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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TNT CRANE & RIGGING, INC.<br><br>Respondent. | OSHRC Docket No. 16-1587 |

ON BRIEFS:

Brian A. Broecker, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Elena S. Goldstein, Deputy Solicitor; Kate O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Pamela D. Williams, Esq.; Travis W. Vance, Esq.; Fisher & Phillips LLP, Charlotte, NC and Houston, TX
For the Respondent

**DECISION**

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

TNT Crane & Rigging, Inc. is a crane service provider based in Houston, Texas. In May of 2016, a TNT employee suffered serious injuries when part of a crane being disassembled by a TNT crew in Georgetown, Texas, contacted a power line. The Occupational Safety and Health Administration conducted an inspection and issued TNT a serious citation alleging two violations

of the Cranes and Derricks in Construction Standard, 29 C.F.R. § 1926.1400, with a proposed penalty of $24,942.[1]

Administrative Law Judge Brian A. Duncan vacated both citation items on the grounds that the cited provisions did not apply to the disassembly work being performed by TNT's crew. On review, the Commission reversed the judge's decision, finding that the cited standards were applicable, and remanded for the judge to address the remaining issues in the case. *TNT Crane & Rigging, Inc.*, No. 16-1587, 2020 WL 1657789 (OSHRC March 27, 2020). On remand, the judge again vacated both citation items, finding that the Secretary failed to establish TNT had knowledge of the alleged violative conditions. For the reasons discussed below, we reverse the judge and affirm both citation items.

## BACKGROUND

On the day of the incident, two TNT employees, a spotter/rigger (SR1) and a crane operator, had finished a week-long project installing new antennas on a communications tower. The employees used a Grove GMK all-terrain 275-ton mobile crane to perform this work. With the project complete, their next task was to disassemble the crane for transport.

To assist with the crane's disassembly, TNT sent two additional employees—a second spotter/rigger (SR2) and a driver/rigger—to the worksite. All four employees met to discuss a plan for "breaking the crane down" and loading it onto a semi-truck trailer. The crew's responsibilities under the plan were as follows: the crane operator would operate the crane; SR2 would spot for the crane operator and hold the load line; the driver/rigger would drive the truck that the boom would lay on; and SR1 would spot for the driver/rigger while guiding the truck forward. During the disassembly process, the crane operator had to lower the boom onto the trailer's flatbed with the assistance of the other crew members, so that the boom's extensions could be removed. When it came time to lower the boom, SR2 held a metal connector, known as a "beckett," at the end of the load line so that the line would stay taut during the boom's descent.

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[1] Item 1 alleges a violation of 29 C.F.R. § 1926.1407(b)(3) for exposing employees to the hazard of electrical shock by failing to use at least one of the measures required to prevent encroachment or contact with the power lines while disassembling the crane. Item 2 alleges a violation of 29 C.F.R. § 1926.1407(d) for placing "[p]art of a crane/derrick, load line, or load (including rigging and lifting accessories) whether partially or fully assembled, . . . closer than the minimum approach distance under Table A (see 1926.1408) to a power line."

As the crane operator lowered the boom, the load line held by SR2 contacted a 14,400-volt power line, electrocuting SR2. SR2 was hospitalized with severe burns and other serious injuries.

## I. DISCUSSION

To prove a violation, "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Here, the Secretary alleges violations of § 1926.1407(b)(3) (Item 1) and § 1926.1407(d) (Item 2), two provisions located in a section of the construction crane standard entitled "Power line safety (up to 350kV) – assembly and disassembly."

As noted, we have already determined that these provisions apply to the work at issue. *TNT Crane*, No. 16-1587, at 11, 2020 WL 1657789, at *8. On remand, the judge addressed the remaining elements of the Secretary's burden of proof and vacated both citation items. The judge found that the Secretary established both noncompliance and exposure, but failed to establish that TNT had knowledge of the violative conditions. The only issue on review is whether the judge erred in finding that knowledge was not proven.

