United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MOUNTAIN STATES CONTRACTORS, LLC., Respondent.	OSHRC Docket No. 13-2043

Appearances:

Matt S. Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For Complainant

Howard M. Kastrinsky, Esq. & Michael D. Oesterle, Esq., King & Ballow, Nashville, Tennessee
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). Responding to a report of a crane collapse, the Occupational Safety and Health Administration ("OSHA") conducted an investigation of Mountain States Contractors, LLC ("Respondent") that began on May 21, 2014, at Respondent's worksite located at the intersection of the Cumberland River and Highway 109 in Gallatin, Tennessee. (Ex. J-1). As a result, on November 7, 2013, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one serious, one other-than-serious, and one willful violation with a total proposed penalty of $60,900.00. Respondent did not contest Citation 3, Item 1,

which alleged an other-than-serious violation of 29 C.F.R. § 1910.134(k)(6). Respondent timely contested the remaining Citation items. Prior to a trial on the merits, the parties reached a settlement with respect to Citation 1, Item 1. The Court issued an *Order Approving Stipulation of Partial Settlement* on June 12, 2014, which concluded action on Citation 1, Item 1. The trial on Citation 2, Item 1 took place on September 16–18, 2014, in Nashville, Tennessee. Both parties timely submitted post-trial briefs. In addition, Respondent filed a *Motion for Sanctions* (Motion), to which Complainant filed a reply. The Motion has been addressed in a separate Order.

II. Stipulations

On September 5, 2014, the parties submitted a "Joint Stipulation Statement" to the Court. (Ex. J-1). The Stipulations are as follows:

1. Jurisdiction of this action is conferred upon the Commission by § 10(c) of the Act.

2. Respondent, Mountain States Contractors, LLC, is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5).

3. The principal place of business of Respondent is at 2209 Crestmoor Drive, Suite 210, Nashville, Tennessee 37215.

4. Respondent had a place of employment at the Cumberland River where it intersects Highway 109 in Gallatin, Tennessee. Respondent was engaged in construction work as of the dates of the alleged violations.

5. Respondent timely contested Citation 1, Item 1 and Citation 2, Item 1. Respondent did not contest Citation 3, Item 1.

III. Factual Background

Thirteen witnesses testified at trial: (1) Kathleen Carlson, Respondent's Human Resources Manager; (2) Kevin Tubberville, Respondent's Custodian of Records; (3) Kevin Hinson, former employee of Respondent, current COO of Jones Brothers,[1] and the individual overseeing the Highway 109 bridge project; (4) Tommy Shehane, Respondent's superintendent; (5) Shawn Shehane, foreman and crane operator for Respondent; (6) Brian Bundy, crane operator; (7) Aaron Hutchins, crane operator; (8) Robert Kindrat, Equipment Manager for Jones Brothers; (9) Michelle Sotak, Compliance Safety and Health Officer (CSHO); (10) William Cochran, OSHA's Nashville Area Director; (11) Keith Swafford, Project Management Estimator for Jones Brothers; (12) William Doyle Curtis, foreman for Respondent; and (13) Tommy Forrest, Superintendent for Britton Bridge.

a. The Investigation

Respondent is a construction contractor, which, at all times relevant to this proceeding, was under contract with the Tennessee Department of Transportation to build two bridges over the Cumberland River. (Tr. 80). On May 21, 2013, while working on the Highway 109 bridge, the boom cable of the Terex HC 165 crane ("crane") snapped, causing the boom to fall onto the highway. (Ex. C-18, C-19). The accident was reported to OSHA, which assigned CSHO Michelle Sotak to inspect the worksite. (Tr. 319–20). CSHO Sotak met with the police officer at the worksite, as well as members of Respondent's management team. (Tr. 320–21). Because she arrived in the afternoon, CSHO Sotak began by laying the groundwork for further investigation, taking pictures of the worksite, and arranging to conduct employee interviews on the following day. (Tr. 321–28; Ex. C-18 to C-23).

1. Jones Brothers is an affiliate of Mountain States Contractors. (Ex. J-2).

On the second day of her investigation, May 22, 2013, CSHO Sotak took additional photographs, including pictures of the cable that is the subject of the Citation at issue. (Tr. 328). CSHO Sotak also conducted interviews with three individuals, all of whom had operated the crane in the three months leading up to the accident. Those individuals were: Shawn Shehane,[2] Brian Bundy, and Aaron Hutchins. Shawn Shehane and Hutchins provided statements to CSHO Sotak, who memorialized them in written form. (Ex. C-16, C-32). Shawn Shehane and Hutchins signed the statements indicating that they had reviewed the statement for accuracy and affirmed that the information contained therein was true and correct to the best of their knowledge. (Ex. C-16, C-32).

Shawn Shehane, who was a foreman on the project and also operated the crane, told CSHO Sotak that he had seen broken wires on the boom cable prior to the accident but that the cable did not meet the out-of-service criteria. (Tr. 340–41). Bundy, who was operating the crane at the time of the accident, stated that he did not know why the cable broke. (Tr. 339). Hutchins, on the other hand, told CSHO Sotak a much different story. According to CSHO Sotak, Hutchins told her that there were broken wires throughout the boom cable, that the boom cable met the out-of-service criteria before the accident, and that he informed Shawn that the cable was "bad" and needed to be replaced. (Tr. 329, 653–54).

On June 17, 2013, approximately a month after the accident, CSHO Sotak had the opportunity to more thoroughly inspect the boom cable and took pictures, which show multiple cracked wires, corrosion, and damage. (Tr. 349–50; Ex. C-4 to C-14). She also interviewed Robert Kindrat, an employee of Jones Brothers, who conducted the annual inspection of the crane at issue in this case. (Tr. 260). According to CSHO Sotak, Kindrat told her that his

2. There were two Shehanes that testified at trial: Shawn Shehane and Tommy Shehane. To avoid confusion, any reference to the Shehanes will typically be to their first names, i.e., "Shawn" and "Tommy".

inspection of the crane cables revealed that the auxiliary cable was "bad" and that the boom cable had broken wires but that it did not satisfy the out-of-service criteria.[3] (Tr. 341; Ex. C-17). Neither of the cables were replaced immediately after the annual inspection. (Ex. C-15, R-25 to R-27).

CSHO Sotak also testified that she had an additional conversation with both Bundy and Hutchins on July 18, 2013. CSHO Sotak stated that she asked both operators whether they thought the crane should have been brought down (taken out of service). (Tr. 340). According to CSHO Sotak, Bundy and Hutchins told her they believed the crane should have been brought down because they observed broken and smashed wires. (*Id.*). Following up on this information, CSHO Sotak again spoke with Tommy and Shawn Shehane, superintendent and foreman, respectively. Shawn reiterated his belief that the boom cable did not meet the out-of-service criteria, and Tommy stated that, due to the condition of the boom cable, a new one had been ordered. (Tr. 340–41).

In addition to conducting interviews and taking photographs, CSHO Sotak also reviewed the Daily Inspection forms that were filled out by the crane operators. According to the operators, these forms were filled out on a daily basis and kept in the cab of the crane. (Tr. 162). After the book of forms was filled up, those documents were supposed to be transmitted to the project office. (Tr. 111–12; C-15). There was no evidence that these documents were reviewed by the site foreman, superintendent, or by members of Respondent's safety and health department;[4] instead they were shipped to a central facility for storage. (Tr. 163–64). The daily

3. For purposes of clarification, the boom cable is a load-bearing cable that adjusts the height of the boom. (Tr. 306). The auxiliary cable, on the other hand, is responsible for opening and closing the clam-shell bucket attached to the end of the boom. (Tr. 290).

4. The exception to this is Shawn Shehane, who was both a foreman and operator of the Terex crane. In his capacity as an operator, Shawn documented his own inspections and had access to the documentation of the inspections performed by Hutchins and Bundy, but he did not review them. (Tr. 163).

inspection forms included notations regarding the condition of both the auxiliary and boom cable in the three months prior to the accident at issue. (Ex. C-15). A review of the daily inspection forms, coupled with trial testimony and other exhibits, yields the following timeline:

- Starting on February 19, 2013, Hutchins indicated that the auxiliary cable needed to be replaced. (Ex. C-15). Additionally, for the cable spool and winch he marked the "Repair" box, which, according to the form, means that the "item needs to be repaired *before further operation*." (*Id.*) (emphasis added).[5] At this time, Hutchins testified that he believed the auxiliary cable met the out-of-service criteria. (Tr. 221).

- Hutchins made the same notations regarding the auxiliary cable on 2/25/13, 2/26/13, and 3/27/13. (C-15).

- On April 1, 2013, Shawn Shehane noted, "Need new cable on aux. drum." (Ex. C-15). He also marked the "Repair" box for both the cable spool and auxiliary winch.

- On April 2, 2013, Hutchins again noted that the auxiliary line needed to be replaced; this time with three exclamation points. He continued to mark the "Repair" box for the cable spool and auxiliary winch. (*Id.*).

- On April 3, 2013, Hutchins continued to note problems with the auxiliary line. This same day, Kindrat performed the annual inspection, in which he noted that the auxiliary cable was "bad" and that a new one had been ordered. Kindrat also identified two broken wires on the boom cable. (Tr. 264; Ex. C-15, C-17).

- On April 9, 2013, Hutchins again noted that the auxiliary cable needed to be replaced, followed by 14 exclamation points. (Ex. C-15). Again, the "Repair" box is checked for both the cable spool and auxiliary winch. (*Id.*).

