

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Centimark Roofing Systems,

Respondent.

OSHRC Docket No. **04-0496**

Appearances:

Esther D. Curtwright, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
New York, New York  
For Complainant

Joseph L. Mooney, Esquire  
Goldberg Segalla, LLP  
Buffalo, New York  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Centimark Roofing Systems (CRS) was having parts for a trash chute hoisted to a warehouse roof by a crane company on October 27, 2003, in Tonawanda, New York, when an 8-foot piece of steel tubing (bar) slipped from the load and struck the crane operator. The crane operator and a CRS roofer had rigged the load. As a result of an inspection by the Occupational Safety and Health Administration (OSHA), CRS received a serious citation for violations of the crane and derrick standards at 29 C.F.R. § 1926.550 on February 13, 2004. CRS timely contested the citation.

The serious citation alleges that CRS violated 29 C.F.R. § 1926.550(a)(19) (item 1) for failing to keep employees clear of the load being hoisted to the roof; 29 C.F.R. § 1926.550(b)(2) (item 2a) for allowing an apprentice to operate the crane without being directly supervised by a licensed crane operator; and 29 C.F.R. § 1926.550(b)(2) (item 2b) for failing to secure and balance the load before it was lifted as required by the American National Standards Institute (ANSI), B30.5-3.2.3(a)(2), 1968. The serious citation proposes a total penalty of \$10,000.00.

The hearing was held in Buffalo, New York, on November 30 and December 1, 2004. The parties stipulated coverage and jurisdiction (Tr. 6). Item 2a of the citation, alleging a violation of § 1926.550(b)(2) for failing to supervise the apprentice crane operator, was withdrawn by the Secretary (Tr. 3). The parties filed post-hearing briefs.

CRS denies the alleged violations. CRS argues that it was not the employer of the crane operator, and it did not direct or control the lift resulting in the accident. It was the crane operator who supervised the rigging of the load involved in the accident and directed the load to be hoisted. Also, CRS argues that its employee was not exposed to the lift.

For the reasons discussed, the alleged violations are vacated.

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*Background*

CRS is a commercial roofing contractor with more than 250 employees (Tr. 189). David Muha is CRS's operations manager for the area of Buffalo, New York. Muha supervises thirty employees in approximately three crews (Tr. 290, 301).

In September 2003, chemical manufacturer FMC contracted CRS to remove the existing roof from its warehouse in Tonawanda, New York, and replace it with a tar and gravel four-ply built-up roofing system (Tr. 117, 132, 291). In order to hoist materials and equipment on and off the roof, CRS contracted D.J. Wilson, Inc. (Wilson Crane), an independent crane service company, to provide a truck crane and crane operator (Tr. 98, 119, 292). CRS had used Wilson Crane in the past on other projects (Tr. 292). There was no written contract between CRS and Wilson Crane (Tr. 98, 118).

Wilson Crane is a small crane company with approximately four employees: two licensed operators and two apprentices. It is owned by David Wilson (Tr. 94, 117). For the FMC project, Wilson Crane used a 23-ton Turex truck crane on September 23 and October 27, 2003 (Tr. 70, 117). David Wilson testified that the crane operator's job is to set up the crane for safe operation and follow the instructions of the customer. The crane operator was not to provide any other services such as rigging loads (Tr. 99-101, 116).

On October 27, 2003,<sup>1</sup> the truck crane provided by Wilson Crane was operated by licensed crane operator Robert Mazza and three-year apprentice crane operator Robert Mascho (Tr. 9-10).

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<sup>1</sup>David Wilson operated the crane on September 23, 2003 (Tr. 118).

Mazza had been employed by Wilson Crane for approximately one year (Tr. 107). Apprentice Mascho was sent to the job because a jib had to be attached to extend the reach of the crane (Tr. 98).

During the morning, CRS used the truck crane to remove debris material from the warehouse roof and lift small rock to the roof. Mazza operated the crane, and CRS foreman Herbert Brion directed the lifts (Tr. 11-12, 330, 347-348). CRS had two employees on the ground and approximately five employees on the roof (Tr. 11, 302, 341-342). The crane made more than ten lifts (Tr. 75). When the loads required rigging, CRS employees performed the rigging (Tr. 11, 73, 75-76, 330).