### A. Knowledge

To establish knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). It is well established under Commission precedent that the knowledge of a supervisor can be imputed to the employer. *See, e.g., Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (supervisor's knowledge is imputable to employer), *aff'd*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (applying agency law's long-standing principle that corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

Here, the judge found that the crane operator was TNT's supervisor at the Georgetown worksite and that the alleged violative conditions stemmed solely from his misconduct because he created the disassembly plan and operated the crane that contacted the power line.[2] As a result,

[2] TNT argues on review, as it did before the judge, that the crane operator was not a supervisor, because he lacked the power to hire, fire, or discipline employees. TNT, however, also concedes

the judge concluded that under the Fifth Circuit's decision in *W. G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), the Secretary was required to establish that the supervisor's misconduct was foreseeable before the supervisor's knowledge of his own misconduct could be imputed to TNT.[3] In *Yates*, the court held that "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Yates*, 459 F.3d at 608-09 (emphasis in original). According to the judge, the Secretary failed to show that TNT's safety policies, training program, or audit and disciplinary program were deficient, and therefore the supervisor's misconduct was not foreseeable.

On review, the Secretary argues that the judge erred in applying *Yates* because all of the crew members were engaged in the violative conduct at issue under each citation item and therefore it is the supervisor's actual knowledge of the entire crew's misconduct that is imputed to TNT. In response, TNT defends the judge's ruling and claims that even if the entire crew was found to be engaged in the violative conduct, "it was [the supervisor's] misconduct . . . which undergirded his crew's actions."

We agree with the Secretary. As to Item 1, there is no dispute that the TNT crew disassembled the crane without a required protective measure in place to prevent encroachment. Contrary to the judge's finding, the violative conduct occurred once the crew collectively began their disassembly work without such a measure in place—it was not the supervisor's plan for the work (which was in fact developed by the crew as a whole) or his operation of the crane. Indeed, the cited standard requires that the encroachment prevention measure be in place *before* disassembly begins.

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that this issue is not before the Commission. We note that the record shows the crane operator, who himself testified that he was the onsite supervisor, was responsible for ensuring worksite safety and assessing the crew's understanding of work plans and practices.

[3] The Fifth Circuit is a relevant circuit here, as both the worksite and TNT's headquarters are in Texas, which is within the geographical area of the Fifth Circuit. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

Likewise, Item 2 involves the crew's collective failure to maintain the required Table A clearance during the disassembly process. The driver/rigger testified that he had to "back the trailer right up to the back of the crane" but made clear that maintaining the required clearance was a team effort: "[A]s the boom came down, *we* were going to drive the truck forward and lay the boom down on top of the trailer so *we* could work directly off the trailer." And in positioning the truck, the driver/rigger testified that SR1 assisted by serving as spotter because "*we* [were] literally . . . driving at the power line with a trailer behind *us*."[4] Thus, contrary to the judge's finding, the violative conduct was not limited to the supervisor's operation of the crane.

In short, both alleged violations rest on the work activities the entire crew collectively engaged in on the day of the incident. Indeed, the crew conducted a job safety analysis (JSA) together and then met as a group to discuss the disassembly plan before starting their work, the execution of which required all of them to participate. During the JSA, two of the crew members expressed concerns with the plan, but after being reassured by the other two crew members that the crane had been assembled without incident in the same location, they agreed to proceed.

Because we find that TNT's entire crew collectively engaged in the violative conduct alleged in each citation item, the supervisor's knowledge of the other crew members' conduct is imputed to TNT without a showing of foreseeability. This is consistent not only with Commission precedent but also that of the Fifth Circuit. In *Angel Bros. Enter., Ltd. v. U.S. Dep't of Labor*, 18 F.4th 827, 832 (5th Cir. 2021), the Fifth Circuit recently rejected the very same argument TNT makes here about its supervisor's role in the crew's violative conduct and affirmed the Commission's decision to decline extending *Yates* to a situation involving a foreman who directed a subordinate to work in an unprotected excavation:

