuring the crane. It should have ensured proper precautions were taken, such as having a supervisor with the necessary expertise at the Worksite or ensuring [redacted] used the larger crane recommended by Werner. See *Nat’l Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973) (“Even an instance of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence [if] such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees.”); *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1896 (No. 12-1045, 2016) (holding that in determining an employer’s due diligence, “[m]ore generalized instructions may be permissible in light of an employee’s specialized training and experience, just as they may

be inadequate in light of an employee's lack of experience, poor safety history, or lack of supervision.").

[redacted] was an inexperienced crane operator. STIS knew crane operators required supervision because they employed a crane supervisor, Dessel. Yet, there was a complete absence of any supervisor with knowledge of crane operators at the Worksite on the day of the accident. Werner and Lanza certainly lacked any requisite knowledge about crane operations and did not have the skills necessary to identify hazards related to a crane. In effect, STIS gave an inexperienced crane operator complete discretion in how the job was completed on October 20, 2023. Through reasonable diligence, the company should have known of the inadequacy of supervision and the fact that the inadequate supervision would have resulted in a failure to identify the existence of a hazardous condition. Accordingly, the Secretary has proved constructive knowledge. And, the Secretary has established a violation of 29 C.F.R. § 1926.1417(o)(1).

d. Affirmative Defense: Unpreventable Employee Misconduct

STIS maintains the cited violation was unforeseeable and the result of unpreventable employee misconduct (UEM). Specifically, it claims that despite having rules in place and communicating those rules to its employees, [redacted] operated the crane beyond its rated capacity when he swung the second load beyond the rubbers, and that split-second decision offered no window in which anyone could intervene or stop the misconduct. (Resp't Br. 14). According to the Secretary, STIS's work rules were too general to prevent the violation here, and STIS did not effectively communicate rules related to crane safety to Werner or Lanza, who were directly responsible for supervising [redacted] on October 20. (Sec'y Br. at 25-26). The Secretary further argues that STIS failed to discover violations of its rules, evidenced by the fact that [redacted] was entirely unsupervised on October 20, 2023, and STIS had created a situation where [redacted], as

the only crane operator at the Laydown Yard that day, was “delegated the responsibility of monitoring his own adherence to safety standards.” (Sec’y Br. at 27-28).

To establish the unpreventable employee misconduct defense, STIS must prove: (1) it had established work rules designed to prevent the violation; (2) it had adequately communicated those rules to its employees; (3) it had taken steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng’g & Dev. Corp.*, 2012 WL 3875599, at *3. In other words, it is incumbent upon STIS to “demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic].” *Archer-W. Contractors Ltd.*, 1991 WL 81020, at *5. And, “[i]n particular, the employer must demonstrate that it took action to discover violations of work rules by implementing measures to monitor its employees’ adherence to safety rules.” *Dover Elevator Co.*, No. 91-862, 1993 WL 275823, at *7 (OSHRC, July 16, 1993).

STIS’s Work Rules

STIS had specific work rules applicable to crane operators and the supervisors of crane operators. (See Ex. C-15). For instance, it required crane operators to follow all manufacturer’s instructions and procedures, and prohibited operating a crane “in excess of the original load ratings.” (Ex. C-15 at 3). It also required supervisors to perform a pre-operation hazard assessment regarding the operation of the crane, and it was the supervisor’s responsibility to ensure that all mobile cranes were operated safely. (Ex. C-15 at 3).

Here, the hazard at issue is a crane operating beyond its rated capacity. The Court is cognizant of the fact that a crane’s load capacity relies on its configuration, which takes into account variables like the length and angle of the boom, whether outriggers are used, and whether the load will be swung outside the rubbers. A work rule intended to avoid exceeding a crane’s

rated capacity must be flexible enough to apply to a variety of situations at a worksite. However, a work rule that simply prohibits the occurrence of a hazard, i.e., an overloaded crane, is meaningless. *See Nooter Constr. Co.*, No. 91-237, 1994 WL 27750, at *7 n.11 (OSHRC, Jan 31, 1994) (holding the work rule at issue had to be “flexible enough to apply to a variety of situations employees might encounter on the worksite, but not so general as to be meaningless ...”). And, merely directing crane operators to follow the operator’s manual and not exceed the rated capacity is reminiscent of general rules that workers “be safe,” which the Commission has rejected. *See, e.g., Automatic Sprinkler Corp. of Am.*, No. 76-5089, 1980 WL 10595, at *7 (OSHRC, May 9, 1980) (“While we have held that employers are not responsible for unpreventable instances of employee misconduct, the formulation and communication of a general work rule is not enough.”).

