OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3457

SECRETARY OF LABOR, **Complainant,** **v.** **ALL ERECTION & CRANE RENTAL CORP.,** **Respondent,** **UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA,** **Authorized Representative.**	**OSHRC DOCKET NO. 13-2047**

Appearances:

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For the Complainant.

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For the Respondent.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) *et seq.* of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act).[1] On May 4, 2013, a Manitowoc 230 Ton Crawler Crane, Model 888, Unit 8495 (the 888 Crane or the crane) was in use at a construction project, known as the continuous caster project, at the Timken Company (Timken) steel mill in Canton, Ohio. That date, May 4, 2013, the 888 Crane boom hoist wire rope broke, causing the boom to collapse, killing two workers. The 888 Crane was owned by All Erection & Crane Rental Corp. (All Crane or Respondent) and rented to and operated by The Beaver Excavating Co. (Beaver). As a result of the fatal accident and subsequent worksite safety inspection the Secretary of Labor (the Secretary) issued a citation to All Crane alleging three serious violations of the Act.

Citation 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.1400(f), for not having a procedure or policy to ensure compliance with the provisions of Subpart CC, "Cranes and Derricks in Construction," regarding boom hoist wire rope inspection and wire rope lubrication. Citation 1, item 2, alleges a serious violation of 29 C.F.R. § 1926.1413(c)(2)(ii), for not ensuring an adequate annual inspection of the 888 Crane's boom hoist wire rope. Citation 1, item 3, alleges a serious violation of 29 C.F.R. § 1926.1413(d), for not ensuring compliant lubrication of the 888 Crane's boom hoist wire rope. The Secretary proposed a penalty of $7,000 for each of the violations, for a total proposed penalty of $21,000.

A hearing on this matter was held in Cleveland, Ohio on October 7-8, 2014. Both parties have filed post-hearing and reply briefs.[2] For the reasons set forth below, the citation is vacated in its entirety.

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[1] The United Brotherhood of Carpenters & Joiners of America, the authorized representative of affected employees, was granted party status in this proceeding.

[2] Respondent filed a post-hearing Motion to reopen and supplement the record. Respondent moved for the receipt into evidence, in the instant case, of a Motion to dismiss All Erection & Crane Rental Corp.'s cross-claims and supporting memorandum filed in a civil action entitled, *Scott Pudelski, et al. v. Beaver Excavating, Inc., et al.*, case no. 2015CV00901, Court of Common Pleas, Stark County, Ohio (2015). The Secretary opposes Respondent's Motion contending that the civil action motion and supporting memorandum are simply arguments of counsel and not evidence. I agree. The documents Respondent seeks to add to the instant record are composed of hearsay statements and argument. Respondent's Motion to reopen and supplement the record is denied.

Jurisdiction

In its Answer Respondent admitted that jurisdiction in this matter is conferred upon the Commission by section 10(c) of the Act and that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. (Tr. 9). Therefore, Respondent is an employer within the meaning of sections 3(3) and 3(5) of the Act. A timely notice of contest was filed by Respondent. Accordingly, the Commission has jurisdiction of the parties and subject matter of this proceeding.

Facts

All Erection & Crane Rental Corp. is engaged in the business of selling, servicing, repairing, and renting construction cranes for use in the construction industry. The majority of All Crane's business relates to its crane rental business. (Ex. J-1 Stip. #1)[3].

During 2012 and 2013, the Timken steel mill, in Canton, Ohio, was engaged in a continuous caster project. Timken hired Continental Design Management Group (CDMG) as the construction project manager. CDMG was the site safety company for the entire project. John Heslep was CDMG's site safety manager. (Tr. 84, 87, 104-107; Exs. J-1 Stip. #7; J-2 pp. 68-69).

In the late spring 2012, for use at the Timken project, All Crane leased to R.G. Smith Co. the Manitowoc 230 Ton Crawler Crane, Model 888, Unit 8495, the 888 Crane, under a Bare Rental lease agreement. (Ex. J-1 Stip. #8). Under a Bare Rental lease agreement, the lessor, All Crane, typically supplies only the crane to the lessee. Once the crane is delivered, it is the responsibility of the lessee to hire a crane crew. The lessee is responsible for all costs associated with operating the crane. Typically, Bare Rental lease agreement terms provide that the lessee is responsible for regularly inspecting and maintaining the crane and operating it in compliance with all applicable laws and regulations.[4] (Ex. J-1 Stip. #5).

[3] The Joint Stipulations are referenced as (Ex. J-1 Stip. # ____). (Tr. 11-12).

[4] The other option is for a crane to be leased pursuant to an Operated Rental lease agreement. Under an Operated Rental lease agreement, the lessor, All Crane, supplies *the crane and the crew* to operate the crane. The crane crew typically includes a crane operator and an oiler, who acts as the operator's assistant. Under an Operated Rental lease agreement, the lessor, All Crane, typically remains responsible for all costs associated with the operation of the crane, including payroll, fuel, lubricants, insurance, repairs, and maintenance costs. (Ex. J-1 Stips. #3, 4).

In June 2012, at the Timken worksite, before leasing the 888 Crane to R.G. Smith, All Crane's field mechanic or assembly / disassembly director Scott Fosbrink constructed the 888 Crane. During the crane erection, Fosbrink was assisted by an All Crane employee, oiler Brad Hoffstetler. Crane operator Scott Pudelski and oiler Jason Lipscomb also assisted. (Tr. 230-31, 387-88, 398; Ex. J-2 pp. 26-28, 31).[5] On June 5, 2012, Fosbrink conducted a comprehensive annual inspection of the 888 Crane, which included inspection of the wire rope. (Tr. 329, 332-34, 343-44; Exs. C-2, C-6). Fosbrink was an experienced, knowledgeable, field mechanic. (Tr. 328-29, 334-43; Exs. R-27; J-2 pp. 104, 118). During the June comprehensive crane inspection, Fosbrink did not see any "developing deficiencies" in the wire rope that required monitoring during the monthly crane inspections. (Exs. C-6; J-2 Stip. #33).

Rich Randall, an All Crane dispatcher, offered Pudelski and Lipscomb the opportunity to work with the 888 Crane for R.G. Smith. (Tr. 229-30, 244; Ex. C-2). Pudelski was hired by R.G. Smith to operate the 888 Crane and Lipscomb was hired to work primarily as the crane oiler. (Tr. 244-45; Exs. J-2 pp. 27-29, 31; C-2). While working for R.G. Smith, at the Timken worksite, Pudelski and Lipscomb were on R.G. Smith's payroll. (Tr. 231, 265-266; Ex. J-2 pp. 28-30).

Prior to their work for R.G. Smith, Pudelski was employed by All Crane. Lipscomb was employed by Kelley Steel Erectors. (Tr. 244; Exs. J-2 pp. 31-32; C-2). All Crane dispatcher Randall knew that Lipscomb wanted more work hours than he was receiving at Kelley Steel. (Tr. 244-45). When Randall informed Lipscomb of the job opportunity at R.G. Smith, he did so as a favor to Lipscomb. (Tr. 248-49). Similarly, the record reveals that Pudelski and Randall were personal friends. (Ex. J-2 pp. 116-117).

In November 2012, R.G. Smith ended its work with the 888 Crane at the Timken steel mill project. The Beaver Excavating Co. also had work at the Timken worksite in connection with the continuous caster project. Beaver operated several cranes at the Timken worksite, however, none was as large as the 888 Crane. (Tr. 45-46, 64-65, 183-84, 255-256, 329; Exs. C-3; J-1 Stip. #7; J-2 pp. 33-34). Beaver supervision, at the Timken worksite, included project superintendent Moe Turner and supervisors Paul Cardoni and Mike Demos. (Tr. 157, 173, 180;

[5] Scott Pudelski was unable to testify at the hearing. As agreed by the parties, Pudelski's deposition transcript and State of Ohio Bureau of Workers' Compensation Affidavit were received into evidence at the hearing. (Tr. 12-17; Exs. J-2 and C-2, respectively).

Exs. C-2 para 1; J-2 pp. 35-36, 59). Beaver's safety department personnel included head of safety Randy Martin and site safety supervisor Mike Hofacker. (Tr. 65-67, 81-82; Ex. J-2 pp. 65, 67-68).

Beaver fleet manager Hugh Brown called All Crane salesman Mike Garrity to inquire about taking over the rental of the 888 Crane. Beaver made crane rental inquiries with All Crane and Capital City Crane, one of All Crane's competitors. (Tr. 58). Following negotiation between Brown and Garrity, All Crane entered into a Bare Rental lease agreement with Beaver for lease of the 888 Crane that previously had been leased to R.G. Smith.[6] (Tr. 46, 75, 311-313; Exs. C-3; J-1 Stip. #7; R-5).

Crane operators and oilers were hired out of the union hall to operate the 888 Crane. (Tr. 156, 243, 251, 253; Exs. J-1 Stip. #11; J-2 p. 105). Under the collective bargaining agreement with the Operating Engineers, Pudelski, who had been the 888 Crane operator for R.G. Smith, had the right to stay with the crane, when the 888 Crane was leased to Beaver. (Exs. J-1 Stip. #12; J-2 pp. 36-38). Although Beaver operated several of its own cranes, Beaver did not have any employees with the skill or experience to operate a 230 ton crane. (Tr. 42-45, 64-65, 256, 319-20). During the rental negotiation, All Crane salesman Garrity told Beaver fleet manager Brown that Pudelski would be the 888 Crane operator. (Tr. 46-47; Ex. C-3). All Crane's dispatcher Randall informed crane operator Pudelski that he would stay with the crane on the Timken worksite when the crane was taken over by Beaver. (Ex. J-2 p. 33; C-2).

The Bare Rental lease agreement between All Crane and Beaver provided that the crew to operate the 888 Crane would be hired by Beaver and added to Beaver's payroll. (Ex. J-1 Stip. #10; R-5). When Beaver leased the 888 Crane from All Crane, Beaver's project superintendent Turner asked Lipscomb if he wanted to come over to Beaver's payroll and work for Beaver. (Tr. 251). Soon thereafter, Turner offered Lipscomb the opportunity to be the 888 Crane night operator. Lipscomb accepted the offer and worked as Beaver's night shift 888 Crane operator until the May 4, 2013 accident. (Tr. 230, 251-53; Ex. J-1 Stip. #12). The 888 Crane operators for Beaver, Pudelski and Lipscomb, moved from R.G. Smith's payroll to Beaver's payroll. (Tr. 231, 253; J-1 Stip. #12; J-2 pp. 33-35).

[6] Beaver also was cited by OSHA for violations following the May 4, 2013 accident investigation. (Tr. 170-175, 185-189, Ex. R-2).

Before turning over the 888 Crane from the R.G. Smith lease to the Beaver lease, Beaver insisted that All Crane conduct a comprehensive annual inspection. On November 19, 2012, All Crane's field mechanic Fosbrink conducted the comprehensive inspection and reconfigured the crane for Beaver. The crane inspection included inspection of the wire rope. (Tr. 60-61, 311-13, 315, 329, 377, 393; Exs. C-5; J-1 Stip. #9; J-2 p. 118).

During both the June and November 2012 comprehensive annual inspections, Fosbrink did not see any "developing deficiencies" in the wire rope that required monitoring during the monthly crane inspections. Further, Fosbrink did not see evidence of broken strands, core protrusion, rust, corrosion, under lubrication, brittleness, wire rope fatigue, or wire rope failure. Had those indicators of wire rope deterioration and failure been present, Fosbrink would have condemned the wire rope at the time of the comprehensive inspection. It is impossible to say with any degree of certainty that the wire rope was fatigued or showed excessive wear when it was inspected by All Crane on November 19, 2012. (Tr. 362-64; Exs. C-5; C-6; J-1 Stips. #19, 33; R-24 pp. 10-12).

Under the terms of the Bare Rental lease agreement, Beaver assumed complete control over the operation and maintenance of the 888 Crane after All Crane reconfigured and inspected the 888 Crane on November 19, 2012. (Ex. J-1 Stip. #9). The terms of the Bare Rental lease agreement provided that once the crane was leased to Beaver, All Crane did not have responsibility to inspect or maintain the crane or its wire rope. (Ex. J-1 Stip. #21).

Under the lease agreement, All Crane had the right to enter the premises / worksite to inspect the 888 Crane. The lease also gave All Crane the right to take possession of the crane if, in its opinion, Beaver was in violation of the lease or the equipment was being abused or neglected. (Ex. R-5, para. 8). That said, the Timken continuous caster project was a secure worksite and All Crane did not have unrestricted access. All Crane, as a crane supplier, did not have a daily presence on the worksite. (Tr. 316-17; Ex. J-1 Stip. #15) Any All Crane employee who wanted to enter the worksite had to be escorted by a Beaver employee. (Tr. 57, 146, 248, 348-49; Ex. J-2 p. 49).

