United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MAXIM CRANE WORKS, Respondent.	OSHRC Docket No. 17-1894

ON BRIEFS:

Brian A. Broecker, Attorney; Heather Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Randolph T. Struk, Esq.; Clark Hill PLC, Pittsburgh, PA
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

Maxim Crane Works is a nationwide crane rental company. In April 2017, a Maxim employee was injured when he fell while disassembling a crane at Maxim's maintenance yard in Ridley Park, Pennsylvania. As a result of the incident, the Occupational Safety and Health Administration inspected the yard and issued Maxim a two-item serious citation with a total proposed penalty of $25,350.

Following a hearing, Chief Administrative Law Judge Covette Rooney affirmed both citation items and assessed the proposed penalty for each violation. Only Item 1, alleging a fall

protection violation of 29 C.F.R. § 1910.28(b)(1)(i), is at issue before the Commission.[1] For the reasons discussed below, we affirm the citation.[2]

BACKGROUND

At its Ridley Park yard, Maxim stores, maintains, uses, and rents out a variety of types and sizes of cranes; the company also provides onsite rigging, operational, and maintenance personnel to its customers' worksites. Maxim's customers are predominantly in the construction industry (about 70-75 percent), while the remaining customers are from other industries. Cranes that have been assembled at the yard, whether for maintenance, use, or display, usually must be disassembled before they can be transported to a customer's worksite.

On April 14, 2017, Maxim was disassembling a Manitowoc 14000 crawler crane at the yard for transport to a customer's construction site in New Jersey where a Maxim employee would work onsite as the crane's operator.[3] The crane had been used most recently by Maxim for logistics, loading and unloading of trucks, and moving pieces of equipment or crane sections throughout the yard. During portions of the disassembly process, a Maxim employee stood on top of the lowered lattice boom of the crane. Per company policy, he was not wearing fall protection because he was working at an elevation of less than 15 feet. While disconnecting two sections of the lattice boom, the section the employee was standing on unexpectedly shifted, causing him to lose his balance and fall approximately nine and a half feet to the ground. The employee suffered multiple serious injuries including a fractured skull and concussion.

DISCUSSION

The question before us is whether the cited standard, 29 C.F.R. § 1910.28(b)(1)(i), which requires fall protection on walking-working surfaces with an unprotected side or edge that is 4 feet

[1] Maxim petitioned for review of both citation items, but the Commission requested briefs only as to Item 1. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4 (No. 86-360, 1992) (consolidated) ("Ordinarily the Commission does not decide issues that are not directed for review.").

[2] On June 2, 2020, Maxim filed a motion requesting oral argument. Because we find that the record and briefs provide a sufficient basis upon which to decide this case, the motion is denied. *See, e.g.*, *Manganas Painting Co.*, 21 BNA OSHC 1964, 1968 n.3 (No. 94-0588, 2007).

[3] The Manitowoc crane was contracted to be assembled and operational at the construction site on April 24.

or more above a lower level, applies to the cited condition.[4] On review, as it did before the judge, Maxim argues that 29 C.F.R. § 1926.1423(f), a construction standard that requires fall protection for crane disassembly work starting at an elevation of 15 feet, preempts the cited general industry standard because (1) Maxim was engaged in construction work, and (2) even if it was not, § 1926.1423(f) should nonetheless apply to its disassembly work. The judge rejected both arguments and agreed with the Secretary that the cited general industry provision applies because Maxim was not engaged in construction work at the time of the crane's disassembly.

I. Whether Maxim was engaged in construction work

The construction standards in Part 1926 apply to "every employment and place of employment of every employee *engaged in construction work*." 29 C.F.R. § 1910.12(a) (emphasis added). The term "construction work," as used in § 1910.12(a), is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). The Sixth Circuit, a relevant circuit here,[5] has established a two-step test for determining whether an employer is engaged in construction work.[6] *Cardinal Indus. Inc.*, 828 F.2d 373, 379 (6th Cir.

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[4] To establish a violation, the Secretary must prove that the cited standard applies, there was a failure to comply with the standard, employees were exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *See Briones Utility Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part,* 681 F.2d 69 (1st Cir. 1982). Only the applicability element of the Secretary's prima facie case is on review before the Commission.

[5] This case arose in Pennsylvania, which is in the Third Circuit, and Maxim has its headquarters in Kentucky, which is in the Sixth Circuit. *See* 29 U.S.C. § 660(a) (employers may seek review in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or in the District of Columbia Circuit); 29 U.S.C. § 660(b) (Secretary may seek review in the circuit where the violation occurred or in the circuit in which the employer's principal office is located). In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted).

[6] We note that two months after issuing its decision in *Cardinal Indus., Inc.*, 12 BNA OSHC 1585 (No. 82-427, 1985), the Commission relied on that decision's reasoning in *Nu-Way Mobile Home Mfg.*, 12 BNA OSHC 1670 (No. 80-7082, 1986), which presented the same question and a similar fact pattern. *Nu-Way*, which could have been appealed to the Fifth or D.C. Circuits, was not appealed. The following year, the Sixth Circuit reversed the Commission's *Cardinal Industries* decision. *Cardinal Indus.*, 828 F.2d at 380. Therefore, the rationale underpinning the *Nu-Way*

1987), *abrogated by Martin v. OSHRC* (*CF&I*), 499 U.S. 144 (1991). The first step is to determine whether there was "a nexus between the work and the construction site." *Id.*; *Simpson, Gumpertz & Heger Inc.*, 15 BNA OSHC 1851, 1857 (No. 89-1300, 1992) (relying on court's analysis of the definition of "construction work" in *Cardinal Industries*), *aff'd*, 3 F.3d (1st Cir. 1993). In other words, the Commission must determine whether there is " 'some direct and tangible connection or relationship with the physical [construction] site or location of the structure.' " *Cardinal Indus.*, 828 F.2d at 379 (quoting *Cardinal Indus., Inc.*, 12 BNA OSHC 1585, 1589 (No. 82-427, 1985) (Rader, Commissioner, dissenting)). If a nexus is established, the second step is to determine whether the work in question was "integral and necessary" to construction work by considering the nature of the tasks performed and the employer's primary function. *See Clean Fuels of Indiana, Inc.*, No. 15-1121, at 4-6 (OSHRC 2020) (assessing whether tank cleaning company's work was "integral and necessary" to construction of gas station); *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2062 (No. 10-0551, 2014) (citing *B.J. Hughes, Inc.*, 10 BNA OSHC 1545, 1546-47 (No. 76-2165, 1982)); *Cardinal Indus.*, 828 F.2d at 380 n.11 (factors such as the nature of the tasks performed and the employer's primary function become relevant only after a determination that there is a nexus to a construction site).

Although both parties agree the Commission should examine the work Maxim's employees were performing on the day the violation occurred, they disagree as to the relevant time period for determining whether a nexus between that work and the construction site exists, and whether the work was "integral and necessary" to construction work. Maxim argues that the Commission should disregard any activity the crane was involved in at its maintenance yard *before* that day and focus solely on the purpose for which the crane was being disassembled, while the Secretary argues that the Commission should disregard the reason why the crane was being disassembled, as well as how it was to be used *after* that day.

Because, as noted, § 1910.12(a) states that the construction standards apply to employees who are "*engaged* in construction work" (emphasis added), only activities occurring at the time of the alleged violation, not any future or past activities, are relevant to this aspect of the inquiry. This does not mean, however, that the work Maxim generally performs at the yard, without regard

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decision has effectively been overruled. Moreover, subsequent Commission decisions addressing this same question have applied the principles discussed below. *See infra* note 11.

to any specific crane, is irrelevant. On the contrary, we find that it informs our assessment of Maxim's primary function in the second step of the inquiry, as we discuss in Section B, below.

A. Nexus to a Construction Site

In finding that Maxim's work at its yard on the day of the violation lacked a nexus with the New Jersey construction site, the judge relied on a number of facts related to the general operation of the yard and how the crane in question had been used there prior to disassembly. As discussed above, however, we find that it is only appropriate to consider the work Maxim was performing at the time of the violation. Thus, the issue here is whether the judge erred in finding that Maxim's disassembly work on the day of the accident lacked a nexus to the construction site for which it was destined.[7]

There is no dispute that the disassembly work occurred at Maxim's maintenance yard, which is neither a construction site nor near the New Jersey construction site. Maxim argues, however, that a nexus nonetheless existed because it was disassembling the crane for transport to a specific construction site where one of its employees would operate the crane. We disagree. In *Cardinal Industries*, the Sixth Circuit concluded that there was not a nexus between the cited employer's work mass-producing housing units in a factory and the various construction sites to which a different employer transported those units and installed them because the production work occurred wholly within the factory, with no connection to a specific construction site. *Cardinal Indus.*, 828 F.2d at 375, 380. Maxim distinguishes its disassembly work from that mass-production work by pointing out that the Manitowoc crane was destined for a *specific* construction site, unlike the housing units in *Cardinal Industries.* But, as the Secretary points out, this is a distinction that makes no difference because, just as the work in *Cardinal Industries* was not customized for a specific construction site, Maxim's disassembly of the crane was not customized work designed to meet the specifications of a specific construction project—rather, as the Secretary contends, it was "routine" disassembly work.[8] *See id.* at 380 (implying that customization of the units may

[7] As the judge pointed out, the burden is on the Secretary to establish the applicability of the cited standard; accordingly, the Secretary must establish that the disassembly work that Maxim was performing at the Ridley Park yard *lacked* a nexus with the New Jersey construction site. *See Astra Pharm.*, 9 BNA OSHC at 2129.

[8] We disagree with Maxim that the Secretary's characterization of this work as "routine" minimizes the complicated and difficult nature of crane disassembly. Rather, the Secretary is simply pointing out that there was nothing about disassembling this particular crane for transport to a construction

have led to a different outcome by specifically mentioning the "mass-production" character of the units in the holding).