Moreover, there is no evidence in the record concerning what specific training and information STIS actually provided to crane operators and their supervisors. There is no evidence of what training was provided to a foreman who, like Lanza, would be working closely with a crane operator but was not himself a certified crane operator. Thus, the Court is limited to reviewing STIS’s written policies prohibiting cranes from being operated beyond their rated capacities. Those work rules, by themselves, are too general to provide meaningful instruction to crane operators and their supervisors. *Nooter Constr. Co.*, 1994 WL 27750, at *7 n.11; *Automatic Sprinkler Corp. of Am.*, 1980 WL 10595, at *7. STIS has not proved the existence of an adequate work rule for purposes of the UEM affirmative defense.¹²

¹² STIS raises Stop Work Authority as another work rule intended to prevent unsafe conditions. (Resp’t Br. 15). However, Stop Work Authority was intended to prevent safety issues that were readily visible to workers at the Worksite. It was not intended to prevent a hazardous condition that an average construction worker could not see. Moreover, Stop Work Authority is only useful if workers are sufficiently knowledgeable about the work to know of potential hazards. Here, the supervisors had essentially no experience or knowledge of how to operate cranes. Stop Work Authority is meaningless if those with the authority do not actually know when to “stop work”.

Communication of Work Rules

Next, STIS maintains it communicated its work rules prohibiting the operation of a crane in excess of its rated capacity to all of its crane operators. However, the record does not support such a clear communication. The October 20, 2023 toolbox talk JSA did not identify overloading the crane as a potential hazard. And, even if it did, there is no evidence that [redacted] attended that toolbox talk or any other safety meeting that day. And, there is no evidence of how rules pertaining to cranes were communicated to crane operators and construction workers working near cranes, nor how crane operators were trained on work rules. *Cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2087 (No. 06-1542, 2012) (finding fall protection work rules were adequately communicated based on evidence showing how company trained employees).

There is evidence, however, that [redacted]’s direct supervisor was not present at the Worksite on October 20, and it appears from the record that the only communication [redacted] received about the job was that the pipes had to be loaded onto the trailer and that it was not a rush. There is no evidence in this record that the crane’s load capacity, or any of the components that made up the crane’s load capacity—such as the weight of the pipes or location of the trailer—was discussed with [redacted] on October 20. Instead, it seems Werner and Lanza simply assumed [redacted] would follow whatever rules and requirements applied to cranes without understanding what those rules and requirements might be. *See Baytown Constr. Co.*, No. 88-2912-S, 1992 WL 155473, at *7 (OSHRC, June 18, 1992) (holding employer failed to convey requisite details), *aff’d*, 983 F.2d 232 (5th Cir. 1993) (unpublished). Accordingly, STIS has not established the communication of its work rules.

Discovery of Violations

“Effective implementation of a safety program requires “a diligent effort to discover and discourage violations of safety rules by employees.” *Propellex Corp.*, No. 96-0265, 1999 WL 183564, at *6 (OSHRC, Mar. 30, 1999). STIS maintains that it actively sought to discover violations. Yet, STIS presented no evidence supporting how it discovered violations of the rule that a crane be operated within its rated capacity. Moreover, it allowed an inexperienced crane operator to complete a job without supervision by anyone with experience in cranes. *Cf. Dover Elevator Co.*, 1993 WL 275823, at *7 (“Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required.”). STIS failed to establish it sought to discover crane operator safety violations.

Enforcement of Rules

“The final element of the unpreventable employee misconduct defense requires that an employer effectively enforce its rules when violations are discovered.” *Propellex Corp.*, 1999 WL 183564, at *6 (citation omitted). “The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees.” *Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954, at *1 (OSHRC, Nov. 14, 1995), *aff’d*, 106 F.3d 401 (6th Cir. 1997). “To prove that its disciplinary system is more than a ‘paper program,’ an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.” *Id.* And, evidence of general enforcement of the rules is not enough; rather, the employer must show that it effectively enforced the rules pertaining to the hazard at issue. *See Propellex Corp.*, 1999 WL 183564, at *7

(“While these memos and notices show that Propellex has disciplined its employees for noncompliance with some safety rules, the record does not show that Propellex regularly and effectively enforced its rule requiring that employees obtain flame permits before any ‘lighters, or other fire, flame, or spark-producing devices’ are carried within the plant area.”); *see also L.E. Myers Co.*, No. 90-945, 1993 WL 99197, at *5 (OSHRC, Mar. 31, 1993) (noting that only one of seven disciplinary notices was similar to the violative conditions for which the employer was cited by OSHA).

