



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

SECRETARY OF LABOR,

Complainant,

v.

A CRANE RENTAL LLC,

Respondent.

OSHRC Docket No. 19-1667

**REMAND ORDER**

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

Respondent was contracted to provide a crane and operator to a multi-employer worksite in Norcross, Georgia, to lift employees of Superior Broadband Towers to the top of a communications tower that was being upgraded. Following an inspection of the worksite, the Occupational Safety and Health Administration issued Respondent a citation alleging serious violations of two provisions of the Cranes and Derricks in Construction standard. Item 1 alleges a violation of 29 C.F.R. § 1926.1431(f)(4) for exceeding the maximum number of individuals the personnel platform was designed to hold.<sup>1</sup> Item 2 alleges a violation of 29 C.F.R. § 1926.1431(m)(2) for failing to ensure that the Superior employees to be hoisted attended a pre-lift meeting with Respondent's crane operator and Superior's competent person on site.<sup>2</sup>

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<sup>1</sup> The cited provision states that "[t]he number of employees occupying the personnel platform must not exceed the maximum number the platform was designed to hold or the number required to perform the work, whichever is less." 29 C.F.R. § 1926.1431(f)(4).

<sup>2</sup> The cited provision states that "[a] pre-lift meeting must be . . . [a]ttended by the equipment operator, signal person (if used for the lift), employees to be hoisted, and the person responsible for the task to be performed." 29 C.F.R. § 1926.1431(m)(2).

Following a hearing, Administrative Law Judge John B. Gatto vacated both citation items, concluding that although the cited provisions applied and Respondent failed to comply with them, the Secretary failed to establish the exposure and knowledge elements of each alleged violation.<sup>3</sup> Before the judge, Respondent did not dispute that the cited provisions applied. Regarding noncompliance, the judge relied on the parties' stipulation that the crane operator "hoisted [the] personnel basket . . . while three of Superior's employees were inside . . . , even though the . . . basket was rated to carry no more than two persons," and found that the crane operator "attended a pre-lift meeting . . . [but] could not identify anyone else who had attended and did not know whether [Superior's foreman] separately briefed the workers to be hoisted."

As to exposure, the judge found that Respondent had no employees exposed to the violative conditions and was not a controlling employer under OSHA's Multi-Employer Citation Policy or the Commission's multi-employer worksite doctrine. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) ("Under Commission precedent, an employer who . . . controls the cited hazard has a duty . . . to protect not only its own employees, but those of other employers engaged in the common undertaking.") (citations omitted). Regarding knowledge, the judge found that: (1) the crane operator was not a supervisor whose actual knowledge could be imputed to Respondent; (2) the operator did not, in any event, have actual knowledge of the violative conditions; and (3) even if Respondent were a controlling employer, the inadequacy of such an employer's safety program cannot be used to establish constructive knowledge of violative conditions to which only another's employer's employees were exposed.

The Secretary petitioned for review, asserting that he "never alleged that [Respondent] was a controlling employer," that his "actual position . . . was that [Respondent] was a 'creating' employer," and that the judge therefore erred in "treat[ing] the case as if it involved a 'controlling employer' under OSHA's multi-employer citation policy." *See, e.g., Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010) ("[T]he Commission has long held that the employer who *creates* a violative or hazardous condition is obligated to protect its own employees as well

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<sup>3</sup> "In order to establish a violation, the Secretary must demonstrate that (1) the standard applies, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited condition, and (4) the employer knew, or, with the exercise of reasonable diligence, could have known of the violative condition." *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1871 (No. 92-0264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995).

as employees of other contractors who are exposed to the hazard.”) (emphasis added) (citation omitted), *aff’d*, 442 F. App’x 570 (D.C. Cir. 2011) (unpublished).

