SECRETARY OF LABOR,

Complainant,

v.

COMPLETE GENERAL CONSTRUCTION COMPANY,

Respondent.

OSHRC DOCKET NO. 02-1995

APPEARANCES:

Patrick L. DePace, Esquire
U.S. Department of Labor
Cleveland, Ohio
For the Complainant

Michael S. Holman, Esquire
Maureen P. Taylor, Esquire
Columbus, Ohio
For the Respondent

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). This case arose following a scheduled, programmed OSHA inspection of one of Respondent's work sites on October 17, 2002, in Columbus, Ohio. After the inspection, the Secretary issued to Complete General Construction Company ("CGC") a citation alleging serious violations of 29 C.F.R. § 1926.550(a)(9) and 29 C.F.R. § 1926.602(c)(1)(ii) and proposing a penalty of $1,700.00 for each alleged violation. CGC filed a timely notice of contest, and this matter was assigned to the Commission's E-Z Trial docket on December 17, 2002.

The administrative trial was held on May 6, 2003. At the trial, I granted the Secretary's unopposed motion to amend the citation to (1) reference only the crane in Item 1 and remove any reference to the track hoe, and (2) withdraw in its entirety Item 2, the item alleging a violation of the terms of 29 C.F.R. § 1926.602(c)(1)(ii). (Tr. 5).

Jurisdiction

At all times relevant to this action, CGC was engaged in "replacing and rebuilding the bridge area and ramp for the I-760 project." (Tr. 11). The Commission has adopted the position of the U.S. Court of Appeals for the Ninth Circuit and held that "statutory jurisdiction [exists] so long as the business is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983); *Usery v. Lacy*, 628 F.2d 1226, 1228-29 (9th Cir. 1980). Allen Tambini, safety director for CGC, testified that CGC is involved in heavy highway construction, which encompasses building bridges and highways and installing utilities such as sewer lines. (Tr. 79). Although there was no testimony regarding the issue of jurisdiction, the Commission has held that "[t]here is an interstate market in construction materials and services and therefore, construction work affects interstate commerce." *Clarence M. Jones*, 11 BNA OSHC at 1531. Thus, even if CGC's contribution to interstate commerce was small and its activity and purchases were purely local, they necessarily had an effect on interstate commerce when aggregated with the similar activities of others. *Id*. I conclude that CGC is an employer "engaged in a business affecting interstate commerce who has employees" within the meaning of section 3(5) of the Act.

Background and Relevant Testimony

Karen Preskar, the Occupational Safety and Health Administration ("OSHA") Compliance Officer ("CO") who conducted the inspection, testified that she had been a safety specialist with the Department of Defense ("DOD") for 28 years and that her duties with DOD had involved ensuring that the DOD work site, including the construction of two new buildings on the site, complied with OSHA and related standards and regulations. She further testified that she transferred to OSHA as a safety specialist in October 2000 and that since then she had conducted approximately 245 inspections focusing on construction.[1] CO Preskar was assigned to inspect the subject site, and, upon arriving at the job superintendent's trailer, she met first with Mr. Ousley, CGC's job superintendent, and then with Allen Tambini, CGC's safety director. She and Mr. Tambini went to the bridge to observe the bridgework, and she saw a crane that was at the lower or ground level. She also saw that the crane's swing radius was taped off, that the crane was in its "set" position, and that it was not

[1]The CO said she had conducted probably 50 inspections that had involved crane guarding and that she had had training relating to crane guarding at both DOD and OSHA. (Tr. 28-29).

being moved. She and Mr. Tambini were discussing the swing radius when she noticed an employee walking by the area of the crane. She then saw the crane being used to lift some pipe, and its counterweight swung across the warning tape demarcating the swing radius, which took it out of the controlled access zone that had been established. CO Preskar stated that she pointed out what she saw to Mr. Tambini and that he agreed that the swing radius zone needed to be reestablished to accommodate the counterweight. (Tr. 8-18, 25, 51-55).

CO Peskar testified that Exhibit C-1, a photo she took, depicts the crane in a moving position and the counterweight swinging over the top of the yellow caution tape and that Exhibit C-2, two photos Mr. Tambini took, depicts an employee walking within the swing radius of the crane shown in C-1.[2] She also testified that without a proper barricade an employee can be struck or pinched, especially since it is very difficult for the operator to see behind him when he is operating the crane. The CO explained that a proper barricade involves establishing a controlled access zone around the swing radius to "keep employees out of the danger area of the counterweight when it swings." She agreed that a crane does not have to be guarded "[i]f there is no chance of operation, there is no one scheduled to operate it, there is no operator, [and] there are no employees in the area." The CO stated that if there is a potential for the crane to operate, then it should be guarded. (Tr. 20-24, 50).

Allen Tambini, CGC's safety director, testified that he has a B.S. in physics, that he has been employed as a well site geologist and as a soils technician, and that he has worked for CGC since 1990; his job with CGC is to ensure that the company is in compliance with applicable government regulations, including OSHA regulations. He further testified that he remained with CO Preskar throughout her entire inspection, that the crane was not in operation at any time that she was in that area, and that she never expressed any concern about the subject crane's guarding or operation.[3] He had no recollection of discussing the crane's swing radius violation with CO Preskar and no recollection of informing her that he would correct or barricade the swing radius of the crane. Mr.