- On April 10, 2013, Shawn Shehane noted, "Aux. drum needs new cable", and checked the "Repair" box for the cable spool and auxiliary winch. (*Id.*).

- On April 11, 2013, Shawn Shehane noted, "Need new cable on Aux. drum. Got new cable coming for boom hoist." (*Id.*). This is the first mention of the boom cable in the daily reports.

- On April 13 and April 15, 2013, Shawn Shehane continued to state the need for a new auxiliary cable, and on April 15, 2013, mentions that the boom cable needs to be replaced. (*Id.*).

5. According to Hutchins, he marked "Repair" on the auxiliary winch and cable spool because there was not a space for him to indicate damage to the auxiliary line other than the comments section. (Tr. 220–21).

- Between April 16 and April 22, 2013, both Hutchins and Shawn Shehane continued to make the same notes for both the boom and auxiliary cables. According to Hutchins' testimony, on April 18, 2013, the only day which indicates he operated the crane for this period, he noticed "hairline fractures" on the boom cable, which he and Darrell Meredith, a mechanic for Jones Brothers, reported to Shawn Shehane. According to Hutchins, Shehane stated that the cable would be okay. (Tr. 232–34; Ex. C-15).

- On April 26, 2013, the auxiliary cable is finally ordered and replaced on the same day. (Tr. 569, 583; Ex. R-25 to R-27).

- On April 28, Hutchins notes that the "boom cable needs replacing" and marks "Repair" for the boom hoist and reeving. (Ex. C-15).

- During the period from May 3 to May 20, 2013, Bundy does not make any notations in the daily inspection log. (*Id.*).

- On May 20 and May 21, 2013, Bundy notes that the boom cable needs to be replaced. (*Id.*).

- On May 21, 2013, the boom cable broke. According to Kevin Hinson, a former employee of Respondent and current Chief Operating Officer for Jones Brothers, there was a replacement boom cable on site the day of the accident. (Tr. 90).[6]

At the conclusion of her investigation, CSHO Sotak recommended the issuance of three Citation items.[7] According to CSHO Sotak, the Citation items were ready to be issued on September 6, 2013; however, Complainant waited an additional two months to issue the Citation and Notification of Penalty while a press release was being prepared. (Tr. 426–27). The Citation and Notification of Penalty was eventually issued on November 7, 2013.

b. Respondent's Policies and Safety Program

As part of their daily inspection, Respondent's crane operators look at, amongst other things, the cables that will be used that day, inspect the cable drums, ensure the cables are rolled up properly on the spool, and check fluids in the crane. (Tr. 189). As noted above, these

6. The foregoing dates do not necessarily reflect all of the dates wherein work was performed on the bridge. However, they do reflect the information contained within the Daily Inspection Reports introduced into evidence. (Ex. C-15).

7. As noted above, the only remaining Citation at issue is Citation 2, Item 1, which will be discussed in detail in Section IV.B, *infra*.

inspections are documented on a Daily Crane Inspection form. (Ex. C-15, R-17). The regulations do not require documentation of the daily inspection.

According to Kevin Hinson, Respondent has a policy that provides crane operators with the authority to remove a crane from service. (Tr. 485). This policy was communicated to the crane operators orally. (Tr. 485). There is no documentation of this policy in Respondent's manuals or safety materials, but the Safety and Health program does state that equipment found to have defects in any critical area that could affect the safe operation of the equipment should be tagged and taken out of service until repairs are made.[8] (Ex. R-17). Each of the crane operators testified at trial that they were aware they had authority to remove cranes from service. (Tr. 605, 636, 660–61).

In addition to performing daily inspections of the cranes, Respondent also has daily Pre-Work Huddles, during which a supervisor discusses the tasks to be performed and the safety issues related to those tasks. (Tr. 486–87). Those daily huddles are also supplemented by weekly training sessions, which address specific safety issues that impacts the worksite. (Tr. 487, 498). Further, Respondent, in addition to performing its own weekly site safety audits, has third-party safety audits performed by Fortier Loss Control Consultants, as well as by Hartford Insurance. (Tr. 488–89, 510–15).

To ensure compliance with its program, Respondent utilizes a progressive disciplinary policy, which includes actions ranging from verbal warnings up to and including termination. (Ex. R-17). Respondent presented evidence that it has disciplined employees, including members of management, for violations of its safety policy. (R-19).

8. This is consistent with the legend at the bottom of the Daily Crane Inspection form, which indicates that "Repair" means that the "item needs to be repaired *before further operation*." (Ex. C-15) (emphasis added).

IV. Discussion

a. Statute of Limitations

As indicated in Section IV.B, *infra*, the allegation contained in the Citation states that "damaged *cables* were not removed from service." Citation and Notification of Penalty (emphasis added). During the pre-trial phase of this case, Complainant argued that the aforementioned language indicated its intent to pursue violations related to both the auxiliary cable and the boom cable. In response, Respondent filed an *Amended Answer*, which alleged that the auxiliary cable was repaired prior to the running of the statute of limitations pursuant to Section 9(c) of the Act, 29 U.S.C. § 658(c). Respondent argues since the auxiliary cable was replaced on April 26, 2013 and the Citation was issued on November 7, 2013, any alleged violation based the auxiliary cable is barred by the Act's statute of limitations. Complainant argues that the statute of limitations defense should be rejected on one of three bases: (1) the deficiencies found on both the auxiliary and booms cables represented a continuing violation; (2) the discovery rule; and (3) that the statute of limitations should be tolled under equitable principles. After reviewing the facts and applicable law, the Court finds that the statute of limitations prohibits Complainant from pursuing a violation as to the auxiliary cable.

According to the Supreme Court, "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1221 (2013) (internal citations omitted). Such statutes provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). In that regard, the Court has concluded that "even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

Section 9(c) of the Act states, "No 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 D.C. Circuit has held that the word "occurrence" clearly refers to "a discrete antecedent event—something that 'happened' or 'came to pass' 'in the past.'" *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109–10 & n.5).

1. *Continuing Violation Theory*

A "continuing violation" is "'one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period,' *Dasgupta,* 121 F.3d at 1139, typically because it is only its cumulative impact . . . that reveals its illegality." *Taylor v. F.D.I.C.*, 132 F.3d 753, 765 (D.C. Cir. 1997). *See AKM LLC*, 675 F.3d at 757 (rejecting Secretary's continuing violation theory as unreasonable and "cannot survive even with the aid of *Chevron* deference"); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989) ("[A] claim . . . wholly dependent on . . . conduct occurring well outside the period of limitations . . . cannot [support] a continuing violation."); *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 422 (1960) (holding as untimely "a finding of a violation which is inescapably grounded on events predating the limitations period").

In support of its position, Complainant cites to *dictum* in the *AKM LLC* decision, wherein the D.C. Circuit stated:

> Of course, where, for example, a company continues to subject its employees to unsafe machines . . . , or continues to send its employees into dangerous situations without appropriate training . . . , OSHA may be able to toll the statute of limitations on a continuing violations theory since the dangers created by the violations persist.

Id. at 758. The intent behind Complainant's citation of this passage is clear: Respondent subjected its employees to an unsafe machine (the crane) that had a catalog of violations which were present before, and continued into, the six-month limitations period. In particular, Complainant notes that Hutchins testified that the auxiliary cable met the out-of-service criteria on February 19, 2013, and that the cable was not replaced until April 26, 2013. (Tr. 221; Ex. R-25 to R-27). Complainant also notes that Hutchins also testified that he observed six fractured wires in a lay of the boom cable on April 18, 2013.[9] Thus, both the boom cable and the auxiliary cable met the out-of-service criteria during the period between April 18 and April 26, 2013. According to Complainant, this period of overlap "created a situation where the crane was not in compliance with § 1926.1413 from at least February 19, 2013 . . . to May 21, 2013 . . . . *Sec'y Br.* at 10.

The D.C. Circuit noted that the purpose behind a continuing violations theory is that a particular occurrence could not reasonably be expected to be made the subject of a lawsuit because "its character as a violation did not become clear until it was repeated during the limitations period . . . typically because it is only its cumulative impact . . . that reveals its illegality." *Taylor*, 132 F.3d at 765. In this case, the violation was not repeated. Rather, a separate violation, albeit pursuant to the same standard, occurred on a different part of the crane. Admittedly, the violations occurred on the same piece of equipment—the Terex HC 165—however, these were two separate, discrete violations as advanced by Complainant in his interpretation of the Citation language noted above. Once the auxiliary cable was repaired, the violation ceased to exist *as to that part of the crane*. *See Dziura v. United States*, 168 F.3d 581,

9. This testimony forms the basis of Complainant's allegation that Respondent violated 29 C.F.R. § 1926.1413(a)(4)(ii)(B) with respect to the boom cable. *See* 29 C.F.R. § 1926.1413(a)(2)(ii) (apparent deficiency in Category II includes "six randomly broken wires in one rope lay").

583 (1st Cir. 1999) (continuing violation doctrine "is generally thought to be inapposite when an injury is definite, readily discoverable, and accessible in the sense that nothing impedes the injured party from seeking to redress it"). Complainant has treated the auxiliary cable and boom cable as two definite and distinct violations, both readily discoverable and accessible to Complainant. Complainant cannot have his cake and eat it too by arguing that they are two distinct violations while at the same time arguing that they are one violation for the purpose of getting past the statute of limitations hurdle. This argument is clearly disingenuous.