In addition to *Cardinal Industries*, the judge also correctly relied on the Sixth Circuit's decision in *Cleveland Electric Illuminating Co. v. OSHRC*, 910 F.2d 1333 (6th Cir. 1990) in finding a nexus lacking here. In that case, the court held that training activities at an electric company substation were not considered construction work and lacked a nexus to a particular construction project because "no actual construction or repair was being performed at the . . . training site when the citation was issued," and the training was general training required for future work at any given construction site. *Id.* at 1336. Maxim contends that its activities are different from those in *Cleveland Electric* in that the training there was not to prepare for a specific construction project, while the Manitowoc crane being disassembled was destined for a specific construction site. In making this argument, however, Maxim ignores the fact that "no actual construction or repair was being performed" at its Ridley Park yard. *See id.* In other words, a key element of the court's rationale was that no such work was being performed at the site where the training took place. Here, Maxim's crane disassembly on the day of the accident took place at its maintenance yard, not an active construction site.

The case law also does not support Maxim's argument that a nexus exists here because one of its employees would be operating the crane once it arrived at the construction site. It is true the Commission has found that equipment or materials suppliers may be engaged in construction work if they perform activities at the worksite that are "an integral part of and cannot be separated from the construction activities"—as opposed to the mere delivery of materials or equipment which is not construction work. *A.A. Will Sand & Gravel Corp.*, 4 BNA OSHC 1442, 1443 (No. 5139, 1976); *see also Cardinal Indus.*, 828 F.2d at 378 ("[A]n operation will be considered 'construction' under the Davis-Bacon Act [and thus the OSH Act][9] only if the work is performed on, or in close

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site that was different from disassembling the same crane, or a similar crane, for transport to a non-construction/industrial site. The Secretary's claim is not that this was an *easy* task, but that it was not a *customized* task.

[9] The Davis-Bacon Act's definition of "construction" is relevant here because after defining the term "construction work," § 1910.12(b) expressly refers to the discussion of the terms "construction," "alteration," and "repair" in 29 C.F.R. § 1926.13, which in turn explains that those terms as used in the Construction Safety Act must be interpreted consistently with those terms as used in the Davis-Bacon Act. *See Cardinal Indus.*, 828 F.2d at 376-78. And the Construction

proximity to, the construction site. If not, only the delivery *and* installation of items fabricated offsite, not the fabrication process itself, may be considered 'construction' under the Davis-Bacon Act" (emphasis added)). Indeed, the Commission in *A.A. Will Sand* found that the cited employer was engaged in construction work where one of its employees delivered gravel to a construction site, unloaded it onto a conveyor belt in response to signals from workers at the site, and made adjustments to the conveyor itself. 4 BNA OSHC at 1443. And in *Anthony Crane Rental Inc. v. Reich*, the D.C. Circuit found that the cited crane rental company was engaged in construction work despite having leased the crane to the customer without a crane operator and not performing any construction work itself because, by " 'providing [onsite] mechanic services on an ongoing and regular basis, [the crane rental company] engaged in activities which were inextricably linked to the construction project in question.' " 70 F.3d 1298, 1303 (D.C. Cir. 1995) (quoting *Anthony Crane Rental, Inc.,* 16 BNA OSHC 2107, 2108 (No. 91-556, 1994)).

According to Maxim, its crane disassembly work should be treated like that of the employers in *A.A. Will Sand* and *Anthony Crane*—specifically, Maxim claims the employers in both of those cases delivered materials and equipment and worked at the site, just as it was disassembling the crane for transport to a construction site where one of its employees would operate it. But Maxim ignores that the citations in both of those cases involved work that occurred *on* the construction site, not work performed elsewhere before the equipment or materials have even arrived at the site. Because only the work that occurred at the time of the alleged violation is relevant here, Maxim's disassembly of the crane at its Ridley Park yard is not the same as delivering materials or equipment to, and then working on, a construction site. Put simply, any work Maxim was expected to perform at the construction site is not at issue here, only its work at the maintenance yard.[10]

Safety Act is relevant because "the construction industry standards in 29 C.F.R. Part 1926 . . . were promulgated pursuant to section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 (1982), also known as the Construction Safety Act." *Id.* at 376 n.5 (citing 29 C.F.R. § 1926.1).

[10] We are also unconvinced by Maxim's claim that its disassembly work is an example of an activity initiated away from a construction site that can still be considered necessary for and directly connected to a particular construction project. Maxim again relies on *Anthony Crane*, arguing that both Maxim and the employer in that case were crane rental companies that provided cranes to a construction site along with employees to work onsite (as a mechanic in *Anthony Crane* and as a crane operator here). But, as explained above, unlike the citation here, that citation related

In sum, the common thread in the cases in which a nexus was established is missing here—the violative conditions neither occurred at a construction site nor involved work that occurred as part of an active construction project. Accordingly, we find the Secretary has demonstrated that Maxim's disassembly work lacked a nexus to a construction site, and therefore the cited general industry standard is applicable to the cited condition.

B. Integral and Necessary Part of Construction Work

Given this conclusion, the second step of the analysis—whether Maxim's activities were "integral and necessary" to construction work—need not be reached. However, we nonetheless find the Secretary has also demonstrated that Maxim's work was not an "integral and necessary" part of construction work. *See Ryder Transp.*, 24 BNA OSHC at 2062; *Cardinal Indus.*, 828 F.2d at 380 n.11 (factors such as the nature of the tasks performed and the employer's primary function become relevant only after a determination that there is a nexus to a construction site).

While there is no question that disassembling a crane could be considered construction work, the Commission has held that even "activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a nonconstruction operation." *B.J. Hughes*, 10 BNA OSHC at 1547 (employer's cementing work was not construction work because it was performed as part of an oil-drilling operation—a nonconstruction operation). In addition, such activities are not considered construction work when they are "ancillary to and in aid of [an employer's] primary nonconstruction function."[11] *Royal Logging*, 7 BNA OSHC 1744,

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to a condition that occurred at the construction site. *See Anthony Crane*, 70 F.3d at 1303. As such, the D.C. Circuit's decision does not address whether a similar "direct and tangible connection" to a construction site would exist if the cited condition had not occurred on a construction site.

Likewise, in *National Engineering & Contracting Co. v. OSHRC*, the employer was cited under a construction standard for a condition that occurred while employees were replacing valves in a pump house as part of a larger construction project to upgrade and expand a waste treatment plant. 838 F.2d 815, 816 (6th Cir. 1987). The Sixth Circuit affirmed the judge's finding that the valve replacement could not be isolated from the project as a whole and viewed as accomplishing a non-construction purpose when the employer's primary purpose at the worksite was to perform construction work. *Id.* at 818. Although Maxim argues that the disassembly work at its yard similarly cannot be isolated from the New Jersey construction project as a whole, we agree with the Secretary that *National Engineering* is distinguishable since the employees there were working at the construction site and the employer's primary purpose at the worksite was construction.

[11] Maxim argues that *B.J. Hughes* and *Royal Logging* are inapplicable here because they predate the Sixth Circuit's *Cardinal Industries* decision and because the activities involved in those cases

1750 (No. 15169, 1979) (logging company's "roadbuilding activities, rather than being the purpose of Respondent's work, [we]re ancillary to and in aid of its primary nonconstruction function to cut and deliver logs"), *aff'd*, 645 F.2d 822 (9th Cir. 1981). *But see Clean Fuels*, No. 15-1121, at 4-5 (OSHRC 2020) (cleaning fuel tanks at construction site of newly constructed gas station was construction work because it was "inextricably linked" to the construction).

As to whether Maxim's primary function at the Ridley Park yard where the disassembly took place is construction, we conclude that it is not. Maxim's "core business" (in the words of its Safety Director) is to lease cranes to companies in the construction and other industries, as well as to provide crane operators and personnel for rigging and maintenance. And the primary purpose of its maintenance yard is to serve as a satellite location to store and maintain crawler, as well as other, cranes for lease to industrial and construction worksites throughout the region. As the judge noted, the activities that take place at the yard—including logistics, crane assembly and disassembly, loading and unloading tractor trailers, and moving pieces of equipment and crane sections—are nonconstruction activities.

Disassembly of the Manitowoc crane was thus part of Maxim's primary function at the yard, which was preparing cranes for lease to other companies. This particular crane, and most other cranes at the yard, could not be transported to, and so could not be leased to, other companies without first being disassembled. Accordingly, if Maxim decided to assemble a particular crane for its own nonconstruction use at the yard—as it did with the Manitowoc crane—Maxim would have to disassemble it in order to lease the crane to a customer. That the crane being disassembled on April 14 was designed for use on construction sites and was rented to Maxim's construction customers does not change the fact that its disassembly occurred to prepare the crane for rental—a nonconstruction purpose. Therefore, we find that the disassembly activities here were performed as part of Maxim's rental operation and thus were "ancillary to and in aid of" Maxim's primary

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lacked a nexus to a specific construction project. As the Secretary points out, the court's decision in *Cardinal Industries* simply clarified that an employer's work must have a nexus to a construction site. The Commission and the courts have continued to treat pre-*Cardinal Industries* decisions as good law when they do not contradict the clarification provided by the Sixth Circuit's decision. *See, e.g.*, *Cleveland Elec.*, 910 F.2d at 1335 (citing *Royal Logging*); *Clean Fuels*, No. 15-1121, at 5 (OSHRC 2020) (citing *B.J. Hughes* and *Royal Logging*); *Ryder Transp.*, 24 BNA OSHC at 2062 n.3 (citing to *B.J. Hugues* and distinguishing *Royal Logging* on the facts).

nonconstruction function of leasing cranes to its customers. *See B.J. Hughes*, 10 BNA OSHC at 1547; *Royal Logging*, 7 BNA OSHC at 1750.

II. Whether § 1926.1423(f) nonetheless applies to the crane's disassembly

Maxim makes several arguments to support its contention that the requirements of § 1926.1423(f) should apply to its disassembly work instead of the cited general industry standard irrespective of whether Maxim was engaged in construction work. We find none of the company's claims persuasive.