Here, STIS submitted evidence of its progressive discipline policy and provided documentation supporting a handful of disciplinary actions in 2023. (Exs. R-4, C-4). Although this demonstrates employees were disciplined generally, there is no evidence that STIS had ever disciplined a crane operator for the improper operation of a crane. In fact, there is evidence to the contrary. Ware admitted that he observed [redacted] operating a crane without setting cones or a barricade—in violation of STIS policy—and simply informed him of the rule since “I knew that he was new to the site.” (Ex. C-17). And notably, no one was disciplined for the October 20, 2023 accident.¹³

STIS failed to establish it effectively enforced its safety rules.

e. The Violation was Serious

Under section 17(k) of the Act, 29 U.S.C. § 666(k), a serious violation is deemed to exist when there is a “substantial probability that death or serious physical harm could result” from a condition or practice. “This does not mean that the occurrence of an injury must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if injury does occur.” *Schuler-Haas Elec. Corp.*, No. 03-0322, 2006 WL 1355469, at *8 (OSHRC,

¹³ STIS management testified that if [redacted] had survived the accident, he would have been disciplined for operating the crane in excess of its rated capacity. (Tr. 460).

May 8, 2006). Exceeding a crane's rated capacity is dangerous, as provided in the crane's operator manual: "OPERATION OF THIS EQUIPMENT IN EXCESS OF RATING CHARTS AND DISREGARD OF INSTRUCTIONS IS DANGEROUS . . ." (Ex. C-12 at 10). Moreover, there can be no question as to the potential for death or serious bodily injury to the operator and workers near the crane if that crane falls over or collapses. *Cranes and Derricks in Construction*, 75 Fed. Reg. 47906-01, 47911 (Aug. 9, 2010) (to be codified at 29 C.F.R. pt. 1926). The violation was properly classified as serious.

B. Citation 1, Item 2

The Secretary alleged a serious violation of 29 C.F.R. § 1926.1427(f)(1)(i), which requires employers to conduct an evaluation to ensure each crane operator is "qualified." The Secretary described the violation as follows:

29 CFR 1926.1427(f)(1)(i): Through an evaluation, the employer did not ensure that each operator was qualified by a demonstration of the skills and knowledge, as well as the ability to recognize and avert risk, necessary to operate the equipment safely, including those specific to the safety devices, operational aids, software, and the size and configuration of the equipment. Size and configuration includes, but is not limited to, lifting capacity, boom length, attachments, luffing jib, and counterweight set-up:

(a) On or about October 20, 2023 and at times prior, the employer did not ensure an operator had been evaluated by the employer and qualified by a demonstration of the skills and knowledge necessary to operate the Grove YB-5518 crane and the ability to avert risk while operating the crane. The operator lifted a load without extending the outriggers, did not accurately program the LMI (Load Moment Indicator) to capture actual lifting configurations and exceeded the capacity of the crane. These factors resulted in the crane overturning, crushing the operator and resulting in fatal injuries.

(Citation at 6).

a. Application

"As part of her prima facie case the Secretary must show that the standard is applicable."

Field & Assocs., Inc., No. 97-1585, 2001 WL 392475, at *1 n.5 (OSHRC, Apr. 17, 2001). Here,

section 1926.1427(a) generally requires that the employer “must ensure that each [crane] operator is trained, certified/licensed, and evaluated.” The evaluation itself requires the following:

(f) Evaluation.

(1) Through an evaluation, the employer must ensure that each operator is qualified by a demonstration of:

(i) The skills and knowledge, as well as the ability to recognize and avert risk, necessary to operate the equipment safely, including those specific to the safety devices, operational aids, software, and the size and configuration of the equipment. Size and configuration includes, but is not limited to, lifting capacity, boom length, attachments, luffing jib, and counterweight set-up.