When the CRS employees broke for lunch, Mazza and Mascho removed the crane's jib and moved the truck crane to the other side of the building in order to lift parts for a trash chute to the roof (Exh. C-1; Tr. 12-13, 329). The roof was approximately 30 feet above the ground (Tr. 158, 237, 337). The parts for the trash chute were lying lengthwise on the back of CRS's stake truck. The stake truck had a 24-foot flat bed (Exhs. C-1, C-2; Tr. 16, 58, 341). The trash chute parts consisted of the chute cap, eight weights, two counter weight baskets, a support beam, two 12-foot track bars, and two 8-foot bars which were designed to fit inside the longer bars (Exhs. C-2, C-4; Tr. 145-146, 240). Foreman Brion instructed CRS roofer Somsanit Thongseng (Joy) to remain on the ground and assist in uploading the parts (Tr. 14-15, 250, 277). Brion also asked Mazza if he wanted to help "upload some of the equipment until the other guys got back" (Tr. 334). Mazza agreed.

Mazza and Joy rigged the trash chute parts in two loads. Apprentice crane operator Mascho operated the crane (Tr. 15, 18). The first load consisted of the eight weights (Tr. 15, 255, 336). CRS foreman Brion remained on the roof to direct the lifts. When he observed that Mazza and Joy had placed the eight weights on one sling, he directed them to use two slings so that the weights would be easier to unload (Tr. 178, 255-256, 337). Brion used hand signals to direct apprentice Mascho in lifting the weights to the roof (Tr. 169, 337, 339). Once the weights were on the roof, Brion and the other CRS employees removed the weights from the slings and moved them to their location on the roof (Tr. 220, 338-339).

When the crane was lowered for the second load, Mazza and Joy rigged the remaining chute parts with a single 20-foot sling (Tr. 15-16, 258-259, 338). They wrapped the sling around the bars, through the baskets and choked each end of the load (Exh. C-7; Tr. 163, 260, 274). Mazza stood on

the ground, and Joy stood on the truck's bed (Tr. 258-259). Mazza then signaled apprentice Mascho to lift the load (Tr. 20, 52). According to Mascho, the crane lifted the load slowly and straight up to a height of approximately 15 feet. The load then suddenly shifted and tilted approximately 45 degrees (Tr. 29, 53, 340). When the load tilted, a track bar slipped from the load and struck Mazza who was walking back to the crane (Tr. 29, 60, 351). Foreman Brion testified he did not see the load being lifted until he returned to the corner of the roof and saw it tilt (Tr. 338-339). When he saw the load tilt, Brion yelled to Mascho to watch out. Brion testified that Mascho turned and looked up when the bar struck him in the face (Tr. 340). During the lift, Joy remained on the truck. He had moved closer towards the cab (Tr. 341). The accident occurred at approximately 1:20 p.m. (Tr. 230).

After OSHA was notified of the accident by the police, Compliance Officer (CO) Colin Sargent arrived on the site to conduct an investigation at approximately 3:30 p.m. As a result of his investigation, serious citations were issued to CRS and Wilson Crane (Tr. 103).<sup>2</sup>

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*Discussion*

There is no dispute that CRS hired Wilson Crane as an independent contractor to hoist loads to and from its roofing project for FMC. Section 1926.550 sets safety requirements for the operation, maintenance and inspection of cranes in construction, including truck cranes. The application of § 1926.550 to the truck crane in this case is supported by the record and is not in dispute. The parties do not dispute that CRS roofer Joy and crane operator Mazza rigged the two loads of trash chute parts. It is also undisputed that the load, which is the subject of the citation, was not properly rigged to prevent the load from tilting and the 8-foot bar from slipping from the load.

CRS argues it was not responsible for rigging the load involved in the accident. It did not know or should have known of the inadequate rigging, and its employee was not exposed to the hazard of a suspended load. CRS argues it was not the employer of the crane operator, and it did not direct or control the lift resulting in the accident. It was the crane operator who supervised rigging the load and who directed the load to be hoisted.

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<sup>2</sup> The OSHA citation received by Wilson Crane was settled (Tr. 103).