First, Maxim relies on a portion of the preamble to the Cranes and Derricks in Construction Final Rule to support its contention that OSHA deliberately placed all fall protection standards regarding cranes and derricks in Subpart CC of Part 1926, and thus did not intend to limit the applicability of those standards solely to construction. But Subpart CC's scope provision reads: "This standard applies 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) (emphasis added). This plain language is consistent with the preamble, which states that "the standard applies to only equipment used for construction activities." Cranes and Derricks in Construction, 75 Fed. Reg. 47,906, 47,923 (Aug. 9, 2010) (Final Rule); *see Arcadian Corp.*, 17 BNA OSHC 1345, 1348 (No. 93-3270, 1995) (considering legislative history where plain meaning of statutory language is clear only to determine whether there is express legislative intent to the contrary), *aff'd*, 110 F.3d 1192 (5th Cir. 1997).

Section 1926.1423 itself specifies that "[p]aragraph[] . . . (f) of this section appl[ies] to all equipment *covered by this subpart* except tower cranes." 29 C.F.R. § 1926.1423(a)(1) (emphasis added). And the portion of the preamble discussing § 1926.1423 states, "subpart CC specifies the circumstances in which fall protection must be provided to workers *on equipment covered by subpart CC*" and discusses the fact that "[f]alls have traditionally been the leading cause of death among *construction* workers." Cranes, 75 Fed. Reg. at 47,999 (emphases added). Thus, the scope provision plainly limits applicability of the standard to cranes when they are used in construction, a reading that—contrary to Maxim's claim—the preamble supports.[12]

[12] Maxim also argues that because § 1926.1423 is the only OSHA standard that addresses crane assembly and disassembly, it is more specifically applicable than the general industry standard and should apply here. However, a specific standard will prevail over a general standard only if *both* standards are applicable to the condition. 29 C.F.R. § 1910.5(c)(1); *see also* OSHA, CPL-02-00-

Second, Maxim alleges that § 1926.1423(f) reflects OSHA's determination of the safest requirements for crane disassembly and that, consequently, complying with the cited general industry standard poses a greater hazard than complying with § 1926.1423(f). Maxim explains that the only feasible place for employees to tie off on a lattice boom is at their feet on the boom itself, which creates two problems: (1) the lanyard poses a tripping and entanglement hazard that makes a fall more likely; and (2) at heights of less than 15 feet, a personal fall arrest system either would not stop a fall before the employee hits the ground or the lanyard would have to be so short that performing the required tasks would be impossible. *See* Cranes, 75 Fed. Reg. at 48,002 (identifying the difficulty of having a lanyard both short enough to prevent the employee from hitting the ground and long enough to afford the employee the range of movement necessary for the work).

In response, both the judge and the Secretary point to the compliance officer's testimony that a portable anchorage point could be used. Maxim disputes the feasibility of that option but offered no rebuttal to that testimony. *Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1119 (No. 88-572, 1993) (Secretary's unrebutted evidence is sufficient to sustain his case). Even if using a portable anchorage point was infeasible and tying off at an employee's feet at elevations below 15 feet would be more dangerous than not tying off, Maxim remains adamant that it is not alleging a greater hazard defense here, only challenging the general industry standard's applicability. And as discussed above, § 1926.1423 plainly states it is applicable only to construction work.[13]

Finally, Maxim argues that public policy requires the Commission to apply § 1926.1423(f) to the company's disassembly activities because our decision here will mean that different fall protection standards apply depending on where a crane is assembled or disassembled, even though the potential hazards are identical regardless of where the activities take place.[14] More broadly,

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160, Field Operations Manual, ch. 4 ¶ I.A.3 (Aug. 2, 2016) (restating § 1910.5(c)(1)'s requirement). Here, as we have already found, § 1926.1423(f), by its own terms, does not apply because Maxim was not engaged in construction work.

[13] Furthermore, the injured employee testified that Maxim sometimes assembles and disassembles cranes at sites that have a strict six-foot fall protection rule. In those situations, Maxim's employees "abide by [those companies'] safety standards."

[14] Thus, for example, the assembly of the Manitowoc crane at the New Jersey construction site, and its later disassembly at the site after completion of the project in order to transport it back to Maxim's yard, would constitute construction activities, subject to the construction standard.

Maxim argues that applying subpart CC based on the location of the crane's operation means that employers could ignore other critical safety standards included in subpart CC, even though the activities involve the same tasks and the same inherent risks.

OSHA directly addressed this policy concern in the final rule preamble when it explained that "[e]mployers who use covered equipment for both general industry work and construction work would not be required to comply with subpart CC when the equipment is used for general industry work and not construction work." Cranes, 75 Fed. Reg. at 47,923. OSHA thus deliberately chose not to make these standards generally applicable, and the Commission lacks any authority to broaden the standard so that it applies to employers in all industries. As the Commission has explained:

> An employer who disagrees with a standard, on the basis that its particular requirements are arbitrary or inappropriate, has two options. The employer may apply for a variance. The employer may also seek to have the Secretary alter [the] standard through rule-making proceedings. Such alterations to OSHA's safety standards cannot, however, be obtained in adjudicatory proceedings before the Commission, which only concerns itself with the employer's alleged violation of an existing standard. In these proceedings, an employer cannot question a standard's wisdom.

Carabetta Enters. Inc., 15 BNA OSHC 1429, 1432 (No. 89-2007, 1991) (citations omitted). Consequently, whether there should be a consistent set of rules for crane assembly and disassembly, or even for crane operations generally, across general industry and construction sites, is an issue for OSHA to address through rulemaking. Accordingly, we affirm Citation 1, Item 1.[15]

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: May 20, 2021

[15] Maxim does not challenge either the characterization of, or the $12,675 penalty assessed for, Item 1, and we see no reason to disturb the judge's findings on these issues. *See*, *e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where characterization and penalty were not in dispute).

Some personal identifiers have been redacted for privacy purposes.

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. MAXIM CRANE WORKS, and its successors, Respondent.	OSHRC DOCKET NO. 17-1894

Appearances: Kate O'Scannlain, Solicitor of Labor
Oscar L. Hampton III, Regional Solicitor
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U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania

For the Complainant

Randolph T. Struk, Esquire
Clark Hill PLC, Pittsburgh, Pennsylvania

For the Respondent

Before: Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

Maxim Crane Works (Respondent) is a crane rental company. On Friday, April 14, 2017, a crane assembly/disassembly director who worked for Respondent fell approximately 9 feet to the ground from the lattice boom of a Manitowoc 14000 crane as it was being disassembled at Respondent's facility in Ridley Park, Pennsylvania. The worker had no fall protection and was

hospitalized, having suffered serious injuries including a concussion as a result of the fall. The Manitowoc 14000 was being disassembled for the purpose of transporting it from Respondent's facility in Ridley Park to a construction worksite in New Jersey.

The Occupational Safety and Health Administration (OSHA) investigated this matter on Tuesday, April 18, 2017 pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). After its investigation, OSHA signed, dated and mailed to Respondent, on August 8, 2017, a two-item serious citation alleging violations of OSHA's general industry standards found at 29 C.F.R. Part 1910, and proposing a total penalty of $25,350. Respondent received the citation on October 17, 2017 and filed a notice of contest on November 3, 2017, bringing this matter before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Philadelphia, Pennsylvania on October 23 and 24, 2018. Both parties filed post-hearing briefs and post-hearing reply briefs. As discussed below, the citations and proposed penalties are affirmed.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the Act and if the employer timely contests the OSHA Citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of the Act. 29 U.S.C. § 652(5). *See* Complaint & Answer at ¶¶ 4; Joint Prehearing Statement at 9-10 ¶ V.

It is also determined that Respondent filed a timely notice of contest. For the purposes of determining jurisdiction, the relevant consideration is the timeliness of Respondent's notice of

contest, not the timeliness of the Secretary's citation.[1] 29 U.S.C. 659(c); *see also Yelvington Welding Serv.*, 6 BNA OSHC 2013, 2016 (No. 15958, 1978) (construing 29 U.S.C. § 658(c) [section 9(c) of the OSH Act relating to the 180-day timeline to issue a citation] as a statute of limitations rather than an absolute jurisdictional bar to the issuance of a citation after six months.).

The OSH Act allows 15 working days "from the receipt" of the citation by the employer for the employer to notify the Secretary of its intent to contest the citation. 29 U.S.C. § 659(a) (If an employer fails to file a timely notice of contest, "the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency."). While the citation for this matter was dated and sent by certified mail on August 8, 2017, the record establishes that Respondent did not receive the first mailing of the citation. Instead, Respondent received the citation by a second mailing, via United Parcel Service ground delivery, signed as received on October 17, 2017. Within 15 working days of October 17, Respondent notified the Secretary of its intent to contest the citation on November 3, 2017. Therefore, Respondent's notice of contest is timely.

Based upon the record, the undersigned concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the Act.

[1] The timeliness of the citation was a subject of Respondent's August 15, 2018 motion for summary judgment, which was denied on September 10, 2018 and then denied reconsideration on September 21, 2018. *See* Respondent Maxim Crane Works LP's Motion for Summary Judgment (Aug. 15, 2018); Respondent Maxim Crane Works LP's Memorandum of Law in Support of Motion for Summary Judgment (Aug. 15, 2018); Secretary's Response in Opposition to Respondent's Motion for Summary Judgment (Aug. 30, 2018); Order Denying Respondent's Motion for Summary Judgment (Sept. 10, 2018); Respondent Maxim Crane Works LP'S Sur-Reply to the Secretary's Response in Opposition to Respondent's Motion for Summary Judgment (Sept. 10, 2018); Secretary's Response in Opposition to Respondent's Motion for Reconsideration (Sept. 18, 2018); Order Denying Respondent's Motion for Reconsideration (Sept. 21, 2018). After a hearing with testimony regarding this matter, this issue is adjudicated herein.

STIPULATIONS

The parties stipulated to the following facts:

1. Maxim has a web site at www.cranerental.com.

2. On April 14, 2017, Maxim had a facility located at 601 W. Chester Pike, Ridley Park, PA 19078 (hereafter the "worksite").

3. On April 14, 2017, Maxim employee [redacted] was part of a work crew that was disassembling the lattice boom of the Manitowoc 14000 crane at the worksite.

4. On April 14, 2017, during the course of disassembling the lattice boom of the Manitowoc 14000 crane, sections of the lattice boom were at times rigged to a Liebherr LRl400 crane.

5. On April 14, 2017, [redacted] was on top of the lowered lattice boom of the Manitowoc 14000 during portions of the disassembly process.