The damage to the auxiliary cable, as alleged, was clearly recognized by Complainant as a violation of the cited standard regardless of whether a similar violation on the boom cable was discovered during the applicable limitations period. In other words, it was not the cumulative impact of having multiple non-complying cables that revealed the illegality of the auxiliary cable violation; rather, it was the discrete event of Hutchins discovering that the auxiliary cable met the out-of-service criteria (and the subsequent interview with CSHO Sotak). *See AKM LLC*, 675 F.3d at 757 (holding that Volks' conduct—failure to document injuries—"would be immediately apparent to an OSHA administrator" and declining to apply continuing violation theory). Further, the discrete violation was remedied by replacing the cable on April 26, 2013. As in *Dziura*, the occurrence in question was "definite, readily discoverable, and accessible in the sense that nothing impede[d] [the Government] from seeking to redress it." *Id.* As will be addressed more fully with respect to Complainant's discovery rule argument, there was no impediment to Complainant's ability to cite Respondent for the auxiliary cable violation—the Citation was ready for issuance on September 6, 2013, which is a little less than three weeks shy of the six-month limitation that began on April 26, 2013. The only impediment to issuing the

Citation within the applicable limitations period was Complainant's own desire to issue a press release, which postponed the issuance of the Citation by two months.

Complainant's approach is a novel one—attempting to intertwine discrete violations of the same character on the same machine in order to stretch the limitations period beyond six months. The problem with this argument, however, is quite simple—once the auxiliary cable was replaced, the violation was "inescapably grounded on events predating the limitations period." *Local Lodge No. 1424*, 362 U.S. at 422. Thus, "the occurrence of the violation" ended on April 26, 2013, which is more than six months before the issuance of the Citation. Although the boom cable was alleged to have violated the same standard on the same crane, the existence of that violation was an entirely separate "occurrence". Based on the foregoing, the Court rejects Complainant's continuing violation theory.

2. *Discovery Rule*

In the past, the Commission has held that "the statute of limitations does not begin to run until OSHA discovers or reasonably should have discovered a violation." *Sun Ship, Inc.*, 12 BNA OSHC 1185 (No. 80-3192, 1985); *see also Yelvington Welding Svc.*, 6 BNA OSHC 2013 (No. 15958, 1978). The continued viability of this doctrine, known as the discovery rule, however, has been called into question by the Supreme Court in *Gabelli v. S.E.C.*, 133 S. Ct. 1216 (2013).

In *Gabelli*, the Securities Exchange Commission (S.E.C.) argued that the discovery rule should be applied to toll the statute of limitations in its pursuit of civil penalties. *Id.* at 1221. The Court noted that the doctrine arose in 18th-century fraud cases as an exception to statutes of limitation. *Id.* There was a recognition that "'something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he

or she has been defrauded.'" *Id.* (internal citation omitted). Thus, in the Court's own precedents, it explained that "fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered." *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793, 176 L. Ed. 2d 582 (2010). When faced with the S.E.C.'s arguments, however, the Court remarked that "we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties." *Gabelli*, 133 S. Ct. at 1221.[10]

The problem with extending the discovery rule to enforcement actions is that "the Government is not only a different kind of plaintiff, it seeks a different kind of relief." *Id.* at 1223. The Government, unlike a private party, is situated to investigate and uncover violations. *Id.* at 1222. The Government is not seeking recompense for its own injury; rather, "penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers." *Id.* at 1223. In that regard, the Court has held that it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Id.* (citing *Adams v. Woods*, 2 Cranch 336, 342 (1805)). Further, the Court noted that, while it is easy to measure what a "reasonably diligent plaintiff" should have known, it is much more difficult to apply that test to the Government. *Id.* (citing *3M Co. v. Browner*, 17 F.3d 1453, 1461 (C.A.D.C. 1994) (indicating funding, personnel, poor design of enforcement program, etc. as potential factors). After reviewing the text of the relevant statute, the Court concluded that there was a "lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations" and declined to apply it. *Id.* at 1224.

10. The case upon which the S.E.C. relied, *Exploration Co. v. United States*, 247 U.S. 435 (1918), actually involved the United States as the aggrieved party in a fraudulent land transaction. The Court noted that, in that specific case, the Government was not acting in its capacity as an enforcer, but was instead the victim of fraud. *Id.* at 449.

Contrary to Complainant's arguments that *Gabelli* is somehow inapposite, it is of little relevance that the decision did not involve OSHA's six-month statute of limitation. The overarching theme of *Gabelli* is that, absent some indication or direction from Congress, the statute of limitation in enforcement actions should not be extended by virtue of the discovery rule. *Id.* Further, Complainant's argument that "OSHA cannot just walk onto a construction site and demand to inspect" simply does not hold water. The Act states:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credential to the owner, operator, or agent in charge, is authorized—to enter without delay and at reasonable times any factory, plant establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . . .

29 U.S.C. § 657(a)(1). The parties have not directed the Court to any textual or historical sources where Congress could have intended to graft the discovery rule onto the Act's statute of limitations, nor could the Court identify such authority on its own. The Court finds, in light of *Gabelli*, the Commission precedent (which were all decided before *Gabelli*) on the discovery rule is no longer controlling. Accordingly, the Court rejects Complainant's argument for the application of the discovery rule.

In the alternative, even if the Commission precedents on the discovery rule have continued viability, notwithstanding the Supreme Court's holding, the Court nonetheless finds that the facts of this case do not support application of the discovery rule. The Supreme Court once held "the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" *Gabelli*, 133 S. Ct. at 1224 (citing *Amy v. Watertown (No. 2)*, 130 U.S. 320, 324 (1889)). Commission precedent, if applicable, does not support such an exception in this case.

Yelvington is inapposite because, contrary to the present case, OSHA could not have learned of the violation until after the statute had lapsed. In that case, the respondent failed to report a fatality within the 48-hour reporting requirement, which, in turn, prevented OSHA from learning about the violation. *Yelvington*, 6 BNA OSHC 2013. Accordingly, the Court held that "having failed to report the accident and thereby having prevented OSHA from learning of the accident, the employer could not avail itself of the limitation period." *Sun Ship*, 12 BNA OSHC 1185 (citing *Yelvington*, *supra*).

In *Sun Ship*, however, the Commission rejected application of the discovery rule because the respondent "did not conceal the facts alleged to constitute a violation." *Id.* Rather, "the Secretary had a full opportunity to learn the facts, and did learn them in time to issue a citation within six months of each alleged violation." *Id.* Complainant in this case had the opportunity to learn the facts, learned them, and could have issued a citation within six months of the last date that the auxiliary cable was alleged to have violated the Act except for his desire to issue a press release to shame the Respondent.

Complainant's argument is quite simple—CSHO Sotak could not have learned of the accident until, at the earliest, May 21, 2013, when the inspection began; thus, that is the date by which the statute of limitations should be measured. By Complainant's logic, however, there is no temporal limit to a CSHO's ability to find evidence of any violation, whether six months or three years ago. This runs afoul of the concerns expressed by the Supreme Court: "[G]rafting a discovery rule onto [the statute of limitations] would raise similar concerns. It would leave defendants exposed to Government enforcement action . . . for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223.

This consequence also concerned the D.C. Circuit, which stated:

> Under [the Secretary's] interpretation, the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example, the Secretary promulgated a regulation requiring that a record be kept of every violation for as long as the Secretary would like to be able to bring an action based on that violation. There is truly no end to such madness. If the record retention regulation in this case instead required, say, a thirty-year retention period, the Secretary's theory would allow her to cite Volks for the original failure to record an injury thirty years after it happened. . . . We cannot believe Congress intended or contemplated such a result. Congress's aim in creating OSHA was to improve the safety of America's workplaces. *See* 29 U.S.C. § 651(b). Congress evidently thought this goal would be served by mandating that OSHA enforce record-making violations swiftly or else forfeit the chance to do so, as reflected in its requirement that citations not issue later than six months after a violation.

AKM LLC, 675 F.3d at 758.

In the present case, there was no act by Respondent to conceal its activities, and Complainant was fully capable (and prepared) to issue a citation within the six-month statute of limitations as to the auxiliary cable. He chose not to do so. As the Supreme Court noted, the exceptions to application of a statute of limitations should be narrowly construed to prevent judicial legislation. Given the facts of this case, the Court finds that such an exception under the discovery rule is not warranted on the grounds proffered by Complainant.

3. *Equitable Tolling*

"The doctrine of equitable tolling allows courts to toll a statute of limitations when 'a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010) (internal quotation omitted). This should be distinguished from the discovery rule, which governs when a claim accrues as opposed to "doctrines that toll the running of the applicable limitations period when the defendant takes steps beyond the challenged conduct itself to conceal that conduct from the plaintiff." *Gabelli*, 133 S. Ct. at n.2. The Supreme Court has held that "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect . . . ." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Thus, as the

Sixth Circuit noted, "[T]he doctrine of equitable tolling is used sparingly by federal courts." *Robertson*, 624 F.3d at 784.

Complainant contends that Respondent concealed the violation related to the auxiliary cable. CSHO Sotak claims she was initially told that the auxiliary cable was replaced. (Tr. 418; R-2). Later in the investigation, however, Dwayne Smith, Respondent's safety manager, told her that the cable had not been replaced since it was purchased in 2011. (Tr. 364, 418–19, 448–49). Complainant claims it reasonably relied on the statement from Dwayne Smith in determining the statute of limitations period, and issued the Citation on November 7, 2013. (Ex. R-2). Accordingly, it claims that the statute of limitations should be tolled.