We agree with the Secretary. At no point has the Secretary asserted that Respondent was a controlling employer. The OSHA compliance officer who inspected the worksite testified that he considered Respondent “the creating and the exposing employer” because its operator “actually lift[ed] the personnel basket and allow[ed] more than [two] employees inside of the basket while it was being elevated,” and “created the hazard of the pre-lift meeting . . . by not ensuring that they conducted a mandatory, pre-lift meeting in accordance with the regulation.” In his post-hearing brief to the judge, the Secretary never mentioned controlling employer liability. On the contrary, the Secretary expressly claimed that the company was a creating employer twice, stating that the compliance officer “determined Respondent was a creating and exposing employer at the work site,” and that this “case presents the issue of whether Respondent, a creating and exposing employer, violated the alleged safety standard.”<sup>4</sup> As such, the compliance officer’s testimony and the referenced statements in the Secretary’s post-hearing brief directly raise a creating employer theory that necessarily applies to both citation items.<sup>5</sup> In fact, Respondent understood that the Secretary was asserting a creating employer theory, as the company dedicated a subsection of its post-hearing brief regarding Item 1 to addressing why it “was not the ‘creating’ employer,” and then argued with respect to Item 2 that “the Secretary failed to show that [it] was a . . . creating . . . employer.”

For these reasons, we conclude that the judge erred in analyzing this case under a controlling employer framework rather than the Secretary’s stated theory for Respondent’s alleged liability. Accordingly, we remand this case to the judge for consideration of whether the Secretary has proven that Respondent was a creating employer. *See, e.g., Smoot Constr.*, 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006) (“[T]he contractor created the non-compliant trench.”); *C.*

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<sup>4</sup> The Secretary did not raise the exposing employer theory in his petition seeking review of the judge’s decision, presumably because the record is clear that only Superior employees were exposed to the alleged violative conditions. Indeed, as the judge found, Respondent had no employees exposed to the violative conditions and thus could not have been an exposing employer under OSHA’s own policy. OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy (Dec. 10, 1999) (exposing employer is one “whose *own employees* are exposed to the hazard”) (emphasis added).

<sup>5</sup> For this reason, we question the judge’s assertion (made in a footnote in his decision) that, “[a]s to Item 1, the Secretary never . . . relied on OSHA’s multi-employer citation policy.”

*Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2127 (No. 91-2929, 1994) (“It was therefore the duty of Abbonizio, the employer of the workers who created the condition, to comply . . .”). *But cf. Lewis & Lambert Metal Contractors, Inc.*, 12 BNA OSHC 1026, 1029 (No. 80-5295-S, 1984) (employer asserting multi-employer worksite defense “did not create . . . the elevator shaft or stairway guardrail violations”).

If the judge determines on remand that Respondent was shown to be a creating employer, we direct him to reconsider, in light of the company’s creating employer status, the noncompliance and knowledge elements of the Secretary’s case with respect to both citation items.<sup>6</sup> *See, e.g., Smoot Constr.*, 21 BNA OSHC at 1557 (rejecting claim that creating employer “took adequate measures to prevent entry into the non-compliant trench”); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 & n.13 (No. 95-1449, 1999) (finding that “Access is responsible under the OSHA standards for creating a hazard” and noting that “Access does not argue . . . that it took all reasonable measures to protect [the other employer’s] employees”); *see also* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy (Dec. 10, 1999) ¶ X.B (example of employer “not citable” as creating employer when it damages guardrail, does not repair because it lacks authority to do so, but then takes “effective steps” to keep all workers from unprotected edge).

SO ORDERED.

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Chairman

/s/ \_\_\_\_\_  
Amanda Wood Laihow  
Commissioner

Dated: January 10, 2023

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<sup>6</sup> The judge need not revisit the exposure element because the parties’ factual stipulations along with undisputed testimony at the hearing establishes that employees of Superior were exposed to the alleged violative conditions. *See Summit Contractors*, 23 BNA OSHC at 1205 (creating employer “is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard”).



Some personal identifiers have been redacted for privacy purposes.

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SECRETARY OF LABOR,  
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v.

