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

SECRETARY OF LABOR, Complainant, v. A CRANE RENTAL LLC, Respondent.	OSHRC Docket No. 19-1667

REMAND ORDER

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: January 10, 2023

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