The Court disagrees. CSHO Sotak was initially told that the cable had been replaced, but opted to rely on conflicting information coming from Mr. Smith. Instead of attempting to reconcile the conflict through further investigation, which would have uncovered the documentation and information illustrating that the auxiliary cable had been replaced, CSHO Sotak relied on the last thing that she was told. There was no suggestion that the documents submitted by Respondent, which established the date the auxiliary cable was purchased and replaced, were inauthentic or fraudulent. Further, there was no indication that Respondent took steps to actively conceal the existence of an alleged violation from Complainant. Complainant's failure to comply with the statute of limitations did not "unavoidably [arise] from circumstances beyond [his] control." *Robertson*, 624 F.3d at 783. It was certainly within Complainant's control to investigate further; in fact, one might argue that it was Complainant's duty to reconcile the conflicting information presented to him. As noted earlier in Section IV.A.1, the ability to cite Respondent in a timely fashion—as regards the auxiliary cable—was also within Complainant's control. CSHO Sotak testified that the Citation was prepped for signature and

issuance on September 6, 2013, but that it was not issued for another two months because Complainant wished to issue a press release in conjunction with the Citation.

That Complainant chose to make its wine with sour grapes does not obligate the Court to drink it. Complainant's failure to meet the statutory deadline for issuing a citation as to the auxiliary cable is a product of his own failure to conduct a more thorough investigation and his desire to publicize his enforcement efforts. Based on these facts, the Court finds no equitable reason to toll the statute of limitations as to the auxiliary cable. Complainant's arguments for the application of equitable tolling are thus rejected.

b. Citation 2, Item 1

Complainant alleged a willful violation of the Act as follows:

> 29 CFR 1926.1413(a)(4)(ii)(B): When a deficiency in Category II was identified, operations involving the use of the wire rope in question was not prohibited until the wire rope was replaced.
>
> a) Hwy 109 @ Cumberland River – On or about 5/21/13, damaged cables were not removed from service.

The cited standard provides:

> If a deficiency in Category II (*see* paragraph (a)(2) (ii) of this section) is identified, operations involving use of the wire rope in question must be prohibited until . . . [t]he wire rope is replaced . . . .

29 C.F.R. § 1926.1413(a)(4)(ii)(B).[11]

To establish a *prima facie* violation of section 5(a)(2) of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

11. There are alternative measures that may be taken by the employer if a Category II deficiency is found; however, there was no evidence to suggest that Respondent implemented those measures.

A. The Standard Applies

The first element, as always, is whether the standard applies to the cited condition. *Ormet Corp.*, 14 BNA OSHC 2134. Respondent has stipulated that it was engaged in construction work on the dates in question. (Ex. J-1). Further, Respondent was using a crane to build a bridge over the Cumberland River. (Tr. 83–87, 320). The cited standard, 29 C.F.R. § 1926.1413(a)(4)(ii)(B), applies to cranes used in construction. Accordingly, the Court finds that the standard applies.

B. The Terms of the Standard Were Violated

The standard at issue requires that "[i]f a deficiency in Category II (*see* paragraph (a)(2)(ii) of this section) is identified, operations involving use of the wire rope in question must be prohibited until . . . [t]he wire rope is replaced . . . ." 29 C.F.R. § 1926.1413(a)(4)(ii)(B). As it relates to this case, a Category II deficiency is present in a running wire rope when there are "[s]ix randomly distributed broken wires in one rope lay or three broken wires in one strand in one rope lay, where a rope lay is the length along the rope in which one strand makes a complete revolution around the rope." *Id.* § 1926.1413(a)(2)(ii)(A)(1).[12] As will be shown, the determination of whether the terms of the standard were violated hinges on two key issues: (1) the meaning of the term "broken" as that term is used in 29 C.F.R. §1926.1413(a)(2)(ii); and (2) the quality of the evidence proffered by Complainant, in particular, the credibility of the individuals that operated the crane.[13]

12. This is also known as the "3-and-6 Criteria".
13. In order to determine whether Respondent is in violation of the cited standard, 29 C.F.R. § 1926.1413(a)(4)(ii)(B), Complainant must first prove that a Category II deficiency was present on the cable (referred to in the regulation as a "running wire rope").

1. *What Constitutes a "Broken" Wire?*

At trial, and in its brief, Respondent places significant emphasis on the meaning of the term "broken" as it applies to the individual wires that make up the boom cable. In his statement to CSHO Sotak, Hutchins described the wires as "broken" or "broke". (Tr. 329–39; Ex. C-16). Respondent contends that these statements are meaningless because CSHO Sotak failed to inquire as to what Hutchins meant when he said "broke" or "broken".[14] At first blush, this argument carries some cachet because there were multiple terms used to describe the condition of the wires on the boom cable: Hutchins referred to the wires as "broken" in his statement, but then referred to them as "fractured" at his deposition and trial; Kindrat also referred to "broken" wires during his annual inspection; whereas Bundy and Shehane referred to the deficiencies as "cracks". Thus, Respondent suggests that Complainant is attempting to expand the definition of "broken" to include other deficiencies ("cracks" and "fractures") not accounted for by the regulations, thereby depriving Respondent of fair notice and due process. However, based on the analysis below, the Court rejects Respondent's arguments.

A running wire rope, which is the term applicable to the boom cable in this case, is comprised of three main parts: wires, strands, and a core. (Ex. C-29). *See also* 29 C.F.R. 1926.1401 (defining running wire rope). The core is at the center of the cable. The strands are groups of individual wires that are wrapped around the core. For the purposes of the standard, a "lay" is the distance it takes for a strand to make a complete revolution around the core. Thus, to violate the standard, it must be proved that: (1) there were three broken wires in one group of

14. Each crane operator testified at trial that they were familiar with the 3-and-6 criteria. (Tr. 160, 196, 216). The Court can then infer that when the crane operators used certain terms when communicating with the CSHO that they knew the meaning of those terms in the context of the 3-and-6 criteria and their conclusions. *See Oakland Constr. Co.*, 3 BNA OSHC 2023 (holding that reasonable inferences from circumstantial evidence is proper).

wires as it makes one revolution around the cable; or (2) there were six broken wires in any group of wires within one lay.

In support of Respondent's argument, it argues that there is a distinction between the terms "cracked" and "broken" as those terms are used to describe a Category I deficiency (not cited in this case) and a Category II deficiency (cited in this case). A Category II deficiency, as is alleged here, refers to "broken" wires. *See* 29 C.F.R. § 1926.1413(a)(2)(ii). A Category I deficiency, on the other hand, includes "significantly corroded, cracked, bent, or worn end connections (as from severe service)." *Id*. § 1926.1413(a)(2)(E). Respondent's argument becomes less convincing when one examines both regulations and discovers that the deficiencies described in the cited sections refer to two entirely different portions of the cable. Category II refers to the main body of the cable and its constituent parts, whereas Category I refers to that cable's end connections, or what it is connected to the end of the cable. *See* Cranes and Derricks in Construction, 73 Fed. Reg. 59714-01, 59777 ("In the Committee's experience, one type of error that occurs is when somebody between shifts cuts the cable and puts the end connection back the wrong way.").

In an attempt to make its case stronger based upon the above distinction, Respondent resorts to arguing that the use of different terms implies a different category of deficiency. To support its argument Respondent manipulated the language of the standard as follows: "On the other hand, a Category I deficiency allows the competent person to decide whether to take the equipment out of service, if a ***wire rope*** is 'significantly corroded, **cracked**, bent, or **[has]** worn end connections.'" *Resp't Br.* at 19 (citing 29 C.F.R. § 1926.1413(a)(2)(i)(E)) (emphasis and alterations in original). This manipulation does not comport with the language of the standard, or its regulatory history.

First, the language of the Category I standard only refers to "apparent deficiencies", which include "significantly corroded, cracked, bent, or worn end connections." There is no reference to the wire rope itself, only its end connections. Second, all of the listed deficiencies in § 1926.1413(a)(2)(i)(E) modify the term "end connections"—Respondent's use of the bracketed term "has" completely changes the meaning of the regulation in a manner that was not intended.[15]

Contrary to Respondent's arguments, the use of the terms "cracked" and "broken" in this context does not illustrate an intent to create a distinction, based on severity, between deficiencies on the same type of equipment; rather, those terms modify different nouns—end connections as regards Category I and wires as regards Category II. The deficiencies listed in a particular category refer to the specific piece of the cable. This is further supported by Section 1926.1413(a)(2)(A), which lists Category I deficiencies *as to the wire rope structure*. Specifically, it states that Category I deficiencies include "[s]ignificant distortion *of the wire rope structure* such as kinking, crushing, unstranding, birdcaging, signs of core failure or steel core protrusion between the outer strands." 29 C.F.R. § 1926.1413(a)(2)(A). Notably, the words "broken" and "cracked" appear nowhere in this subsection, which is the Category I corollary to Section 1926.1413(a)(2)(ii)(A)(1).

Ultimately, Respondent takes issue with Complainant's interpretation of the standard, which conflates the terms "broken", "cracked", and "fractured." According to the Merriam-Webster Dictionary, the term "broken" is defined as:

> 1: violently separated into parts **:** shattered
> 2: damaged or altered by breaking: as

15. Further evidence of this is found in Section 1926.1413(a)(2)(i)(D), which immediately proceeds the disputed regulation. It specifically lists "improperly applied end connections" as a Category I deficiency. When read together, it is clear that all of the deficiencies in subsections (E) and (D) modify the term "end connections".

a **:** having undergone or been subjected to fracture <a *broken* leg>

…

d **:** discontinuous, interrupted

e **:** disrupted by change

3 *a* **:** made weak or infirm

…

4 *a* : cut off **:** disconnected.