Item 1 - Alleged Violation of  
29 C.F.R. § 1926.550(a)(19)<sup>3</sup>

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The citation alleges that CRS failed to keep employees clear of a load being lifted. Section 1926.550(a)(19) provides that “All employees shall be kept clear of loads about to be lifted and of suspended loads.”

The Secretary’s citation alleges the violation occurred during the second lift of trash chute parts which resulted in the accident. It also identified the exposed employees as crane operator Mazza and CRS roofer Joy. The citation does not assert that CRS failed to keep employees clear of the loads lifted during the morning or the first load of weights. Also, the record shows that neither Mazza nor Joy was directly underneath the load while it was suspended (Tr. 20, 52, 59-60, 185).

The facts regarding the second lift of trash chute parts are not significantly disputed. The load was rigged by crane operator Mazza and CRS roofer Joy. While standing on the ground, Mazza choked one end of the parts, gave the lift signal to apprentice operator Mascho, and started walking toward the crane when the load was lifted (Tr. 18, 20, 58, 78, 260). Mazza was 5 to 10 feet from the truck when he was struck by the bar (Tr. 80).

After Mazza choked one end, Joy wrapped the sling through the parts and choked the other end of the load. He then hooked the load to the crane’s boom. Joy remained on the truck and walked toward the truck’s cab (Tr. 16, 19, 58, 260, 262). Joy testified he was immediately behind the cab when the accident occurred (Tr. 263, 266). However, Joy’s testimony regarding his location is disputed. Apprentice crane operator Mascho testified that Joy was in front of a generator on the truck which was several feet from the cab (Exh. C-2; Tr. 89). Mascho’s testimony is supported by CRS foreman Brion. Brion testified that Joy was approximately 8 feet from the cab (Tr. 341).

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The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The truck's bed was 24 feet long. The chute's parts were approximately 12 feet long and positioned slightly over the end of the truck (Tr. 333). As viewed by the crane operator, both employees stood to the right of the load (Exhs. C-1, C-2; Tr. 24, 238). The load's intended path was straight up from the truck's bed to a height above roof level, over toward the left until the load cleared the heating/air conditioning units on the roof, and then down onto the roof (Tr. 235-238).

Although neither Mazza nor Joy was directly under the load at anytime, CO Sargent testified that as a load is lifted, the area to be kept clear below the load increases (Tr. 187). According to CO Sargent, a suspended load does not necessarily have to be over an employee's head to be considered a violation (Tr. 238). The Secretary refers to Mazza's injury as evidence that he was not properly kept clear of the load. The Secretary asserts that Joy was in a similar position from the load as Mazza and could have been injured if the load had tilted in his direction (Tr. 185-186). CO Sargent opined that the 8-foot bar which struck Mazza was inside a 12-foot bar and when the load tilted approximately 45 degrees, the bar slid out from inside the larger bar (Tr. 185, 240).

A violation of § 1926.550(a)(19) is not supported by the record. The Secretary failed to show that CRS, through its foreman, knew or should have known with the exercise of reasonable diligence that the second load was being lifted, or that Mazza or Joy were in the zone of danger. As discussed, foreman Brion did not direct the apprentice crane operator to lift the second load. When he gave the signal to lift the load, Mazza took control of the second lift. According to the owner of Wilson Crane, whoever is giving hand signals to the crane operator directs the lifting operation (Tr. 113). *Also see* § 5-3.2.3(a) of ANSI, B30.5, 1968, for "Crawler, Locomotive and Truck Cranes" which is incorporated by § 1926.550(b)(2). CRS did not create or control the improperly rigged load. The CRS foreman was not present when the load was lifted, and he was not aware that it had been lifted until it was approximately 15 feet in the air, immediately before it tilted (Tr. 338-339). Although Brion had directed the earlier lifts and knew a second lift of trash chute parts was planned, it was Mazza who took responsibility to have the second load lifted. Also, it was not shown that Mazza or Joy's locations while the load was suspended was in accordance with CRS's practice or training.