After the November 19, 2012 crane reconfiguration and inspection, All Crane's involvement with the 888 Crane was limited to repair of the crane's air compressor and operator's seat on or about April 3, 2013. (Ex. J-1 Stip. #13). Pursuant to the terms of the Bare Rental lease agreement, Beaver was under no obligation to use All Crane to perform the repairs.

(Ex. J-1 Stip. #14). All Crane had other cranes on the Timken worksite. During the term of Beaver's lease agreement for the 888 Crane, Fosbrink returned to the Timken worksite a few other times, specific dates unknown, regarding All Crane's other cranes. (Tr. 316-17, 394; Ex. J-2 p. 61). The record does not reveal the scope of All Crane's involvement with those cranes.

At the Timken worksite, the 888 Crane was operated under harsh conditions. During the period from May to November 2012, R.G. Smith operated the 888 Crane for 800 hours. During the period from November 19, 2012 to May 4, 2013, Beaver operated the 888 Crane for over 2500 hours. Beaver operated the 888 Crane during harsh winter weather conditions. Additionally, the Timken project involved expansion of a steel mill which created a corrosive environment. (Tr. 164-65, 254-258, 373-379; Ex. J-1 Stip. #18).

During the Beaver Bare Rental lease agreement, the 888 Crane shift and monthly crane inspections were conducted by the crane operators Pudelski and Lipscomb. (Tr. 257-58, 274; Ex. J-2 pp. 56-57, 93-95, 99, 111-12). The shift and monthly inspections of the 888 Crane were noted on Beaver crane inspection forms and the forms were retained by Beaver's safety department. [7] (Tr. 65-68; Ex. J-1 Stip. #22; R-14; R-15). The parties stipulated, however, that Beaver, in fact, did not regularly inspect or maintain the wire rope on the 888 Crane. (Ex. J-1 Stip. #23). During the OSHA investigation, OSHA Compliance Safety and Health Officer ("CSHO") Dvorak reviewed hours of Timken construction site surveillance videotape. During the term of the Beaver crane lease, the videotape revealed that the crane operators' claims that they performed the shift crane inspections on a regular basis were not accurate. (Tr. 129-31, 189-91; R-14; R-15).

All Crane had no knowledge whether Beaver's employees were properly inspecting the 888 Crane, maintaining the crane, or using the proper lubricant. (Tr. 395-96; Ex. J-1 Stip. #25). During the lease of the crane to Beaver, All Crane had no role in the daily and monthly inspections of the 888 Crane's wire rope. (Tr. 395-96; Ex. J-1 Stip. #16; R-5).

[7] I give little weight to the parties' stipulation that "Beaver Excavating did have knowledge of facts leading to the violations alleged in this case." (Ex. J-1 Stip. #26). There is nothing in the record to demonstrate how the parties, the Secretary and All Crane, are competent to stipulate to the state of mind of a third party: Beaver Excavating. Beaver's knowledge of any violative condition must be established by record evidence. For example, Beaver fleet manager Brown testified that Beaver safety department officials were responsible for the 888 Crane inspection logs. (Tr. 67-68). This suggests that Beaver had either actual or constructive knowledge of any deficient shift or monthly inspections of the 888 Crane.

During the Beaver lease of the 888 Crane, crane operator Pudelski worked with oilers Matt Hatfield and Megan Maley. Crane operator Lipscomb's oiler was Nick Claus. During the Beaver lease of the 888 Crane the oilers were hired out of the union hall and were on Beaver's payroll. It was the crane oilers' job to lubricate the crane's wire rope. (Tr. 186, 273-74, 278-80; Ex. J-2 pp. 58, 71-76, 104-07, 117). Beaver supplied the fuel, lubricant, and oil for the 888 Crane and wire rope. If lubricant or grease for the crane was needed, Pudelski would contact Beaver project superintendent Turner or supervisor Demos. (Ex. J-2 p. 100). The lubricant was kept in the 888 Crane storage compartment. (Tr. 278-80). All Crane did not supply the wire rope lubricant. (Tr. 359-61).

Between November 20, 2012 and May 4, 2013, All Crane did not assess the condition of the 888 Crane wire rope or abate any hazards associated with the condition of the wire rope. (Ex. J-1 Stip. #17). The parties stipulated that All Crane did not have a legal duty to train Beaver employees on proper crane inspection and wire rope inspection under the Act or under the Bare Rental lease agreement between All Crane and Beaver. (Ex. J-1 Stip. # 24).

On May 4, 2013, the boom hoist wire rope cable on the 888 Crane failed causing the boom and load to fall, resulting in two fatalities. (Ex. J-1 Stip. #27). Pudelski was the 888 Crane operator and Hatfield was the crane oiler at the time of the crane collapse. (Tr. 154-156; Exs. C-2; J-2 pp. 58, 105). The main boom hoist cable failed due to wire rope fatigue. The wire rope cable had been in service for nearly six years. (Ex. J-1 Stip. #32). The wire rope segments running over the sheaves repeatedly bent during operation of the crane, causing the wire rope to become work hardened and brittle. As a result, the wire rope could no longer support the weight for which it was rated. (Ex. J-1 Stip. #28). At the time of the accident, the 888 Crane was lifting approximately 100 pounds. Prior to May 4, 2013, the 888 Crane often lifted more than 1,000 pounds. (Exs. C-2; J-2 pp. 102-103, 110).

After the failure, fatigue breaks were evident upon inspection of the wire rope. (Ex. J-1 Stip. #32). The wire rope revealed broken strands and signs of core protrusion. (Tr. 362-363; R-24 pp. 10-12). These fatigue breaks in the wire rope did not occur as a result of a single lifting incident. (Ex. J-1 Stip. #29). On May 4, 2013, prior to the wire rope failure, fatigue breaks along the length of the rope should have been visible and apparent had an adequate inspection of the wire rope been performed. (Ex. J-1 Stips. #20, 30). It cannot be stated with reasonable certainty that the fatigue breaks should have been visible during the June 5, 2012 and November

19, 2012 comprehensive annual inspections. (Ex. J-1 Stips. #19, 33). After the accident, the wire rope also showed signs of light corrosion, which can be caused by environmental conditions and insufficient lubrication. (Tr. 362-363; Exs. J-1 Stip. #31; R-24 pp. 10-12). The conditions under which the 888 Crane was used and the extensive use of the crane probably resulted in excessive wear on the wire rope. (Tr. 375-376. *See* Tr. 362-64).

Following the fatal accident, OSHA CSHO Dvorak and Assistant Area Director (AAD) Montgomery conducted an inspection. The 888 Crane was removed from the worksite and no longer used by Beaver on the Timken project. The crane was transported to a fenced evidence preservation site controlled by OSHA. (Tr. 225-227).

Following the May 4, 2013 crane boom hoist wire rope failure, Beaver replaced the 888 Crane with a crane leased from Capital City Crane, a competitor of All Crane, pursuant to an operated rental agreement. (Tr. 51-52; Ex. J-2 p. 121). Crane operators Pudelski and Lipscomb continued to work for Beaver, at the Timken worksite, as crane operators on cranes not owned by All Crane. (Tr. 52, 256-59; J-2 pp. 113-14).

Applicable Law

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atl. Battery Co.,* 16 BNA OSHC 2131, 2137 (No. 90-1747, 1994).

Judgment on Partial Findings

At the conclusion of the Secretary's case-in-chief, All Crane moved for a directed verdict / involuntary dismissal under Federal Rule of Civil Procedure 52(c)[8]. (Tr. 300, 305). This

[8] In its brief Respondent states that it made the motion under Fed.R.Civ.P. 41(b). Prior to the 1991 amendments to the Federal Rules, Rule 41(b) was the relevant rule. Fed.R.Civ.P. 52(c) is the rule now applicable. As stated by the Advisory Committee on Rules regarding the 1991 amendment to Rule 41(b):

> Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against

Motion was based upon the Secretary's alleged failure to present evidence in its case-in-chief that any of the cited safety standards had been violated, or that Respondent was the employer of the crane crew. The Motion was held in abeyance pending the conclusion of the hearing.

Federal Rule of Civil Procedure 52(c) states:

> (c) **Judgment on Partial Findings**. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Under Rule 52(c), the court has the discretion to defer ruling on the motion until the close of evidence. The Commission has held that "[u]nless…evidence clearly preponderates against complainant, the Judge must either deny [a Rule 52] motion or defer disposition until the conclusion of respondent's case." *Spirit Aerosystems, Inc*., 25 BNA OSHC 1093, 1095 (No. 10-1697, 2014)(citing *Morgan & Culpepper, Inc.,* 5 BNA OSHC 1123, 1124-25 (No. 9850, 1977)*, aff'd in relevant part,* 676 F.2d 1065 (5th Cir. 1982)). Here, the evidence did not clearly preponderate against complainant, the Secretary. After presentation of the Secretary's case, there remained matters regarding the weight to be accorded evidence and credibility findings regarding testimony received during the Secretary's case in chief. Even if Respondent ultimately was found not to be the employer, there remained issues regarding Respondent's potential liability pursuant to the multi-employer doctrine. (Tr. 20-23). Accordingly, it was determined that a ruling on Respondent's Motion be deferred.

Upon denial of Respondent's Motion, Respondent had a choice. Respondent could decline to put on evidence, rest on the perceived failure of the opposing party to establish its case, and appeal the denial of its Motion. Alternatively, Respondent could present its evidence and thereby waive its right to appeal from the denial of its Motion. *Ne. Drilling, Inc. v. Inner Space Servs., Inc.,* 243 F.3d 25, 37 (1st Cir. 2001); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor,* 88 F.3d 98, 108 (2d Cir. 1996). Respondent chose the second alternative, presenting its

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> whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c). Fed.R.Civ.P 41(b) advisory committee's note.

evidence, rather than the first which would have afforded it the right to appeal from the denial of the Motion at issue.

As Respondent chose to present its case, it cannot now claim that the evidence in the Secretary's case, viewed by itself and independently from the whole record, was insufficient. *N.Y. State Elec. & Gas Corp.,* 88 F.3d at 108-109. Once Respondent chose to present its case, the Court was obligated to render a decision based on the record as a whole. Section 11(a) of the Act, 29 U.S.C. §660(a). *See Bituminous Constr., Inc. v. Rucker Enters., Inc*., 816 F.2d 965, 967 (4th Cir. 1987).

Employment Relationship.

The employment relationship between All Crane and the 888 Crane operators and oilers, during the term of the Bare Rental lease agreement between Beaver and All Crane, is central to the Secretary's Complaint allegations. It is the Secretary's contention that All Crane was the employer of the 888 Crane operators and oilers. As the employer, All Crane had a duty to comply with the cited standards and abate any resulting hazards. (Sec'y Br. pp. 9, 11-16).

In opposition, All Crane contends that Beaver was the employer of the 888 Crane operators and oilers during the term of Beaver's Bare Rental lease agreement with All Crane. (Resp't Br. pp. 8, 10-11, 19-24; Resp't Reply Br. pp. 2-6). All Crane contends that "no All Crane employees created any hazards, controlled any hazards, were responsible for correcting any hazards or were exposed to any hazards." (Resp't Br. p. 2; Resp't Reply Br. pp. 6-8).

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.,* 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005)(consolidated). In determining whether the Secretary has satisfied this burden, the Commission has used either the "economic realities" test or the *Darden* "common law agency" or "right of control" test. Both tests involve similar factors. *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001)(citations omitted). Under *Darden*, the court must analyze "the hiring party's right to control the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992); *All Star Realty Co., Inc.,* 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014). Such analysis must include control over the workers and not just the results of their work. *Don Davis*, 19 BNA OSHC at 1482. Thus, one who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set his pay or work hours cannot be said to control the worker. *Id*.

In addition to the hiring party's right to control, *Darden* provides guidance regarding other factors to consider when determining the employment relationship, as follows:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24.

Under *Darden*'s common law approach, the factors determining the employment relationship are non-exhaustive and "no shorthand formula or magic phrase . . . can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden* 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.* 390 U.S. 254, 258 (1968)). The principal guidepost in determining the employment relationship is the extent of control that one may have over the worker. *Clackamas Gastroenterology Assocs., P.C. v. Wells,* 538 U.S. 440, 448 (2003).

Under the economic realities test, the factors to consider include who pays the employees, who directs and controls them, who provides the safety training and instructions, and who the employees consider to be their employer. *Griffin & Brand*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (No. 87-214, 1989)(consolidated). *See also Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994).

All Crane places significant reliance on the assignment of responsibilities over the crane operators and oilers in the Bare Rental lease agreement between All Crane and Beaver. Under the Bare Rental lease agreement the lessee Beaver was responsible for hiring a crew to operate the crane. All Crane contends that during the term of the Bare Rental lease agreement the 888 Crane operators and oilers were Beaver employees. (Tr. 30-31, 423-426; R-5) *See* Resp't Br. pp. 5, 8, 10; Resp't Reply Br. pp. 3-4, 8-9).