Merriam-Webster.com, http://www.merriam-webster.com/dictionary/broken (March 26, 2015). Similarly, the term "cracked" is defined as "*broken* (as by a sharp blow) so that the surface is fissured." *Id.*, http://www.merriam-webster.com/dictionary/cracked (March 26, 2015) (emphasis added). The Court finds that Complainant's interpretation of the term "broken" comports with its plain meaning. *See Auer v. Robbins*, 519 U.S. 452 (1997). Apart from the dictionary, and in very real terms, however, the Court doubts that such fine distinctions carry much weight when the cracked, broken, or fractured wire has several tons of weight applied to it. Thus, insofar as the wires have been referred to as broken, cracked, or fractured, the Court will accord each of those terms the same meaning.

2. *The Evidence*

Complainant proffered both documentary and testimonial evidence in support of its allegation that the boom cable exhibited a Category II deficiency, which mandates that the crane be taken out of service by a competent person. Of particular note were the photos taken by CSHO Sotak, the Daily Crane Inspection forms, and the testimony of Hutchins, Bundy, Shawn Shehane, and Robert Kindrat. The Court shall address each piece of evidence in turn.

i. The photographs

CSHO Sotak took photographs of the boom cable on two separate occasions after it snapped on May 21, 2013. (Ex. C-4 to C-14). These photographs show a cable that, without context, clearly meets the Category II criteria. (*Id.*). The problem with this evidence, however, is the fact that there was no credible testimony that the photographs accurately depicted the

condition of the cable at any time *prior* to the day of the accident. During the accident, the cable "whipped" and fell with the boom onto the highway, which could have caused at least some of the damage observed in the photographs. (Tr. 369–70). There was no forensic analysis of the cable post-accident to indicate whether the cause of the broken wires depicted in the photographs was the result of something other than the accident. *See All Purpose Crane, Inc.*, 13 BNA OSHC 1236 (No. 82-284, 1987) (crediting expert testimony indicating that without proper in-depth analysis nobody could ascertain what caused wires to break).[16] Accordingly, the Court accords no weight to the photographs taken by CSHO Sotak.

ii. CSHO Sotak

The testimony of CSHO Sotak is set forth in detail in Section III(a), *supra.* The Court accords great weigh to her testimony as it relates to her interviews with Shawn Shehane and Aaron Hutchins.

iii. Robert Kindrat

As noted *infra* as it relates to the testimony of the crane operators, the Court is more interested in what Kindrat observed as opposed to what he concluded. Kindrat performed the annual inspection of the crane on April 3, 2013. During his inspection, he observed two broken wires in two different lays on the boom cable. (Tr. 264). At the time, however, Kindrat did not have a crane operator with him to "boom down" the crane in order to unspool more of the boom cable for inspection. (Tr. 263). Darryl Meredith, along with Aaron Hutchins, conducted a follow-up inspection, during which they found additional broken wires. (Tr. 273–75). Kindrat testified that Meredith told him about additional broken wires, but that the cable did not need to

16. The standard at issue in *All Purpose Crane* was 29 C.F.R. § 1926.550(a)(7)(1). The set of standards found in 1926.550 was supplanted by the standards now found at 1926.1400 *et seq*. *See* Cranes and Derricks in Construction, 75 Fed. Reg. 47906-01, 47920 (August 9, 2010).

be taken out of service. (Tr. 275). Although Kindrat's testimony does not support a finding that the boom cable met the out-of-service criteria at the time of his inspection, the Court is curious as to how he certified an annual inspection without exposing the full length of the cable. (Ex. C-17). *See* 29 C.F.R. § 1926.1413(c)(2)(ii) ("The inspection must be complete and thorough, covering the surface of the entire length of the wire ropes . . . .").

The Court is dubious about the annual examination performed by Kindrat. During his annual inspection, which requires that the entire cable be laid bare, he certified that he performed a complete inspection of the boom cable even though he admitted at trial that he had not boomed down the crane. Further, though he also testified that he observed broken wires in the boom cable, he did not document these findings in his annual report. (Ex. C-17). The auxiliary cable, which was characterized as "bad" and "ordered" in his inspection report, was not replaced until more than two weeks, fourteen exclamation points, and nine uses later. (Ex. C-15). Instead, much like the documentation of, and response to, the Daily Inspection forms, it appears that the annual inspection is viewed as little more than a perfunctory process attendant to owning and operating a crane.

To the extent the Court concludes that the annual inspection report was merely a perfunctory process in order to "check the box" as to what was required under the regulation, the Court is hard-pressed to ascribe any weight to the conclusions reached by Kindrat in his annual inspection report. A review of the testimony indicates the annual inspection was perfunctory. First, Kindrat did not have an operator boom down the cable for inspection. Second, his report states that he reviewed the Daily Inspection forms and concluded they were acceptable. However, he does not address the consistent comments about the cables needing to be replaced or that they were bad, nor did he discuss the equipment not being taken out of service based on

the Company's own policy, or follow-up with the operators who made those comments to obtain further information. Third, supporting the conclusion that his inspection was merely perfunctory is that Hutchins and Meredith called Kindrat *after* his inspection report and advised him that "additional" broken cables had been identified and the boom cable needed to be replaced. Even after those communications, Kindrat did not amend his inspection report to reflect this information. Thus, even if by chance the inspection report was reviewed by supervisors or the safety department, those individuals would not have correct information on which to act. Even after the communication from Hutchins and Meredith in which they identified "additional" broken wires he did nothing. This information, along with his testimony that he observed broken wires, should have placed Kindrat on further notice that the annual inspection he just concluded was not accurate or sufficient and needed to be re-done.

iv. Shawn Shehane

a. **Pretrial statements**. On April 11, 2013, Shawn Shehane was the first crane operator to observe and document broken wires in the boom cable wires.[17] (Exs. C-15 and C-32). According to his sworn statement, however, he did not believe that the cable met the 3-and-6 criteria at any time prior to the accident. In his statement he verified that the boom cable had been ordered for 2 ½ to 3 weeks. Shawn also stated that Aaron Hutchins told him that he noticed broken strands in the cable. In response, Shawn told CSHO Sotak that he advised his superintendent, "Tony", who "got it ordered." (Ex. C-32).

b. **Trial testimony**. Shehane testified that Hutchins asked him to look at the boom cable on the Terex HC 165 at some point after the annual inspection. (Tr. 618). He said that he saw "hairline cracks, small fractures" in the lay, but that he did not see any wires that were

17. As noted above, Kindrat actually noticed cracks in the boom cable wires during his annual inspection on April 3, 2013.

"broken apart" and thus concluded that the cable did not meet the 3-and-6 criteria. (Tr. 619). Shehane also testified that Hutchins did not convey his belief that the crane should be taken out of service. (Tr. 619). This testimony needs to be evaluated in conjunction with: (i) his entries on his Daily Inspection forms indicating on April 13, April 16 and April 22, 2013, he made a notation that the boom cable needs to be replaced; (ii) Hutchins' testimony that on April 18, 2013, he and Darrell Meredith discussed the need for the boom cable to be replaced with him; and (iii) his written statement to the CSHO that he had observed broken wires—not hairline fractures—on the boom cable.

v. Brian Bundy

a. **Pretrial statements**. Brian Bundy was operating the crane at the time of the accident, and, according to the Daily Inspection forms, was the only individual that operated the crane in the weeks leading up to the accident. (Ex. C-15). For the period of May 3, 2013 to May 20, 2013, he made no entries on the Daily Inspection form regarding the boom cable. On July 18, 2013, in an interview with the CSHO, Bundy stated that the cable needed to be taken out of service. (Tr. 340). According to his deposition, Bundy testified that he observed cracks in "half a dozen" lays along the boom cable. (Tr. 202).

b. **Trial testimony**. At trial, Bundy stated that he did not believe the boom cable met the 3-and-6 criteria. (Tr. 662–63). Much like Shawn Shehane's testimony, significant emphasis seems to be placed on the fact that cables were not broken in two. (Tr. 200). Instead, he testified that he saw "some cracks in it, just a couple." (Tr. 200). Notwithstanding the specificity of his prior deposition testimony, at trial Bundy testified to only seeing "some", "a couple", or "a few" cracks along the cable. (Tr. 200, 203). Bundy's testimony needs to be evaluated in conjunction with: (i) the Daily Inspection forms he completed, which, for the period of May 3 to May 20,

2013, indicate he made no notations on his Daily Inspection form, but then on May 20 and May 21, 2013 indicates that the boom cable needed to be replaced; and (ii) the July 18, 2013 statement he made to the CSHO indicating that the boom cable needed to be taken out of service. (Ex. C-15).

vi. Aaron Hutchins

a. **Pretrial statements**. The lynchpin of Complainant's case begins with Hutchins. In his signed statement to CSHO Sotak, Hutchins stated that there were multiple broken wires on the boom cable, which met the 3-and-6 criteria and should have been taken out of service as early as April 18, 2013. (Ex. C-16). In his statement, Hutchins told CSHO Sotak that he noticed broken strands a couple of days after the annual inspection. Hutchins indicated that: (i) he advised Shawn that the boom cable was bad and a new cable was needed; (ii) the boom hoist cable was broken with wires broke throughout the cable; and (iii) he had seen some strands that met the 3-and-6 criteria. Finally, he stated he noticed this when the cable was on the sheave. (C-16).