6. On April 14, 2017, while on top of the lowered lattice boom of the Manitowoc 14000, [redacted] was approximately nine and a half feet above the ground.

7. On April 14, 2017, [redacted] was not using fall protection while on top of the lowered lattice boom of the Manitowoc 14000.

8. On April 14, 2017, [redacted] fell off the lowered boom of a Manitowoc 14000 crane and was treated by medical professionals at a local hospital.

9. On April 14, 2017, Maxim reported [redacted]'s accident to OSHA via the hotline.

10. OSHA conducted an inspection at Maxim's Ridley Park facility, and subsequently issued a Citation and Notification of Penalty to Maxim.

("Stipulations"; Joint Prehearing Statement at 9.)

BACKGROUND

Respondent's core business is to provide lifting services to its customers. (Tr. at 377.) Respondent rents out cranes of all different types and all different sizes, and also provides competent rigging, operational and maintenance personnel for its cranes on Respondent's customers' worksites. (Tr. at 378.) Respondent's customers include "anybody with a good credit

reference," but, according to Respondent's Safety Director, John Merrill, 70 to 75 percent of Respondent's customers are in the "construction industry" whereas the other 25 to 30 percent of its customers are from "some other industry." (Tr. at 378-379.) Respondent serves customers nationwide and employs 2,500 workers. (Tr. at 49; Ex. C-4 at 1.) At Respondent's "satellite" worksite in Ridley Park, Respondent employs eight workers. (Tr. at 49, 311; Ex. C-4 at 1.)

In its Ridley Park yard, Respondent stores, maintains and uses the cranes that are also eventually rented out to "industrial facilities in the southern part of the region." (Tr. at 318-319.) Respondent's Regional Safety Manager, Joseph Shinn, testified that, in between rentals, Respondent uses the cranes in the Ridley Park yard to load and unload tractor trailers, assemble and disassemble other cranes, and move pieces of equipment or crane sections throughout the yard. (Tr. at 320.)

At the time of the incident, Respondent was in the process of disassembling the Manitowoc 14000 crane (Manitowoc) in preparation for its transportation to one of Respondent's customers, Durr Mechanical, for a steel erection construction site in New Jersey. (Tr. at 406-407.) Respondent enlisted the assistance of another one of its cranes it had at the Ridley Park yard, a Liebherr LR1400 (Liebherr), to aid the disassembly process of the Manitowoc. (Stipulations at ¶ 4.) Disassembly of the Manitowoc at the Ridley Park yard was estimated to take two to three days. (Tr. at 408, 421.) The Manitowoc would then be transported to New Jersey in sections, with state issued transportation permits allowing the large sections to travel. Once at the Durr Mechanical construction site in New Jersey, the Manitowoc would be assembled, on the construction site, for use at that location. Respondent's employees were scheduled to operate the Manitowoc at the Durr Mechanical location in New Jersey. (Tr. at 407, 413.)

On the day of the incident in Ridley Park, six Respondent employees were directed to disassemble the Manitowoc. (Ex. C-20.) The order to disassemble the crane came from Respondent's Operations Department, located 40 miles away from the Ridley Park yard. The Operations Director was John Mongon. Mongon directed Ridley Park Branch Manager "DJ" to disassemble the crane, and DJ directed mechanic [redacted] and the crew of five other Respondent workers, including Jacob Stanchock, Dante Puzzangara, Jonathan Labuski, Charles Boone and Harry Duff, to accomplish that task. (Tr. at 224, 244, 282; Ex. C-20.) Respondent management on site at the Ridley Park yard at the time of the incident included Branch Manager "DJ" and Safety Manager Joseph Shinn. DJ and Shinn were in the shop at the Ridley Park yard at the time of the incident, in view of the disassembly process but not participating in the disassembly process. (Tr. at 91, 231, 233, 244, 254-255.) Shinn was part of the management team but did not direct work. (Tr. at 317-318.) Shinn testified that he did not know that the Manitowoc was being disassembled that day; he found out when he got a telephone call notifying him "to come to the yard right as the accident happened." (Tr. at 318.) Joe Shinn called 911. (Tr. at 268; Ex. C-61.)

Incident

Respondent assigned 6 workers to disassemble the Manitowoc on the day of the incident. [redacted] led the disassembly crew, directing the movements and sequence of events of the crew during the disassembly process. (Tr. at 222-223.) It is undisputed that, while [redacted] directed the disassembly process, all of the workers had "interchangeable" positions and accomplished the task together and [redacted] had no management authority. (Tr. at 222-224, 283.)

The Manitowoc is a large crawler crane. It is designed to work on "uneven ground, muddy ground, an area that needs improvement," because "the design of the crane is made so that it's very stable, inherently stable. It also has a lot of traction to be moving around on lousy ground." (Tr.

at 379.) The Manitowoc is so large that it must be disassembled and transported in sections from location to location and the operator's manual contains many warnings on crushing, falling, collapsing hazards while operating, assembling and disassembling the crane. *See* Exs. C-36, R-36A (Manitowoc operator manual). Indeed, the Manitowoc requires another crane to assist in its disassembly – in this case, the Liebherr. [redacted] and the other crewmembers were using the Liebherr to disassemble the Manitowoc's boom on the day of the incident. The record does not contain much information, such as an operator manual, on the Liebherr other than it was used at the Ridley Park yard to hoist sections of the Manitowoc during the disassembly process on the day of the incident.

The following facts are not in dispute: no crew member, including [redacted], wore fall protection while working to disassemble the Manitowoc that day. The Manitowoc's boom is not equipped with a railing or anything else to prevent a fall. The Manitowoc's boom was lowered and resting on the ground around the time of the incident. The boom itself consists of several sections – starting with "the head" at the very end of the boom followed by two 40- foot sections, and then, as relevant to this case, 1) a 10-foot section, 2) an 18-foot section, and finally, 3) the heel (the section of the boom that connects to the cab of the crane). (Tr. at 23, 386; Exs. C-20, C-22, R-22A.) Around the time of the incident, Respondent had disconnected the head and the two 40-foot sections from the boom. (Tr. at Ex. C-20.) This case focuses on the last three sections: 1) the 10-foot section, 2) the 18-foot section, and 3) the heel.

All three of these sections were connected to each other by 25-30-pound steel pins – each 2.5 to 3 inches in diameter – and the task at the time of the incident that day was to disconnect the 10-foot section from the 18-foot section (which was still connected to the heel) by removing the steel pins that joined them. (Tr. at 64-65, 182-183, 227-228, 383.) While on the Manitowoc's

boom, before the three sections were disconnected from each other, [redacted] was standing at a height of 9.5 feet above the ground. Additionally, while standing on the Manitowoc's boom, before the three sections were disconnected from each other, the Manitowoc's 18-foot section of the boom was rigged to the Liebherr while [redacted] was standing on it. (Tr. at 227, 266, 297; Exs. C-4 at 2, C-20, C-61 at 1.)

The Liebherr was used to hoist the 18-foot section of the Manitowoc boom to aid in the release of the 25-30-pound steel pins, which were to be removed by Puzzangara on the ground below. (Tr. at 64-65, 266-267, 297-298; Exs. C-4 at 2, C-61 at 2.) Respondent concedes that the Liebherr raised and lowered the 18-foot section of the Manitowoc's boom in the following manner:

> 26. Any alleged hoisting of a load that serves as the basis for Maxim's alleged violation of 29 CFR 1910.180(h)(3)(v) was limited to lifting an 18-foot section of the boom of the Manitowoc crane no more than ¼ inch. *HT at p. 272, LL 7-20*.[2]
>
> 27. Any alleged lowering of a load that serves as the basis for Maxim's alleged violation of 29 CFR 1910.180(h)(3)(v) was limited to lowering an 18-foot section of the boom of the Manitowoc crane no more than 2-3 inches. *HT at p. 273, LL 13-23*.

(Resp't Br. at 6.) After the pins were removed, the 10-foot section failed to disengage from the 18-foot section of the Manitowoc boom. (Tr. at 267, 298; Ex. C-61 at 2.) [redacted] was on the top of the boom at that time, and as he turned to walk toward the heel, the 10-foot section unexpectedly disengaged from the 18-foot section of the boom, causing [redacted] to lose his balance and fall approximately 9.5 feet to the ground below. (Tr. at 52-53, 64, 228-229, 267-268, 298; Exs. C-4 at 2-3, C-61 at 2.) [redacted] suffered multiple lacerations, a fractured scapula, a fractured skill and a concussion. (Tr. at 233; Stipulations at ¶ 8.)

[2] The reference to "HT" is a direct quote from Respondent's brief and refers to the "Hearing Transcript."

OSHA Investigates and Issues a Citation

On Monday, April 17, 2017, OSHA directed OSHA compliance safety and health officer (CO) Herbert Allen Wilcox[3] to investigate this matter, following Respondent's report to OSHA of [redacted]'s hospitalization. (Tr. at 36, 39, 120-121; Ex. C-2.) CO Wilcox arrived at Respondent's Ridley Park yard the following day, April 18, to begin the investigation. CO Wilcox's investigation lasted 3.5 to 4 hours, during which he interviewed management and non-management employees, took photographs and measurements, and obtained copies of Respondent's incident reports, photographs, safety and health manual, and the Manitowoc's operator's manual. (Tr. at 36, 39; Exs. C-3-C6, C-11, C-22-C-23, C-36-38.)