> Angel Brothers' argument—that a supervisor's knowledge cannot be imputed to the employer when the supervisor authorizes, or takes some other active role in, a

[4] We note that the cited provision only permits "a dedicated spotter who is in continuous contact with the equipment operator." 29 C.F.R. § 1926.1407(b)(3)(i). Here, the record shows that unlike SR1, SR2 did not qualify as a "dedicated spotter" under the crane standard's definition of that term because his sole responsibility was not to "watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories)"—he was also responsible for maintaining tension on the load line. 29 C.F.R. § 1926.1401 ("To be considered a dedicated spotter, the requirements of § 1926.1428 (Signal person qualifications) must be met and [the spotter's] sole responsibility is to watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum approach distance is not breached.").

> subordinate's safety violation—finds no support in *Yates*, agency principles, or in other caselaw. Ordinary imputation principles thus apply. [The] [f]oreman[]'s knowledge of the crew member's safety violation is attributable to Angel Brothers.

*Angel Bros. Enter., Ltd.*, No. 16-0940, 2020 WL 4514841 (OSHRC July 28, 2020). As the court explained, whether a supervisor engages in misconduct alongside a subordinate or authorizes a subordinate to engage in misconduct, "both of those scenarios involve a subordinate's violation of safety rules so 'it is reasonable to charge the employer with the supervisor's knowledge' of the subordinate's misconduct." *Angel Bros.*, 18 F.4th at 833 (citing *Yates*, 459 F.3d at 607 (citation omitted)). Accordingly, under both Fifth Circuit and Commission precedent, the supervisor's actual knowledge of the crew's violative conduct is imputable to TNT without a foreseeability showing. We therefore conclude the Secretary has met his burden of proving knowledge and thus all the necessary elements of both violations.

**A. Unpreventable Employee Misconduct (UEM)**

As it did before the judge, TNT argues on review that both violations were the result of unpreventable employee misconduct. To establish this affirmative defense, an employer is required to show that it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered."[5] *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). For the following reasons, we conclude that TNT has failed to establish the affirmative defense.[6]

*Item 1*

To prove a UEM defense, the employer must establish it had a work rule that effectively implemented the requirements of the standard. *Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No.

[5] The judge did not reach the UEM defense since he vacated both violations. Nonetheless, his foreseeability analysis, as well as the parties' discussions of foreseeability on review, closely tracks an analysis of the UEM defense, though the burden of proof falls on TNT, not the Secretary. *See Calpine Corp.*, No. 11-1734, 2018 WL 1778958, at *9 (OSHRC Apr. 6, 2018) (employer carries evidentiary burden for UEM affirmative defense), *aff'd*, 744 F. App'x 879 (5th Cir. 2019) (unpublished).

[6] On review, the Secretary claims that the company's UEM defense must fail because the entire crew was engaged in the misconduct and TNT only alleged the defense as to its supervisor. We disagree with the Secretary's characterization of TNT's argument. Although the company focuses on its supervisor's operation of the crane as the misconduct at issue, it does not limit its defense to his conduct alone.

91-1613, 1994); *see also Mosser Constr. Co*., 15 BNA OSHC 1408, 1415 (No. 89–1027, 1991) (work rule inadequate because it was not "clear enough or broad enough to eliminate employee exposure" to the specific violative conditions); *Archer-W. Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) (work rule inadequate because "even if the employee had complied," it would not "eliminate the [cited] hazard"), *aff'd*, 978 F.3d 744 (D.C. Cir. 1992).

We find that TNT failed to establish it had work rules that sufficiently addressed the requirements of § 1926.1407(b)(3).[7] In Section 13 ("Cranes") of TNT's safety policy, a work rule addressing "Electrical Hazards and Warnings (1926.1411)"[8] states:

> **For lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet.**
>
> . . .
>
> If it is determined that any part of the equipment, load line or load could get closer than 20 feet to a power line then at least one of the following measures must be taken: 1) Ensure the power lines have been de-energized and visibly grounded, 2) Ensure no part of the equipment, load line or load gets closer than 20 feet to the power line, or 3) Determine the line's voltage and minimum approach distance permitted.