29 C.F.R. § 1926.1427(f)(1)(i). The standard applies to STIS as the employer of crane operators, including [redacted]. The Secretary has established the first element of her prima facie case.

b. Violation

The Secretary contends STIS failed to ensure, through an evaluation, that [redacted] was qualified by a demonstration of his skills and knowledge before starting his employment with STIS. (Sec’y Br. 12-13). STIS maintains [redacted] was evaluated and that management at the Worksite ensured he was qualified to work as a crane operator. (Resp’t Br. 19).

STIS points to the following evidence adduced at trial in support of its position that it did not violate the standard. [redacted] was hired on September 18, 2023, and his personnel file contained his crane operator certification card, among other on-boarding documents. (*See* Ex. R-5). Ware, an STIS safety specialist, signed a backdated witness statement report, stating he—in September 2023—watched [redacted] successfully operate a carry deck crane.¹⁴ (Ex. C-17). Ware wrote that [redacted] did an “excellent job both loading and unloading the piping.” (Ex. C-17). He noted that [redacted] used the outriggers and properly “followed his rigger while backing up each

¹⁴ Ware’s witness statement report was prepared after the accident in response to CSHO Lane’s request for any prior evaluations of [redacted]. According to STIS, those evaluations “were not previously reduced to writing.” (Tr. 238).

time.” (Ex. C-17). Ware testified at trial that he conducted two evaluations of [redacted] after [redacted] was hired, and [redacted] did a great job operating the crane during both evaluations. (Tr. 334-35).

Esway, another STIS safety professional, also submitted a witness statement report—back-dated to September 2023—stating he witnessed [redacted] performing lifts using an 18-ton crane. (Ex. C-16). Esway noted that [redacted] “was in compliance while operating, he had the crane level and his outriggers engaged as well as JHA properly filled out and utilizing the LMI system for the crane.” (Ex. C-16). STIS contends this evidence proves it did not violate the standard. The Secretary, on the other hand, maintains that STIS did not follow its own evaluation procedures for [redacted], and it maintains that [redacted] was never evaluated because there is no documentation of an evaluation. (Sec’y Br. 12-13).

Here, STIS had a policy requiring crane operators to be evaluated by STIS before operating any equipment. It had a specific form that was filled out during these evaluations, and completed forms were kept in the crane operator’s personnel file. STIS followed its own procedures when evaluating some of the other crane operators in September and October 2023. (*See* Ex. R-6). Yet, STIS was unable to produce evidence that it followed its own procedures with [redacted]. For example, it did not produce a crane operator evaluation form for [redacted].¹⁵ It did not produce any witnesses that could testify to evaluating [redacted] when he was first hired. Ware’s evaluations were not completed for the purpose of qualifying [redacted] to operate a crane at the Worksite. Moreover, Ware is not a certified crane operator, and there is no evidence showing his evaluations were done alongside a certified crane operator. Ware even admitted that his evaluation of [redacted] was informal. (Tr. 366-67). Thus, Ware’s evaluations of [redacted] cannot satisfy the

¹⁵ The standard itself requires the employer to document the completion of an evaluation. 29 C.F.R. § 1926.1427(f)(6).

rigorous requirements of the standard. Similarly, Esway was not a crane operator, nor did his witness statement report claim to have conducted the type of qualification evaluation required by the standard. Thus, the Court gives his witness statement report little weight.

No other STIS witnesses testified to evaluating [redacted] when he was hired and prior to operating a crane at the Worksite.¹⁶ There was no evaluation form in [redacted]’s personnel file. Gould, who was in charge of ensuring all crane operators were evaluated, did not evaluate [redacted] himself. (Tr. 405, 428). He testified that he would know an evaluation had taken place if he received the evaluation form. (Tr. 430-31). Based on this record, the Court infers [redacted] never underwent an evaluation that complied with the cited regulation. *See Capeway Roofing Sys., Inc.*, No. 00-1968, 2003 WL 22020485, at *12 (OSHRC, Aug. 26, 2003) (“The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party’s case.”). In addition, his certification cannot substitute undergoing a qualification evaluation. *See* 29 C.F.R. § 1926.1427(f)(3) (“Possession of a certificate or degree cannot, by itself, cause a person to be qualified for purposes of paragraph (f)(1).”) Based on this record, the Court concludes the Secretary established STIS violated the standard.

c. Exposure

To satisfy this element of her *prima facie* case, the Secretary must establish that employees in the “zone of danger” were exposed to a hazard as a result of the way the crane was operated by [redacted], who had not been properly qualified by STIS. *Kaspar Wire Works, Inc.*, No. 90-2775, 2000 WL 1182904, at *18 (OSHRC, July 3, 2000).