A CRANE RENTAL LLC,  
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OSHRC Docket No. **19-1667**

**DECISION AND ORDER**

**Attorneys and Law firms**

Jeremy B. Dailey, Cameron W. Ellis, Rachel L. Graeber, Attorneys, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

J. Larry Stine, Sherifat Oluyemi, Attorneys, Wimberly Lawson Steckel Schneider & Stine, PC, Atlanta, GA, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

**I. INTRODUCTION**

Respondent A Crane Rental LLC (“ACrane”)<sup>1</sup> is a crane rental company that provides cranes, lifting equipment and operators for general contractors and was one of several companies working on a communication tower in Norcross, Georgia, when another company’s employee fatally fell from ACrane’s personnel platform. The United States Department of Labor, through its Occupational Safety and Health Administration (“OSHA”), investigated the fatality and subsequently issued ACrane a two-item citation and notification of penalty (“citation”) under the Occupational Safety and Health Act of 1970 (the “Act”), 29 U.S.C. §§ 651-678, alleging violations of OSHA’s Cranes and Derricks in Construction standard<sup>2</sup> with proposed penalties totaling \$15,343.00.<sup>3</sup> A bench trial was held in Atlanta, Georgia.

<sup>1</sup> While the named respondent is “A Crane” Rental LLC, respondent’s notice of contest references “ACrane” Rental LLC. For ease of reference, the court will use “ACrane.”

<sup>2</sup> The citation alleges violations of 29 C.F.R. §§ 1926.1431(f)(4) and 1926.1431(m)(2).

<sup>3</sup> The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA.

Based upon the record, the court concludes the Commission has jurisdiction over the parties and subject matter in this case. (*See* Compl. ¶¶ I, II, Answer ¶¶ I, II). Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 661(j) of the Act. 29 U.S.C. § 661(j).<sup>4</sup> For the reasons indicated *infra*, the court concludes the Secretary has failed to satisfy the third and fourth elements of his *prima facie* case and the citation must therefore be vacated.

## II. BACKGROUND

This case arose from an inspection on March 22, 2019, of a multi-employer construction site in Norcross, Georgia, following a fatality that occurred the day before while workers were upgrading a communications tower in a parking lot behind a strip mall (the “worksite”). (Tr. 13:23-25; 14:23-24; 15:7-15). The multi-employer construction site included five companies: Ericsson was the general contractor and it subcontracted the project to Future Technology. Superior Broadband Towers (“Superior”)<sup>5</sup> was subcontracted to provide the workers to execute the upgrading of the communications tower. Big Rentz was contracted to provide the crane and it contracted with ACrane to provide a crane, a personnel basket, a rigging system to lift Superior’s workers and equipment onto the communications tower, and an operator, [redacted]. (Tr. 14:2-24; 14:11-15:2; 15:15-25; 20:18-24; 122:8-12; Ex C-3).

The personnel basket was rated to carry no more than two persons. (Jt. Stip. ¶¶7, 9; *see also* Tr. 245:8-11; Ex C-3). Gorman, Superior’s foreman at the worksite was the lift director responsible for determining what was going to be lifted.<sup>6</sup> (Tr. 194:18-196:4). [redacted] was paid hourly, had no supervisory job functions and was supervised by Shannon Graham, ACrane’s

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*See* Order No. 1–2012, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has redelegated his authority to OSHA’s Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms “Secretary” and “OSHA” are used interchangeably herein. For simplicity, the court also refers to actions taken by the Assistant Secretary and the Area Directors as actions taken by the Secretary.

<sup>4</sup> If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

<sup>5</sup> Vertical Vision Construction, LLC d/b/a Superior Broadband Towers was referred to by some witnesses as “Southern Broadband” and others as “Superior Broadband.” However, both parties referred to it as Superior Broadband in their briefs.

<sup>6</sup> [redacted] identified Superior’s foreman as the lift director and testified his last name was Gorman. (Tr. 118:11-17).

operations manager.<sup>7</sup> (Tr. 81:3-21). [redacted]’s responsibilities included crane assembly, determining the location of the crane at the worksite, and rigging the personnel basket. (Ex. C-5).