b. **Trial testimony**. At trial, he testified that, during his interview, he told CSHO Sotak that wires were broke throughout the cable and that some strands met the out of service criteria. (Tr. 239). He also testified that there were more than six "hairline fractures" on the cable, and, when confronted with his deposition testimony, admitted that there were more than six of these hairline fractures in a lay of the boom cable. (Tr. 233). When he observed these fractures on April 18, 2013, he showed them to Shawn Shehane, who decided to continue using the boom cable in that condition. (Tr. 234). In the Daily Inspection forms, Hutchins also continued to document on various dates the need for the boom cable to be replaced and marked "Repair" next to the implements of the crane associated with the boom cable. (Ex. C-15). Notwithstanding the

foregoing, at trial Hutchins would not admit that the same number of wires in a lay were "broken", and thus testified that the cable did not meet the out-of-service criteria prior to the accident on May 21, 2013. (Tr. 237–38).

vii. Daily Crane Inspection Forms

Although the Court has already laid out in detail the substance of the Daily Inspection forms, there is one additional issue to address with respect to this evidence. *See* Section III.A, *supra*. Respondent has called into question the propriety of Complainant using the inspection forms in support its allegation that the boom cable should have been taken out of service. Specifically, Respondent contends that the Daily Inspection forms are voluntary self-audits, because the regulations do not require documentation of the daily/shift inspection. *See* 29 C.F.R. 1926.1413(a). According to Complainant's inspection policy, "[T]he Agency will not routinely request self-audit reports at the initiation of an inspection, and the Agency will not use self-audit reports as a means of identifying hazards upon which to focus during the investigation." Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Safety and Health Self-Audits, 65 Fed. Reg. 46498 (2000).

The Court finds that the Daily Crane Inspection forms are not voluntary self-audits. Voluntary self-audits are, by definition, not mandated by regulation. The daily/shift inspection, on the other hand, is mandatory. 29 C.F.R. 1926.1413(a). Those mandatory inspections do not become voluntary self-audits merely because Respondent chose to document them. By way of comparison, the audits performed at Respondent's worksite by Fortier Loss Consultants are clearly voluntary audits because there is no standard mandating their implementation. (Ex. R-24). *See also BP Products N. Am., Inc., & BP-Husky Refining, LLC*, 2013 WL 9850777 at *3–4 (No. 10-0637, 2013) (ALJ) (rejecting Secretary's use of self-audit performed by third-party

safety consultant and commissioned by respondent). In *BP Products*, the audits were not performed pursuant to a duty imposed by the Act. The ALJ was just as concerned with *how* the reports were used as much as the fact *that* they were used; namely, that the Secretary used them to identify hazards that would serve as the basis for a citation. *Id.* at *4. Further, as discussed by the ALJ in *BP*, the purpose behind the policy was to ensure that employers were not dissuaded from engaging in independent activities to make their workplaces safer. *Id.*

No such concerns are present under the circumstances presented here, where Respondent is already required to perform the inspections. *See* 65 Fed. Reg. at 46501 ("The policy applies to audits . . . (2) that are not mandated by the Act, rules or orders issued pursuant to the Act, or settlement agreements."). Finally, even if the reports could conceivably be considered voluntary self-audits, Complainant did not run afoul of its own mandate—the hazard had been identified by the time the reports were reviewed. *See id.* ("OSHA intends to seek access to such reports only in limited situations in which the Agency has an independent basis to believe that a specific safety or health hazard warrants investigation, and has determined that such records may be relevant to identify or determine the circumstances of the hazardous condition."). Additionally, the only evidence that does not seem to be a moving target from the pretrial phase of this litigation to the trial itself are the Daily Inspection forms. For the reasons stated below, the Court gives great weight to the Daily Inspection forms.

3. *Conclusion*

The Court finds that the great weight of the evidence supports Complainant's allegation that the terms of the cited standard were violated. There is no documentary evidence, photographic or otherwise, that specifically illustrates the boom cable met the 3-and-6 criteria

prior to May 21, 2013. However, the testimony and statements of Hutchins, when coupled with the Daily Crane Inspection reports, support the Court's conclusion.

As Respondent notes, both Bundy and Shawn Shehane have been consistent in their testimony that they did not observe a Category II deficiency on the boom cable prior to May 21, 2013. That said, the Court is less concerned about their conclusions than what they specifically observed. With respect to Bundy, he testified that he saw "some" or "a few" "cracked" wires, and when presented with his deposition testimony, further admitted that he saw cracks in a half-dozen lays. This testimony directly contradicts the CSHO's testimony that when she met with Hutchins and Bundy on July 18, 2013, Bundy stated to her that the crane should have been taken out of service. (Tr. 340). Likewise, Shawn Shehane also testified to seeing cracks in the boom cable (he was, in fact, the first to observe them). This change in terminology in describing the condition of the boom cable from his statement given to the CSHO undermines his observations. In his statement he specifically stated that the cable had broken wires even though he concluded the broken wires did not meet the 3-and-6 criteria. (C-32). Thus, while they may not have reached the same conclusion as Hutchins (at least insofar as his testimony and deposition testimony are concerned), they nonetheless observed deficiencies such as "cracks" and "hairline fractures".

The problem the Court has with Bundy's and Shehane's testimony is the fact that they attempted to diminish what they saw through the use of hairline distinctions between a "broken", "cracked", or "fractured" wire and generalizations as to the number of deficient wires they observed. As it relates to Shawn Shehane, the Court notes that his characterization of the cable's condition changed from the term "broken" wires in his statement to "cracked" or "fractured" in his testimony. As to Bundy, his characterization of the cable's condition has ranged from

concluding the crane should have been removed from service when he spoke to CSHO Sotak on July 18, 2013, to seeing just a couple of cracks in the cable, to having observed cracks in "half of a dozen" lays on the boom cable when confronted with his deposition testimony. (Tr. 202). This sort of wordplay appeared as if it were coached and aimed at mitigating the consequences of their observations. The generalized and obfuscatory nature of Shehane's and Bundy's observations, along with their use of different terms as they were prepared for trial, undermines the Court's confidence in their respective conclusions that the cable did not meet the 3-and-6 criteria. *See All Purpose Crane*, 13 BNA OSHC 1236 at *2 (discounting crane operator's conclusion that cable did not meet out-of-service criteria based on expert testimony that proper method of inspecting cable involves bending and flexing to reveal otherwise concealed breaks). The Court gives great weight to the statements Shawn Shehane gave to the CSHO as to the condition of the cable and his communication with Hutchins after the annual inspection, in which he stated that Hutchins pointed out to him additional broken wires. However, the Court accords little weight to his conclusions that the cable did not meet the 3-and-6 criteria. (Ex. C-36).

Further, the Court is concerned with the quality of Bundy's observations. Bundy operated the crane eight times between May 3, 2013 and May 20, 2013, before he documented any deficiencies in the boom cable. This is so even though both Shawn Shehane and Hutchins documented seven times previously that the boom cable either needed to be replaced or was on order. When coupled with his rather cautious testimony as to his observations, the Court is not convinced that Bundy performed a close enough examination of the cable to make a determination either way. The Court gives Bundy's trial testimony no weight.

Hutchins, on the other hand, was fairly consistent and specific when discussing his observations of the boom cable. To be sure, Hutchins' trial testimony contradicted his earlier

statements and deposition testimony that the cable met the out-of-service criteria, and he also engaged in the same verbal gymnastics as Bundy and Shehane when he stated that the wires were not broken but "fractured". Those changes, however, appear to be a product of the same sort of coaching the Court discerned in Bundy's and Shehane's testimony. Otherwise, in no uncertain terms, Hutchins was consistent throughout that he observed at least six "broken" or "fractured" wires in one lay along the boom cable.[18] Those observations are consistent with: (1) his testimony that he and Meredith expressed their concerns to Kindrat regarding the boom cable; (2) the statements he made to Shawn Shehane, which Shawn repeated in his statement to the CSHO, that the cable had additional broken wires that he located on the sheave in addition to what Kindrat had observed; and (3) the documentation found in the Daily Crane Inspection forms. Though the reports do not specifically mention broken wires or the 3-and-6 criteria, from April 11, 2013 on, they consistently state that the cable needed to be replaced and that its associated implements required "Repair". In that regard, the Court rejects any suggestion, from Hutchins or anyone else, that the statement "the cable needs to be replaced" (or some variant thereof) merely indicates that the cable has some wear and tear and needs to be replaced at some point in the future. (Tr. 643–45). As with the regulations and statutes, the Court ascribes the notes in the Daily Inspection forms their clear and unambiguous meaning. All crane operators testified that they knew the 3-and-6 criteria. Stating that the cable needs to be replaced is a strong indication that the cable meets the out-of-service criteria. This is only made stronger by the fact that all crane operators indicated that the implements associated with the boom cable needed "Repair", which, according to Respondent's own definition, means that the "item needs to be repaired *before further operation*." (Ex. C-15) (emphasis added). Again, this appears to be

18. As the Court noted earlier, it sees no meaningful difference between a cracked, fractured, or broken wire.

another attempt at confusing the rather clear message conveyed by Hutchins at the outset of the investigation that the cable should have been taken out of service.

In summary, the Court gives great weight to: (1) CSHO Sotak's testimony as to Shehane's and Hutchins' pretrial statements; (2) the Daily Inspection forms; (3) the pretrial statements of the crane operators, which show substantial consistency as to the condition of the boom cable; and (4) the trial testimony of Hutchins, insofar as that testimony is consistent with the other operators' statements to CSHO Sotak, as well as his own pretrial statements. Based on the foregoing, the Court finds that Complainant has proved by a preponderance of the evidence that Respondent violated the terms of the standard.

c. Respondent's Employees Were Exposed to the Hazard

There is no real dispute as to whether Respondent's employees were exposed to the hazard. Complainant identified at least four people that were exposed to the falling boom and cable, which will whip back when it breaks under tension. (Tr. 369). In particular, the cable whipped back and broke out the windows of the crane cab, which was occupied by Bundy at the time of the accident. (Tr. 369–70). This evidence is more than adequate to establish employee exposure.