CO Wilcox first spoke with John Mongon, Respondent's operations manager, and Joe Shinn, Respondent's safety manager. (Tr. at 40.) CO Wilcox testified that they told him that Respondent requires fall protection above 15 feet and that Respondent has a progressive disciplinary policy for enforcement of its safety rules that includes a verbal warning, written warnings and then termination. (Tr. at 41.) CO Wilcox then walked Respondent's worksite and took notes. (Tr. at 40-43, 49-52; Ex. C-3 (CO Wilcox's notes interviewing John Mongon ("JM") and Joe Shinn ("JS")), C-4 (CO Wilcox's field notes).) He interviewed several employees, including Jonathan Labuski, who provided a signed written statement to CO Wilcox. (Tr. at 259-269, 367-369; Ex. C-19.) CO Wilcox testified that the workers told him that they had seen

[3] CO Wilcox has performed 63 inspections over the course of the two years he has been a compliance safety and health officer at OSHA. (Tr. at 28.) Prior to joining OSHA, CO Wilcox spent approximately 18 years in the health and safety industry, working as a consultant for a health and safety and environmental consulting firm, and performing as a safety director at a manufacturing and sawmill facility. (Tr. at 28-29.) CO Wilcox has an associate's degree in bioenvironmental engineering and an associate's degree in allied health sciences. He is in his final semester of a bachelor's degree in environmental science with a concentration in safety and health. (Tr. at 29.)

instances of verbal reprimands for safety violations, but that no worker told him that they had heard of written warnings or terminations due to safety warnings. (Tr. at 55.) CO Wilcox also testified that he received no information from Respondent that any worker had been disciplined for "riding" a load. (Tr. at 110-111.)

After his investigation, CO Wilcox developed an OSHA violation worksheet that served as a basis for his recommendation for the OSHA citations at issue here. (Tr. at 71-74; Ex. C-19.) At that point, according to CO Wilcox, his recommendations are reviewed and issued by the OSHA area director. (Tr. at 27.) The Citation in this matter was signed by Jorge Alzata for OSHA Area Director Theresa Downs on August 8, 2017. (Citation at 7, 9.)

OSHA receptionist Pamela Graham testified about what happened to the Citation in this matter after August 8, 2017. (Tr. at 330-367.) Ms. Graham testified that she was assigned the task of mailing out the Citation to Respondent. (Tr. at 333.) Ms. Graham sent the Citation to Respondent via United States Postal Service certified mail on August 8, 2017. (Tr. at 335.) Ms. Graham testified that her diary sheet for this case, and the USPS tracking system[4] using the

[4] Ms. Graham tracked and printed out the tracking results from the USPS tracking website of the certified mailing of the Citation package using its designated USPS certified mailing tracking number on October 16, 2017 and October 31, 2017. (Tr. at 336-343; Exs. C-47-C-48.) The October 16 printout does not show events earlier than September 11, 2017 as it appears that the events field is not expanded any earlier than that date on the printout. (Ex. C-47 at 1.) Respondent did not object to the admission of the October 16 printout at the hearing. (Tr. at 337.) The October 31 printout, however, does show earlier events, starting on August 9, 2017. (Ex. C-48 at 3.) Respondent raised a hearsay objection to the admission of the October 31 printout at the hearing. (Tr. at 338-342.)

Respondent argued that "there's been an implication in some pleadings that have been filed in this case that we somehow refused to take [the delivery of the citation] or not." (Tr. at 341.) Over Respondent's hearsay objection, the October 31 was admitted under Federal Rule of Evidence 807 "Residual Exception" as the information within the October 31 printout comes directly from the USPS tracking website and because it is more probative than any other evidence that can be obtained through reasonable efforts (such as tracking down the "specific USPS employee who attempted to deliver the certified mailing"). (Tr. at 341-342.) The

tracking number on the certified mailing receipt, confirmed that she mailed the Citation for this matter on August 8, 2017. (Tr. at 335; Ex. C-45-C-48.)

Ms. Graham testified that the certified mailing was never returned to the OSHA office by the USPS. (Tr. at 350.) She testified that she was alerted to a possible issue with the certified mailing of the Citation by an October monthly report circulated by her managers regarding dates and deadlines for various employers. (Tr. at 343, 352-355.) After checking the certified mailing tracking number on the USPS tracking website on October 16, 2017, Ms. Graham mailed the Citation a second time, using United Parcel Service (UPS) Ground. (Tr. at 344; Ex. C-49-C-51.) Ms. Graham then checked the UPS tracking system, which notified her that this second mailing of the Citation was delivered to Respondent on October 17, 2017. (Tr. at 348.)

DISCUSSION

The Citation Was Timely

Respondent claims that the Secretary issued the Citation for this matter in an untimely manner, in violation of the OSH Act, and that therefore the Citation should be vacated, and the penalties should be nullified. (Resp't Br. at 22-24.) The Secretary argues that Respondent misinterprets the OSH Act, that the Secretary indeed issued the Citation in a timely manner, in accordance with the OSH Act, and that Respondent's argument should therefore be rejected. (Sec'y Reply Br. at 1-4.) The undersigned agrees with the Secretary.

Section 9(c) of the OSH Act states "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). The

undersigned notes that the October 31 printout indicates that on August 28, 2017, the certified mailing was marked as "Unclaimed/Being Returned to Sender." (Ex. C-48 at 2.) While noteworthy, this information is not necessary and is not used by the undersigned to conclude that OSHA timely issued the citation in this matter, as discussed herein.

Commission looks "to § 10(a) [29 U.S.C. § 659(a)] as governing the service of citation, as well as the notification of proposed penalty, where as here both documents were served together." *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 n.6 (No. 76-2165, 1979) (holding that where "the citation and notification of proposed penalty were in fact sent together, [they] must stand or fall together insofar as the validity of their service is concerned."). Section 10(a) of the OSH Act states in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation under section 9(a) of this Act, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 of this Act and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

29 U.S.C. § 659(a). The Commission has held that "ordinarily, nonreceipt or refusal to accept mail does not affect the validity of service. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1148 at 590–91 (1969)." *George Barry, et al., d/b/a Union Waterproofing, Roofing & Painting Co.*, 9 BNA OSHC 1264, 1266-1267 (No. 77-2720, 1981); *see also Donald K. Nelson Constr., Inc.*, 3 BNA OSHC 1914, 1915 (No. 4302, 1976) ("Rules governing service are designed to apply generally to all cases in order that an objective determination of the adequacy of service may be made.").

The relevant facts for this issue are these: the occurrence of the alleged violation in this matter happened on April 14, 2017. The date of the Area Director's authorized individual's signature on the Citation and Notification of Penalty is August 8, 2017, slightly less than four months from the date of the incident. The Citation and Notification of Penalty was mailed by certified mail that same day on August 8, 2017. Respondent did not receive the certified mailing of the Citation and Notification of Penalty. Respondent received the second mailing of the August

8, 2017 signed Citation and Notification of Penalty, sent by UPS Ground, on October 17, 2017, approximately three days after the end of the six-month statute of limitations had run.

Respondent argues that sections 9(c) and 10(a) impose a duty on the Secretary "to issue and serve" the Citation within six months of the alleged violation. (Resp't Br. at 24.) Respondent points to the following excerpt from OSHA's field operations manual (FOM): " 'a citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the citation is actually signed, dated ***and served*** by certified mail as provided by § 10(a) of the Act. FOM, CPL 02-00-160, chapter 5, ¶ XI.A.' " (Resp't Br. at 22-23) (emphasis by Respondent). Respondent claims that because it received the Citation more than six months after April 14, 2017, "the Secretary failed to issue *and serve* the Citation within the statute of limitations period, as required by §§ 9(c) and 10(a) of the OSH Act[.]" (Resp't Br. at 24) (emphasis in the original).

Here, even following Respondent's logic, the Secretary issued the Citation and Notification of Penalty in a timely manner. The record amply establishes that OSHA in fact sent the Citation and Notification of Penalty by certified mail on August 8, 2017, well within the six-month statute of limitations.[5] The record also establishes that Respondent was in nonreceipt of the August 8, 2017 certified mailing of the Citation and Notification of Penalty. Thus, service of the August 8, 2017, certified mailing of the Citation and Notification of Penalty was still valid, even though

[5] Both parties discussed *Earth Developers, Inc.*, 27 BNA OSHC 1030 (No. 17-1120, 2017) (ALJ), a case where the citation was deemed untimely because the record established that it was mailed after the statute of limitations had run. (Resp't Br. at 23-24; Sec'y Reply Br. at 3.) The undersigned agrees with the Secretary that this case is non-precedential and distinguishable. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (holding that unreviewed administrative law judge decision does not constitute binding precedent for the Commission). Here, unlike the facts in *Earth Developers*, the record amply establishes that the Secretary sent the Citation and Notification of Penalty by certified mail within the statute of limitations timeframe.

Respondent did not receive it. *George Barry, et al., d/b/a Union Waterproofing, Roofing & Painting Co.*, 9 BNA OSHC at 1266-1267. Furthermore, Respondent has not claimed any sort of prejudice in presenting its case by receiving the second mailing of the Citation and Notification of Penalty approximately three days after the end of the six-month timeframe. *Gen. Dynamics Corp., Elec. Boat Div., Quonset Point Facility*, 15 BNA OSHC 2122, 2125 (No. 87-1195, 1993) ("Under long-established Commission precedent, the employer must establish such prejudice, to warrant vacating the citation for lack of 'reasonable promptness.' ").

To the extent that Respondent is arguing that the OSH Act mandates that the Citation was issued only upon its receipt, the undersigned is not persuaded. The word "receipt" in section 10(a) is separate from the word "issued" and refers to the starting point of the separate 15-day period the employer has to contest the Citation that has been issued:

> If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

29 U.S.C. § 659(a) (emphasis added). Indeed, the Commission has examined the legislative history of the OSH Act and has determined that, regarding the service of the Citation, "the distinction between citations and notices of proposed penalties is deliberate, for Congress explicitly rejected a provision that would have combined proposed penalties with the issuance of a citation." *B. J. Hughes, Inc.*, 7 BNA OSHC at 1474 n.6 citing Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Occupational Safety and Health Act of 1970, 92nd Cong., 1st Sess., p. 1202.[6]

[6] The undersigned also finds that the Secretary's arguments regarding his interpretation of the word "issue" to be reasonable. The Secretary argues that he has "consistently and reasonably interpreted

Accordingly, the undersigned finds that the Citation in this matter was timely.

The Citation Items Are Affirmed

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980). A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

Serious Citation 1, Item 1: Fall Protection

The Secretary claims that Respondent violated 29 C.F.R. § 1910.28(b)(1)(i), which requires:

> Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level is protected from falling by one or more of the following: (A) Guardrail systems; (B) Safety net systems; or (C) Personal fall protection systems, such as personal fall arrest, travel restrain, or position systems.