On the first day, [redacted] hoisted two of Superior’s employees on the personnel platform. (Tr. 104:18-24). On the second day, one or two of Superior’s employees were lifted. (Tr. 105:2-12). On the third day, March 21, 2019, Gorman loaded the personnel platform with equipment and three Superior employees. [redacted] testified at trial that due to the platform's location, he could not see it until it had been lifted about halfway up the communications tower. (Tr. 106:4-16; 156:1-16; Tr. 106-13-20; Jt. Stip. ¶10). [redacted] testified that at that point he decided it was safer to take the three workers to the top of the tower rather than lower them to the ground. (Tr. 106:21-24). Tragically, while attempting to tie off to the tower, one of Superior’s employees fell approximately 105 feet to his death. (Tr. 46:2-8).

Linston Maurice Starks, current Assistant Area Director of the OSHA Atlanta Area East Office, was an OSHA Compliance Safety and Health Officer<sup>8</sup> at the time of the accident, and inspected the worksite on March 22, 2019, the day following the fatal accident. (Tr. 15:7-15). Starks interviewed [redacted] and similar to [redacted]’s trial testimony, [redacted] provided a hand-written signed statement, which stated, “I could not see what work they were doing [illegible] or the basket.” (Ex. C-6.) About ninety days later, on June 22, 2019, Starks interviewed [redacted] again and [redacted] provided a second signed statement. (Ex. C-5). This time, Starks typed the questions, typed [redacted]’s purported answers, printed the statement, allowed [redacted] a chance to review it, and [redacted], after providing some written corrections, signed the statement. (Tr. 13:23-25; 33:11-19; Ex. C-5). In this second statement, in response to the question: “Who determined the setup location of the crane on-site?” [redacted] purportedly answered: “I determined the best location for the crane, I look at the close and flat area. *I could see the basket from the ground to the whole tower.*” (Ex. C-5 p. 1 ¶4; Ex. C-5 p. 2 ¶5) (emphasis added).

At trial, when Starks was asked when he arrived at the accident scene arrived if it changed since the accident had happened, he testified that “Based on my knowledge and the questions that I asked, the position of where the basket was -- personnel basket was located and the crane is the position that they were doing the lifting and the lowering of the employees that were in the

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<sup>7</sup> Although Graham and [redacted] were on-site upon Stark’s arrival, Graham did not visit the site until the accident. (Tr. 15:16-25; Tr. 92:9-18; Ex. C-3).

<sup>8</sup> “Compliance Safety and Health Officer” means “a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections.” 29 C.F.R. § 1903.22(d).

personnel basket.” (Tr. 23:5-12). However, Starks did not see the crane in the position that it had been at the time of the accident. (Tr. 71:12-21).

By the time Starks visited the worksite, [redacted] credibly testified that the crane had already been placed into “the safed-up position,” which is the normal end-of-day position, meaning it had been “boomed-in” and the basket was sitting directly in front of the operator’s cab. (See Ex. R-1; Tr. 103:14-104:3). [redacted] testified that when the crane is in “the safed-up position at the end of the job,” the crane “is all the way retracted. It’s not a working configuration; it’s just how the crane is parked so that if something did fail overnight, had a hydraulic issue or anything else, the crane would be safe.” (Tr. 102:18-19, 21-25). [redacted] testified that the “safed-up position” that Starks observed the crane is not where [redacted], as an experienced crane operator, “would lift the personnel basket from.” (Tr. 103:14-18). And [redacted] testified that during the lifts the basket was located in various places: “It would be by their trailer behind the tree line sometimes, it would be behind the shed sometimes, and sometimes behind the antennas.” (Tr. 101:20-22).

A review of a photograph admitted by ACrane without any objection by the Secretary shows that from where the crane was positioned, the lower half of the communications tower was obstructed by trees.<sup>9</sup> (Ex. R-2.) There is also evidence that radios were used to communicate, which reinforces [redacted]’s testimony that [redacted] was unable to see the personnel platform until it cleared the trees about halfway up the tower. [redacted] testified that because he could not observe the workers being loaded, “the foreman or the worker would get on the radio to let me know.” (Tr. 101:23-25; 102:1-4). Starks admitted that “[redacted] indicate that they were using radios as one part of communication.” (Tr. 27:2-4). And according to Starks, “if you can’t see where you’re moving equipment or parts or individuals, that you’re blind, and that’s the purpose of the communication with the person on the ground or radios.” (Tr. 88:1-5; 100:20-25).

The court closely observed [redacted] and his demeanor during his testimony and he was candid and responsive to the questions posed to him. [redacted] displayed no evasiveness or deflective tactics. The court finds [redacted] to be a credible witness.<sup>10</sup> As indicated *supra*,

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<sup>9</sup> While Starks did not know if the photograph was an accurate depiction of the accident scene because he did not take it and he was behind the building where the tower, crane, and the personnel basket were located, the Secretary offered no evidence to rebut this photographic evidence. Since this exhibit corroborates [redacted]’s testimony and the Secretary offered no evidence to rebut it or to corroborate Starks’ testimony, the court finds the preponderance of evidence shows [redacted] was unable to see the personnel platform until it cleared the trees about halfway up the tower.

<sup>10</sup> Although the court also found Starks to be a credible witness, unlike [redacted], Starks did not have first-



[redacted]’s trial testimony and his first hand-written OSHA statement were corroborated by record evidence. The court finds the preponderance of evidence establishes [redacted] was unable to see the personnel platform until it cleared the trees about halfway up the tower.

Section VI (B)(6) of ACrane’s written procedure for Crane Hoisted Personnel Platforms requires that “workers to be hoisted” must attend the pre-lift meeting. (Jt. Stip. ¶13). Earlier that day, Gorman, Superior’s foreman at the worksite, in his capacity as the lift director, held a lift meeting with [redacted]. (Tr. 112:20-113:1; *see also* (Jt. Stip. ¶¶11, 12). [redacted] did not know which Superior employees would be hoisted and had no knowledge of whether Gorman briefed Superior’s employees to be hoisted separately, although [redacted] did observe Gorman walking towards Superior’s crew after meeting with [redacted]. (Tr. 113:5-12).

### III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act “establishes a comprehensive regulatory scheme designed ‘to assure so far as possible safe and healthful working conditions’ for ‘every working man and woman in the Nation.’” *Martin v. Occupational Safety and Health Review Comm’n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). To achieve this purpose, the Act imposes two duties on an employer: a “general duty” to provide to “each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees,” 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standard at issue in this case was promulgated.<sup>11</sup>

The “Commission is responsible for carrying out adjudicatory functions” under the Act. *CF&I*, 499 U.S. at 144. Thus, “[t]he Commission’s function is to act as a neutral arbiter and determine whether the Secretary’s citations should be enforced over employee or union objections.” *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (*per curiam*).

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hand knowledge of the worksite at the time of the accident. Therefore, the court gives Starks’ testimony less weight.

<sup>11</sup> As indicated *supra*, the Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health. The Assistant Secretary promulgated the Cranes and Derricks in Construction standard.

Therefore, Congress vested the Commission with the “adjudicatory powers typically exercised by a court in the agency-review context.” *CF&I*, 499 U.S. at 151.

Under the law of the Eleventh Circuit where this case arose,<sup>12</sup> “the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer ‘knowingly disregarded’ the Act’s requirements.” *Quinlan v. Sec’y, U.S. Dep’t of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). “If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct.” *Id.* (citing *id.* at 1308).