(Emphasis in original). Although this rule's requirements share some similarities with § 1926.1407, notably absent are the specific requirements of the cited provision, § 1926.1407(b)(3), which expressly mandate that an employer implement an encroachment prevention measure prior to crane disassembly to ensure that the 20-foot distance from the power line is maintained when any part of the crane or equipment could potentially breach that distance.

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[7] Under paragraph (3) of § 1926.1407(b)—titled "*Preventing encroachment/electrocution*"—the employer must implement one of five "additional measures" and is required to select a "measure . . . from th[e] list [that is] effective in preventing encroachment." 29 C.F.R. § 1926.1407(b)(3). The five measures are: (1) use of a dedicated spotter who is in continuous contact with the equipment operator (with four listed requirements for the spotter); (2) a proximity alarm set to give the operator sufficient warning to prevent encroachment; (3) a device that automatically warns the operator when to stop movement, such as a range control warning device, that is set to give the operator sufficient warning to prevent encroachment; (4) a device that automatically limits range of movement, set to prevent encroachment; and (5) an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings. *Id.* § 1926.1407(b)(3)(i)-(v).

[8] As the Secretary points out, TNT's rule also references a different OSHA provision, which by its terms, governs "equipment traveling under or near a power line on a construction site with no load." 29 C.F.R. § 1926.1411(a). For both Items 1 and 2, however, we rest our analysis of TNT's UEM defense primarily on the substance of the company's rules and how they compare in that regard to the cited provisions.

Contrary to TNT's work rule, the cited standard does not permit reliance on an employer's general plan or intent to maintain the 20-foot distance without an affirmative, specific measure in place before starting disassembly to prevent encroachment.

Section 13 of TNT's safety policy mentions only one of the cited provision's numerous encroachment prevention measures, stating that "[i]f necessary a spotter will be designated to monitor the approach distance and alert [the] Operator if that distance becomes compromised." But as the Secretary points out, nowhere does the policy identify when a spotter is "necessary" or otherwise required. No other prevention measure required by the standard is mentioned in the policy. Under these circumstances, we find that TNT's work rule does not sufficiently address the requirements of § 1926.1407(b)(3) and therefore, the company has not proven the first element of its UEM defense. *See Lukens Steel Co.*, 10 BNA OSHC 1115, 1125 n.25 (No. 76-1053, 1981) (employer cannot prove UEM defense where it lacked specific work rule governing cited conduct). Accordingly, we conclude that the defense has not been established for Item 1.[9]

*Item 2*

We find that TNT has shown it had work rules to address the requirements of § 1926.1407(d)[10] and adequately communicated those rules to its employees, but failed to prove it sufficiently monitored for compliance with those rules and effectively enforced them when violations were discovered. Regarding the company's work rules, Section 23 ("Electrical Safety") of its safety policy, under the heading of "Working Near Power Lines (unqualified employees only)," states: "**For lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet**." (Emphasis in original). Section 23 also provides: "If it is determined that any part of the equipment, load line or load could get closer than 20 feet to a

[9] We note that even if TNT had work rules sufficient to address the provision cited under Item 1, its UEM defense would nonetheless fail for the same reasons explained below with respect to Item 2—TNT has not proven that it adequately monitored for safety violations and effectively enforced its rules.