29 C.F.R. § 1910.28(b)(1)(i). The Secretary alleges that Respondent "did not ensure that each employee on a walking-working surface with an unprotected side or edge that was 4 feet (1.2 m) or more above a lower level was protected from failing by one or more the following: Guardrail systems, safety net systems, or personal fall arrest systems:

'issuance' as used in § 9(c) to mean 'to sign and send by certified mail[,]' and that he has "consistently advanced this interpretation in Commission litigation." (Sec'y Reply Br. at 1-3.) The Secretary further points out that OSHA's FOM's use of "served by certified mail" means "sent by certified mail," and so "the FOM is perfectly consistent with the formal interpretation set forth in the Secretary's litigation papers." (Sec'y Reply Br. at 4.)

(a) 601 Chester Pike/Manitowok [*sic*] crane – On or about 4/14/17, an employee was standing on a section of the lattice boom, exposing the employee to a fall hazard of approx. 9.5 feet

(Citation at 6.)

It is undisputed that Respondent's employee, [redacted], worked from the top of the Manitowoc's lowered boom, without any sort of fall protection, from a height of 9.5 feet during the disassembly process on the day of the incident. (Stipulations ¶¶ 5-7.) It is also undisputed that Respondent requires fall protection during the disassembly process at the Ridley Park yard beginning at 15 feet. (Tr. at 41, 229-230.) The cited standard requires fall protection at 4 feet. Respondent argues that the cited standard is inapplicable and that the fall protection standard for cranes in construction at 29 C.F.R. § 1926.1423(f), which requires fall protection at 15 feet for assembly/disassembly of cranes in construction work, applies to the cited working conditions instead. (Resp't Br. at 11-22; Resp't Reply Br. at 2-8.) The Secretary claims that the cited general industry standard applies to the disassembly of the Manitowoc in the Ridley Park yard on the day of the incident because that activity did not fall within the definition of "construction work," as has been defined in Commission precedent. (Sec'y Br. at 17-20.)

The General Industry Standards are Applicable

The construction industry standards prescribed in Part 1926 apply to "every employment and place of employment of every employee engaged in construction work." 29 C.F.R. § 1910.12(a). The term "construction work" as used in section 1910.12(a) "means work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b).

"Part 1926 applies … to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work." *Snyder Well Servicing, Inc.*, 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982). "Activities that could be regarded as construction work should not be so regarded when they are performed solely as part

of a nonconstruction operation." *BJ-Hughes*, 10 BNA OSHC 1545, 1547 (No. 76-2615, 1982); *see also Royal Logging Co.*, 7 BNA OSHC 1744, 1750 (No. 15169, 1979) (concluding that even though a logging operation involved some roadbuilding, that roadbuilding was "ancillary to and in aid of [the logging company's] primary nonconstruction function to cut and deliver logs"), *aff'd* 645 F.2d 822 (9th Cir. 1981). Similarly, the mere use of equipment that is often used in construction work does not transform nonconstruction work to "construction work." *BJ-Hughes,* 10 BNA OSHC at 1547 (rejecting Secretary's argument that Part 1926 applied because the equipment involved was typically used in construction).

"[A] finding of 'construction work' under section 1910.12 requires some nexus to the construction site." *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373, 379-380 (6th Cir. 1987), *abrogated on other grounds by Martin v. OSHRC*, 499 U.S. 144 (1991). A nexus, in the worker safety context, is a "direct and tangible connection or relationship" between the work being performed and the worksite. *Id*. at 379; *see generally Integra Health Mgmt., Inc.*, 27 BNA OSHC 1838, 1844-1846(No. 13-1124, 2019) (Commission discussing "nexus" concept with regard to workplace violence under a §5(a)(1) [29 U.S.C. § 654(a)(1)], the "general duty clause," analysis). Here, the Secretary argues that there is an insufficient nexus between Respondent's disassembly work at the Ridley Park yard and the New Jersey construction site. (Sec'y Br. at 17-22.) Respondent argues that there is a "clear, direct and tangible" nexus between the disassembly activities and the construction site in New Jersey. (Resp't Br. at 11-17.)

The burden is on the Secretary to establish the applicability of the general industry 4-foot fall protection requirement, instead of the less restrictive 15-foot fall protection cranes in construction requirement, in this case. *Astra Pharma. Prods.*, 9 BNA OSHC at 2129. As discussed herein, the record establishes that the Ridley Park crane disassembly work had some form of

connection to both the Ridley Park yard and to a New Jersey construction site. Thus, to prove his case, the Secretary must establish that the disassembly work that Respondent was doing at the Ridley Park yard had an insufficient "direct and tangible connection or relationship" with the New Jersey construction site. Based on the evidence in the record, the undersigned concludes that the Secretary has established that the Ridley Park disassembly activities had an insufficient nexus with the New Jersey construction worksite, and therefore the more restrictive 4-foot fall protection requirement under the cited general industry standard applies in this case.

The Secretary argues that the disassembly activity on the day of the incident took place not at a construction site, but at the Ridley Park yard. (Sec'y Br. at 19.) The Secretary additionally points out that Respondent is not a construction company, rather, it is a crane rental company, and the Ridley Park yard is used for "storage, maintenance, and retail operations to support the rental, leasing and sale" of Respondent's cranes. (Sec'y Br. at 19.)

Respondent argues that it was disassembling the Manitowoc on the day of the incident so that it could be transported to the New Jersey construction site, for which it was earmarked and leased.[7] (Resp't Br. at 13.) Once at the New Jersey construction site, Respondent's own employees would reassemble the Manitowoc and operate it on the construction site. (Resp't Br. at 13.) Respondent argues that without the disassembly of the Manitowoc on the day of the incident, "the crane could not have been transported to, nor could it otherwise have been operated at," the New Jersey construction site. (Resp't Br. at 15.) Thus, according to Respondent, the disassembly activities on the day of the incident were "performed directly in relation to and for the sole purpose of the [New Jersey] construction project, and were a necessary and immediate

[7] The Manitowoc is too large to be transported fully assembled to New Jersey from the Ridley Park yard. (Resp't Br. at 13.)

precedent step to [Respondent's] operation of the crane to erect steel at that construction site." (Resp't Reply Br. at 2.)

Both parties rely on *Cleveland Electric Illuminating Co. v. OSHRC*, 910 F.2d 1333 (6th Cir. 1990) as support for their arguments.[8] The Secretary argues that the "activities and conditions present at the time of the alleged violations" are the focal point for this inquiry. (Sec'y Br. at 19-20.) The Secretary points out that the 6th Circuit held training activities at an electric company substation were not considered "construction work" because "no actual construction or repair was being performed at the Clinton Road training site *when the citation was issued*." (Sec'y Br. at 18-20.) The Secretary states that the 6th Circuit found that even if the training "was in the nature of construction work, their activities lack the nexus to a particular construction site required by *Cardinal Industries*." (Sec'y Br. at 19-20.)

Respondent, on the other hand, argues that, unlike the company in *Cleveland Electric*, Respondent's Manitowoc was earmarked for a specific construction site in New Jersey. (Resp't Reply Br. at 4-5.) Thus, according to Respondent, *Cleveland Electric* supports its argument that the Ridley Park disassembly activities should be considered "construction work" because its Manitowoc was intended solely and specifically for a construction site. (Resp't Reply Br. at 5); *see also* Resp't Br. at 14-15 citing *A. A. Will Sand & Gravel Corp.*, 4 BNA OSHC 1442, 1443 (No. 5139, 1976) (respondent's delivery of material to a construction site constitutes "construction

[8] Both parties also cite to multiple ALJ decisions regarding this issue including *All Florida Tree & Landscape, Inc.*, 25 BNA OSHC 1310, 1349 (No. 13-0373, 2015) (ALJ); *Delta Elevator Serv. Corp.*, 24 BNA OSHC 1968 (No. 12-1446, 2013) (ALJ); *Murphy Enterprises, Inc., d/b/a Murphy Bros. Exposition*, 17 BNA OSHC 1477 (No. 93-2957, 1995) (ALJ); *Cornell & Co., Inc.*, 15 BNA OSHC 1726 (No. 91-990, 1992) (ALJ); *Kullman Industries, Inc.*, 14 BNA OSHC 1282 (No. 88-109, 1989) (ALJ). As noted above, unreviewed administrative law judge opinions do not constitute binding precedent within the Commission. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976).

work" subject to the construction standards where the delivery employee assisted at the site and, thus, the delivery became "an integral part of ... the construction activities."); *United Tel. Co. of the Carolinas*, 4 BNA OSHC 1644, 1645 (No. 4210, 1976) (work "incidental to subsequent construction and part of the total work to be performed" is subject to the construction standards).

The preponderance of the evidence supports the Secretary's argument that there is an insufficient nexus between the Ridley Park disassembly activities on the day of the incident and the New Jersey construction worksite to render the construction standards applicable. Here, the activity in question occurred at Respondent's Ridley Park yard, which serves to store, maintain and even use the cranes that are also eventually rented out to "industrial facilities in the southern part of the region." (Tr. at 318-319.) Contrary to Respondent's arguments, the evidence regarding other uses of the Manitowoc, as well as the Liebherr, and other aspects of its Ridley Park yard are not "irrelevant" and "of no import" to the inquiry here. (Resp't Br. at 16; Resp't Reply Br. at 7-8.) The record establishes that Respondent uses the cranes at its Ridley Park yard for non-construction purposes, including to load and unload tractor trailers, assemble and disassemble other cranes, and move pieces of equipment or crane sections throughout the yard. (Tr. at 320.) While this Manitowoc was earmarked for a construction site, and is also designed to be used on construction sites (according to Safety Director Merrill), CO Wilcox testified that management told him that Respondent also used the Manitowoc as a "display crane" for advertising purposes at the Ridley Park yard. (Tr. at 76, 116, 203-205, 379.)

Additionally, the undersigned questions Respondent's claims that Respondent's business is to provide heavy lift services "principally" and "primarily" for customers at construction job sites. (Resp't Br. at 14; Resp't Reply Br. at 3.) The undersigned notes, however, that Safety Director Merrill quantified its customers: while 70 to 75 percent of Respondent's customers are in

the "construction industry," the other 25 to 30 percent of its customers are from "some other industry." (Tr. at 378-379.) Consequently, up to a third of Respondent's cranes are not used in the construction industry at all. While assembly and disassembly of cranes can happen at construction worksites, this particular activity happens regularly at this particular worksite for the purpose of transporting the crane to a client in whichever industry they belong as long as the client has a good line of credit. (Tr. at 378); *BJ-Hughes*, 10 BNA OSHC at 1547 (activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a non-construction operation).