The Secretary contends that the Bare Rental lease agreement between All Crane and Beaver is a private agreement. The OSHA regulations control, not a private agreement. (Tr. 29, 419-420). The Secretary contends that during the term of the 888 Crane lease agreement between All Crane and Beaver, the 888 Crane operators Pudelski and Lipscomb were All Crane

employees. (Tr. 25-27, 416-419; *See* Sec'y Br. pp. ii, 8, 11-16). Also All Crane employees Fosbrink, Hoffstetler, Pudelski, Lipscomb, and others were exposed to the crane collapse hazard. (*See* Sec'y Br. pp. 9-10; Sec'y Reply Br. pp. 1-2). Further, All Crane was a controlling employer. (*See* Sec'y Reply Br. p. 1.)

An employer cannot contract away its legal duties to its employees or its ultimate responsibility for compliance with OSHA obligations. *Froedtert Mem'l Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004). *See Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978). In the instant case, the Bare Rental lease agreement terms alone are not determinative. When determining the employment relationship, it is more important to assess and weight who actually controls the critical indicia of employment. The case facts, not solely the lease agreement terms, are determinative.

In this case, the weight of the record evidence reveals that at the Timken worksite, during the term of the Bare Rental lease agreement between Beaver and All Crane, the 888 Crane operators and oilers worked under the direction and control of their Beaver, not All Crane. Beaver controlled the manner and means of the daily work activity of the 888 Crane operating crew members. The weight of the evidence discloses that the 888 Crane operators and oilers were employees under the Act of Beaver, not All Crane.

Hire of the 888 Crane operating crew.

The Secretary asserts that as a condition of the 888 Crane rental, All Crane required Beaver to hire All Crane's employees, Pudelski and Lipscomb, to operate the crane. Beaver fleet manager Hugh Brown testified that Beaver employees had no experience operating a 230 ton crane, such as the 888 Crane, and Beaver had no operators qualified to operate it. He asserted that the 888 Crane crew was assigned by All Crane salesman Mike Garrity. Also, according to Brown, Garrity insisted that the crane be rented under a Bare Rental lease agreement, and that All Crane operators work on the crane. According to Brown, Garrity said All Crane already had a crew on the 888 Crane, while it was leased to R.G. Smith, and that crane crew would come with the crane. Brown testified that Beaver was forced to put the crane crew on Beaver's payroll as a condition of the rental. (Tr. 44-47).[9]

[9] Beaver's site safety supervisor, Michael Hofacker, was also of the opinion that the crane operators came with the crane and were not Beaver employees (Tr. 85). Hofacker's opinion

Based on his email correspondence with Garrity, it was Brown's understanding that the 888 Crane operators and oilers came from All Crane. (Tr. 46-48, 58-60). At the hearing, the Secretary introduced the relevant email correspondence. On November, 27, 2012, Beaver's fleet manager Brown, sent an email to All Crane's salesman Garrity stating:

> I know we talked that your operators had to go on our payroll for the rental of the 888, what is the minimum crawler that requires them to be on our staff? Who can I talk to at your office about this? I just want to get some more clarification as it is your crane.

Garrity responded on the same date:

> Anything above an 80 ton Crawler requires operator on your payroll. Is there a problem?

Finally, on November 29, 2012, Brown asked Garrity:

> Next question regarding operators. I guess Scott [Pudelski] had a deal with RG [Smith] that he would get Cleveland rate?[10] That is what he is wanting from us. Is this something that should have been talked about in the beginning? Let me know what protocol is.

(Ex. C-3).

Garrity disputed Brown's interpretation of their discussions. Garrity testified that while he asked Beaver to take the 888 Crane under a Bare Rental agreement, he did not force them to do so. He denied that he required Beaver to hire any specific operator. Rather, Beaver was free to choose any operator or oiler it wanted, which is consistent with a Bare Rental lease agreement. (Tr. 314-315). Garrity's understanding of the rental negotiation is supported by the fact that, when renting the crane, Beaver obtained a quote from Capital City Crane, one of All Crane's competitors, but chose to rent from All Crane. (Tr. 58). The availability of a competitor's crane contradicts Brown's contention that Garrity "forced" Beaver to accept All Crane's terms. Rather, it suggests that Beaver made an informed business decision to rent from All Crane. Indeed, after the accident, Beaver replaced the 888 Crane with a crane from Capital City Crane rented under an Operated Rental agreement. (Tr. 51-52).

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regarding the employment status of the 888 Crane operators is contradicted by the credible record evidence. Accordingly, I give little weight to his testimony.

[10] According to the collective bargaining agreement with the Operating Engineers union, employees in the Cleveland region are paid at a higher wage rate than those in the Akron region. All Crane is based in Cleveland. The Timken project was located in Canton, which is in the Akron region. (Tr. 264-65)

While the email correspondence could be read to suggest that the 888 Crane operators came from All Crane's payroll, the preponderance of the evidence demonstrates that, during the Bare Rental lease agreement between Beaver and All Crane, the 888 Crane operators and oilers were not attached to the 888 Crane as All Crane employees. Brown, in his first email, apparently assumed that the 888 Crane operators were on All Crane's payroll prior to the Bare Rental lease agreement with Beaver. However, Brown's second email acknowledges that before the Beaver Bare Rental lease Pudelski had been working for R.G. Smith, nor for All Crane.

In addition, the parties stipulated that the operators and oilers were hired out of the union hall. (Tr. 156, Ex. J-1 Stip. #11). The terms of the Bare Rental lease agreement for the 888 crane provided that the crew hired to operate the crane would be hired by Beaver and added to Beaver's payroll. (Ex. J-1 Stip. #10).

Considering the record evidence as a whole, the email exchange cited by the Secretary demonstrates only that Brown was confused about the status of the operators and the protocol involved in employing the crane operators after Beaver assumed control over the rented 888 Crane. I find that the weight of the evidence establishes that Brown fundamentally misunderstood the employment status of the crane operators.[11] Accordingly, I do not credit his testimony regarding the intent of the emails.

Before his employment with R.G. Smith, Lipscomb worked for Kelley Steel Erectors. Lipscomb received a call from All Crane dispatcher Randall asking if he was interested in working with the 888 Crane for R.G. Smith at the Timken site as an oiler or operator. Lipscomb testified that Randall contacted him because Randall knew that things at Kelley Steel were slow and that Lipscomb wanted to work more hours. By informing him of the opportunity at R.G. Smith, Randall was doing him a favor. According, to Lipscomb, it was in Randall's interest to help Lipscomb because a time might come when Randall would want Lipscomb to work for All Crane. (Tr. 229, 244-245, 248-249).

In his affidavit, crane operator Pudelski attested that before moving over to R.G. Smith, he was employed by All Crane. According to Pudelski, he was directed by All Crane dispatcher Randall to work the Timken job. He was to erect the 888 Crane for R.G. Smith and then operate

[11] Beaver fleet manager Brown incorrectly believed that prior working on the 888 Crane for Beaver, Lipscomb came from All Crane. He did not know whether 888 Crane oilers Maley, Hatfield and Claus came from All Crane. (Tr. 58-60). Brown was unaware that Lipscomb continued to work for Beaver following the May 4, 2013 accident. (Tr. 52).

the crane. (Ex. C-2 para. 1). In his deposition, Pudelski testified that he and Randall were personal friends. They had been to each other's homes and had gone deer hunting together. (Ex. J-2 at pp. 116-117). This is suggestive of Lipscomb's view that Randall was doing Pudelski a personal favor when Randall referred Pudelski to the opportunity to operate the 888 Crane for R.G. Smith.

In his affidavit, Pudelski also noted that All Crane was not required to provide a crane operator for rented cranes. Rather, All Crane was requested by R.G. Smith to provide a crane operator and oiler. When the crane moved to Beaver, All Crane dispatcher Randall informed Pudelski that he would be staying with the crane. (Ex. C-2 para. 1).

The major difference between the experience of Lipscomb and Pudelski is that, at the time the work opportunity with R.G. Smith occurred at the Timken worksite, Pudelski was employed by All Crane while Lipscomb was working for a third company: Kelley Steel. In both instances, it appears R.G. Smith needed a crew for the crane and asked the crane owner, All Crane, to provide a crew. (Ex. C-2 para. 1). In neither instance is there any indication that when the crane operators and oilers went to work for R.G. Smith, they were expected to remain under the supervision or control of All Crane.

While at R.G. Smith, Lipscomb worked primarily as a crane oiler. When the 888 Crane was leased to Beaver, Beaver's project superintendent Turner asked Lipscomb if he wanted to come over to Beaver's payroll and work for them. Turner gave Lipscomb the option of becoming a crane operator if he was willing to work the night shift. Lipscomb accepted Turner's offer and worked as Beaver's 888 Crane night shift operator until the May 2013 accident. Lipscomb did not permanently operate the 888 Crane until after he accepted Beaver's offer. There is no evidence that All Crane had any input into Turner's employment offer to Lipscomb. (Tr. 245, 251).

The parties stipulated that, under the collective bargaining agreement with the Operating Engineers, Pudelski, who operated the crane for R.G. Smith, had the right to stay with the crane when Beaver took over rental of the 888 Crane. (Ex. J-1 Stip. #12; J-2 pp. 36-38). The record does not address whether, as an oiler on the crane, the collective bargaining agreement also gave Lipscomb a right to follow the crane. The record reveals that the 888 Crane oilers, including Claus and Hatfield, were hired out of the union hall. (Tr. 156, 238, 251; J-1 Stip. #11; J-2 p. 105).

The Secretary failed to establish that during the term of the Bare Rental lease agreement between All Crane and Beaver, regarding the 888 Crane, the crane operating crew members were attached to the crane as All Crane employees. The evidence establishes that All Crane did not require Beaver to hire any particular crane operator. If Garrity told Brown that Beaver was required to hire Pudelski to operate the crane, it was because the collective bargaining agreement gave Pudelski the right to follow the crane and not because All Crane wanted Beaver to hire one of its employees.

Beaver's site safety supervisor at the Timken worksite, Hofacker, testified that when Pudelski and Lipscomb came over to Beaver, he reviewed Beaver's rules with them. (Tr. 102). Both Pudelski and Lipscomb received employee hiring packages from Beaver. (Tr. 112, 114, 260, Exs. R-18, R-19, J-2 at 51). These were the only employment documents for the 888 Crane operators and oilers, during the term of the Bare Rental lease agreement between Beaver and All Crane, received in evidence. No All Crane employment documents were offered or received in evidence.

Supervision and Direction.

Beaver management was onsite daily. The crane operators and oilers were supervised by Beaver managers who had the authority to correct violations. In his affidavit, Pudelski attested that his daily activities were supervised by Beaver supervisor Demos. Pudelski considered his direct report to be Beaver project superintendent Turner. Nobody at Beaver ever suggested that Pudelski was employed by All Crane. (Tr. 157, 173, 180; Exs. C-2, para. 1; J-2 pp. 35-36, 59, 116).

Lipscomb testified that from November 20, 2012, until the accident on May 4, 2013, Beaver supervisor Cardoni was his supervisor. Lipscomb considered Beaver to be his employer. Lipscomb testified that if Beaver was not happy with his operation of the crane, Beaver could have asked him to leave the job. (Tr. 253, 257, 278).

Beaver site safety supervisor Hofacker testified that Beaver project superintendent Turner supervised operations of the crane. The only time Hofacker supervised the crane operators was when they were out of compliance or did something unsafe. Hofacker had no knowledge of or role regarding Beaver crane maintenance on the Timken worksite. (Tr. 83, 85, 101).

All Crane did not supervise the work of the 888 Crane crew and exercised no control over their activities. All Crane salesman Garrity testified that once the 888 Crane was turned over to

Beaver, All Crane did not supervise the crew or inspect the crane. After November 19, 2012, when the crane was reconfigured for Beaver, All Crane had no involvement with the daily operation of the crane. (Tr. 315; Ex. J-1 Stips. #13, 15).

Work Assignments.

As discussed above, Beaver's project superintendent Turner gave Lipscomb the option of becoming an 888 Crane operator for Beaver if he was willing to work the night shift. Turner offered Lipscomb the assignment to work as a crane operator, rather than as an oiler. Turner offered the night shift assignment, rather than the day shift. There is no evidence that All Crane was involved in these work or shift assignments. (Tr. 251).

In addition, Beaver assigned operators Lipscomb and Pudelski to work on other cranes at the Timken worksite, when the 888 Crane was no longer functional. For several weeks after the accident, both Pudelski and Lipscomb continued to work as crane operators for Beaver. There is no evidence that the cranes they operated were owned by All Crane. They remained on Beaver's payroll. (Tr. 52, 252, 256-257; Ex. J-2 pp. 112-115).

Crane Operator Expertise.

The record reveals that as licensed operators, the 888 Crane operators had advanced skill in crane operations. Lipscomb is an accredited national certified crane operator (NCCO). Lipscomb's crane training was mostly through the union hall. (Tr. 237-238, 241-242). Pudelski, participated in an apprenticeship through the Operating Engineers, passed written and practical tests taken through the Operating Engineers training center, and received his crane operators license (CCO). (Ex. J-2 pp. 17-20).

