

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

BIGGE CRANE AND RIGGING COMPANY,
and its successors,

Respondent.

OSHRC DOCKET NO. 00-0768

APPEARANCES:

For the Complainant:

Jan M. Coplick, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California

For the Respondent:

Robert D. Peterson, Esq., Rocklin, California

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Bigge Crane and Rigging Company, and its successors (Bigge), at all times relevant to this action maintained a place of business at the Travis Air Force Base (AFB) in California, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 25-26, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Bigge's Travis AFB work site. As a result of that inspection, Bigge was issued a citation alleging a violation of §1926.501(b)(1) of the Act, and proposing a penalty of \$2,500.00. By filing a timely notice of contest Bigge brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On February 6, 2001, a hearing was held in San Francisco, California. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical), with an unprotected side or edge 6 feet (1.8m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

- (a) An employee of Bigge Crane & Rigging was observed working on the unprotected edge on a 25 foot Commissary roof without fall protection, which exposed the employee to death or other permanent serious injury or disability.

Facts

CO Kenneatha Clark testified that, on January 25, 2000, she conducted a program planned inspection at Travis AFB (Tr. 23). CO Clark was accompanied by Susan Clabby, a safety specialist for Travis AFB, who acted as her escort (Tr. 24). As CO Clark and Ms. Clabby approached the commissary, they observed a crane, which was being used to hoist slabs of concrete wall out of the commissary and onto a grassy area outside (Tr. 29, 132; Exh. C-8). Clark testified that from her position, approximately 120-150 feet away, she could clearly see a man standing on the edge of the commissary roof (Tr. 30, 35, 43, 93). As she watched, the man put his foot up on the parapet at the edge of the roof (Tr. 36, 39; Exh. C-4, 002). Clark could not make out the man's facial features, nor is he identifiable from the pictures Clark took at the time of the incident (Tr. 35, 38; Exh. C-4, 001 and 002). However, CO Clark stated that the man was tall, with long dark hair, and that he appeared to be holding a radio (Tr. 36). When Clark observed the hazard, a slab was being lifted out from the center of the roof (Tr. 151-52). Clark's testimony was corroborated in all material respects by that of Susan Clabby (Tr. 178, 182-86).

CO Clark testified that she then proceeded to the job trailer near the commissary. The man continued to stand on the edge of the roof with his foot on the parapet until she came to within approximately 70 feet of the commissary, at which point she could no longer see him over the lip of the building (Tr. 47, 94). At the job trailer she spoke with Doug Smith, a project superintendent with Intertex, the general contractor on site (Tr. 48). Based on Clark's description, Smith identified the man on the roof as Mark Pease, a foreman/rigger for one of the subcontractors, Bigge Crane (Tr. 57, 71, 132). Clark did not speak to Pease on the 25th, however, as all of Bigge's employees left the site before Clark could meet with them (Tr. 59-61).

On January 26, 2000, Clark met with Doug Smith and James Coenen, representatives from Intertex and Bigge, respectively (Tr. 63-64, 69). The representatives took Clark to meet with Mark

Pease, whom she then interviewed in private (Tr. 71-72). Clark testified that she asked Pease if he was the man she had seen on the roof the day before (Tr. 72). Clark stated that Pease clearly indicated he was the man she saw on the roof the previous day. Pease told Clark that he had watched her come on to the site while monitoring the lift (Tr. 72, 74, 166). Pease admitted that he was not using any fall protection on the roof (Tr. 75). Pease told Clark that he needed to be able to move around to do his job, and argued that no fall protection was required (Tr. 74-77). Clark testified that Pease's appearance was consistent with her observations of the previous day, and that she had no doubt he was the man she saw on the roof (Tr. 71, 166).

Mark Pease testified that as foreman/rigger, his job at the Travis AFB site was to ensure that the interior walls being demolished were conveyed safely from the interior of the commissary to the landing area (Tr. 216, 220). Pease stated that his job is to make sure the load is secured properly inside the building, and to observe the load until it clears the building, and the oiler on the ground can see it (Tr. 217, 222). Once the oiler has the load in sight, Pease testified, he relocates so that he can land it (Tr. 217-18, 221). Pease's job requires him to be in radio contact with the crane operator who is performing the lifts (Tr. 217-18).