The undersigned is also not persuaded by Respondent's extensive arguments regarding the applicability of 29 C.F.R. § 1926.1423[9] based on its own interpretation of the rule and its preambles.[10] (Resp't Br. at 17-22.) Respondent's Vice President of Safety, Troy Wagner, testified that he relied on the language of 29 C.F.R. § 1926.1423 and the preambles to both the proposed and final rules to develop Respondent's safety program and specifically, Respondent's 15-foot fall protection requirement. (Resp't. Br. at 19-22.) Respondent argues that the preamble to the final rule reveals that placing:

> … the § 1926.1423 fall protection rule within the construction industry standards was not intended to limit its applicability solely to construction, but instead was intended to ensure that employers would be able to easily locate, identify and then

[9] That section states:

> For assembly/disassembly work, the employer must provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level, except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

29 C.F.R. § 1926.1423(f).

[10] The Secretary treats these arguments as the affirmative defenses of infeasibility and greater hazard in his brief. (Sec'y Br. at 27-30.) The undersigned treats these arguments through the lens of applicability, placing the burden on the Secretary, as that is how the arguments are presented in Respondent's brief. (Resp't Br. at 17-22.)

> follow the safest procedures to follow when assembling or disassembling crane booms, where those tasks are to be performed.

(Resp't Br. at 21-22.)

Respondent argues that the fall protection standards of Part 1910 "not only fail to offer greater protection to workers disassembling crane booms, but on the contrary, is far less safe and makes an accident more likely to occur." (Resp't Br. at 18.) Respondent claims that, because a worker must work from the top of the lowered boom, the only fall protection possible would be a personal fall arrest system, which would create "a tripping and entanglement hazard that has the potential to make a fall more likely to occur." (Resp't Br. at 20.) Therefore, Respondent declares that:

> It is both impractical and inappropriate, and indeed is more dangerous, to require the use of fall protection when employees are performing assembly/disassembly work on a horizontal lattice boom crane when working at a height less than 15 feet above the next lower structural level.

(Resp't Br. at 20-21.)

Despite its extensive arguments, Respondent's basis for this idea is fundamentally flawed. Respondent claimed that "the Secretary has not introduced any evidence, nor has the Secretary even attempted to argue, that it would be safer had [Respondent's] employees [followed the cited general industry fall protection standard]." (Resp't Br. at 20.) Respondent points to CO Wilcox's testimony that an employee tying off at his feet on the Manitowoc's boom would be subject to a tripping and entanglement hazard, making a fall potentially more likely. (Resp't Br. at 20; Tr. at 197.) CO Wilcox, however, also testified that it is possible to utilize portable anchorage points

"that go into the trailer hitch of a pickup truck and it has a swinging boom along the top of it." (Sec'y Br. at 29-30; Tr. at 195-197.) Respondent did not address this solution at all.[11]

The undersigned is also persuaded by the Secretary's argument that Respondent quoted OSHA's preamble out-of-context and in a misleading manner. (Sec'y Reply Br. at 8-9.) The Secretary maintains that, taken within context, the preamble to 29 C.F.R. § 1926.1423 makes clear that, contrary to Respondent's assertions, OSHA did intend to limit 29 C.F.R. § 1926.1423 solely to construction. Within context, the portion of the preamble is as follows:

> As discussed in the preamble to the proposed rule, the Committee determined that safety would be enhanced by addressing the problem of fall hazards associated with cranes and derricks comprehensively and that putting all such requirements in subpart CC would make it easier for employers to readily determine the applicable fall protection requirements (see 73 FR 59799, Oct. 9, 2008). Accordingly, under the final rule, subpart M [of the construction standards, Part 1926, which concerns fall protection] does not apply to equipment covered by subpart CC except where § 1926.1423 incorporates requirements of subpart M by reference.

Sec'y Reply Br. at 9 citing Cranes and Derricks in Construction, Final Rule, 75 Fed. Reg. 47906, 47999 (Aug. 9, 2010) (to be codified at 29 C.F.R Part 1926); *see also* Ex. R-38A at 1 (Respondent's exhibit of applicable portion of preamble). The Secretary also points out that the preamble does not refer to general industry standards in any way, nor has OSHA amended the general industry standards to indicate that they have been superseded by 29 C.F.R. § 1926.1423. (Sec'y Reply Br. at 9.)

Respondent further argues the following:

> The process of assembling and disassembling a lattice boom is the same, regardless of whether the boom is assembled/disassembled in [Respondent's] yard or, alternatively, on a construction site. Given the way that OSHA has interpreted and

[11] The undersigned also notes that Respondent does not incorporate its own expert's testimony into this argument in its briefs at all. *See* Tr. at 469-533 (testimony of Anthony Lusi). The expert testified under the limited basis regarding assembly and disassembly of crane booms involved in the incident. The expert, however, did not talk to any of the employees involved in this matter nor did he see the Manitowoc involved in this matter. (Tr. at 485.) The expert's testimony is therefore of no use here.

> applied the fall protection standards in this matter, there would have been no violation if [Respondent] employees had been disassembling the crane while the crane was sitting just inside the fence line of a construction jobsite. However, there would be a violation if [Respondent's] employees performed the very same task in the very same way on a crane sitting across the street from the construction site. This logic leads to absurd and inconsistent results.

(Resp't Br. at 20-21.) This argument flows from Respondent's fundamentally flawed predicate that there is no viable fall protection evidence for distances less than 15 feet, which, as noted above, there is such evidence.

The cited standard applies to Respondent's disassembly activities at the Ridley Park yard on the day of the incident. There is no dispute that the facts of this case satisfy the remaining elements of a violation of the cited standard. Respondent's worker [redacted] violated the cited standard by not having fall protection and was exposed to the fall hazard while disassembling the Manitowoc from a height of approximately 9 feet on the day of the incident.

Regarding knowledge, given its 15-foot fall protection rule, Respondent's management were aware that when they directed [redacted] and the disassembly crew to disassemble the Manitowoc on the day of the incident that the workers were disassembling the Manitowoc from a height greater than 4 feet to as much as 15 feet without any fall protection at all. This awareness is sufficient to establish knowledge of the physical conditions constituting the violation of the cited standard. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"), *aff'd,* 79 F.3d 1146 (5th Cir. 1996) (unpublished); *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (knowledge is imputed to the employer "through its supervisory employee."). This citation item is therefore affirmed.

As far as characterization, this citation item is properly characterized as serious. 29 U.S.C. § 666(k) (A violation is "serious" if a substantial probability of death or serious physical harm

could have resulted from the violative condition). CO Wilcox testified that the hazard of falling, should it occur, was likely to cause death or serious physical harm. (Tr. at 85.) [redacted]'s fall resulted in serious injuries like broken bones and a concussion. This citation item is affirmed as serious.

Serious Citation 1, Item 2: Standing on the Lattice Boom

The Secretary claims that Respondent violated 29 C.F.R. § 1910.180(h)(3)(v), which requires: "No hoisting, lowering, swinging, or traveling shall be done while anyone is on the load or hook." 29 C.F.R. § 1910.180(h)(3)(v). The Secretary alleges that, on the day of the incident, Respondent's "employee was standing on a section of the lattice boom while it was being hoisted and lowered, exposing the employee to caught-between, struck-by, and fall hazards." (Citation at 7.)

Respondent argues that the record does not establish that any worker "was standing or otherwise was located on a section of the boom when that section was being hoisted up or lowered down." (Resp't Br. at 7.) Respondent further argues, "even should the Court conclude there is sufficient evidence to find [redacted] was on the 18-foot boom section when it was either lifted or lowered, which [Respondent] denies, the section would have been lifted no more than ¼ inch and lowered no more than 2 or 3 inches." (Resp't Br. at 10.) Thus, according to Respondent, "such de minimus movement" should not be a basis of a violation of the cited standard. (Resp't Br. at 10.)

The Secretary argues that Respondent's policies "clearly prohibit its employees from 'riding the load,' e.g., standing on pieces of equipment or crane components as they are hoisted or lowered by a crane." (Sec'y Br. at 11 citing Exs. C-37 at 7, 9, 13 ("No one is permitted to ride the hook or load,") and C-38 at 42 ("Under no circumstances may anyone ride the hook or load.").)

The cited standard, however, conveys a stricter sense of forbidden conduct. To the extent that the term "riding the load" has a distance or time element in it, the cited standard is more restrictive – it forbids any person's presence for any amount of time or distance on a load while it is being hoisted or lowered. 29 C.F.R. § 1910.180(h)(3)(v).

[redacted] understands the difference between "riding the load" and the complete prohibition of being on a load while it is hoisted or lowered. The following testimony is illustrative:

> Q But you did testify earlier that you've never seen a Maxim employee be disciplined for riding a load during assembly or disassembly?
>
> A What do you mean riding a load, like coming off the ground and putting it on a trailer or just like coming up an inch and coming down?
>
> Q Even just coming an inch and putting it down.
>
> A No.

(Tr. at 240-241.) In this instance, [redacted] shows that he has never seen any discipline for either scenario, "riding a load, like coming off the ground and putting it on a trailer," or standing on a load "just coming an inch and putting it down." (Tr. at 240-241.) Yet, this testimony also illustrates that he sees a distinction, and Respondent in fact makes this argument – that a "de minimus" movement should not be a basis for a violation here. (Resp't Br. at 10.)

The undersigned rejects this argument as it contradicts the language of the cited standard. No amount of movement is allowed under the cited standard when someone is on the load. Additionally, it is irrelevant, with respect to establishing noncompliance, whether even a de minimus lifting or lowering of the boom actually caused [redacted]'s fall. (Resp't Br. at 10); *see Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not dependent on the cause of an accident."),

aff'd in relevant part, 351 F.3d 1254 (D.C. Cir. 2003). The facts that are relevant are those that establish whether [redacted] was on the boom when the Liebherr hoisted it.