Lipscomb testified that Beaver generally deferred to the operator regarding safe operation of the crane. The operator determined the angle of the lift and, occasionally Lipscomb would tell Beaver how the lift should be made. While working as the 888 Crane operator for Beaver, Lipscomb never conferred with All Crane regarding the operation of the crane. (Tr. 235-236, 267-268).

Beaver's site safety supervisor Hofacker testified that he had limited knowledge about cranes and relied on the crane operators' expertise and knowledge. The only time he supervised the crane operators was when they were out of compliance or did something unsafe. (Tr. 85-86, 95).

Wages and Benefits.

While working on the Timken worksite operating the 888 Crane for Beaver, Lipscomb testified that he was a member of the Operating Engineers Union, Local 18. As a crane operator, his working conditions, including his wage and overtime rates, were set forth in the collective bargaining agreement. Lipscomb did not negotiate his wages with Beaver. Lipscomb testified that an issue arose regarding which collective bargaining agreement with the Operating Engineers was applicable to the working conditions of the crew operating the 888 Crane leased by Beaver from All Crane at the Timken worksite: the heavy highway agreement, the maintenance agreement, or the building trades agreement. Resolution of this issue impacted pay. (Tr. 261-264, 275-276).

It is very telling that when the dispute arose regarding the calculation of pay the crane operators would receive under the collective bargaining agreement, the operators mainly spoke with Beaver project superintendent Turner and supervisor Cardoni. The matter was resolved when one of Beaver's owners, Mr. Sterling, gave the employees the choice of accepting Beaver's decision regarding the applicable collective bargaining agreement or quitting and finding work elsewhere.[12] All Crane had no role in this dispute. (Tr. 253-254, 262-264, 277-278).

The collective bargaining agreement included pay rates, in part, by geographic regions. It included a "Cleveland rate" that was somewhat higher than the "Akron rate." The Timken site geographically fell under the Akron rate. While working as the 888 Crane operator for Beaver, Lipscomb was paid the Akron rate, plus long boom pay. (Tr. 264-265).

The record does not support a finding that the general discussion and email exchange between Beaver's fleet manager Brown and All Crane's salesman Garrity, set forth above, involved a "wage negotiation" between All Crane and Beaver. (Tr. 58, 314; Ex. C-3). Rather, the record reveals that the wages of the crane operators and oilers were established in a collective bargaining agreement with the Operating Engineers. (Tr. 76-77, 264-265). Brown testified that he did not know whether the 888 Crane crew was paid at the Cleveland rate or the Akron rate. (Tr. 77). While Brown's email indicates that Pudelski had a deal with R.G. Smith to be paid at

[12] During inclement weather, the operators were given the choice of going home and not being paid or staying on site and receiving pay. Under the union collective bargaining agreement, operators were guaranteed pay for 40 hours a week. The dispute arose over whether the operators would be paid for four days at ten hours a day or for five days at eight hours a day. This made a difference in overtime pay and also the amount of pay an employee would receive for an inclement weather day. The operators wanted to be paid on a four / ten basis, while Beaver wanted to pay them on a five / eight basis. (Tr. 254, 262-264)

the "Cleveland rate," if Pudelski and R.G. Smith did, in fact, strike a deal, there is no evidence that All Crane played any part in that agreement.

Work Hours.

Lipscomb and Pudelski agreed that Beaver determined the hours that they operated the crane. In order for the operators to collect their full pay for the day, Beaver's rules required them to remain on site during inclement weather when the 888 Crane was not operated. Beaver set their work hours and scheduled the days they worked. During the workday, Beaver supervisor Demos or project superintendent Turner would direct Pudelski regarding lunch breaks. (Tr. 238-239, 250, Ex. J-2, pp. 38-39, 59-60).

Replacement Crane Operators.

Beaver's fleet manager Brown testified that when an 888 Crane operator took a day off, All Crane selected the replacement. (Tr. 45). As noted above, Brown had a mistaken understanding regarding the employment status of the regular crane operators, Lipscomb and Pudelski, during the term of Bare Rental lease agreement between Beaver and All Crane for the 888 Crane. Therefore, little weight is given to Brown's testimony that All Crane selected the replacement crane operator during the term of the rental.

Pudelski testified that when he took some time off, All Crane sent a replacement. While working as a crane operator for Beaver, when he needed time off, Lipscomb would let Beaver know he would be taking a day off and he would call All Crane to see if they could send someone over because, a lot of times, All Crane had a larger pool of operators than the union hall. Lipscomb explained that it was easier to find a replacement oiler. When he worked as an oiler for R.G. Smith and needed time off, R.G. Smith would just call the union hall to get a replacement oiler. (Tr. 232-233; Ex. J-2, p. 39).

While the record shows that All Crane had a role in finding replacement operators, it does not reveal the scope of that involvement. For example, the record does not disclose the terms and conditions of employment of the replacement operators, including who paid the substitute operators' wages, set their work hours, assigned their shifts, etc. No contemporaneous employment records, such as payroll records, time sheets, or hiring hall referral sheets, were offered into evidence to document the employment status of the substitute operators who worked on the 888 Crane during Beaver's rental. Therefore, the record does not establish that the substitute operators were employees of All Crane during the time they operated the 888 Crane

during its lease to Beaver. That All Crane may have referred or suggested an employee to operate its leased crane when the regular operator was absent sheds little light on the employment relationship between All Crane and the regular operators of the 888 Crane during its lease to Beaver.[13]

Worksite Safety.

Beaver management was onsite daily. Beaver's site safety supervisor Hofacker visited the Timken project worksite a couple times each week. (Tr. 62, 82-83). Timken Project Manger CDMG's site safety manager John Heslep also was onsite. (Tr. 87).

Hofacker testified that Beaver controlled the safety conditions of its employees, including the crane operators. (Tr. 97-98). CSHO Dvorak agreed that Beaver had complete control over safety conditions at the jobsite. (Tr. 201). Pudelski testified that he regularly attended safety meetings conducted by Beaver. (Ex. J-2, pp. 54-56, 67-68, 77-79). This was confirmed by Hofacker who testified that 888 Crane operators Pudelski and Lipscomb and oiler Maley attended Beaver safety talks. (Tr. 97-102; Ex. R-13). Hofacker held weekly meetings with people from Timken and CDMG, during which worksite safety was discussed. (Tr. 87-88, Exs. R-11, R-12). Beaver's Hofacker and CDMG's Heslep would also conduct a weekly walk-around of the site. (Tr. 87, 104; Ex. J-2 pp. 83-84). All Crane did not participate in these meetings. (Tr. 89). Pudelski recalled that once each week Beaver's Hofacker and / or CDMG's Heslep would ask Pudelski how the 888 Crane was operating. (Ex. J-2 p. 89).

Pudelski and Lipscomb attended Timken site-specific training. (Tr. 242-243; Ex. J-2 p. 88-89). Upon his hire by Beaver to operate the 888 Crane, Lipscomb did not recall receiving safety training from Beaver. (Tr. 240). Lipscomb did attend a couple Beaver safety luncheons. (Tr. 239). Lipscomb operated the 888 Crane at night. He did not recall Beaver having a night shift safety person. Lipscomb rarely recalls seeing or interacting with Beaver's Hofacker. (Tr. 97, 239-40). He did not recall anyone from Beaver asking him how the 888 Crane was running or observing Lipscomb's shift crane inspections. (Tr. 240-241).

Review and retention of crane inspection reports.

[13] Further, the record contains no evidence to indicate when All Crane might have provided a substitute operator. As will be discussed below, this is particularly important because, under section 9(c) of the Act, any hazard exposure had to occur within six months of the citation.

The OSHA inspection revealed that Beaver provided the crane inspection logs for the 888 Crane. Beaver collected the crane inspection logs. Beaver and CDMG monitored the 888 Crane inspections. (Tr. 159-160).

Beaver's site safety supervisor Hofacker testified he provided the crane annual inspection reports and the crane operators' credentials to CDMG site safety manager Heslep. (Tr. 104-110; Ex. R-11). Periodically Hofacker would review shift crane inspections with Heslep. (Tr. 105). Pudelski testified that Heslep would check and review Pudelski's daily crane inspection log. (Ex. J-2 pp. 87-88). The daily inspection log books for the 888 Crane stayed with the crane. (Tr. 96; Ex. J-2 pp. 93-94.).

Provision of the means to perform assigned tasks.

Beaver provided the crane inspection logs used by the 888 Crane operators during their shift and monthly crane inspections. (Tr. 95, 159-160; Exs. R-14; R-15). Beaver supplied the fuel, lubricant, and oil for the 888 Crane and wire rope. If lubricant or grease for the crane was needed, Pudelski would contact Beaver project superintendent Turner or supervisor Demos. (Ex. J-2 p. 100). The lubricant was kept in the 888 Crane storage compartment. (Tr. 278-80). All Crane did not supply the wire rope lubricant. (Tr. 359-61).

In summary, the evidence establishes that All Crane did not require Beaver to hire All Crane employees as a condition of the 888 Crane rental. The weight of the evidence reveals that Beaver controlled the manner and means of the 888 Crane operators' and oilers' daily work. The 888 Crane operating crew considered Beaver to be their employer, received hiring packages from Beaver, and attended safety meetings held by Beaver. Beaver paid their wages, settled pay disputes, determined their work hours, work days, and their shift and job assignments as crane operator or oiler. The record reveals that Beaver directed the work of the 888 Crane crew, provided daily on-site supervision, and spoke to the crane operators if they were out of compliance or did something wrong. Beaver also provided the means by which the 888 Crane operators and oilers performed their assigned tasks. Beaver provided the daily and monthly crane inspection logs and the wire rope lubricant for the 888 Crane.

Indeed, the weight of the credible record evidence discloses that after the 888 Crane was reconfigured for Beaver on November 12, 2012, the 888 Crane operators and oilers were employed by Beaver. Critically, several potential witnesses who may have had information that would shed additional light on the realities of the worksite were not called to testify.

Specifically, Beaver's project superintendent Turner, supervisors Cardoni and Demos, and vice-president Sterling may have been able to provide additional relevant information. They were not called to testify at the hearing.

The testimony of the OSHA CSHO on the employment relationship, between the 888 Crane operating crew and Beaver and All Crane, was less helpful. The CSHO was uncertain regarding many of the elements central to determining the employment relationship between the 888 Crane crew employees and the two potential employers.[14] I find that the testimony of Lipscomb and the deposition of Pudelski are entitled to greater weight. Both 888 Crane operators worked at the Timken worksite and had firsthand knowledge relevant to the employment relationship between themselves, Beaver, and All Crane.

Therefore, the Secretary failed to meet his burden to establish that an employment relationship existed between the 888 Crane operating crew and Respondent All Crane at the Timken worksite, at the time relevant to the alleged violations. Considered as a whole, the weight of the evidence supports the conclusion that the 888 Crane operators and oilers during the term of the Bare Rental lease agreement between Beaver and All Crane were Beaver employees.

Multi-Employer Doctrine.

That Beaver, rather than All Crane, was the employer of the 888 Crane crew, during the term of Beaver's Bare Rental lease agreement with All Crane, does not resolve all the issues. Liability under the multi-employer doctrine may be found even where there is no direct employment relationship between the responsible employer and the exposed workers. On a multi-employer construction worksite, when an employer creates or controls a hazardous condition, that employer owes a duty under section 5(a)(2) of the Act, not only to its own employees, but to employees exposed to the hazard who are employed by other employers.

[14] For example, when the citation was first issued, the CSHO testified that he believed the 888 Crane crew consisted of Beaver rather than All Crane employees. (Tr. 197-198). At the hearing, however, he was no longer sure whether the 888 Crane crew was employed by Beaver. (Tr.176) The CSHO testified that the 888 Crane crew was on Beaver's payroll records and that they were supervised by Beaver personnel who had the authority to correct violations. (Tr. 157, 180). However, the CSHO was not certain if Beaver was responsible for disciplining the crane crews. (Tr. 158). Because Respondent owned the 888 Crane, it was the CSHO's belief that All Crane had control of the 888 Crane. (Tr. 160, 163). The CSHO testified that he did not know the difference between a Bare Rental lease agreement and an Operated Rental lease agreement for a crane rental. (Tr. 147). The CSHO did not understand how a crane lease agreement might impact the employer / employee relationship. (Tr. 176).

Summit Contractors, Inc., 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010), *aff'd* 442 F. App'x 570 (DC Cir. 2011)(*Summit II*). Under the doctrine a controlling employer may be responsible for the exposure of another employer's employees where that employer could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite. *Summit II*, 23 BNA OSHC 1196*; Centex-Rooney Constr. Co.,* 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). Generally, multi-employer liability attaches to an employer who creates or controls a condition. The employer need not do both. *Access Equip. Sys., Inc.,* 18 BNA OSHC 1718 (No. 95-1499, 1999). *See* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy (Dec. 10, 1999)(discussing that employers at multiemployer worksite - defined as either creating, exposing, correcting, or controlling employers - may be cited, whether or not their own employees are exposed).