[10] Section 1926.1407(d) requires:

> *Assembly/disassembly inside Table A clearance prohibited.* No part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, is allowed closer than the minimum approach distance under Table A (*see* § 1926.1408) to a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

power line then at least one of the following measures must be taken: Ensure no part of the equipment, load line or load gets closer than 20 feet to the power line . . . ." And Section 23 contains the relevant Table A referenced in § 1926.1407 that sets forth the minimum clearance distance for varying voltage ranges. Further, Section 1 ("General Safety") of TNT's policy, under the heading of "Working Around Cranes and Other Heavy Equipment," states: "All equipment, cranes and booms are to be kept a minimum of at least ten (10) feet from energized power lines." In short, these work rules set forth the minimum approach distance (MAD) that cranes and related equipment must maintain from power lines.[11] Therefore, we find that TNT had adequate work rules to address the cited standard's requirements.[12] *Cf. Calpine Corp.*, No. 11-1734, 2018 WL 1778958, at *8 (OSHRC Apr. 6, 2018) (work rule requiring use of personal fall protection at heights greater than four feet "is not equivalent" to cited standard, which requires either railings or an attendant at a temporary floor opening on the platform) (citation omitted), *aff'd*, 774 F. App'x 879, 884 (5th Cir. 2019) (unpublished).

In addition, we find that TNT adequately communicated these work rules to its employees. According to testimony from TNT's vice president of health, safety, and environment (VP), the company's safety program, which includes information pertaining to power line safety, is communicated to all employees engaged in field operations. For new hires, TNT uses a safety orientation script that covers power line safety, including maintaining an appropriate distance between a crane and power lines.[13] At orientation, employees are also provided with the

[11] Given our reliance on Section 23, as well as Section 1, of TNT's safety policy as the basis for our finding, we need not address the Secretary's contention that TNT cannot also rely on its work rule in Section 13 because that rule ("All equipment is to be operated so the minimum approach distance is maintained from exposed energized lines and equipment.") is not specific to crane disassembly. We note, however, that Section 13 contains the same language found in Section 23, as discussed above, pertaining to the minimum clearance distance, as well as Table A.

[12] The Secretary argues that TNT's work rules are deficient because they provide "no guidance to employees on *how* to assemble or disassemble cranes in a way that would ensure that they did not inadvertently breach the MAD[.]" But § 1926.1407(d) contains no such guidance or instruction, requiring only that the MAD be maintained.

[13] The safety orientation script states:

> Cranes, derricks, and winch trucks must be operated with extreme caution when near power lines. Assume all wires are hot. All power lines must be flagged or barricaded where there is a danger of contact by mobile equipment. Lines that can be reached accidentally must be de-energized or otherwise made safe before any work is done. Never operate equipment closer than 10 feet to a power line of 220

company's safety manuals. Both a TNT branch manager and the driver/rigger at the Georgetown worksite testified that TNT provides employees with specific training on power line safety.[14]

Furthermore, the company's VP explained that TNT's branch divisions hold regular safety meetings, with the Marshall and San Antonio branches that the crew came from meeting three times a week, on varying topics including power line safety and clearance distances. Work crews conduct JSAs before starting a job to identify specific hazards on the worksite, as well as steps to mitigate or eliminate those hazards, just as the crew did here for the Georgetown project. As for the company's crane operators, TNT's safety manager testified that all crane operators receive training related to power line safety during their on-boarding process. Therefore, we find that TNT has shown it sufficiently trained its employees on power line safety. *Compare PAR Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004) ("[E]mployers cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for specific instructions."), *with Floyd S. Pike Elec. Contractor, Inc.*, 6 BNA OSHC 1675, 1678 (No. 3069, 1978) (finding adequate communication where the employer "issue[d] an employee manual to each of its employees," and the foreman attended a safety meeting two weeks before the violations).

In terms of monitoring for safety compliance, TNT admits that it did not audit or inspect the Georgetown worksite, but claims that the judge, in analyzing foreseeability as part of the Secretary's burden to prove knowledge, correctly found this was insignificant considering evidence showing that the company "deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites." As evidence of its monitoring efforts, TNT points to its inspection forms, which include a safety checklist with one item addressing power lines, from four safety audits it conducted in May 2016 at other worksites.

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> volts or more. Voltages greater than 50,000 volts require more distance. No equipment shall be operated over the top of power lines.