D. Respondent Knew or with the Exercise of Reasonable Diligence Could Have Known of the Violative Condition

"To establish knowledge, Complainant must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Jacobs Field Svcs. N.A.*, 2015 WL 1022393 at * 3 (No. 10-2659, 2015) (citing *Contour Erection & Sliding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007)). To determine reasonable diligence, the Court considers several factors, including "an employer's obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately

supervise employees, and implement adequate work rules and training programs." *Id.* (citations omitted); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000).

"The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981). It is the substance of the delegation of authority, not the formal title of the employee having such authority, that determines whether a person is properly characterized as a supervisor. *Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993). *See Diamond Installations*, 21 BNA OSHC 1688 (No. 02-2080, 2066) (permitting imputation of knowledge to employer based on temporary delegation of authority). The Commission has also held that an individual empowered to take corrective action, or is responsible for ensuring that work is done safely, can be considered a supervisor for the purposes of imputing knowledge to the employer. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003); *Kern Bros. Tree Svc.*, 18 BNA OSHC 2064 (No. 96-1719, 2000).

The Court finds that Complainant has established actual and constructive knowledge with respect to the boom cable. Shawn Shehane testified that he was a foreman for Respondent and supervised a crew of three to four. (Tr. 141–43). He was the first to observe and report "cracks" in the boom cable wires, viewed them independently with Hutchins, and inspected and operated the crane after Hutchins voiced his concern. Clearly Shawn Shehane had knowledge of the condition. Regardless of whether he concluded, reasonably or not, that what he observed

constituted a Category II violation, Shawn saw the cable in a condition that the Court has found violated the terms of the standard. Thus, Respondent had actual knowledge of the condition.

Tommy Shehane was the bridge superintendent and thus responsible for multiple foremen and their crews. (Tr. 105–106). Tommy testified that Shawn told him the cable was showing signs of wear in April, and that he placed an order for a new one. (Tr. 109–110). Tommy admitted that he did not monitor the cable; he relied on the crane operators to make that call. (Tr. 109). He was aware of the Daily Crane Inspection forms and where they were kept, but neither he nor Shawn reviewed those forms. Without a single supervisor reviewing these forms, it seems to matter very little whether Hutchins used a few exclamation points or fourteen of them. Given the factors relied upon the Commission, the Court finds that Tommy Shehane, though he may not have observed the condition, had the opportunity to do so and thus had constructive knowledge of the condition. He admitted that he did not review the forms or monitor the condition of the cable, notwithstanding the fact that he had been told that a new one needed to be ordered. It appears that very little supervision was occurring by way of inspection in this particular work area, or through review of readily available, company-mandated inspection information. *See Jacobs Field Svcs. N.A.*, *supra* (discussing factors considered in determining reasonable diligence).

Based on the foregoing information, the Court can reach a couple of different conclusions as to the knowledge of Hutchins and Bundy, neither of which is helpful to Respondent. Because no one in management reviewed the records made by Hutchins, Bundy, or Shawn Shehane, management failed to exercise reasonable diligence in supervising its employees, and thus knowledge is established. On the other hand, if the crane operators are given sole authority to monitor a crane, with what appears to be little supervision, and can stop work by pulling that

crane out of service due to apparent safety hazards, they satisfy the test for being supervisors under the Act. That conclusion is further supported by the fact that all crane operators were characterized as competent persons. Accordingly, all crane operators had actual knowledge of the condition of the cable and had the authority to shut down the crane until deficiencies had been addressed. (Tr. 495). Accordingly, the Court finds Respondent had both actual and constructive knowledge of the violation.

E. Was the Violation Properly Classified as Willful?

"A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). "[I]t is not enough for the Secretary to show than an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard's requirements, and is on notice that a violative condition exists. *See J.A. Jones*, 15 BNA OSHC 2201; *D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).

Good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether an employer acted in good faith. *J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O'Horo*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990). Thus, an employer "is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety." *Id.* (citing *Coleco Indus.*, 14 BNA OSHC 1961 (No. 87-2007, 1992).

Respondent's treatment of the boom cable is just one example of what appears to be an institutional disregard for the requirements of the Act. Equally relevant to the analysis of this issue is how Respondent treated the deficiencies that were uncovered on the auxiliary cable. Even though Respondent cannot be cited for a violation that may have been present on the auxiliary cable, the Court is not restrained from discussing such facts in relation to its willfulness determination. *See Cleveland Wrecking Co.*, 24 BNA OSHC 1103 (No. 07-0437, 2013) (holding that near-misses occurring outside the statute of limitations are relevant to question of employer's knowledge).

As early as February 19, 2013, Hutchins noted that the auxiliary cable needed to be replaced and indicated "Repair" in the columns next to the equipment the auxiliary cable was associated with. At trial he testified that the auxiliary cable met the out-of-service criteria as of that date. He then proceeded to use the crane four more times, indicating the same problems each time. (Ex. C-15). On April 2, Hutchins again remarked that the auxiliary cable needed to be replaced, this time followed by three exclamation points. On April 3, Robert Kindrat performed an annual inspection, noted that the auxiliary cable is "bad", but did not take the crane out of service. In fact, after the annual inspection, the crane was used an additional nine times by

Hutchins and Shehane before the auxiliary cable was replaced on April 26, 2013. (Ex. C-15). If the report of Kindrat is to be believed, the auxiliary cable should have been ordered on April 3, 2013, at the conclusion of his inspection. (Ex. C-17). As the purchase order shows, however, that cable was not ordered until April 26, 2013. Thus, it took Respondent from February 19, 2013 until April 26, 2013 to replace the auxiliary cable—66 days in total. Even before problems were reported on the boom cable, Respondent had been confronted with cable deficiencies on the same crane in the same location within a fairly condensed timeframe. In this instance, the Court finds Respondent had heightened awareness of the requirements of the standard through Shawn Shehane, Hutchins, and Kindrat, but also Tommy Shehane, who was contacted for the purposes of ordering a new auxiliary cable.

The boom cable was handled in much the same fashion. Kindrat performed and certified an annual inspection even though he admitted he did not do a complete inspection. He noticed broken wires in the boom cable, but he did not document them. Kindrat was also informed of additional broken wires on the cable by Meredith and Hutchins after the annual inspection, but he did nothing to follow up. Shehane, Hutchins, and Bundy all made notations in the daily log indicating that the boom cable needed to be replaced. Yet, no one can say when a cable was actually ordered. According to Kindrat, he told Darryl Meredith to order a new boom cable right after he performed his annual inspection in early April. (Tr. 275). Unlike the auxiliary cable, however, there is no documentary evidence to indicate when the cable was ordered, purchased, or received; rather, the only evidence presented at trial was that the new boom cable was at the worksite at the time of the accident on May 21, 2013. The Court is perplexed by the testimony regarding the availability of a new boom cable: If the boom cable was at the worksite on the day of accident, why was the boom cable not previously replaced, especially since the evidence was

that the auxiliary cable was ordered and replaced on the same day? Having the replacement boom cable at the worksite and not installing it would support a further finding that Respondent, while having heightened awareness of the regulation, decided it was not important enough to stop work to do the installation.

Respondent, through its crane operators, who are also considered competent persons and could stop work on the crane, had heightened knowledge. Each crane operator at the trial testified that they knew the 3-and-6 criteria. Yet, each crane operator, even after making written notations in the Daily Inspection forms that the boom cable needed to be replaced, continued to use the crane. This type of action, continued use of the crane after noting the boom cable needed to be replaced, clearly demonstrates an utter disregard for the requirements of the Act.

The institutional failures in this case are rampant. First, Tommy Shehane testified, in no uncertain terms, that he is not a competent person with respect to cranes, he has not gone through any crane training, has not operated a crane, and that he places the sole responsibility for the operation and monitoring of those cranes with the crane operators. (Tr. 119–20, 112). In that respect, the Court is curious as to how Tommy Shehane could have exercised any supervision over his foremen or operators if he had not received any training regarding the equipment he was charged with supervising. *See Thomas Industrial Coatings, Inc.*, 23 BNA OSHC 1521 (No. 06-1974 *et al.*, 2010) (ALJ) (holding that entrusting supervision over the construction of a scaffold to a foreman with minimal knowledge of scaffolding standards demonstrates an intentional disregard for the requirements of the Act). Further, though Tommy may not have been versed in cranes, surely he had the wherewithal to review the Daily Inspection forms and probe further into what was contained in them. The Daily Inspections forms clearly state that the boom cable

needed to be replaced. Clearly, one does not need special training to read that notation and further inquire as to the basis of the statement.