Pease testified, however, that although he had been on the commissary roof without fall protection during the remodeling project, he was never within six feet of the edge of the roof on January 25th (Tr. 212-14). At the hearing Pease denied seeing Clark and Clabby come onto the site from the roof. Pease stated that he only saw Clark and Clabby coming up the ramp into the commissary as he left the site for the day after finishing his last hoist (Tr. 214-15).

Pease stated that when he arrived on the work site on the 26th, Bud Foster, a foreman from Accurate, told him that OSHA had a picture of someone sitting on the roof (Tr. 225-26). According to Pease, he told Foster that it was not him (Tr. 225). Pease testified that when Clark interviewed him later that day, he admitted being on the roof during the entire job (Tr. 236). According to Pease, however, it never occurred to him to deny being near the edge of the roof, because he did not realize that Clark thought *he* was the man OSHA had photographed (Tr. 237, 240-42). According to Pease, he did not even know that Clark believed a Bigge employee was involved in the misconduct she was discussing with him. Pease stated that he believed Clark could have been referring to anybody (Tr. 237-38). Pease's testimony at the hearing contradicted his deposition testimony. During his deposition Pease admitted that he *did* know Clark was alleging that a Bigge employee had been on the edge of the roof (Tr. 237-38).

Discussion

The cited standard states:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

As a threshold issue, Bigge argues that Complainant failed to prove the cited standard's applicability. Bigge maintains that Complainant did not prove the edge of the commissary roof was an "unprotected side or edge."

Subpart M §1926.500(b) defines *Unprotected sides and edges* as "any side or edge. . . of a walking/working surface, e.g. floor, roof, ramp or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high." It is undisputed that there was a parapet around the edge of the commissary roof, and that CO Clark did not measure the height of the wall. It is clear, however, from CO Clark's testimony, and from Exh. C-4, 002, that the top of the parapet was low enough for a man to comfortably rest his foot on it. Though CO Clark's photographs are blurry, they are clear enough for this judge to find, by a preponderance of the evidence, that the parapet wall was approximately knee height, considerably less than the 39 inches required for fall protection. The cited standard is applicable.

As both Complainant and Bigge note in their briefs, the only other issue in dispute is the identity of the individual on the commissary roof. The testimony of CO Clark and Mr. Pease are in direct conflict, and cannot be reconciled. In order to resolve this matter, therefore, this judge must determine which of the two versions of events is more credible.

For the reasons stated below, this judge credits the testimony of CO Clark.

1) Both CO Clark and Ms. Clabby testified that the crane was in operation as they approached the commissary. Clark specifically stated that the slab was being lifted from the center of the commissary roof when she observed the hazard. According to Mr. Pease's own description of his job, he would have been on the roof, watching the crane as it lifted its load from inside the commissary, communicating with the crane operator by walkie-talkie. This conforms to Clark and Clabby's description of what they saw.

2) Clark and Clabby provided identical, albeit general, descriptions of the individual they saw on the commissary roof. That description fits Mr. Pease. Intertex's superintendent was able to identify Pease from the CO's description of the exposed employee and her account of his actions.

3) Pease's claim that he did not know he had been identified as the individual seen and photographed on the commissary roof is not credible. Pease had admittedly been asked earlier on the 26th whether he was the man OSHA had photographed on the roof; it is inconceivable that Pease did not appreciate the purpose of CO Clark's questioning when Bigge management brought her over to interview him privately. The differences between Pease's testimony at the hearing and at his deposition also impugn his credibility in this matter.

4) Generally, Pease was not a credible witness, in that he was belligerent and uncooperative on the stand, refusing to clarify ambiguous answers to counsel's questions.

This judge credits CO Clark's version of the events of January 25-26, 2000. The cited violation is deemed established.

Penalty

A penalty of \$2,500.00 was proposed for the single "serious" violation.

The violation was correctly classified as serious. One employee was exposed to the danger of falling approximately 25 feet from the commissary roof to the ground below for approximately three minutes (Tr. 32, 46, 158, 187). A fall from that height would undoubtedly result in serious injury, up to and including death (Tr. 48).

As the parties introduced no evidence of Bigge's size, history, or good faith, this judge has no basis upon which to reduce the proposed penalty, which will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of \$2,500.00 is ASSESSED.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: