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

SECRETARY OF LABOR, Complainant, v. J.F. WHITE CONTRACTING COMPANY, Respondent.	OSHRC Docket No. 08-1355

APPEARANCES:

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BEFORE: John H. Schumacher
Administrative Law Judge

DECISION

This matter is before the Commission pursuant to a timely Notice of Contest filed by the employer pursuant to the Occupational Safety and Health Act of 1970; 29 U.S.C. §§651-678 ("the Act").

On July 24, 2008, OSHA Assistant Area Director James Mulligan was driving to work when he passed a worksite on Morrisey Blvd. near the University of Massachusetts, in Boston, Mass. (Tr. 21) Mulligan noticed a person in a reflective vest leaning against a track crane. The crane had a load of sheet piles in the air, and there was no physical barricade to prevent an employee from entering the swing radius of the crane. (Tr. 22-24). Mulligan called his office and reported the hazard. (Tr. 24)

In response, OSHA Compliance Officer Mark Heffron ("CO") was sent to the site. (Tr. 51) The CO observed a crane on a median strip, between a section that had Jersey barriers separating it from the traffic. (Tr. 53, Exh. J-24). According to the CO, the crane, which was picking up sheet piles, did not have barricades around the swing radius. (Tr. 53) He observed at least two employees in the general area of the swing radius. (Tr. 125) One of the employees was behind the crane and not looking at the crane or what was going on towards the mast section where a load would be lifted or let down (Tr. 53)

As a result of the CO's observations, the Secretary issued to respondent, a citation alleging a serious violation of 29 CFR §1926.550(a)(9)[1] on the grounds that the "employees were exposed to being struck by the crane counter weight as it rotated that was not barricaded to prevent employees from entering while picking and setting sheet pile bundles." The Secretary proposed a penalty of $5000 for the violation, and the case was subsequently assigned to be heard under the rules for Simplified Proceedings.

On March 24, 2009 the Secretary filed a Motion to Amend the Complaint to allege a repeated violation. In her Motion the Secretary asserted that, when issuing the original

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[1]The standard provides:

§1926.550 Cranes and derricks.

* * *

(9) Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

citation, a search of respondent's records on the OSHA Intranet system did not reveal any previous final orders for violations of the cited standard. Subsequent to issuing the citation, however, it was discovered that there was a final order issued against respondent for a violation of the cited standard that was erroneously not entered into the system. Moreover, further research revealed that a second final order for a violation of the cited standard was entered within three years of issuance of the current citation. To prevent the case from being removed from Simplified Proceedings, the Secretary did not seek to increase the penalty from the $5000 originally proposed. (Tr. 10) I granted the Motion to Amend on March 30, 2009.

A hearing was held on April 3, 2008 in Boston, Massachusetts. The parties have fully briefed this case and the matter is ready for decision.

The Violation

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

It is not disputed that the swing radius of the crane was not barricaded in compliance with 29 CFR §1926.550(a)(9) and that respondent knew of the condition. Although respondent properly argues that the CO overstated in his report the number of employees exposed (Tr. 170-171), the evidence clearly establishes employee exposure. For one, as discussed *infra*, both operator Pamela Witkum and foreman Brian Snape operated as spotters to keep other employees away from the rotating superstructure. (Tr. 250) The performance of their duties required them to be close to the crane when the superstructure was rotating. Second, the evidence is clear that other employees were in

the vicinity of the crane. (Tr. 171-172) While there is no evidence that any of these employees actually entered the area covered by the rotating superstructure, the purpose of the standard is to prevent such an entry. Therefore, employees in the vicinity who might inadvertently enter the "danger zone" are exposed to the hazard covered by the standard. *See e.g. Seyforth Roofing Co.*, 16 BNA OSHC 2031, 2033, n.4 (No. 90-0086, 1994) Accordingly, the Secretary has established a *prima facie* violation of the standard.

Respondent raises the affirmative defense of infeasibility of compliance. It contends that the area was to small to allow for technical compliance with the standard. To establish the affirmative defense of infeasibility the employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. *Star Brite Construction Co.*, 19 BNA OSHC 1687, 1690 (No. 95-0343, 2001)

It was generally agreed that the conventional method of guarding the crane was to extend 10-foot long pipes attached to the tracks of the crane and placing caution tape at the ends of the pipes. (Tr. 69, 268, 300) In this manner, the barricade would move as the crane is rotated. However, it could also consist of a chain, fence or something else of a physical nature that would be visible to an employee and would require the employee to physically penetrate. (Tr. 194)

Respondent contends that the crane was not barricaded because it was relocated to an area where it was too narrow to place barricades and still be able to rotate the crane. (Tr. 247) Pile driving foreman, Brian Snape, testified that the crane was 18-29 feet wide. (Tr. 251) According to Snape, to fully enclose the swing radius of the crane required an

area approximately 38 to 40 feet wide, (Tr. 242) and the work zone in which the crane was operating was only 20-25 feet wide. (Tr. 251) Snape stated that if they put out the plastic pipes used to string the yellow barricade tape, the pipes would have stuck out into a trafficked road. (Tr. 251) Both crane operator Mark Nagle and oiler/operator Pamela Witkum agreed with Snape. They, too, testified that the poles were too long and would have stuck out beyond the Jersey barriers and impeded traffic. (Tr. 268-270, 300). Moreover, there was a large cage containing oxygen cannisters between the Jersey barriers that would have been struck by the poles when the crane moved back and forth. (Tr. 342)

Respondent further contends that, instead of a physical barrier, it took other precautions to insure that no employee was exposed to the hazard of being struck by the rotating superstructure of the crane. Crane operator Nagle testified that oiler Witkum was instructed to guard the swing radius. (Tr. 274) According to foreman Snape, he would watch the front of the crane while oiler/operator Witkum would watch the back. (Tr. 250) Moreover, audible alarms and flashing lights would go off whenever the crane would swing. (Tr. 277, 302) Witkum confirmed that she was directed to make sure that nobody approached the swing radius. (Tr. 304) She averred that she always knew where the members of the crew were and testified that nobody entered the swing radius. (Tr. 307) She noted that she was not visible in photo exhibits J-23 and J-24, and speculated that she was either on the other side of the machine or in the ladies room. (Tr. 307) She stated that if she had to leave the site for some reason, she would always inform foreman Snape. (Tr. 307)

Foreman Snape further testified that the crew was fully informed about what was happening with the crane. He stressed that there were no circumstances where the crane would swing without him first contacting the other members of the crew. (Tr. 282) They knew when the crane would be moved and what precautions they should take. He pointed out that the crane would only swing under his direction. (Tr. 247, 249) He also noted that

moving the sheet piles would not take very long and that he thought visual protection would be sufficient for those few minutes. (Tr. 252)

The CO testified that prior to the completion of his inspection, respondent abated the hazard by erecting pvc poles and attaching yellow caution tape. (Tr. 84, Ex. J-46) However, Witkum testified that, to make them fit into the restricted area, the poles had to be broken in half. (Tr. 309-310) Indeed, the CO admitted that the "abatement" did not comply with the standard because the tape did not extend beyond the superstructure of the crane. (Tr. 216-219)

I find that respondent established that technical compliance with the standard was infeasible. The area in which the crane was operating made it impossible to fully barricade the swing radius without having portions of the barricade protrude onto oncoming traffic. Therefore, remaining issue is whether respondent's use of a "spotter" system was sufficient to constitute an effective method of alternative compliance. The significant aspect of the affirmative defense of infeasibility is that it recognizes that there will be times when literal compliance with a standard will not be possible and permits an employer to avoid liability for noncompliance "provided the employer has done everything it can to protect its employees by alternative means of protection." *Rockewll International Corp.*, 17 BNA OSHC 1801, 1807 n.9 (No. 93-45, 1996)(consolidated).

The cited standard has long been interpreted as requiring a physical barricade rather than employee spotters. *Concrete Construction Co.*, 4 BNA OSHC 1828, 1829-30 (Nos. 5692 & 7329, 1976) Thus, to establish that, by using employee spotters, it has done "everything it can" to protect its employees, respondent must first show that it could not have used any form of physical barricade. While it is permissible to use employees in addition to a physical structure, spotters do not substitute for such structures. *Id.* The advantage of a physical barrier over spotters is obvious. Unlike human "spotters", barricades do not need to take bathroom breaks or get distracted. Moreover, as the CO

testified, the crane operator needs to signal a spotter when he intends to move the crane. This distracts from the operators other duties, such as keeping attention on his load, his instrument panel, and other operating devices. (Tr. 72). This is not a problem when the crane is protected by a physical barricade. Moreover, although the CO agreed that the barricade set up during the inspection might not have fully restricted exposure to the area covered by the rotating superstructure (Tr. 217-219), he did opine that it was an effective protective measure

> because they have something that's physically up that informs people of where the area that the crane would swing into to inform them to stay out of that particular area because that's where the rotating structure path of travel was going to be based on the crane placement.

(Tr. 85)

The evidence here demonstrates that some form of physical barricades could have been, and indeed was set-up during the inspection, and that this barricade added a margin of safety over respondent's "spotter" system. Therefore, until this barricade was erected, respondent failed to do everything it could to reduce employee exposure to the rotating superstructure of the crane. Accordingly, the affirmative defense fails.

Characterization

The citation, as amended alleges that the violation is repeated based on two earlier final orders affirming citations for violation of the cited standard. To establish a repeated violation under section 17(a) of the of the Act, the Secretary must demonstrate that there was a Commission final order against the employer for a substantially similar violation. *Hackensack Steel Corp.,* 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) The Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standard. *Potlatch Corp.*, 7 BNA OSHC at 1063.

The record shows that there are two final orders issued against respondent for

violation of the cited standard. Respondent was first cited for a serious violation of the cited standard n April 5, 2005 on the ground that "employees were exposed to a serious struck-by hazard while working around the Manitawac Crane without a labeled swing area." Per a settlement agreement, signed by the parties on August 1, 2005, the Secretary *inter alia,* reduced the violation to other than serious and respondent withdrew its notice of contest. The settlement agreement was approved by Administrative Law Judge William Cregar on August 31, 2005 and became a final order of the Commission on September 30, 2005. (Ex. C-56)

The second citation was issued on May 25, 2006 and alleged a repeated violation of the cited standard on the grounds that "the employees were exposed to struck-by hazard while accessing within the swing radius of he Manitowoc Cranes without radius swing protection." The matter was again resolved by a settlement agreement where the Secretary, *inter alia*, withdrew the repeated characterization and respondent withdrew its notice of contest. The settlement agreement was signed by the parties on or about November 17, 2006 and was approved by Judge Covettte Rooney on December 6, 2006. It became a final order of the Commission on January 8, 2007.

Based on this record, I find that the violation was properly characterized as "repeated."

PENALTY

Although the violation was properly characterized as "repeated" I find that respondent made a good-faith effort to protect its employees. The evidence establishes that, before respondent moved the crane to the work area in question, it was guarded in a manner consistent with the standard (Tr. 68). However, when requested to move the crane to the new location, respondent found that the area was too small for a barricade that literally complied with the standard. Although respondent had a legal obligation to provide the best physical barrier it could, it chose to use two spotters. (Tr. 250) These

employees, Brian Snape and Pamela Witkum, testified at the hearing. I found them to be diligent, highly professional, safety conscious individuals who took their safety responsibilities seriously. Their efforts substantially reduced the likelihood that an accident would occur and demonstrates that the gravity of the violation was low.

The purpose of assessing higher penalties for repeat violations is to induce future compliance from a recalcitrant employer. Here, there was nothing recalcitrant about respondent, who made a serious, albeit legally insufficient, effort to protect its employees. Indeed, their efforts to protect employees from the crane demonstrated a concern for employee safety and a good-faith attitude toward their obligations under the Act. The Secretary proposed a penalty of $5000 for the violation. Under the circumstances here, I find the penalty to be excessive. Considering the low gravity of the violation and respondent's good-faith attitude toward employee safety I find that a penalty of $2500 is appropriate.

ORDER

Based upon the foregoing findings of fact and conclusions of law it is **ORDERED** that the citation for a repeated violation of 29 C.F.R. §1926.550(a)(9) is AFFIRMED and a penalty of $2500 is ASSESSED.

SO ORDERED

/s/
John H. Schumacher
Administrative Law Judge

Dated: September 8, 2009
Washington, D.C.