Second, both Tommy, the superintendent, and Shawn, the foreman, testified that neither of them reviewed the Daily Inspection forms because the operation and inspection of the crane was the sole province of the crane operators. However, as to Shawn, this testimony is troubling since he was also a crane operator and had access to the Daily Inspection forms of the other operators but did not review them. In addition, Shawn had two lines of authority upon which he could act to correct the deficiency—one as a foreman/supervisor and one as a crane operator. As noted above, the failure of Tommy and Shawn to review the Daily Inspection forms carries two consequences. One, it illustrates that Respondent was plainly indifferent to the requirements of the Act in that all of the responsibility for complying with the Act was laid upon the crane operators. There were multiple signs that indicated the auxiliary and boom cables exhibited deficiencies, from requests to order a new cable to exclamations calling for its replacement, and yet no discernible action was taken by Respondent. The treatment of these notations and reports indicates that the inspection forms appear to be little more than a *pro forma* method of indicating that the regulation-mandated inspection occurred. What they reveal, however, is a series of big problems with no one willing to take responsibility for a solution. Secondly, if the Court is to accept the argument that knowledge of the crane's condition is solely limited to those that operate it by virtue of Respondent's policy, the Court must conclude that the crane operators are supervisors. By vesting the crane operators with the responsibility for filling out reports, reviewing those reports, and taking corrective action to ensure a safe workplace, Respondent has essentially placed them in a position of supervision.

In addition to neither Tommy nor Shawn reviewing the Daily Inspection forms, it appears the Daily Inspection forms were not sent to the Project Office at the end of each week as required. (Ex. C-15). Instead, the testimony was that the inspection book stayed in the crane cab until the book was complete and then it was shipped to a central facility for storage. (Tr. 111–12, 162, 163–64). Thus, the completion of the Daily Inspection forms appears also to be perfunctory since there was no evidence that these forms were reviewed by Tommy or Respondent's safety and health department. Had Tommy or the Respondent's safety and health department reviewed these forms, hopefully the handling of this matter may have been different. The Court infers that the reason why these reports were to be sent to the Project Office at the end of every week was to not only insure that the daily inspections were being done, but also that they are made aware of any deficiencies and that those deficiencies are corrected. The actions of Respondent clearly demonstrate the last part of the above inference was not important to them—being made aware of any deficiency and making sure it was corrected. All Respondent seemed to focus on was the perfunctory completion of the Daily Inspection forms.

Also underscoring the institutional failure of Respondent was the Annual Inspection performed by Kindrat. As previously stated, the Court is dubious about the annual examination performed by Kindrat. During his annual inspection, which requires that the entire cable be laid bare, he certified that he performed a complete inspection of the boom cable even though he admitted at trial that he had not boomed down the crane. Further, though he also testified that he observed broken wires in the boom cable, he did not document these findings in his annual report. (Ex. C-17). The auxiliary cable, which was characterized as "bad" and "ordered" in his inspection report, was not replaced until more than two weeks, fourteen exclamation points, and nine uses later. (Ex. C-15). Instead, much like the documentation of, and response to, the Daily

Inspection form, it appears that the annual inspection is viewed as little more than a perfunctory process attendant to owning and operating a crane. The Court incorporates its complete discussion of Kindrat's Annual Inspection report here as further support for a finding of institutional indifference.

The Court concludes, pursuant to the admissions of Respondent's own witnesses, that Hutchins and Bundy were supervisors. Admittedly, such a finding makes the case for a willful violation more direct. Hutchins observed more than six broken wires in a lay on the boom cable on April 18, 2013. He continued to operate the crane and allowed others to do so for a period lasting longer than a month, even though he knew that the cable met the out-of-service criteria and after he reported the problems to his superior, Shawn Shehane. This series of events repeated itself over the course of four months with respect to different cables on the same crane, with different operators carrying out different types of inspections, and no one claiming authority or responsibility for any of it. This represents a conscious disregard for the requirements of the Act at the individual and institutional level.[19]

If, as Respondent asserts, the crane operators were the sole arbiters of crane workplace safety, the operators' judgment in operating the crane with the cable deficiencies certainly represents a conscious disregard for the Act. Conversely, and perhaps the more likely case, is Respondent so poorly managed this process that it was impossible to determine who had authority and what that responsibility entailed. The bridge superintendent did not have a working knowledge of cranes, yet he was charged with supervising the crane operators. His method of supervising the crane operators consisted of placing "sole responsibility" for the safe

19. The Court would note that, although the crane operators testified that they had the authority to remove the crane from service, the facts of this case at least call that into question. Hutchins testified that he had previously removed a crane from service even though it did not yet meet the out-of-service requirements and that Shawn Shehane acquiesced. (Tr. 637). If that were the case, the Court is confused as to why Hutchins failed to act similarly in this case.

operation of the crane in the hands of the crane operator. In fact, at one point, Tommy testified that he was waiting on the operators to tell him that the cable had gone bad before they replaced it. (Tr. 108). According to Tommy Shehane, not even foremen have the authority to remove a crane from service unless, like Shawn, they are an operator. (Tr. 112). Respondent cannot disclaim its responsibilities under the Act by making individual employees responsible for ensuring his employer's compliance with it. *See* 29 U.S.C. § 654(a) (the *employer* is responsible for providing employment and a place of employment free from recognized hazards and for complying with standards promulgated under the Act). In this particular case, Respondent did not merely fail to exercise reasonable diligence, but it failed to implement any meaningful system whereby the observations and determinations of the crane operators could be observed and/or verified. Giving the crane operators this broad-reaching power with no possibility of oversight is little different than directing one's employees to "be safe" and is an abdication of responsibility akin to sticking ones' head in the sand. Notwithstanding other evidence of Respondent's safety program, the failure to have a meaningful process for ensuring safe work practices at a level above the crane operator represents an institutional failure at every level of supervision and is another indication of Respondent's conscious disregard of its responsibilities under the Act. *See Rawson Contractors, Inc.*, 20 BNA OSHC at 1082 (holding that even a good safety program is insufficient to negate willfulness where there is an absence of any evidence that the employer enforced its safety rules). Respondent exhibited both heightened awareness of and utter disregard for the Act and its requirements. Absent a finding of any affirmative defense being applicable, Citation 2, Item 1 will be affirmed as a Willful violation of the Act.

As a final note, the Court also finds that Respondent did not act in good faith such that Complainant's allegation of willfulness is negated. *See J.A. Jones*, 15 BNA OSHC 2201

(holding good faith efforts can negate a claim of willfulness). Merely complying with the requirements of the Act, as by performing daily and annual inspections, does not, in and of itself, constitute good faith. In this case, Respondent's blasé treatment of the daily and annual inspection forms belies any such claim. Rather, by delegating unfettered (and unsupervised) power and authority to the crane operators, Respondent acted unreasonably with respect to its obligations and committed a willful violation of the Act.

V. Affirmative Defenses

Respondent argues that the violation was the result of unpreventable employee misconduct. In order to prevail on this defense, Respondent must prove that: (1) it has work rules designed to prevent the violation; (2) that it has adequately communicated those rules; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations are discovered. *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010). The Court finds that Respondent's argument fails as to element (3).

Respondent had a fairly clear set of work rules that applied to when a crane should be removed from service. (Ex. R-16, R-17). Respondent also has a fairly robust training program, which was exemplified through multiple exhibits submitted at trial. Further, Respondent introduced a number of disciplinary documents showing that it punishes violations of other work rules. (Ex. R-19). The problem, however, is that Respondent utterly failed to take steps to discover violations. By Respondent's own admission, it placed sole discretionary authority on the crane operators. According to the testimony of the COO, the superintendent, and the foreman, nobody reviews the Daily Inspection forms that are filled out by the crane operators. Based on Respondent's narrative, crane operators appear to operate with little direction, other than where to point the crane, and even less oversight. While the safety program may have been

enforced and effective in other areas of Respondent's operation, there is no clear indication that such was the case here. That is due, in no small part, to the fact that it appears as if Respondent willfully blinded itself to the potential for hazardous conditions on the crane. *See N & N Contractors, Inc.*, 18 BNA OSHC 2121 (holding that employers must exercise reasonable diligence to discern presence of violations, including adequate supervision of employees, inspecting work area, anticipating hazards, and taking measures to prevent occurrence of violations); *see also Burford's Tree*, 22 BNA OSHC 1948 (rejecting defense of employee misconduct because respondent failed to monitor compliance with seatbelt rule on daily basis). Further, the fact that multiple supervisory level employees engaged in the violative behavior speaks to the lack of oversight exercised by Respondent and the enforcement of its work rules. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.").

Based on the foregoing, the Court finds that Respondent failed to establish the defense of unpreventable employee misconduct. Accordingly, Citation 2, Item 1 shall be affirmed as a willful citation.

VI. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*,

15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

The Court finds that the violation was of high gravity, high severity, and greater probability (Ex. R-2). Respondent's failure to adequately monitor and respond to cable deficiencies exposed its employees to the very real hazard of a crane collapse. In this case, Respondent was fortunate that nobody died as a result of it conscious disregard of the Act's requirements. For a period of almost four months, one cable or another met the criteria under which it should have been removed from service. This speaks not only to the hazard's duration, but also to the good faith of Respondent in addressing such hazards. The pass-the-buck mentality exhibited by Respondent's management does not illustrate the sort of good faith that Commission precedent indicates would warrant a reduction in penalty. The Court has also taken into consideration the size of Respondent in assessing the penalty.

Complainant proposed a gravity-based penalty of $56,000.00 for Citation; however, in light of the foregoing discussion as to the total institutional failure to comply with the Act and that four supervisors were vested with the authority to correct any deficiency but chose not to, the Court hereby assesses a fine of $60,000.00.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 2, Item 1 is hereby AFFIRMED as a willful violation of the Act, and a $60,000.00 penalty is ASSESSED.

SO ORDERED

/s/ *Patrick B. Augustine*
Patrick B. Augustine
Judge, OSHRC

Date: April 23, 2015
Denver, Colorado