### **Alleged Violations**

The Secretary alleges in amended Item 1 that on or about March 21, 2019,<sup>13</sup> ACrane committed a serious<sup>14</sup> violation of section 1926.1431(f)(4) of OSHA’s Cranes and Derricks in Construction standard when a “two-person personnel basket was utilized by the crane operator to hoist the communication tower construction crew consisting of three employees to heights above 90 feet from ground level.” (Compl. Ex. A.) Thus, the Secretary asserts the “maximum capacity of the personnel basket was exceeded, exposing employees to fall and struck-by hazards.” (*Id.*) The cited standard mandates that the “number of employees occupying the personnel platform

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<sup>12</sup> The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally 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). Here, the alleged violations occurred in Georgia, which is in the Eleventh Circuit and A Crane’s principal place of business is in Pennsylvania, which is in the Third Circuit. (*See* Compl. ¶ III, Answer ¶ III). Compl. Ex. A; *see also* Jt. Prelim. Report and Disc. Plan ¶11.) Since both parties cited to the Eleventh Circuit in their post-trial briefs, the court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable that the case will be appealed.

<sup>13</sup> The citation, pleadings, and Pretrial Order were amended by consent of the parties at trial to reflect the correct date for both Items 1 and 2 is March 21, 2019. (Tr. 52:7-23).

<sup>14</sup> A “serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” 29 U.S.C. § 666(k).

must not exceed the maximum number the platform was designed to hold or the number required to perform the work, whichever is less.” 29 C.F.R. § 1926.1431(f)(4).

The Secretary alleges in amended Item 2 that on or about March 21, 2019, ACrane committed a serious violation of section 1926.1431(m)(2) of OSHA’s Cranes and Derricks in Construction standard when it did not ensure that “employees hoisted in a personnel basket attended the pre-lift meeting with the crane operator and competent person responsible for the communication tower work.” (Compl. Ex. A.) The cited standard mandates that the pre-lift meeting must be attended by “the equipment operator, signal person (if used for the lift), employees to be hoisted, and the person responsible for the task to be performed.” 29 C.F.R. § 1926.1431(m)(2).

### **(1) Whether Cited Standard Applied**

OSHA’s Cranes and Derricks in Construction 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). ACrane does not dispute that the equipment it used at the worksite is covered by the standard. Further, it admits that it provided the crane, operator, personnel basket and sling system at the worksite on March 21, 2022, and that the personnel basket was used to hoist workers. (Ex. J-3 ¶¶ 1-4, 10). Therefore, the Secretary has established the cited standard applied to the cited conditions.

### **(2) Whether Cited Standard Was Violated**

ACrane stipulated that on March 21, 2019, [redacted] hoisted ACrane’s personnel basket at the worksite while three of Superior’s employees were inside the basket, even though the personnel basket was rated to carry no more than two persons. (Ex. J-3 ¶¶ 7-10; *see also* Tr. 245:8-11). Further, although [redacted], the equipment operator, attended a pre-lift meeting on the day of the accident, [redacted] could not identify anyone else who had attended and did not know whether the Lift Director separately briefed the workers to be hoisted. (Tr. 112:20-113:1; Tr. 113:5-12). As indicated *supra*, the pre-lift meeting must be attended by “the equipment operator, signal person (if used for the lift), employees to be hoisted, and the person responsible for the task to be performed.” Therefore, the Secretary has established that both instances of the cited standard were violated.

### (3) Whether Employees were Exposed to Hazard

To “satisfy the third element, the Secretary bears the burden of showing that the cited respondent is the employer of the exposed workers at the site.” *Quinlan*, 812 F.3d at 836. “In determining whether the Secretary has satisfied its burden, the Commission applies the control-based test set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).” *Id.* As the Supreme Court has noted, courts have “often been asked to construe the meaning of ‘employee’ where the statute containing the term does not helpfully define it.” *Darden*, 503 U.S. at 322. That is the case here since the Act defines an employee as “an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(6).<sup>15</sup> As the Commission noted, this definition is “unhelpfully circular.” *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001).