[14] In rebuttal, the Secretary points to the supervisor's testimony that TNT never trained him on power line safety as evidence that TNT failed to adequately communicate its work rules to employees. But the supervisor, who had twenty-three years of experience as a crane operator, later acknowledged that he had received "training relating to working around power lines" from the Houston Area Safety Council during his employment with TNT and had worked safely around power lines "many times" before the incident. And when asked if he knew it was TNT's policy to stay at least 20 feet away from a power line, he confirmed that he was aware of that policy. Therefore, we find the Secretary has failed to rebut TNT's evidence on training.

In response, the Secretary argues that TNT failed to establish it conducted audits with sufficient regularity to reasonably ensure compliance with power line safety rules.

We agree with the Secretary. According to TNT's VP, it is the company's practice not to send a supervisor to remote worksite locations, like the one in Georgetown, because its employees are hired and trained to work with "limited supervision," though the VP clarified that "doesn't mean absent from supervision." Further, the VP could not identify how frequently worksite audits occurred, particularly how often remote worksites were inspected, stating simply "I can't tell you the number at this time." Likewise, the Georgetown driver/rigger testified that field safety audits occur "all the time," but he never identified the frequency or location of such audits. While the inspection forms TNT submitted into evidence show that the company conducted at least four audits over the course of a month at other worksites, the record lacks any context for whether that in fact reflects the frequency with which monitoring was performed. Also, none of the four audits involved work near overhead power lines and the record does not show whether any of those audits occurred at a remote worksite like the one at issue here. *See Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000) (employer had a safety program and conducted worksite visits, but audits were inadequate where there was no evidence that either the program or the worksite visits pertained to enforcing the cited provision), *aff'd*, 277 F. 3d 1374 (5th Cir. 2001).

Finally, absent sufficient evidence to evaluate the frequency of the company's audits, we disagree with the judge that TNT's failure to audit its Georgetown worksite was reasonable. The installation project was scheduled to take a few days but had stretched out to a week due to rainy weather, which made the crew's work, including the crane disassembly, more challenging. It is troubling that none of TNT's safety professionals visited the worksite to inspect or verify that the crew was working safely, particularly given TNT's claim that neither the crane operator nor any other onsite employee served as a supervisor at the worksite.

In sum, TNT has failed to provide the evidence necessary to evaluate the adequacy of its auditing program, such as the frequency with which audits occurred at each worksite and whether remote worksites, like the one at issue here, were ever audited at all. Therefore, we find that TNT failed to show it took adequate steps to discover violations of its work rules. *See Manganas Painting Co.*, 21 BNA OSHC at 1998 (finding monitoring inadequate where supervisors "could have seen" employees "work[ing] without respiratory protection in plain view"); *see also Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) ("Establishing adequate procedures

for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards . . . . It is not enough that an employer has developed an exemplary safety program on paper," because "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program.") (citation omitted).

Finally, as to enforcement, TNT submitted into evidence its written progressive discipline policy and eight disciplinary actions it took in response to violations of company rules, including its termination of the supervisor at the Georgetown worksite. The Secretary claims that none of these disciplinary actions pertain to crane safety or the work rules TNT claims applied here, but we find the supervisor's termination is clearly one such action. *See Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline."), *aff'd*, 106 F.3d 401 (6th Cir. 1997); *cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (evidence of prior discipline for fall protection violations established effective enforcement despite employer's decision to forego discipline for fall protection violations at issue in citation). TNT administered the remaining disciplinary actions in the record in 2015 and early 2016 to other employees not at issue here, and none of them relate to power line safety.

Thus, other than the disciplinary action taken against the supervisor, TNT has not shown that it ever previously disciplined an employee for violating its power line safety rules. As a large crane-industry employer with more than 250 employees and numerous offices, we find it highly unlikely that no TNT employee had ever previously violated these rules. *See Angel Bros.*, 18 F.4th at 832 (rejecting "statistically implausible claim that although OSHA found violations during 80% of its five inspections, the company committed no safety violations the other 6,000 or so times it performed excavations"). Moreover, the fact that TNT's supervisor, as well as the rest of the crew, were collectively involved in the violative conduct is evidence of lax enforcement and attention to crane safety near power lines. *See Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (enforcement ineffective where all employees were involved in violation, despite evidence of post-inspection suspension and eventual termination); *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) ("Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Floyd S. Pike Elec.*