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[2]The CO said that she did not speak to the crane operator and that she did not know the name of the employee exposed to the cited hazard; however, Mr. Tambini told her he thought the employee shown in C-2 was a CGC employee but that "he wasn't sure." (Tr. 58-59).

[3]Mr. Tambini specifically stated that he did not observe the crane picking up pipe and moving it around at anytime on the job site because a track hoe was used to move pipe. (Tr. 85).

Tambini said that CGC has a safety manual that forms the basis for training its employees, including crane operators, and that the training of crane operators includes discussions about crane safety and the swing radius. He also said that the operator of the subject crane was Terry Leonard, that he had spoken previously to Mr. Leonard and stressed the need to barricade the crane, and that he had observed Mr. Leonard operating a crane on about ten occasions and he had always barricaded it properly. Mr. Tambini stated that his practice during an OSHA inspection would be to take care of an observed violation, whether he agreed with the CO or not, and that if saw a crane being operated that was not properly barricaded he would require the problem to be remedied. (Tr. 76-85, 90-92, 104-05, 122-23).

Upon examining Exhibit C-2, Mr. Tambini said the photos showed Mitchell Jamison, a CGC employee, who was in charge of the pile driving operation. He also said that he would not be comfortable with Mr. Jamison standing in the location depicted in Exhibit C-2 if the crane were in operation. Mr. Tambini stated that he could not tell from Exhibits C-1 and C-2 whether there was a crane operator inside the cab, but he agreed that he could make out a blue and white or black and white checkered shirt inside the cab; he also indicated that he did not know why the crane would be in the position shown in C-1 unless it was operating. Mr. Tambini noted that if a crane were stopped and locked and an oiler were performing maintenance on it, the crane probably would not have to be barricaded. (Tr. 104, 113-14, 125-28).

Terry Leonard testified that he has been a crane operator for 20 of the 27 years he has been employed in the construction industry and that he has been a crane operator for CGC since 1998. He identified himself in Exhibit C-1 as wearing a plaid blue and white shirt and sitting in the cab of the crane, and, upon examining the photo, he stated that he had the crane in a "non-working position." He explained that the crane was in a non-working position because he had just "swung it around" to enable the oiler to either grease or clean the deck and that while the oiler was doing such work the crane was in the "positive house lock" position. With respect to Exhibit C-2, Mr. Leonard stated that "I think we probably just backed that crane in there and set it up" and that to move the crane he would "set it back down level or raise the outriggers, you would retract the outrigger beams. I would make sure everything was locked off in the crane * * * ." Mr. Leonard conceded that Exhibits C-1 and C-2 showed that there was no swing radius controlled access zone established behind the crane.

He was unsure whether the employee in Exhibit C-2 was Herb, the oiler, or Mitchell Jamison. (Tr. 129-32, 142-43, 146-49).

Discussion

Citation 1, Item 1

This item alleges a violation of the terms of 29 C.F.R. 1926.550(a)(9). The cited standard provides that "(a)ccessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane." Pursuant to Commission precedent, this standard requires an employer to erect a physical barricade around the swing radius of the crane. *See Concrete Constr. Co.,* 4 BNA OSHC 1828 (No. 5692, 1976), *aff'd*, 598 F.2d 1031 (6th Cir. 1979). The CO recommended the issuance of this item because she observed the counterweight to CGC's crane swing into an unprotected area. (Tr. 18; Exh. C-1).

The evidence shows, and CGC does not deny, that it utilized a crane with a rotating superstructure at the subject site. The evidence also shows that there was an accessible area between the crane and a nearby trench that was within the swing radius of the counterweight to the crane; as indicated above, the CO observed an employee walk into this area shortly before the cab moved and she also saw the counterweight swing into the same area. The counterweight was approximately 6 feet from the ground, and this establishes that it could have struck an employee who happened to pass by while it was moving. (Tr. 156). I accordingly conclude that the standard applies.[4]

As set out above, Mr. Tambini testified that the crane did not move while he and the CO were standing on the bridge. I observed both witnesses on the stand, and, based on their respective demeanors and the physical evidence corroborating the CO's statement (Exhs. C-1, C-2 and R-6), I find the CO's testimony more credible on this issue. *See J.L. Foti Const. Co. v. OSHRC,* 687 F.2d 853, 855 (6th Cir. 1982) (resolving conflicting evidence in favor of the CO's testimony); *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No.98-0866, 2000), *aff'd,*19 BNA OSHC 1567 (No. 01-

[4]To prove an employer violated an OSHA standard, the Secretary must show that: (1) the standard applies; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence should have known, of the violative condition. *Kiewit Western Co.*, 16 BNA 1689, 1691 (No. 91-2578, 1994); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

1205, 2001) (in resolving conflicting evidence, it is the Judge who heard the case who is best qualified to make specific credibility findings). I find, accordingly, that the cab to the crane, and the accompanying counterweight to the boom, swung in the manner described by the CO while the CO and Mr. Tambini were located on the bridge.