However, “the common-law element of control is the principal guidepost that should be followed.” *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 448, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003). The Secretary offered no evidence addressing this common-law element of control to establish ACrane was the employer of the exposed workers at the site. Instead, the Secretary simply asserts since ACrane stipulated that on March 21, 2019, [redacted] hoisted the personnel basket with three Superior employees on it even though only two people were allowed in the personnel basket, these admissions establish “the exposure of *personnel* to the hazard” and that based upon these stipulations, “the only issue remaining for the Court in determining whether Respondent violated the OSHA standard is employer knowledge.” (Sec’y’s Br. 13; Ex. J-3 ¶¶ 7-10) (emphasis added). The court disagrees. Again, the Secretary bears the burden of showing that the cited respondent is the employer of the exposed workers at the site. *Quinlan*, 812 F.3d at 836. And the evidence shows the three workers lifted by [redacted] were *not* employees of ACrane but were employees of Superior. Therefore, the Secretary has failed to satisfy the third element by proving ACrane was the employer of the exposed workers.

“An employment relationship, however, is not the only basis for liability when a company fails to take reasonable steps to protect worker safety.” *Fama Constr., LLC v. U.S. Dep’t of Lab.*, No. 19-13277, 2022 WL 2375708 at \*3 (11th Cir. June 30, 2022). “Under Commission precedent, an employer may be held responsible for the violations of other employers where it could

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<sup>15</sup> The Act defines an employer as “a person engaged in a business affecting commerce who has employees,” 29 U.S.C. § 652(5).

reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.” *Summit Contracting Grp., Inc.*, No. 18-1451, 2022 WL 1572848 at \*2 (OSHRC May 10, 2022) (citation omitted). Thus, if ACrane were a controlling employer on the worksite, the Secretary could<sup>16</sup> have cited it under OSHA’s multi-employer citation policy, “which provides that ‘[a]n employer who has general supervisory authority over [a] worksite,’ must ‘exercise reasonable care to prevent and detect violations on the site.’” *Fama*, 2022 WL 2375708 at \*3 (quoting OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.E.1–2 (Dec. 10, 1999)). For the reasons indicated *infra*, the court concludes the Secretary also failed to establish ACrane was a “controlling” employer.

As the Eleventh Circuit has noted, under OSHA’s multi-employer citation policy, “[t]he type of control required is not control over ‘the manner and means by which the [work] product is accomplished,’ *Darden*, 503 U.S. at 323, but control over matters affecting the safety of the workers on the jobsite.” *Fama*, 2022 WL 2375708 at \*4. This would include things like “the authority and ability to control the workers’ use of safety equipment and adherence to safety procedures.” *Id.*

Here, ACrane was one of multiple companies working at the worksite and there is no evidence in the record that it exercised control over any of the other companies’ employees or had the authority and ability to control the other companies’ employees use of safety equipment or adherence to safety procedures. [redacted]’s unrefuted testimony was that Gorman, Superior’s foreman, was the worksite lift supervisor, and Gorman was responsible for determining when lifts occurred and who would be hoisted in the personnel basket. (Tr. 107:11-13; 101:11-16). [redacted]’s testimony is corroborated by Starks, who also testified that “the lift director would have to be someone from Superior because they would know more about what had to go up and what position they needed to be in.” (Tr. 88:22-25). While [redacted] admitted he had the authority to refuse to hoist personnel or terminate a lift if a safety concern was identified, (Tr. 107:11-13; 117:2-7; 144:9-12; 229:7-11), there is no evidence this authority included the authority and ability to control the workers’ use of safety equipment or adherence to safety procedures.

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<sup>16</sup> As to Item 1, the Secretary never mentioned or relied on OSHA’s multi-employer citation policy at trial or in his post-trial brief (the first mention of this policy was on page 19 of the Secretary’s brief related to Item 2).