With this in mind, the undersigned finds that the Secretary has shown by the preponderance of the evidence that [redacted] was on the Liebherr's load (the Manitowoc boom) while the boom was being hoisted on the day of the incident. It is undisputed that [redacted] was on the load during portions of the disassembly process. (Stipulations at ¶ 5); *see also* Tr. at 64-65, 227-228, 267, 298; Exs. C-20, C-61.

Respondent argues that the evidence in the record does not pinpoint exactly that [redacted] was on the load as it was hoisted or lowered. Respondent argues the following: [redacted] testified that he could not remember being on the load is it was being hoisted or lowered; [redacted] could not recall anyone ever being on a load at the Ridley Park yard as it was being hoisted or lowered; Puzzangara testified that [redacted] was "on the other piece," "still connected to the crane," and not on the 18-foot boom section that was actually rigged to the Liebherr that was hoisting or lowering the boom section; Puzzangara also testified that he had never seen any Maxim employee standing on a load while it was being hosted or lowered; Labuski testified that the Liebherr operator simply removed slack from the rigging, and did not actually hoist anything when [redacted] signaled the Liebherr operator to hoist the section; and Labuski clarified at trial that, despite what was written in his statement to CO Wilcox during the OSHA investigation, he was "pretty sure [he] meant to write that [[redacted]] was not on top of the boom" when the instruction was given. (Resp't Br. at 7-9.) Respondent further argues that a lack of disciplinary action for "riding a load" is not a basis on which to find the fact that [redacted] was on the load as it was being hoisted or lowered. (Resp't Reply Br. at 9-10.)

The facts are these: [redacted] was on the 18-foot boom section, the Liebherr's load, before the pins were removed. [redacted] and the disassembly crew rigged the Liebherr to the 18-foot section of the Manitowoc boom in order to remove the pins. [redacted] climbed on top of the 18-foot section and rigged it himself. (Tr. at 227.) The Liebherr had to hoist the 18-foot boom section a slight amount so that the workers could remove the pins by hand. (Ex. C-20.) The pins were removed after the Liebherr "hoists up." (Tr. at 267-268.) [redacted] then instructs the Liebherr to "hoist down," but the 10-foot boom section did not immediately release from the 18-foot boom section. (Tr. at 267.) The 18-foot boom section was still rigged to the Liebherr at that time. [redacted] was still on top of the Manitowoc boom at that time. (Tr. at 266-268.) No one testified or stated that they ever saw [redacted] get off the 18-foot boom section at any time. (Sec'y Reply Br. at 5-6.) Rather, the evidence establishes that he was in the process of walking on the 18-foot boom section to the heel to get down from the boom when the sections suddenly separated. *See* Tr. 298 (Puzzangara affirming his prior statement to CO Wilcox that "Bryan was on top as they were lowering it down. He started to come down and the section broke loose as soon as he turned around. And Bryan fell off."); Exs. C-20 ("[redacted] proceeded to walk towards the cab to climb off the boom. While walking towards the cab, the 10' section broke free causing the 18' section to suddenly drop 6 inches. The sudden drop caused [redacted] to lose his footing and fall off the 8 [sic] foot high boom section to the ground."); C-61 at 2 ("Bryan signals operator to hoist down slow and nothing is happening. Bryan decides to get down from top of boom and as he turns around to start walking back towards the 14000 . . . [the boom] fell about 6" throwing Bryan off boom section.").[12]

[12] Respondent's critiques of the nuances of each witness's testimony is unpersuasive. The undersigned finds that CO Wilcox's testimony and the statements given to him on the day of the investigation are credible due to fresher memories closer in time to the incident. The undersigned

The fact that when the boom sections separated, it was sudden and unexpected to [redacted], who was still on top of the boom, also supports the Secretary's recitation of the evidence. The preponderance of the evidence therefore supports the Secretary's argument that [redacted] did not come down from the 18-foot boom section before or during the Liebherr's act of hoisting the 18-foot boom section so that the pins could be removed. The Secretary has established noncompliance with the cited standard.

Regarding knowledge, the undersigned finds that the Secretary has established that Respondent had constructive knowledge of this violative condition. *See Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1627 (No. 99-1520, 2004 (factors considered for constructive knowledge include adequate work rules and training programs, adequate supervision, adequate anticipation of hazards, and adequate prevention measures); *Pa. Power & Light Co. v. OSHRC,* 737 F.2d 350, 357–58 (3d Cir. 1984) ("The courts of appeals have consistently held that the adequacy of a company's safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable.").

The record establishes that Respondent's management knew that Respondent's crew was disassembling the Manitowoc on the day of the incident - management directed [redacted] and the disassembly crew to disassemble the Manitowoc and management was on-site at the Ridley Park yard, within viewing distance of the disassembly process. (Tr. at 91, 232-233, 245, 254-255, 309; Ex. C-61 at 2); *see Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304,

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further finds that, based on observations of their demeanor on the stand at the hearing, Respondent's workers appeared coached and they testified with hesitation. To the extent any testimony at the hearing diverges substantively from the statements given to CO Wilcox during his investigation, the undersigned accords greater weight to the more contemporaneous statements given to CO Wilcox during the investigation.

1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994) ("The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew or should have known of the conditions constituting a violation"); *Schuler-Haas Elec. Co.*, 21 BNA OSHC 1489, 1493-94 (No. 03-0322, 2006) (finding that employer had constructive knowledge because it could have known of the physical conditions constituting the violation); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (finding constructive knowledge when a supervisor could have discovered and eliminated the hazard with reasonable diligence).

Respondent's pertinent disassembly safety rule, however, was not equivalent to the cited standard. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1054-55 (No. 86-1087, 1991) (finding inadequate work rules and a lack of specific training or instructions on stacking techniques supported a finding of constructive knowledge). Although Respondent has a rule forbidding "riding the load," the record establishes that this rule is insufficient. As noted above, [redacted]'s testimony suggests that Respondent's rule is not as strict as what the OSHA regulation requires – that there is a difference between "riding the load" and being on the load "just like coming up an inch and coming down." (Tr. at 240-241.) The cited standard prohibits any presence on the load even "just like coming up an inch and coming down." The record also contains evidence, including testimony from [redacted], stating that they have never been disciplined or seen any discipline even for the less stringent rule for "riding" a load, suggesting that Respondent did not take adequate steps to discover safety violations, or that it had effectively enforced its work rules when violations were discovered. (Tr. at 110-111, 237, 302, 308-309); *see Gary Concrete Prods., Inc.*, 15 BNA OSHC at 1056 (ineffective enforcement of safety rules when management was aware of safety-deficient nature of job performance but directed performance of a job anyway).

The awareness by management of the disassembly process on the day of the incident, and the insufficient work rule combined with lack of disciplinary enforcement of a less strict rule prohibiting riding a load, convinces the undersigned that Respondent had constructive knowledge of the violative condition on the day of the incident. *See S.J. Louis Constr.*, 25 BNA OSHC 1892, 1900 n.24 (No. 12-1045, 2016) (evaluating employer's safety program for adequacy involves same factors for evaluating constructive knowledge and the defense of unpreventable employee misconduct (UEM)); *see also Daniel Int'l Corp.,* 9 BNA OSHC 2027, 2031 (No. 76-181, 1981) (rejecting UEM defense based on employees' failure to tie-off where construction fall protection standard required openings to be protected by guardrails or covers, stating that the employer's tie-off rule "is not equivalent to the cited standard"); *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1075 (No. 09-1072, 2013) (employer's monitoring and enforcement of work rule that did not meet cited provision's requirements could not be used to establish UEM defense).

The Secretary has also established that Respondent's employee, [redacted], was exposed to the violative condition when the Liebherr hoisted and lowered the Manitowoc boom while he was on it. As found above, the general industry standards are applicable under the facts of this case, where a Liebherr was hoisting and lowering a load at the Ridley Park yard. This citation item is affirmed.

This citation item is also properly characterized as serious. 29 U.S.C. § 666(k) (A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition). CO Wilcox testified that the hazard of falling, should it occur, was likely to cause death or serious physical harm. (Tr. at 108-109.) [redacted]'s fall resulted in broken bones and a concussion. This citation item is affirmed as serious.

PENALTY

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

CO Wilcox testified to how the penalty for each citation item was calculated and proposed for this matter. (Tr. at 87-89, 108-110.) CO Wilcox also testified that OSHA considered this violations here to have a high gravity based on the high severity of the injury (like death, head trauma, brain injuries, broken bones and paralysis) as a result of a fall at nine feet combined with a greater probability of its occurrence on this worksite given that Respondent's workers were standing on a 4 inch wide walking surface exposed to a fall of 9 feet the entire time they were on the walking surface. (Tr. at 84-87.)

As for history, CO Wilcox testified that Respondent had two previous inspections with the past five years that resulted in serious violation citations that became a final order before the inspection in this case. (Tr. at 88, 109.) As a result, the penalty calculation was increased by 10%, however, the high gravity of the violation already established the maximum statutory penalty for each citation item, and so the penalty was not adjusted for history. (Tr. at 89, 109.) The other factors, size and good faith, were considered, but were found to not apply to Respondent. (Tr. at 87-88, 109.)

Both of the serious violations were high gravity based on the potential for death or serious physical harm, and because there was an injury, in this case, broken bones and a concussion. (Tr.

at 89, 109, 233.) Therefore, serious Citation 1, Item 1 was proposed at a $12,675 penalty, and serious Citation 1, Item 2 was proposed at a $12,675 penalty. Respondent has not addressed the calculation of the amount of the proposed penalties in its briefs. After consideration of the statutory factors with regard to the penalties for the affirmed violations, the undersigned agrees with the penalty amounts proposed by the Secretary for each citation item. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1) Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1910.28(b)(1)(i), is AFFIRMED, and a penalty of $12,675 is ASSESSED,

2) Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1910.180(h)(3)(v), is AFFIRMED, and a penalty of $12,675 is ASSESSED,

SO ORDERED.

*/s/*_____
COVETTE ROONEY
Chief Judge, OSHRC

DATE: January 14, 2020
Washington, D.C.