In the preamble to its proposed rules on cranes and derricks, the Secretary explicitly stated his intent that the multi-employer policy be applied. *See Cranes and Derricks in Construction* (Proposed Rule), 73 Fed. Reg. 59714, 59731-33 (Oct. 9, 2008). For example, the Secretary noted that in *Anthony Crane Rental, Inc. v. Reich,* 70 F.3d 1298, 1306 (D.C. Cir. 1995), the D.C. Circuit suggested that standards promulgated by OSHA, to adopt Construction Safety Act (CSA) standards as OSHA standards, might limit an employer's obligations under the construction standards in part 1926 to the employer's own employees. The Secretary made it clear that he intended to eliminate any ambiguity and that the multi-employer doctrine applied to the crane and derrick standards. 73 Fed. Reg. at 59731-59732. Therefore, should the evidence reveal that All Crane created and / or controlled the cited hazards, the question whether All Crane's employees were exposed to the cited hazards is only one part of the analysis. Whether the employees of other employers were exposed also must be considered.

Respondent contends that the Secretary does not claim a violation of the Act under OSHA's multi-employer doctrine, as the multi-employer doctrine was not raised in the Secretary's case-in-chief or in the Secretary's post hearing brief. Further, the CSHO stated that OSHA did not consider the multi-employer doctrine when the citation issued.[15] (Tr. 184; Resp't Reply Br. pp. 6-7).

[15] It is well established that neither the Secretary nor the Commission is bound by representations or interpretations of the Act by OSHA Compliance Officers. *Kaspar Wire Works, Inc. v. Sec'y,* 268 F.3d 1123, 1128 (D.C. Cir. 2001); *L.R. Willson & Sons, Inc. v.*

Review of the record discloses that from the start of this proceeding Respondent was on notice of the relevancy of the multi-employer doctrine to this matter. Before the hearing, Respondent filed a Motion for summary judgment and supporting memorandum. Respondent contended that the Complaint should be dismissed as the evidence failed to establish that All Crane employees created or controlled any hazards or were exposed to any hazards. Respondent contended that the evidence failed to establish that All Crane employees were responsible for correcting any hazards.[16] Further, All Crane had no knowledge of the alleged hazards. *See* Resp't Memo in support of summary judgment (SJ) Motion pp. 2-3, 12. In Opposition to the Motion, the Secretary contended that All Crane employees were exposed to the crane collapse hazard. The Secretary further contended that All Crane was a creating and controlling employer. Therefore, All Crane had a duty to address hazards it created or controlled, regardless of whose employees were exposed to the hazards. *See* Sec'y Opposition Br to SJ Motion pp. 2, 4-5. At the outset of the hearing, the Motion for summary judgment was denied because there were material issues of fact to be resolved. Also, significant legal disputes remained, particularly whether Respondent had liability under the multi-employer doctrine. (Tr. 20-23. *See also* Tr. 170-171).

Further, in its post-hearing reply brief, the Secretary reiterates that the multi-employer doctrine is applicable to the analysis of this case. The Secretary contends that All Crane was an exposing and controlling employer. The Secretary contends that All Crane employees exposed to the crane collapse hazard included Fosbrink, Hoffstetler, Pudelski, Lipscomb, and others. (Sec'y Br pp. 1-2; Sec'y Reply Br pp. 1-2).

From early in these proceedings, Respondent was aware that the multi-employer doctrine was relevant to this case.[17] Whether the Secretary established that All Crane was liable under the multi-employer policy will be addressed when considering the merits of each violation.

Donovan, 685 F.2d 664, 676 (D.C. Cir. 1982); *Field & Assoc. Inc.,* 19 BNA OSHC 1379 n.8 (No. 97-1585, 2001); *Gem Indus. Inc*., 17 BNA OSHC 1184, 1187 n. 6 (No. 93-1122, 1995).

[16] Respondent's Answer, affirmative defense fifteen: "Respondent was not the creating, controlling, correcting or exposing employer under multi-employer worksite doctrine, if applicable."

[17] To establish a *prima facie* violation, the Secretary must establish both employee exposure and actual or constructive knowledge. These elements are implicit in all citations and need not be specifically pled. On a multi-employer worksite, exposure encompasses both the employees of the cited employer and employees of other employers at the site. Similarly, control can be

The Alleged Violations

1. Citation 1, item 1 alleges a serious violation of 29 C.F.R. § 1926.1400(f) as follows:

> On and before 5/4/2013, the employer did not have any procedure or policy to ensure that the specific provisions of Subpart CC were being met when engaged in activities such as but not limited to, boom hoist wire rope inspection and wire rope lubrication. Employees were thereby exposed to hazards associated with crane and wire rope failures.
>
> The cited standard provides:
>
> Where provisions of this standard direct an operator, crewmember, or other employee to take certain actions, **the employer** must establish, effectively communicate to the relevant persons, and enforce, work rules to ensure compliance with such provisions.

29 C.F.R. § 1926.1400(f)(emphasis added).

This standard is very broad and covers virtually every aspect of the crane standard. In his brief, the Secretary alleges that All Crane did not communicate work rules to ensure compliance with the crane standard. The Secretary contends that All Crane violated the standard because it allowed its employees to work on and around the 888 Crane without performing proper comprehensive, monthly, and shift inspections. (Sec'y Br. p. 8). Lipscomb and Pudelski failed to perform the required shift and monthly inspections of the 888 Crane. (Tr. 28; Sec'y Br. pp. 8, 11). The Secretary contends that Fosbrink's comprehensive crane inspection was noncompliant as he failed to inspect the condition of the boom hoist wire rope or measure its thickness. (Tr. 28, 420; Sec'y Br. pp.10-11). As a result, All Crane did not assess the condition of the wire rope and abate any hazards associated with the condition of the rope between November 20, 2012 and May 4, 2013. (Sec'y Br. pp. 9, 16, 20; Ex. J-1 Stips. #16, 17). The Secretary notes that Lipscomb received no site-specific training from All Crane. (Sec's Br. p. 9). The Secretary contends that All Crane employees were exposed to the crane collapse hazard, including Fosbrink, Hoffstetler, Pudelski, Lipscomb, and others. (Tr. 28, 416; Sec'y Br. pp. 7, 9-10, 20; Sec's Reply Br. pp. 1-2).

The Secretary's assertion that the 888 Crane was not given proper shift and monthly inspections finds support in the record. Lipscomb testified that he conducted daily and monthly crane inspections. (Tr. 257-258, 274). Pudelski testified that he too conducted daily and monthly

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relevant to establishing employer knowledge, especially where only the employees of another employer are exposed.

crane inspections. (Ex. J-2, p. 94). Although the operators filled out the appropriate forms suggesting that the inspections were conducted, surveillance video of the worksite reveals that the operators began work with the crane without conducting the required shift inspections. (Tr. 131, 189-191; Exs. R-14, R-15).

Beaver fleet manager Brown testified that Beaver had no role in the daily or monthly inspections of the crane. (Tr. 50-51). Beaver site safety supervisor Hofacker also testified that Beaver had no role in the daily and monthly crane inspections. (Tr. 50-51, 85). Hofacker based his testimony on the assumption that the 888 Crane operating crew members were not Beaver employees. (Tr. 85). Brown admitted that he was not really in a position to say how the crane was operated and supervised. (Tr. 63). Brown agreed that review of the crane inspection logs was the responsibility of Beaver safety officials. (Tr. 67-68). As Hofacker's testimony regarding the conduct of the inspections was based on the faulty premise that the operators were All Crane employees, and as Brown admitted a general lack of knowledge about the daily operations at the worksite and provided conflicting testimony on this matter, I find that the testimony of both Brown and Hofacker on this issue is entitled to no weight. Beaver employees Pudelski and Lipscomb testified that their assigned duties included conducting the shift and monthly inspections. Pudelski and Lipscomb's testimony regarding their assigned task to conduct the inspections is credited.

The credible evidence reveals that on the Timken worksite, during the term of the Bare Rental agreement between Beaver and All Crane, the 888 Crane operators were assigned to perform shift and monthly inspections. The 888 Crane oilers were assigned to lubricate the boom hoist wire rope. The CSHO testified that he has no reason to believe that All Crane had any involvement with the daily or monthly crane inspections. (Tr. 160). Although he was not sure whether the crane operators were Beaver employees, he agreed that the shift and monthly inspections were the responsibility of the crane operators. (Tr. 176).

The preamble to the standard states that OSHA anticipates that *the employer* will often use the equipment operator as the competent person who conducts the shift inspection required by § 1926.1412(d). *See* Cranes and Derricks in Construction (Final Rule) 75 Fed. Reg. 47906, 47969 (August 9, 2010); 73 Fed. Reg. at 59776. "*The employer* would be required to ensure that the person assigned to perform the shift inspections has the requisite authority." 73 Fed. Reg. at 59776 (emphasis added).

OSHA specifically "recognized that there would be situations where an employer rents or uses equipment owned by another party." 75 Fed. Reg. at 47971. Further, regarding the monthly inspections, the preamble confirms that *the employer who operates or uses the equipment* is responsible to ensure compliance with the standard requiring monthly inspections, including monitoring any deficiencies noted by a qualified person in the annual inspection.

> *[T]he employer engaged in construction activities must conduct a monthly inspection prior to using the equipment.* The monthly inspection is similar to a shift inspection (with the addition of the monitoring of deficiencies that a qualified person deemed not to be a safety hazard in the annual inspection), but, unlike a shift inspection, the monthly inspection must be documented and maintained. *Requiring an employer who uses the equipment* to conduct a monthly inspection when that employer is unable to determine whether another employer conducted a monthly inspection is an insignificant burden compared to the safety benefit of ensuring this inspection is completed.

75 Fed. Reg. at 47971 (emphasis added).

As found above, after the 888 Crane was reconfigured on November 19, 2012, Beaver was both the operator of the Manitowoc 888 Crane and the employer of the crane crew operators and oilers, not All Crane. Beaver had experience operating cranes. Beaver assumed control over the 888 Crane and was responsible for the shift and monthly inspections. Therefore, All Crane was not responsible for any failure, regarding the 888 Crane operating crew, to establish, effectively communicate, and enforce work rules to ensure compliance with the provisions of Subpart CC, including boom hoist wire rope inspection and wire rope lubrication.

The Secretary asserts that the 888 Crane operators, oilers, and the crane assembly and maintenance personnel were All Crane employees. Therefore, All Crane was the controlling employer. (Sec'y Reply Br. p. 1). The Secretary also contends that All Crane was an exposing employer. A non-controlling employer is in violation of the Act when its employees are exposed to hazards. All Crane does not dispute that Fosbrink and Hoffstetler were All Crane employees. All Crane had a responsibility, under the multi-employer doctrine, to abate the hazard or take reasonable measures to protect its employees unless it did not and could not with the exercise of reasonable diligence have known of the hazard. *Anning-Johnson Co.,* 516 F.2d 1081 (7th Cir. 1975); *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185 (No. 12775, 1975). The Secretary notes the parties agreed that "All Crane had no role in the daily and monthly inspections of the 888 Crane's wire rope." (Ex. J-1 Stips. #16, 17). The Secretary asserts that

this constitutes a stipulation that "All Crane failed to exercise reasonable diligence to delete and abate the hazard." (Sec'y Reply Br. p. 2). I find no merit in the Secretary's position.

Under the multi-employer doctrine, an employer may be responsible for the exposure of another employer's employees where the employer could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite. *Centex-Rooney Constr. Co.,* 16 BNA OSHC at 2130. The record establishes that All Crane lacked sufficient control to train the 888 Crane crew or otherwise ensure that they properly conducted shift or monthly inspections or properly lubricated the boom hoist wire rope. The record evidence discloses that All Crane was not responsible for the shift or monthly inspections or lubrication of the boom hoist wire rope. As discussed above, the standard provides that the employer who operates the equipment is responsible to ensure compliance with the standard. Beaver's responsibility is described in the Bare Rental lease agreement. (Ex. J-1 Stips. #5, 9, 21, 22, 24, Ex. R-5 paras. 7, 8). Under the lease, Beaver was required to

> provide, at its own expense, competent, *trained*, and experienced personnel to operate, maintain, and direct the Equipment (the "Operating Crew") properly and safely in strict accordance with the manufacturer's operation manuals and specifications, including rate load capacities, as well as to comply with all laws, regulations, rules, ordinances and orders of lawfully constituted authorities. Use of the Equipment by the Operating Crew constitutes Lessee's [Beaver's] representation that the Operating Crew is familiar with the Equipment, *has received appropriate training*, certifications and licensing, and is competent and qualified to operate, maintain, and direct the Equipment in a safe manner and in accordance with the manufacturer's manual, guidelines and procedures.

(Ex. R-5 at para. 7)(emphasis added).