The court concludes Gorman, not [redacted], as the worksite lift supervisor, had the authority and ability to control the workers' use of safety equipment and adherence to safety procedures. Therefore, the court concludes the Secretary has failed to establish ACrane was a controlling employer. As indicated *supra*, the Secretary also failed to prove ACrane was the employer of the exposed workers at the worksite. Thus, the court concludes the Secretary has failed to satisfy the third element of his *prima facie* case.

#### **(4) Whether ACrane “Knowingly Disregarded” the Act's Requirements**

To satisfy this fourth element, the Secretary can prove ACrane had knowledge of the violations in two different ways:

First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer.... An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct.... An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have.... In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

*Quinlan*, 812 F.3d at 837 (quoting *Comtran*, 722 F.3d at 1307–08). For the reasons indicated *infra*, the court concludes [redacted] was not an ACrane Supervisor. But even if he was, the court credits his testimony that he was unaware of the violative actions because he did not witness the overloading of the personnel platform and only became aware of it mid-lift, i.e., after the violation had already occurred. Therefore, the Secretary has failed to show that an ACrane supervisor had actual knowledge of the violation.

As to constructive knowledge, the Secretary argues that [redacted]'s knowledge can be imputed to ACrane because [redacted] was the only ACrane employee at the worksite and he controlled ACrane's crane operations. (Sec'y's Br. 13-14). The hallmark of a supervisor is authority over other employees. Here, although a pre-lift document from March 21, 2019, was completed and signed by [redacted] as the “Job Site Supervisor,” (Tr. 26:23-27:8; Ex. R-6), [redacted]'s unrefuted testimony was that he signed to certify the “calculations” and “capacities.” (Tr. 146:8-10). In deciding whether an employee qualifies as a supervisor, “[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). And [redacted]'s

unrefuted testimony was he had no supervisory authority over any other employees. (Tr. 107:11-13). [redacted]’s unrefuted testimony is supported by Starks testimony where Starks admitted that while Graham attended the opening conference, [redacted] did not, and that most of the time “opening conferences are with the manager or supervisor.” (Tr. 92: 9-18). There is no other evidence that [redacted] was the worksite supervisor and the court concludes the preponderance of evidence in the record shows he was not.

Finally, even if [redacted] was ACrane’s worksite supervisor and was aware of the overloading of the platform, a “supervisor’s ‘rogue conduct’ cannot be imputed to the employer in that situation. Rather, ‘employer knowledge must be established, not vicariously through the violator’s knowledge, but by either the employer’s actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].” *Comtran*, 722 F.3d at 1316 (quoting *W.G. Yates & Sons Constr. Co., Inc.*, 459 F.3d at 609 n. 8).

Here, the Secretary has not offered any evidence to show ACrane had actual knowledge of the overloading of the platform. And as to constructive knowledge of a *controlling* employer, “neither the Commission nor the Eleventh Circuit has ever relied on that theory to determine whether a *controlling* employer had constructive knowledge of violative conditions to which only another employer’s employees were exposed on a multi-employer worksite.” *Summit*, 2022 WL 1572848 at n. 13 (emphasis in original). “Moreover, doing so here would be concerning given that [ACrane] lacked a direct contractual relationship with [Superior] whose employees were exposed” to the hazard. *Id.* “While such evidence may be relevant to determining whether a controlling employer has exercised reasonable care in relation to its secondary safety role on a multi-employer worksite,” the court finds it “inappropriate to analyze the adequacy” of ACrane’s “own safety program as an independent basis for proving constructive knowledge.” *Id.* Therefore, the court concludes even if ACrane was a controlling employer, any inadequacies in its safety program cannot be used to establish it had constructive knowledge of violative conditions that only Superior’s employees were exposed to. Thus, the Secretary has also failed to satisfy the fourth element of his prima facie case. Accordingly,

#### **IV. ORDER**

**IT IS HEREBY ORDERED THAT** the citation is **VACATED** and no penalty is assessed.

**SO ORDERED.**

/s/\_\_\_\_\_

JOHN B. GATTO, Judge

Dated: October 31, 2022  
Atlanta, GA