Based on the record, I conclude that the terms of the standard were violated. While it is clear that warning tape had been installed on the crane's outriggers on both sides of the crane, thus protecting narrow areas along the sides of the crane, the CO saw and the photographs show that the counterweight swung beyond the warning tape and into the above-noted accessible area. (Tr. 18-20). This demonstrates that there was an area within the swing radius of the counterweight that was not sufficiently barricaded as required by the terms of the standard. I further conclude that the Secretary established her prima facie showing of exposure because a CGC employee, later identified as Mitchell Jamison, the pile-driver foreman, was observed and photographed in the zone of danger only minutes before the counterweight swung out.

The more difficult issue in this case deals with whether the Secretary has demonstrated that CGC had knowledge of the violation. The Secretary did not submit any evidence to show that CGC did not have safety rules or that it did not communicate such rules to its employees so as to establish constructive knowledge. *See Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987); *see also A/C Elec. Co.*, 956 F.2d 530, 535 (6th Cir. 1991). However, the Sixth Circuit, where this case arises, continues to follow Commission precedent that knowledge of a supervisor will be imputed to the employer to establish knowledge of the violation. *See Danis Shook Joint Venture XXV*, 319 F.3d 805 (6th Cir. 2003). I have already found that the crane moved in full view of Mr. Tambini; therefore, if he is a supervisor, he should have been aware of the violation, regardless of whether he admits to having observed the occurrence.

As indicated above, Mr. Tambini is CGC's safety director and is responsible for ensuring that employees observe government regulations and standards. As part of his duties, he regularly issues safety notices to employees, and, in the year before the trial, he had issued between 100 and 200 such notices. (Tr. 78-84). He was not on site at this job, but he was called at the commencement of the inspection. Under CGC's OSHA inspection policy, Mr. Tambini relieves the on-site supervisor when he arrives at a job. (Tr. 88-90). Pursuant to applicable precedent, an employee who has been

delegated authority over other employees, even temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 & 86-469, 1992). It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority, and an employee who is empowered to direct that corrective measures be taken is a supervisory employee. *Dover Elec. Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993). I find that Mr. Tambini clearly had authority to take corrective measures, and, accordingly, I further find that he was a supervisor. Because he should have known of the violation, his knowledge will be imputed to the company.[5] Consequently, I conclude that the Secretary has established a violation of the alleged standard, and this citation item is affirmed.

Classification and Penalty

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. In order to demonstrate that a violation was serious, the Secretary need not establish that an accident was likely to occur, but, rather, that an accident was possible and that it was probable that death or serious physical harm could have occurred. *Flintco, Inc.*, 16 BNA OSHA 1404, 1405 (No. 92-1396, 1993). The Secretary appropriately classified the violation in this case as serious because of the kinds of injuries that could have resulted in the event of an accident.

Once a contested case is before the Commission, the amount of the penalty proposed is just that - a proposal. The Commission, as the final arbiter of penalties, makes the determination of what constitutes an appropriate penalty. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that the Commission give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the

[5]It serves noting that, on this record, CGC did not submit sufficient evidence that would show that the violation was the result of unpreventable employee misconduct. An employer wishing to establish such a defense has the burden of proving that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *See, e.g., Cerro Metal Products Div.*, 12 BNA OSHC 1821 (No. 78-5159, 1986). While there was testimony that CGC had a safety manual, trained employees and had a disciplinary policy (Tr. 81-84), the company submitted no documentary evidence to corroborate this testimony or to show that it had a work rule specific to the subject violation.

employer's prior history of OSHA violations. The gravity of the violation is generally the principal element in penalty assessment. *See, e.g., Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128 (No. 76-2644, 1981); *Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992); and cases cited therein.

The CO testified that in calculating the penalty for this item, she gave CGC credit for good faith because it had an existing safety program, including employee training, that Mr. Tambini administered. She further testified, however, that she gave CGC no credit for size, due to the number of employees in the company, and that she also gave CGC no credit for history because it had had a serious OSHA violation within the month before the inspection.[6] (Tr. 26-27). Upon giving due consideration to the nature of the violation in this case, and to the other foregoing factors, I conclude that the proposed penalty of $1,700.00 is appropriate for this citation item. A penalty of $1,700.00 for Item 1 of Citation 1 is therefore assessed.

ORDER

Based on the foregoing decision, the citation items are disposed of, and penalties are assessed, as follows:

Citation Item	Violation	Disposition	Classification	Penalty
Citation 1 Item 1	§ 1926.550(a)(9)	Affirmed	Serious	$1,700.00
Citation 1 Item 2	§ 1926.602(c)(1)(ii)	Withdrawn		

/s/
G. MARVIN BOBER
Administrative Law Judge

Dated: July 7, 2003
Washington, D.C.

[6]CGC has approximately 600 employees. (Tr. 79).