Consistent with the lease agreement, the parties stipulated that "All Crane had no legal duty under the OSH Act or under the terms of the Agreement with Beaver to train Beaver employees on proper crane inspection and wire rope inspection." (Ex. J-1 Stip. #24). Indeed, the parties stipulated that All Crane had no knowledge whether Beaver was properly inspecting the crane. (Ex. J-1 Stip. #25).

As noted above, it is well established that an employer cannot contract away its obligations under the Act. *Froedtert,* 20 BNA OSHC at 1508. Here, the evidence demonstrates that the allocation of responsibility in the Bare Rental agreement was consistent with the standard that requires the employer to conduct the shift and monthly inspections and with the realities of the worksite. The Bare Rental lease agreement set forth the parties' expectation and

the assignment of responsibilities regarding worksite supervision. It would have been difficult, if not impossible, for All Crane to exercise any control over the 888 Crane operating crew or have knowledge regarding the crews' inspection or wire rope lubrication regimen. All Crane had no regular presence on the Timken worksite and, could only enter the site with an escort from Beaver.

Thus, the stipulation relied on by the Secretary reflects only Respondent's lack of control, not a lack of diligence.

The Secretary relies on *Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628 (10th Cir. 1975). In *Frohlick* the crane company rented out a crane *and operator* to an elevator company. The agreement between the lessor and lessee stated that the crane and operator were "under Lessee's exclusive jurisdiction, supervision, and control." *Id.* at 630. (citations omitted). Despite that language, the court held that where the lessee relies on the crane operator and gives no particular direction as to the operation of the crane, it is the duty of the lessor, as the actual employer, to comply with the Act. The Secretary asserts that Beaver had no experience in operating a crane as large as the 888 Crane and, according to Beaver fleet manager Brown, Beaver "relied on the crane experts." (Tr. 45). The Secretary contends that *Frohlick* controls. I disagree.

Frohlick is easily distinguished. (1) The agreement in *Frohlick* was for lease of a crane *and* an operator. Here, Beaver was to hire its own operators. (2) Frohlick continued to pay the operator. In this case, Beaver paid the 888 Crane operating crew, provided benefits, and resolved all pay disputes. (3) The lessee was required to use the operator furnished by Frohlick. Here, the preponderance of the evidence demonstrates that Beaver was free to choose its own crew, as impacted by the contract with the Operating Engineers. (4) The facts revealed that Frohlick retained control of the crane for safety purposes. In this case, the crane standard placed responsibility for the required inspections on the employer. As discussed above, Beaver was the employer of the crane operators assigned to conduct the shift and monthly crane inspections. Also in this case, All Crane relinquished control to Beaver. (5) Finally, unlike the lessee in *Frohlick*, Beaver had experience in crane operations. Although Beaver did not operate cranes as large as the 888 Crane, it had experience with cranes and, indeed, had other cranes at the Timken worksite. (Tr. 65, 252, 256, 319-320)

As a final basis for liability under the multi-employer doctrine, the Secretary asserts that All Crane's employee Fosbrink failed to conduct a proper annual crane inspection, as discussed in detail below. The Secretary notes that All Crane failed to review the comprehensive inspection reports that All Crane maintained and that, had it done so, it would have known of the deficiency of Fosbrink's annual inspections. Therefore, All Crane created the hazard to which other employees were exposed. (Tr. 28-29, 414-416; Sec'y Br. pp. 7, 10-11, 16-20; Sec'y Reply Br. pp. 1-2; Exs. C-5, C-6). Had the record demonstrated that the annual inspections conducted by All Crane were inadequate, the Secretary might have a valid argument for application of the multi-employer doctrine to All Crane as the creating employer. However, as will be discussed below, the record fails to establish that the annual inspections were deficient.

I also find that any violation based on the exposure of All Crane's employees, including Fosbrink, to the hazardous condition created by the alleged lack of shift and monthly inspections is barred by section 9(c) of the Act. Section 9(c) states that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." Where the hazards created by the violation of a standard persist, a party may continue to violate the standard until its obligations to act pursuant to the standard is satisfied. Section 9(c) may be tolled under the continuing violations theory. *See AKM LLC v. OSHRC,* 675 F.3d 752, 758, 763 (D.C. Cir. 2012)(failure to guard an unsafe machine and failure to provide required employee training are examples of employer obligations, that an employer may continue to violate, as long as employees remain exposed to the hazard). *See Cent.of Ga. R.R. Co*., 5 BNA OSHC 1209, 1211 (No. 11742, 1977), *aff'd in relevant part,* 576 F.2d 620 (5th Cir. 1978).

After Fosbrink was present at the Timken worksite to reconfigure the 888 Crane for Beaver on November 19, 2012, the only time that the record establishes that All Crane employees were arguably exposed to the cited hazard was when they returned to the Timken worksite to repair the 888 Crane's seat and air compressor on April 3, 2013. (Tr. 388). For All Crane, any violation was abated when its employees ceased to be exposed to the hazardous conditions caused by the alleged lack of shift and monthly inspections. The citation issued on November 1, 2013, nearly a year after the crane was reconfigured for Beaver and nearly seven months after All Crane employees returned to the worksite to make repairs. Insofar as the

alleged violation relate to the exposure of All Crane employees to the hazardous condition, the item is barred by section 9(c).[18]

In summary, All Crane was not the employer of the 888 Crane operating crew, was not responsible for conducting the shift or monthly inspections, and lacked sufficient knowledge or control to effect abatement of the wire rope hazard. Further, the record reveals that All Crane's annual inspections of the 888 Crane were not deficient and, therefore, All Crane did not create a hazard to which employees were exposed. In addition, any exposure of All Crane's employees to the hazardous condition created by the alleged lack of shift and monthly inspection or proper lubrication of the boom hoist wire ropes is barred by section 9(c) of the Act. Accordingly, Citation 1, item 1 is vacated.

2. Citation 1, item 2 alleges a serious violation of 29 C.F.R. § 1926.1413(c)(2)(ii) as follows:

> On and before 5/4/2013, the employer did not ensure an adequate annual inspection of the boom hoist wire rope for the Manitowoc 8495 lattice crane, serial number 8881248. The crane was in use at the Timken Company continuous caster project. Employees were thereby exposed to hazards associated with crane and wire rope failures.
>
> The cited standard provides:
>
> (c) *Annual/comprehensive*
> [(1) At least every 12 months, wire ropes in use on equipment must be inspected by a qualified person[19] in accordance with paragraph (a) of this section (shift inspection).]
> (2) In addition, at least every 12 months, the wire ropes in use on equipment must be inspected by a qualified person, as follows:
> (ii) The inspection must be complete and thorough, covering the surface of the entire length of the wire ropes, with particular attention given to all of the following:
> (A) Critical review items listed in paragraph (a)(3) of this section.
> (B) Those sections that are normally hidden during shift and monthly inspections.
> (C) Wire ropes subject to reverse bends.
> (D) Wire rope passing over sheaves.

[18] Had Fosbrink's annual inspection been inadequate, All Crane, as the employer creating the violative condition, would have been responsible for the exposure of Beaver employees to the hazard. As such, the violation would have been continuing and, for this aspect of the item only, the violation would not have been barred by section 9(c) of the Act.

[19] "Qualified person means a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve / resolve problems relating to the subject matter, the work, or the project." 29 C.F.R. § 1926.1401 (definitions).

It is undisputed that All Crane conducted two "annual / comprehensive" inspections within a 12 month period. The first inspection took place on June 5, 2012 when the crane was first erected at the Timken worksite for R.G. Smith. (Tr. 333, Ex. C-6). The second inspection took place on November 19, 2012, when Beaver took over the 888 Crane lease from R.G. Smith and All Crane reconfigured the 888 Crane. (Tr. 331, Ex. C-5).[20] Both inspections were conducted by All Crane's field mechanic Fosbrink.[21] (Tr. 329).

The Secretary alleges that the annual inspections were inadequate in four respects. First, the Secretary alleges that the entire wire rope was not fully removed from the drum. The inspector was not able to view the bottom portion of the rope remaining on the drum and, therefore, the inspector did not inspect the surface of the entire length of the wire rope as required by the standard. (Sec'y Br. pp. 18-19). Second, the Secretary asserts that the inspection was deficient because the inspector did not actually measure the diameter of the wire rope and, therefore, could not tell whether the diameter of the rope was diminished and the integrity of the rope compromised. (Tr. 414-415; Sec'y Br. pp. 7, 10-11, 16-18). Third, the Secretary asserts that, because the 888 Crane was operated under harsh conditions, All Crane was obligated to conduct more frequent comprehensive inspections of the 888 Crane. (Tr. 28, 415-416; Sec'y Br. 18). Finally, the Secretary contends that All Crane's inspector failed to record the condition of

[20] The record reveals that both All Crane and Beaver understood – and relied upon – All Crane's November 19, 2012 inspection, conducted by Fosbrink, to be an "annual / comprehensive" inspection. The standard requires that during monthly periodic inspections special attention be paid to items that were deemed deficient, but not yet a safety hazard, during the annual inspection. *E.g.* 29 C.F.R. § 1926.1413(f)(4). Beaver's operators would rely on the November 19, 2012 annual / comprehensive inspection to provide the basis for their monthly inspections.

[21] Respondent objected to the receipt into evidence of the written annual inspection reports for the 888 Crane prepared by All Crane's field mechanic Fosbrink during his June 5, 2012 and November 19, 2012 inspections. (Tr. 292; Exs. C-6 and C-5). Respondent asserts that the Secretary failed to lay a proper foundation for these exhibits in violation of Fed.R.Evid. 901. Respondent's claim is rejected. (Tr. 292-293).

The documents were received by the CSHO from Respondent during the inspection. (Tr. 296-297). Respondent agreed the documents were not fraudulent and that there was no issue regarding their authenticity. (Tr. 297). Respondent's witness Fosbrink identified the inspection reports during his testimony. (Tr. 331-333). Fed.R.Evid. 901 requires that there be sufficient evidence to support a finding that the item is what the proponent claims. I find that the evidence clearly establishes that the documents are, as purported, the comprehensive inspection reports prepared by Fosbrink, in June and November 2012.

the wire rope on either the June 5, 2012 or November 19, 2012 comprehensive report. (Tr. 414-415; Exs. C-5, C-6; Sec'y Br. p. 18).

Inspection Requirements of the Crane Standard

Before considering the merits of the item, it is helpful to review the inspection requirements of the crane standard.

On August 9, 2010, the Secretary promulgated new rules regarding cranes and derricks in construction. 75 Fed. Reg. 47906. These rules contained specific requirements for the periodic inspection of cranes. Periodic inspection requirements were set forth at 29 C.F.R. § 1910.1412, while requirements specific to the inspection of wire ropes were set forth at 29 C.F.R. § 1910.1413.

Under 29 C.F.R. § 1910.1412, cranes are required to be inspected prior to each shift the equipment will be used, monthly, and during comprehensive annual inspections. Prior to each shift, a competent person is required, at a minimum, to inspect such things as control mechanisms, air and hydraulics, fluid levels, hooks and latches, wire ropes, tires, safety devices and electrical apparatus. Any defects detected during the shift inspection must be fixed prior to using the crane. 29 C.F.R. § 1910.1412(d)(1).

Every month, the crane must undergo an inspection that includes all items required for the shift inspections. 29 C.F.R. § 1910.1412(e)(1). Any deficiencies identified during the annual inspection must be monitored during the monthly inspections. Additionally, the results of the inspection must be documented and maintained *by the employer* that conducts the inspection. 29 C.F.R. § 1910.1412(e)(3). The document must contain the name and signature of the person conducting the inspection and be maintained for a minimum of three months. 29 C.F.R. § 1910.1412(e)(3).

Finally, at least every twelve months, the equipment must be inspected by a qualified person for all the items required for the shift inspections. 29 C.F.R. § 1910.1412(f)(1). Additionally, the equipment must be disassembled, as necessary, to allow inspection for significant wear, cracks, deformity or corrosion of the equipment structure members. 29 C.F.R. § 1910.1412(f)(2) If any deficiency is identified, a qualified person must determine if the deficiency constitutes a safety hazard. If not yet a safety hazard, it needs to be monitored in the monthly inspections. If a safety hazard is identified, the equipment must be removed from service until corrective action is taken. 29 C.F.R. § 1910.1412(f)(4-(6)). The results of the

inspection must be documented and maintained for a minimum of 12 months *by the employer* that conducted the inspection. 29 C.F.R. § 1910.1412(f)(7).

In addition to the general inspection requirements of § 1926.1412, the crane and derrick standards, at § 1926.1413, also contain specific provisions for the inspection of wire ropes. As with the general inspection standards, § 1926.1413 requires shift, monthly and annual inspections.

The wire rope inspection standard requires that

> A competent person must begin a **visual inspection** prior to each shift the equipment is used, which must be completed before or during that shift. The inspection must consist of **observation of wire ropes** (running and standing) that are likely to be in use during the shift for apparent deficiencies, including those listed in paragraph (a)(2) of this section. Untwisting (opening) of wire rope or booming down is not required as part of this inspection.