¹⁶ STIS claims that “Gould testified that [redacted] underwent multiple evaluations prior to operating at the Worksite.” (Resp’t Br. 19 (citing Tr. 443)). This is extremely misleading, as Gould never said [redacted] underwent a qualification evaluation. In fact, Gould expressly stated he did not evaluate [redacted]’s skills and knowledge on the carry deck crane. (Tr. 428).

This “zone of danger” is normally that area surrounding the violative condition that presents a danger to an employee that the standard was designed to prevent. *RGM Constr. Co.*, 1995 WL 242609, at *5. The Secretary argues: “By not evaluating [redacted]’s skills and knowledge, STIS exposed anyone working or standing near a crane operated by [redacted] to serious injury caused by an unevaluated operator.” (Sec’y Br. 21). STIS offers no argument on the element of exposure.

Here, there is no question that it is dangerous for someone to operate a crane without being evaluated for competence. Any worker (including the unevaluated operator himself) who was in proximity to that crane and engaging in the normal activities in the course of their work duties is exposed to the hazard of serious injury or death. *See Williams Enters., Inc.*, No. 14748, 1979 WL 8408, at *3 (OSHRC, Jan 16, 1979) (concluding respondent’s employees were in the “zone of danger” because they had access to the unprotected swing radius of the crane and were working within 20 feet of the crane itself). Exposure is established.

d. Knowledge

To establish knowledge, the Secretary must prove that STIS “knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.” *Am. Eng’g & Dev. Corp.*, 2012 WL 3875599, at *2. The Secretary maintains that STIS knew of the violative condition because it had policies in place requiring crane operators to be evaluated before operating a crane on its worksites. (Sec’y Br. 22). STIS did have a written work rule that required a new crane operator to be evaluated before operating a crane. (Ex. C-17 at 4.13.2; Tr. 172). STIS management knew about that rule. (Tr. 171, 348, 409). In other words, STIS had a “directive that requires . . . certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.” *Danis Shook Joint Venture XXV*, No. 98-1192, 2001 WL 881247, at *5 (OSHRC, Aug. 2, 2001), *aff’d*, 319 F.3d 805 (6th Cir.

2003). But, there is no evidence in the record that anyone from STIS actually knew [redacted] was operating the crane without having been evaluated.

There is, however, evidence of constructive knowledge. The CSHO testified that there was no program in place to ensure evaluations were conducted. STIS management should have known, through the exercise of reasonable diligence, that [redacted] had not been formally evaluated for proficiency in operating the crane. Gould was responsible for ensuring all new hires, including [redacted], completed all required training and evaluations. (Tr. 405). He was the individual who would get the evaluation forms from the evaluator and notify the foreman that an operator was allowed to work. (Tr. 413). Gould should have known that [redacted] was never evaluated as a crane operator because he did not receive documentation and no evaluation was found in [redacted]'s personnel file. (Ex. C-15 at 4.13.3). There is no evidence of STIS having checks in place to ensure requirements were met or any enforcement of the rule. In fact, Werner testified that he had never heard of a crane operator being disciplined for not completing an evaluation or exam. (Tr. 40).

Based on this record, the Court concludes STIS management should have known, through the exercise of reasonable diligence, that [redacted] was never properly evaluated as a crane operator. The Secretary established constructive knowledge.

e. The Violation was Serious

The Secretary classified this Citation Item as a serious violation. *See* 29 U.S.C. § 666(k) (a serious violation is deemed to exist when there is a “substantial probability that death or serious physical harm could result” from a condition or practice). At trial, counsel for STIS asked the Court to consider reducing the classification to a documentation violation with an other-than-serious classification. (Tr. 29).

Although there is evidence of STIS's failure to properly document evaluations more generally, there is also evidence of the more serious violation: [redacted] was not evaluated before operating a crane at the Worksite. An employer's failure to evaluate each and every crane operator for competency presents a significant risk of death or serious physical harm to workers in the proximity of the crane, as well as the operator himself. The fatality in this case unfortunately demonstrates the seriousness of the violation. *Simplex Time Recorder Co.*, No. 82-12, 1985 WL 44773, at *5 (OSHRC, Dec. 16, 1985) (classifying a violation as serious "due to the evidence seriousness of the violation, as shown by the death of an employee"). The Secretary established that Citation 1, Item 2, was a serious violation.