The Secretary's arguments based on the multi-employer worksite doctrine and that Mazza, while performing the rigging, was a "borrowed employee" of CRS are rejected.<sup>4</sup> Both theories rely on a showing of control--control of the hazard or control of the worker. In this case, during the second lift of trash chute parts, CRS neither controlled the hazard nor Mazza. Although CRS had controlled the rigging operation during the morning and the first load of weights, Mazza, unknown to CRS, took control of the second load of parts by signaling the crane operator to lift the load. Mazza did not wait for foreman Brion to return to his position on the roof to direct the crane. Instead, after completing the rigging, Mazza signaled the crane to lift the load. The apprentice crane operator knew that Mazza possessed rigging experience (Tr. 51-52). He relied upon Mazza to do it properly and felt that Mazza knew how to do so (Tr. 45). Although Wilson Crane prohibited its crane operators from engaging in rigging, Mazza volunteered to assist in the rigging operation (Tr. 40, 109-110, 334). Mazza's agreement to assist in the rigging did not make him an employee of CRS.

Furthermore, the record fails to establish employees' exposure. The parties agree that no employee was directly beneath the load when it was lifted nor was an employee within the load's intended path. Section 5.3.2.2 (f) of ANSI, B30.5, 1968, which is the safety code for "Crawler, Locomotive and Truck Cranes," states "the operator should avoid carrying loads over people." Both employees moved toward the right and several feet away from the load as it was being lifted. The load's intended path was toward the left. Unless directly beneath a suspended load, the Secretary's standard does not provide guidance as to what constitutes keeping clear of suspended loads.

The record fails to establish what constituted keeping clear of the load (the zone of danger) and whether the employees were within this area while the load was suspended. The test for

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The multi-employer worksite doctrine provides that an employer who controls or creates a worksite safety hazard may be held responsible under OSHA even if the employees threatened by the hazard are solely employees of another employer. *Access Equipment Systems*, 18 BNA OSHC 1718, 1722-1723 (No. 95-1449, 1999).

The employment relationship between a loaned worker and the borrowing employer is based on common law principles discussed by the Commission in *Froedtert Memorial Lutheran Hospital*, 20 BNA OSHC 1500, 1505 (No. 97-1839, 2004). Among the factors considered such as skill involved, source of tools, location of work, duration of relationship, and method of payment, the control exercised over the worker is the principal focus. *Id.* at 1506.

determining employees' access to a hazard is whether it is reasonably predictable that employees have been, are, or will be in the zone of danger posed by the violative condition. *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). 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 Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). Whether a suspended load exposes an employee to a foreseeable injury, the zone of danger should be based on the path of the load, the distance the employee is from the load, the nature of the materials being hoisted, and the height of the load. *See Rockwell Int. Corp.*, 9 BNA OSHC 1092, 1097-1098 (No. 12470, 1980). The zone of danger to the suspended load was not shown by the Secretary.

Even if Mazza were an exposed employee, the Secretary failed to show that CRS was responsible for ensuring that he stayed clear of the suspended load as required by § 1926.550(a)(19). Mazza signaled the load to be lifted, and apprentice operator Mascho had the crane lift the load. Neither Mazza nor Mascho was an employee of Wilson Crane; they were not employed by CRS.

With regard to CRS roofer Joy, the Secretary argues that he was in the zone of danger when he stayed on the truck. However, the court lacks a basis for determining whether Joy was exposed to a hazard. There was no showing as to what constituted the zone of danger and what compliance with the standard would have been required in this case. *See Precision Concrete Construction*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Based on the testimony, Joy was anywhere from 4 to 12 feet from the suspended load and on the right side of the truck (Tr. 89, 263, 341). As discussed, the truck bed was 24 feet long and the load was approximately 12 feet long based on the length of the parts (Tr. 58, 146). The load was sitting approximately one foot over the end of the truck to allow Mazza to choke the end (Tr. 259). Without establishing the zone of danger, it is impossible to determine whether Joy was exposed to the load when suspended.

Item 2b - Alleged Violation of  
29 C.F.R. § 1926.550(b)(2)

\_\_\_\_\_The citation alleges that CRS failed to secure and balance the load in the sling before it was lifted. Section 1926.550(b)(2) provides:



All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes. However, the written, dated, and signed inspection reports and records of the monthly inspection of critical items prescribed in section 5-2.1.5 of the ANSI B30.5-1968 standard are not required. Instead, the employer shall prepare a certification record which includes the date the crane items were inspected; the signature of the person who inspected the crane items; and a serial number, or other identifier, for the crane inspected. The most recent certification record shall be maintained on file until a new one is prepared.