29 C.F.R. § 1413(a)(1)(emphasis added). The required wire rope inspections are **visual.**

The inspector is required to look for apparent deficiencies in three categories. Category 1 requires inspection for significant distortion, corrosion, bending, or cracking of the wire rope structure, among other deficiencies. 29 C.F.R. § 1926.1413(a)(2)(i). Category II requires inspection for visibly broken wires or a reduction of more than five percent from nominal diameter, among other deficiencies. 29 C.F.R. § 1926.1413(a)(2)(ii). Category III requires inspection for core protrusions, broken strands, or distortion in rotation resistant wire ropes, among other deficiencies. 29 C.F.R. § 1926.1413(a)(2)(iii). A competent person must immediately determine if any deficiency constitutes a safety hazard. If a deficiency is determined to constitute a safety hazard, the equipment must be removed from service until corrected. 29 C.F.R. § 1926.1413(a)(4)(i)-(iii)

Monthly inspections must be conducted in accordance with paragraph (a) "shift inspections." 29 C.F.R. § 1926.1413(b). The monthly inspections must also monitor any deficiencies identified by the qualified person during the annual inspections. The inspection must be documented and maintained. A competent person must immediately determine if the deficiency constitutes a safety hazard. If a deficiency is determined to constitute a safety hazard, the equipment must be removed from service until corrected. 29 C.F.R. §.1926.1413(b).

Finally, the standards require annual / comprehensive inspection of the wire rope. 29 C.F.R. §.1926.1413(c). In addition to apparent deficiencies that were visually inspected for

during the shift inspections, a qualified person must also look for those critical items listed under § 1926.1413(a)(3). Here, the inspection must be "complete and thorough, covering the surface of the entire length of the wire ropes." 29 C.F.R. § 1926.1413(c)(2)(ii). Particular attention must be given to the critical review items listed in paragraph (a) "shift inspections".[22] The inspection must also pay attention to those sections of the rope normally hidden during shift and monthly inspections. 29 C.F.R. § 1926.1413(c)(2)(ii). If any deficiency is determined to constitute a safety hazard, operations involving the rope must cease until the rope is either replaced or repaired. 29 C.F.R. § 1926.1413(c)(3). If a deficiency is deemed not to constitute a safety hazard, the deficiency must be monitored during the monthly inspections. 29 C.F.R. § 1926.1413(c)(3)(ii). The inspection results are to be documented and maintained. 29 C.F.R. § 1926.1413(c)(4).

Having reviewed the inspection requirements for wire ropes, we turn to the merits of the item.

The annual / comprehensive violation alleged

Respondent asserts that the Secretary changed his theory of liability under the standard, during the Secretary's cross-examination of Respondent's witness Fosbrink, after the Secretary had rested its case-in-chief.[23] Regarding alleged deficiencies in the June 5, 2012 and November 19, 2012 comprehensive inspections, Respondent asserts that the Secretary's late changed

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[22] 29 C.F.R. § 1926.1413(a)(3) states:

> *Critical review items*. The competent person must give particular attention to all of the following:
>
> (i) Rotation resistant wire rope in use.
>
> (ii) Wire rope being used for boom hoists and luffing hoists, particularly at reverse bends.
>
> (iii) Wire rope at flange points, crossover points and repetitive pickup points on drums.
>
> (iv) Wire rope at or near terminal ends.
>
> (v) Wire rope in contact with saddles, equalizer sheaves or other sheaves where rope travel is limited.

[23] Further, Respondent's direct examination of All Crane's field mechanic Fosbrink explored the specifics of his wire rope annual inspection. (Tr. 349-358). The Secretary's questioning of the details of Fosbrink's wire rope inspection was an appropriate area of cross-examination. (Tr. 365-387).

violation theories are the alleged failure of All Crane's inspector (1) to examine the small underside section of the wire rope that remained on the drum after the rope was fully extended, (2) to measure the diameter of the wire rope, and (3) to perform more frequent comprehensive inspections, after November 19, 2012, as the 888 Crane was subjected to severe service. (Resp't Br. pp. 25-26, 27-28; Resp't Reply Br. pp. 10-12, 14-15). Respondent claims that this alleged late change in the Secretary's theory of liability was prejudicial and deprived it of an opportunity to effectively defend against the new charges. As a result, Respondent asserts that its rights of due process and fair notice under the Fifth Amendment were violated. I am not persuaded.

The citation explicitly informed Respondent that it was being charged with violating 29 C.F.R. § 1926.1413(c)(2)(ii), which is specifically applicable to the annual inspection requirements for wire ropes and states that the "inspection must be complete and thorough, covering the surface of the entire length of the wire ropes . . . ." Therefore, the Secretary's attempt to show that the inspection was inadequate because it failed to measure the diameter of the wire rope or to examine the small underside section of the wire rope that remained on the drum after the rope was fully extended further explained, but did not change, the Secretary's theory of liability. Moreover, if Respondent was unsure of the particularities of the allegations, it had the opportunity to file a Motion for a More Definite Statement under the Federal Rule of Civil Procedure 12(e).

As discussed above, when Respondent chose to proceed after the Secretary presented his case-in-chief, and after the ruling on Respondent's Motion for a directed verdict / involuntary dismissal was held in abeyance pending the conclusion of the hearing, this Court was obligated to decide this matter on the entire record before it, not just the evidence presented during the Secretary's case-in-chief.

Multi-employer doctrine

On this item, the Secretary properly invokes the multi-employer doctrine. All Crane was clearly responsible for conducting a proper annual / comprehensive inspection. The comprehensive annual inspection forms the base line for many safety concerns inspected during more frequent periodic inspections. *See e.g.* 29 C.F.R. §§ 1926.1413(b)(2) and (c)(3)(ii). An inadequate annual inspection would endanger not only All Crane employees who had occasion to come to the site, but the operating crew and employees of other employers who might be in the vicinity of the crane, until an adequate annual inspection was conducted. Therefore, an

inadequate annual inspection would constitute a continuing violation that would toll section 9(c) of the Act. If the annual inspection was inadequate, All Crane, as the creating employer would be responsible for the violative condition. *Summit II,* 23 BNA OSHC at 1196. In this case, the evidence fails to establish the inadequacy of the annual inspections.

Discussion of the wire rope comprehensive inspection.

The Secretary contends that comprehensive inspection of the 888 Crane's boom hoist wire rope was deficient because All Crane failed to examine the small underside section of the wire rope that remained on the drum after the rope was fully extended. (Tr. 366; Sec'y Br. pp. 18-19).

As noted, the shift inspection of the wire rope is a *visual* inspection. 29 C.F.R. § 1926.1413(a)(1). Pursuant to § 1926.1413(c)(2)(ii)(B), the annual inspection requires that

> particular attention must be given to those sections of wire rope that are normally hidden during shift and monthly inspections. For example, such sections would include parts of the rope that form the lower wraps on the boom hoist drum and which would not be visible unless the drum is in a very low angle position.
> . . .

Unlike the shift and monthly inspections, in which booming down would not be required, booming down would be necessary in order for the inspection to be "complete and thorough, covering the surface of the entire length of the wire rope."

73 Fed. Reg. at 59780.

There is nothing in either the standard or the preamble to the final rule that suggests, even regarding those items for which special attention is required, that the inspection be other than visual.

Fosbrink is a highly experienced and trained inspector.[24] He has been with All Crane for seventeen years, fourteen years as a field mechanic. He was trained at the Manitowoc factory and is factory certified. He has attended twelve to fourteen classes held by Manitowoc and was specifically trained in the same style crane as the 888 Crane, although not that specific model. The training was based on the crane's manual and included how to assemble, disassemble, and configure the crane. The manual also covered the lubrication schedule and wire rope inspection

[24] The Secretary does not dispute that Fosbrink was a "qualified person" within the meaning of the cited standard. I observed Fosbrink testify. He was a credible witness who testified without hesitation or contradiction. He was very knowledgeable regarding crane comprehensive inspections.

and maintenance. Fosbrink received training directly from All Crane, including wire rope inspection and the OSHA crane standards. He has certificates for attending the OSHA 10 and 30 hour courses covering crane safety. (Tr. 328, 334-339; Ex. R-37).

Fosbrink testified that, over his fourteen years as a field mechanic, he conducted hundreds of crane inspections, seventy-five percent of which were on Manitowoc cranes. He estimated that he assembled or reconfigured an 888 crane 40-50 times. His work was supervised by service managers. He has no prior accidents as a result of a mistake, and has never had a boom collapse or a complaint about his work. Indeed, the CSHO testified that Fosbrink seemed very informative and knowledgeable about his job. (Tr. 195, 340-343).

When conducting an annual inspection, Fosbrink consults the annual inspection form and the crane's operating manual.[25] The Manitowoc operator's manual includes a section for wire rope inspection. (Tr. 344). Fosbrink explained that when conducting the 888 Crane annual inspections, the mast was laid forward, exposing all the cables between the gantry and the live mast. He testified that, unlike other cranes, the mast on the 888 Crane could be lowered, enabling him to walk the boom and visually examine the rope itself, which was at eye level. The wire rope was unwound, except for approximately three fourths (3/4) to one layer of cable which remained on the drum. (Tr. 350). That part of the rope that remained on the drum was visually examined. (Tr. 350-352). As described in the preamble, Fosbrink's inspection included the "parts of the rope that form the lower wraps of the boom hoist drum and which would not be

[25] Respondent objected to the receipt into evidence of the wire rope section of the operator's manual for the Manitowoc 230 ton crawler crane. (Tr. 129, 222-223; Ex. C-4). Respondent asserts that the Secretary failed to lay a proper foundation for this exhibit in violation of Fed.R.Evid. 901. Respondent's claim is rejected. During Fosbrink's direct examination, Respondent noted Fosbrink's use and reference to the Manitowoc operator's manual during his comprehensive inspections of the 888 Crane's wire rope. (Tr. 346-347). The CSHO testified that he received the crane operator's manual from the original equipment manufacturer. (Tr. 129). Respondent's field mechanic Fosbrink reviewed the wire rope section of the manual while on the stand and identified it as a section of the Manitowoc operator's manual at issue in this case. (Tr. 369-370, 401; Ex. C-4). If Respondent was concerned that this manual section alone or the June 21, 2012 date were misleading, Respondent could have introduced the earlier version of the Manitowoc operator's manual or additional manual sections to clarify this exhibit or Fosbrink's testimony on direct. (Tr. 407-409). Fed.R.Evid. 901 requires that there be sufficient evidence to support a finding that the item is what the proponent claims. I find that the document is, as purported, the wire rope section of the operator's manual for the Manitowoc 230 ton crawler crane.

visible unless the drum is in a *very low angle position*." 73 Fed. Reg. at 59780 (emphasis added).

During his inspection, Fosbrink did not observe any defects or deficiencies in the wire rope. There was no evidence of wire rope fatigue, excessive wear, significant corrosion, electric arc damage (from lighting or power lines), distortion, core failure, or core protrusion. Further, there was no evidence of worn or compromised end connections, broken rope wires or diameter reduction. According to Fosbrink, he gave special attention to sections that are normally hidden during the operation of the crane. He paid special attention to the areas where the rope passes over the sheaves. Fosbrink testified that the inner core of the rope cannot be inspected unless you cut it or use an awl to remove the outer layer. In that case, the cable has been damaged. As a result, you can't predict an inner core failure. (Tr. 352-356, 359).

In fact, during the June 2012 assembly and the November 2012 reconfiguration of the 888 Crane, the boom was removed all the way to the heel section, laid on the ground, the mast was laid forward parallel to the ground, and the entire wire rope drum was exposed. Fosbrink explained that this is different from a crane and wire rope inspection when the crane is under normal operation and the boom is raised. Under normal operation two to three layers of cable are underneath on the drum and never exposed. (Tr. 354-355).

Fosbrink testified that, except for three fourths (3/4) to one layer which remained on the drum, he unwound the entire rope. The Secretary asserts that Fosbrink could not have inspected the bottom of the wire rope that remained on the drum because it stayed in contact with the drum. (Tr. 366).

Fosbrink testified that he consults the manufacturer's operator manual when conducting his annual inspections and that the manual contains no requirement that the rope be fully removed from the drum. He was not aware of any other requirement that the wire rope be totally removed from the drum. (Tr. 391-392). Although the bottom of the wire rope remained on the drum, he was able to see and touch that part of the rope that was on the drum. (Tr. 350) Had there been a problem with the bottom of the rope, he would have been aware of it by either the distortion on the labeling or the deviation that arose when the rope was rewrapped. (Tr. 397). Therefore, the evidence establishes that Fosbrink's inspection covered the surface of the entire length of the wire rope. Fosbrink did visibly examine and inspect the rope that remained on the drum.