C. Penalty

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993). 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. *Id.*

"It is the Secretary's burden to introduce into the record evidence bearing on these section 17(j) factors." *Valdak Corp.*, No. 93-0239, 1995 WL 139505, at *4 (OSHRC, Mar. 29, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). "He should also explain how he arrived at the penalty he proposed." *Id.* When determining what penalty is appropriate, the judge should articulate the weight given to each of the section 17(j) factors, and if the penalty amounts are not disputed, the judge's analysis should reflect that fact. *Id.*

Here, the Secretary “proposed gravity-based penalties of \$14,518.00 for each citation.”

(Sec’y Br. 23). In his brief, which addressed the violations together, the Secretary stated:

In determining these penalties, OSHA considered that the violation was high gravity due to the probability of the hazard, and the hazard was of “high severity” because it had a high likelihood of causing broken bones and possible death. OSHA rated the probability of an injury occurring as “greater” because of the proximity of the Crane to other employees.

OSHA also considered STIS’s size, violation history, and good faith. STIS received a 10 percent adjustment based on the number of employees controlled by the company. STIS did not receive a history-based adjustment because OSHA had not inspected one of its worksites in the prior five years.

(Sec’y Br. 23). STIS does not dispute the proposed penalty in its post-trial brief.

The Court cannot conclusively determine on this record whether STIS acted in good faith such that a penalty adjustment is warranted. The record also does not establish whether STIS was a large or small employer or whether it had a history of violations. Accordingly, the Court will assess a penalty based on the most important factor: gravity of the violation. *See Trumid Constr. Co., Inc.*, No. 86-1139, 1990 WL 139883, at *5 (OSHRC, Sept. 12, 1990) (assessing a penalty based only on those factors for which there was sufficient evidence in the record).

The Court finds the gravity to be high for Citation 1, Item 1. Although the duration of exposure was short (Lanza testified that from the time the crane lifted the load to its collapse, he had taken 15 to 20 steps), [redacted] nevertheless exposed the three crew members, as well as himself, to serious bodily injury when he operated the crane beyond its rated capacity. *See Vergona Crane Co.*, No. 88-1745, 1992 WL 184539, at *7 (OSHRC, July 22, 1992) (opining “a crane boom collapse could be death or severe injury to any employees in the area”). And, the likelihood of an injury when operating a crane beyond its rated capacity is greater. STIS did not take any specific precautions against overloading a crane, and, in this instance, failed to provide meaningful supervision to [redacted]. The Court will therefore assess a penalty of \$14,518 for Citation 1, Item

1, which imposes the maximum penalty allowed (\$16,131), with a 10% downward adjustment for size, which was previously proposed by the Secretary (Sec'y Br. 23). *See Mosser Constr. Co.*, No. 89-1027, 1991 WL 331513, at *11 (OSHRC, Dec. 10, 1991) (giving the employer a benefit in penalty due to a record containing little relevant information about some of the penalty factors).

The Court also finds the gravity to be high for Citation 1, Item 2. Although STIS argues the violation was simply a documentation oversight, it is clear that allowing workers to operate cranes without being formally evaluated poses a risk of severe injury to workers in the vicinity of the crane, as well as the operator himself. In addition, the likelihood of injury is greater. Although [redacted] had exhibited some competence in his operation of the crane since he was hired, he was nevertheless in the process of making multiple lifts when the accident occurred, and Lanza had planned for the project to take multiple days. This duration, paired with the exposure of Lanza's crew and the lack of precautions taken against injury, results in a conclusion that the gravity of Citation 1 Item 2 is high. The Court will therefore assess a penalty of \$14,518 for that Citation Item, which includes a 10% downward adjustment for size (Sec'y Br. 23). *Mosser Constr. Co.*, 1991 WL 331513, at *11.

ORDER

This Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure and Commission Rule 90(a). Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. Citation 1, Item 1, is AFFIRMED as a serious violation of 29 C.F.R. § 1926.1417(o)(1), with a penalty of \$14,518.
2. Citation 1, Item 2, is AFFIRMED as a serious violation of 29 C.F.R. § 1926.1427(f)(1)(i), with a penalty of \$14,518.

SO ORDERED.

/s/ Christopher D. Helms

Christopher D. Helms
Judge, OSHRC

Date: June 12, 2026
Denver, Colorado