The ANSI standard referenced in § 1926.550(b)(2) holds the person directing the lift responsible for ensuring that the load is “secured and properly balanced.”<sup>5</sup> Section 5-3.2.3(a) of ANSI, B30.5, 1968, the safety code for “Crawler, Locomotive and Truck Cranes” specifically provides:

The individual directing the lift shall see that

1. The crane is level and where necessary blocked properly.
2. The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.<sup>6</sup>

The parties dispute whom was responsible for rigging operations. CRS maintains that crane operators regularly are involved in rigging and are responsible for crane safety. The Secretary asserts that CRS employees had performed all the rigging during the earlier lifts, and Wilson Crane prohibited its crane operators from performing rigging operations.

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<sup>5</sup>

CRS’s argument that Wilson Crane violated ANSI B-30.5-1968, which states that cranes shall be operated only by designated operators and learners under the direct supervision of a designated operator, is immaterial for the purpose of this decision. It is undisputed that CRS did not know Mascho was an apprentice and that he should not have been operating the crane without direct supervision (Tr. 216, 329). However, even if crane operator Mazza was not directly supervising apprentice Mascho, CRS may not be relieved of its responsibility to comply with § 1926.550(b)(2).

<sup>6</sup>

Since the ANSI standard uses the mandatory “shall” rather than the advisory “should”, the Review Commission considers its requirements mandatory. *Brown & Root, Inc., Power Plant Div.*, 9 BNA OSHC 1027, 1029 (No. 76-2938, 1980).

The record, however, is undisputed that crane operator Mazza assisted in rigging the load which resulted in the accident. Mazza took responsibility for directing the second lift when he signaled the crane to lift the load. Mazza was an employee of an independent crane company; he was not an employee of CRS. When an employer such as CRS contracts with a specialist, the employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise, as long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely. *Sasser Electric & Manufacturing Co.*, 11 BNA OSHC 2133 (No. 82-178, 1984).

Since Mazza directed the crane to make the lift, the record fails to show that CRS should be held responsible for failing to secure and balance the load. CRS foreman Brion, who directed the first lift involving the weights, did not see the second load being rigged or lifted until it tilted and the bar struck Mazza (Tr. 340).

CRS lacked actual or constructive knowledge of how the second load was rigged or when it was lifted. Although a CRS roofer assisted in the rigging, his knowledge is not shown to be imputed to CRS. Joy lacked any supervisory responsibility, and foreman Brion was not in a position to see the rigging or lift until it was too late.

To show constructive knowledge, the Secretary must prove that CRS should have known with the exercise of reasonable diligence of the noncomplying condition. The Secretary argues that CRS had constructive knowledge of the violation because it failed to exercise reasonable diligence. As discussed, whether an employer exercised reasonable diligence, involves consideration of several factors, including an employer's obligation to have adequate work rules, training programs, supervision of employees, anticipation of hazards to which employees may be exposed, and measures to prevent the occurrence of violations. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

The record in this case does not establish that the inadequate rigging was reasonably predictable by CRS. There is no showing that the CRS foreman could have recognized the load was not properly rigged from a distance of 30 feet and within three seconds of seeing the suspended load. He could not have known that the employees were exposed to the hazard of inadequate rigging. *Precision Concrete Construction*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Also, the

Secretary presented no evidence as to any inadequacies in CRS's safety program or the foreman's supervision of the employees.

The Secretary also argues the load should have used two slings instead of one sling. However, the use of one sling, according to roofer Joy, was decided by Mazza (Tr. 259-260).

A violation of § 1926.550(b)(2) is not established.

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**FINDINGS OF FACT AND**  
**CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.550(a)(19), is vacated and no penalty is assessed.
2. Citation No. 1, item 2a, alleging a serious violation of 29 C.F.R. § 1926.550(b)(2), is withdrawn by the Secretary.
3. Citation No. 1, item 2b, alleging a serious violation of 29 C.F.R. § 1926.550(b)(2), is vacated and no penalty is assessed.

/s/ \_\_\_\_\_  
**KEN S. WELSCH**  
Judge

Date: April 8, 2005