The Secretary also contends that comprehensive inspection of the 888 Crane's boom hoist wire rope was deficient because All Crane's inspector failed to measure the diameter of the wire rope. The Secretary argues that, without such a measurement, there was no baseline against which Beaver could gauge whether there was a diminution in the diameter of the rope. Indeed, Fosbrink agreed that diminution of the diameter of the wire rope is often the first outward sign that the wire rope core is damaged. (Tr. 385-386). (Tr. 414-415; Sec'y Br. pp. 7, 10-11, 16, 17).

For shift inspections, the standard explicitly requires a *visual* examination of the wire rope to determine if there is more than a five percent diminution of its diameter. 29 C.F.R. § 1926.1413(a)(2)(ii)(B). Annual inspections must be conducted "in accordance with" the requirements of a shift inspection. 29 CFR § 1926.1413(c)(1).

"Regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section." *Custom Built Marine Constr., Inc.,* 23 BNA OSHC 2237, 2239 (No. 11-0977, 2012) *citing Am. Fed'n of Gov't Emps., Local 2782, v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986). *See KS Energy Servs.,* 22 BNA OSHC 1261, 1265 n.8 (No. 06-1416, 2008) citing *Morrison-Knudsen Co. / Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1108 (No. 88-572, 1993)(explaining Commission construes "each part or section . . . in connection with every other part or section so as to produce a harmonious whole.").

Nothing in the standard suggests that a determination regarding the diminution of the diameter of the wire rope requires the use of calipers or other measuring devices. Read as a whole, the annual comprehensive inspection required by the standard to determine a diameter reduction in the wire rope is a *visual* inspection of the rope.

Moreover, although Fosbrink did not actually measure the diameter of the rope the evidence establishes that Fosbrink's visual inspection was sufficient to uncover any reduction in the wire rope's diameter. Fosbrink explained that a diameter reduction would have been apparent as the label on the wire rope would have been distorted and obscured. He testified that any diminution also would have been apparent from deviations in the way the wire rope lay on the drum. As the inspector, if his visual inspection reveals these deviations or distortions he would actually measure the diameter of the cable. Also, he would observe how the wire rope wraps on the drum when it is rewound at the end of the inspection. If the rope starts gapping and jumping when six layers are wrapped on top of the bottom layer, there is a problem and as the inspector he would measure it. He testified that he looked for these things during the inspection

and found nothing out of the ordinary. Even after the accident, Fosbrink saw nothing to indicate that the diameter of the wire rope was reduced. (Tr. 386, 397-398).

The Secretary's contention that the failure to actually physically measure the diameter of the wire rope meant that future inspections were denied a baseline is without merit.[26] By not noting a reduction in the diameter of the wire rope, whomever conducted the monthly inspections was on notice that any distortion of the labeling, deviation in the way the rope lay on the drum, or gapping and jumping as the wire rope rewound might indicate that a reduction in the diameter of the rope had taken place after the annual inspection. With that information, the inspector would decide whether it is necessary to actually measure the wire rope diameter to determine if, and to what extent, the diameter of the wire had been reduced. (Tr. 386-387).

The Secretary also contends that All Crane violated the standard because All Crane failed to perform more frequent comprehensive inspections, after November 19, 2012, as the 888 Crane was subjected to severe service. The 888 Crane was used three times as much between November 2012 and May 2013, when operated by Beaver, then between June 2012 and November 2012, when operated by R.G. Smith. (Tr. 379). For Beaver the 888 Crane ran over 2400 hours. (Tr. 164, 379; Ex. J-1 Stip. #18). On the other hand, R.G. Smith operated the 888 Crane for [approximately] 800 hours. (Tr. 378). Beaver ran the crane approximately twenty hours a day. Sometimes Beaver operated the crane seven days a week. (Tr. 164). The 888 Crane was operated throughout the winter, which could have affected the brittleness of the rope. (Tr. 165). Also, the Timken worksite was a steel mill that created harsh environmental conditions. (Tr. 165).

The Secretary's argument is without merit. Fosbrink did not learn of the harsh conditions under which the 888 Crane was operated until after the accident. He noted that it is not his job to know how the 888 Crane is operator by the lessee. Fosbrink agreed that, under harsh and

[26] The Secretary's contention that All Crane violated the standard because All Crane failed to document the diameter and condition of the wire rope on the June 5, 2012 and November 19, 2012 comprehensive inspection reports is rejected. (Tr. 414-415; Exs. C-4 p. 10; C-5, C-6; Sec'y Br. 17-19). The Secretary notes that § 1926.1412(f)(7) requires the employer who conducts the annual / comprehensive inspection to document, maintain, and retain for a minimum of twelve months, (i) the items checked and the results of the inspection and (ii) the name and signature of the person who conducted the inspection and the date. This information is included on the June and November 2012 inspection reports prepared by Fosbrink. (Exs. C-5, C-6). Further, the Secretary did not move to amend the citation to allege a violation of § 1926.1412(f)(7). Respondent specifically objected to trying anything other than the cited standards. (Tr. 382).

extreme usage, the wire rope should be inspected more frequently than provided by an annual inspection. However, Fosbrink noted that, during his annual inspections, the wire rope on the 888 Crane did not look anything like it did after the accident. He noted that there were broken strands and some core protrusion which indicates wire rope fatigue and wire rope failure. Also, there was some rust and the rope looked extremely brittle. If he saw a rope in such a condition, he would have condemned it. (Tr. 362-364, 372, 395-396; Ex. R-24).

The need to conduct more frequent crane inspections would arise from information uncovered during the periodic shift and monthly inspections. On the 888 Crane those periodic inspections were conducted by crane operators who were Beaver employees. 29 C.F.R. § 1926.1412(g). The crane operators' employer, Beaver, remained responsible to ensure that the periodic shift and monthly crane inspections were competently completed and any need for more frequent comprehensive inspections timely identified.

Consistent with the standard, under the Bare Rental agreement, the duty to perform periodic inspections of the crane (except for annual inspections) and perform regular maintenance was assumed by Beaver. (Tr. 84; Ex. J-1 Stips. #5, 8; Ex R-5, paras. 6, 7). If more frequent inspections were required the responsibility rested with Beaver. Nowhere in the record does the Secretary suggest how frequently the 888 Crane should have been comprehensively inspected.[27]

Further, All Crane was not cited for failing to conduct more frequent inspections due to harsh conditions and usage. The requirement for more frequent inspections when a crane is subject to harsh usage is set forth at 29 C.F.R. § 1926.1412(g). The Secretary did not move to amend the citation. Moreover, when the Secretary adduced evidence and argued that the harsh conditions required more frequent inspections, Respondent specifically objected to trying anything other than the cited standards. (Tr. 375-382, 415-416).

The Secretary has not alleged any other deficiency in Fosbrink's annual inspections.

Accordingly, Citation 1, item 2 is vacated.

3. Citation 1, item 3 alleges a serious violation of 29 C.F.R. § 1926.1413(d) as follows:

> On or before 5/4/2013, the employer did not ensure adequate lubrication of the boom hoist wire rope for the Manitowoc 8495 lattice crane, serial number 8881248. The crane was in use at the Timken Company continuous caster

[27] In that regard, this Court notes that the accident occurred approximately six months after the second annual inspection.

project. Employees were thereby exposed to hazards associated with crane and wire rope failures.

The cited standard provides:

Rope lubricants that are of the type that hinder inspection must not be used.

During the inspection, the CSHO inspected the lubrication on the wire rope. (Tr. 131). He found that the condition of the rope varied from very dry and brittle in some sections to very caked and covered either with wire rope lubricant that solidifies after application or grease. It covered the valleys where the rope strands came together in such a way that a pick was necessary to clean off the lubricant to allow proper inspection of the wire rope. (Tr. 131-132, Ex. C-20, photo 1). Further inspection revealed cans of spray lubricant taken from the storage cabinet in the crane car body, including CRC lubricant. (Tr. 138, Ex. C-20, photo 3). The CSHO noted that when he sprayed the lubricant from the green CRC can onto the body of the 888 Crane, it started clear and then turned black and cakey. (Tr. 138). According to the CSHO, the change of color and texture made it difficult to inspect the rope strands. (Tr. 140). Fosbrink testified that over-lubrication can cause debris and contamination to be picked up by the wire rope. The rope becomes tacky and inspection can be inhibited. According to Fosbrink, if the rope is over-lubricated you can't see it and, therefore, it can't pass inspection. (Tr. 346).

OSHA AAD Montgomery also inspected the wire rope and found that the lubrication was almost like putty. Montgomery explained that the rope cannot be properly inspected when there is lubricant in the valleys of the rope. Also, under such conditions, new lubricant can't be applied to the core of the wire rope. This can lead to the rope becoming brittle, compromising the strength of the rope. If a wire rope is broken in a valley, it indicates that the internal wire rope has been damaged and the rope must be taken out of service. (Tr. 140; 283-285).

The CSHO testified that he found the can of lubricant in the 888 Crane cab storage cabinet a month after the accident. The cabinet was not locked and he did not know if anyone went into the cabinet before he did. However, the 888 Crane had been transported to a fenced evidence preservation site controlled by OSHA. The crane was under lock and key. CSHO Dvorak had the key. He testified that, although it was not transported to the secure site for several days, if someone accessed the crane, it would have appeared on the Timken worksite

surveillance video. (Tr. 225-227). The CSHO never inquired whether All Crane ever purchased the CRC brand lubricant. He didn't actually know who purchased the lubricant.[28] (Tr. 188).

During Beaver's lease of the 888 Crane, one of the crane oilers' job assignments was to lubricate the wire rope. (Tr. 186, 273-274, 278-280; Ex. J-2 pp. 58, 71-76, 104-107, 117). Crane operator Lipscomb testified that, whenever the wire rope looked dry, his oiler Claus would apply lube to the cable. (Tr. 274, 278). The lubricant was kept in the 888 Crane storage compartment. (Tr. 278-280). Beaver supplied the wire rope lubricant used by Lipscomb and Claus. (Tr. 278-280). If lubricant or grease for the crane was needed, operator Pudelski would contact Beaver project superintendent Turner or supervisor Demos. (Ex. J-2 p. 100). All Crane did not supply the wire rope lubricant. (Tr. 359-361). Fosbrink testified that All Crane never used the CRC lubricant found in the 888 Crane storage compartment by the CSHO and that he did not supply lubricant to Beaver. (Tr. 361-362)

The Secretary failed to establish this violation. The evidence establishes that the duty to lubricate the 888 Crane wire rope was assigned to the 888 Crane crew, specifically the crane oilers. As found above, the 888 Crane crew operators and oilers were employees of Beaver, not All Crane. Pursuant to the standard, the employer is responsible to ensure proper lubrication of the crane's wire rope. 29 C.F.R. § 1926.1400(f). Also by contract and practice, it was Beaver's obligation to maintain the crane on a daily basis. (Ex. R-5, para. 8). All Crane had limited access to the Timken worksite. It challenges the imagination to conceive how All Crane could have regularly lubricated the crane wire rope.

The credible evidence demonstrates that the lubrication found in the crane was provided by Beaver. Lipscomb and Pudelski testified that the lubricant was obtained from Beaver. (Tr. 269, 278-280; Ex. J-2 p. 100). Fosbrink, who reconfigured the 888 Crane for Beaver, testified that All Crane did not supply lubricant with the crane. Moreover, Fosbrink testified that he carries a Crosby and Napa brand of lubricant, both of which are clear, lighter, oil based lubricants. He was not familiar with the CRC brand lubricant found in the crane, and had no

[28] In his deposition, CSHO Dvorak stated that Beaver was responsible for the lubrication of the crane. He also stated that All Crane had no control over lubrication of the wire rope after it reconfigured the crane on November 19, 2012. (Tr. 154, 161, 202-203, Dvorak Deposition, pp. 92, 113-114, 151; Ex. R-5 papa. 8). At the hearing, he testified that he was now uncertain and no longer stands by that position. (Tr. 154, 160, 203). In his view, All Crane had the opportunity to be involved with the crane, including its lubrication. (Tr. 163). The CSHO also testified that the crane operators were responsible for lubricating the wire rope. (Tr. 186).

knowledge that the CRC brand was used by All Crane. He testified that he examined the lubrication on the 888 Crane during his November 2012 annual / comprehensive inspection and at that time the rope was properly lubricated. Fosbrink testified that if, the rope was over-lubricated to the point that he could not have conducted a proper inspection; he would have condemned the rope and removed it from service. (Tr. 358, 360-361).

There is no evidence that All Crane was responsible for the regular lubrication of the crane, provided the wrong lubricant, or was either the creating or controlling employer, accordingly, Citation 1, item 3 is vacated.

Findings of Fact and Conclusions of Law

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

Conclusion and Order

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.1400(f) is VACATED;

2. Citation 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.1413(c)(2)(ii) is VACATED;

3. Citation 1, item 3, alleging a serious violation of 29 C.F.R. § 1926.1413(d) is VACATED.

SO ORDERED.

/s/Carol A. Baumerich
Carol A. Baumerich,
Judge, OSHRC

Dated: June 8, 2016
Washington, DC