*Contractor, Inc. v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978) ("[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax."). Therefore, we find that TNT failed to establish it enforced its work rules effectively when violations were discovered. *See Cooper/T. Smith Corp. d/b/a Blakeley Boatworks, Inc.*, No. 16-1533, 2020 WL 1692541, at *2-3 (OSHRC Apr. 1, 2020) (finding ineffective enforcement where evidence was lacking as to whether employer had sufficiently enforced its progressive disciplinary policy, despite employer's submission of ten disciplinary records not relevant to the cited conduct). For all these reasons, we reject TNT's UEM defense for both Item 1 and Item 2.

Accordingly, we reverse the judge, affirm Serious Citation 1, Item 1 and Item 2, and assess the $24,942 total proposed penalty.[15]

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: June 2, 2022

[15] The Secretary proposed a penalty of $12,471 for each citation item and characterized both items as serious. *See* 29 U.S.C. § 666(k) (violation characterized as serious when there is "substantial probability that death or serious physical harm could result" from the hazardous condition at issue). TNT does not dispute the characterization or the proposed penalty amounts on review. Therefore, we affirm both items as serious and assess the total proposed penalty. *See*, *e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where neither were in dispute).

**UNITED STATES OF AMERICA**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TNT CRANE & RIGGING, INC.,<br><br>Respondent. | DOCKET NO. 16-1587 |

Appearances:

Christopher Lopez-Loftis, Esq. U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Collin G. Warren, Esq. & Travis W. Vance, Esq., Fisher & Phillips, LLP, Houston, Texas
For Respondent[16]

Before: Administrative Law Judge Brian A. Duncan

## DECISION AND ORDER ON REMAND

### Procedural History

This matter is before the undersigned on remand from the Occupational Safety and Health Review Commission. This Court originally determined, on September 14, 2018, that Complainant failed to prove the cited regulations in the above-captioned matter applied to the work performed by Respondent's crew at the time of a crane accident which seriously injured an employee. On March 27, 2020, the Commission reversed and determined the cited regulations did apply to the work being performed. In light of the Commission's decision, this Court must now determine whether Complainant proved the remaining *prima facie* elements of Respondent's alleged

[16]. Mr. Warren, who appeared at trial, apparently did not participate in the supplemental post-trial brief, which was signed by Mr. Vance and Pamela D. Williams from Fisher & Phillips' Houston Office. Since Mr. Warren participated in the trial, his name will remain in the caption, but the Court thought it appropriate to note the change.

violations of 29 C.F.R. § 1926.1407(b)(3) and 29 C.F.R. § 1926.1407(d). Ultimately, as discussed below, this Court finds Complainant failed to prove a violation of the cited standards because it did not establish that the violative conduct of the crane operator was foreseeable.

On May 15, 2016, one of Respondent's employees was seriously injured while holding onto a crane hoist cable as the crane operator swung it into an adjacent power line. The injury was reported to Complainant, who dispatched Compliance Safety and Health Officer ("CSHO") Darren Beck to conduct an inspection. Based on what he discovered, CSHO Beck recommended, and Complainant issued to Respondent, a *Citation and Notification of Penalty* ("Citation"), which alleged two serious violations of the regulations found at 29 C.F.R. § 1926.1407. Complainant proposed a total penalty of $24,942 for the violations. Respondent timely contested the Citation, which brought the matter before the Commission.

This Court did not conduct any further evidentiary hearings upon remand. Rather, the Court continues to rely on the testimony and evidence received into the record during the trial on December 20–21, 2017. However, on July 10, 2020, both parties submitted supplemental post-trial briefs for the Court's consideration.

## Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 18). The parties also stipulated that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 18–19). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

## Factual Background

On May 15, 2016, Respondent's employees Jeff Benson and Mark Ryan were completing a week-long project to install new antennas on top of a communications tower in Georgetown, Texas. (Tr. 58, 313, 529). Mr. Benson, Respondent's Crane Operator, was operating a Grove GMK 5275 all-terrain 275-ton mobile crane to perform the work. (Tr. 320; Exs. C-16, C-17). About 9:00 a.m. that day, employees J.L. and Freddie Ray, who were detailed from Respondent's San Antonio office, arrived at the worksite to assist in disassembling the mobile crane once the job was completed. (Tr. 202–203, 254).

Once finished, the crew needed to dismantle the crane and re-load it back on the semi-truck trailer used to transport it. (Tr. 96, 254). Before starting that process, Benson created a job safety analysis (JSA) and discussed with the crew his plan for lowering and disassembling the boom of the crane, including the need to avoid the nearby power lines. (Tr. 203–206; Ex. R-4). Though J.L. and Mr. Ray expressed reservations about the plan, Mr. Benson informed them he had assembled the crane in the exact location where he proposed disassembling the crane, which included a buffer zone of 20 feet from the power line.[17] (Tr. 214). Based on the plan Benson created, and his representation that the plan was safe, J.L. and Mr. Ray agreed. (Tr. 216).

On this particular crane model, the operator's cabin sits on a turntable on the truck, which allows it to rotate left and right. (Tr. 207, 320). Affixed to the turntable is a telescoping boom, which extends and retracts by way of a hydraulic cylinder. (Tr. 207; Ex. C-17). The disassembly plan called for Mr. Benson to first reposition the crane near the semi-truck trailer; then to lower the boom while J.L. removed the block from the becket on the end of the hoist line. (Tr. 88). The

[17]. The power line voltage was 14,400 volts, requiring a minimum encroachment distance of 10 feet per Table A at 29 C.F.R. §1926.1408. Respondent's employees testified that they tried to implement a larger buffer distance. (Tr. 259).

block is the end mechanism on a crane, where rigging is attached to pick up whatever items the crane is lifting. (Tr. 199, 328; Ex. C-16 at TNT 102, C-17 at DOL 187). The becket is a metal connection device at the end of the hoist line, where the block is connected. (Tr. 209, 328). Then, while J.L. physically held the becket to keep the hoist line taught, Benson would reel the line onto the coil.[18] (Tr. 209, 211, 315). Mr. Ray worked with Mr. Ryan to position the flatbed truck for Benson to lay down the boom. (Tr. 210–11).

After the block was removed and the hoist line retracted, the *plan* was to further lower the boom, use a separate helper crane to begin taking off sections of the jib, and place them on the trailer. (Tr. 227, 262, 315, 486-487, 553; Ex. R-4). However, despite this disassembly plan, the crew never progressed past the removal of the block and the beginning of the retraction of the hoist line. As Benson was lowering the boom and retracting the hoist line, he contacted a nearby power line, sending 14,000 volts of electricity through the hoist line to J.L. (Tr. 108, 211–212). Mr. Ray, who was in the cab of the semi-truck, started receiving confusing signals from Mr. Ryan and exited the cab. (Tr. 211–212). As he got out of the truck to inquire, Mr. Ray saw a flash at the base of the crane, ran over to the other side, and found J.L., who was laying on the ground. (Tr. 211–212). As he ran over to assist J.L., Mr. Ray noticed the tip of the boom was over the power line. (Tr. 213).

After emergency responders arrived and had the original crew move the crane and other equipment for access purposes, the entire crew was sent home. (Tr. 268). Respondent had a different crew come to the site a day later to disassemble the crane and remove it from the property. (Tr. 381). As a result of the accident, J.L. experienced a severe electrical shock, serious injuries,

[18]. Mr. Ray testified that removing the block was an unnecessary step in the process that actually increased the likelihood of an accident. The block in question weighed nearly 500 pounds, which would have maintained adequate tension on the hoist line while it was retracted, eliminating the need for J.L. to hold the line. (Tr. 231–233).

and hospitalization. (Tr. 213, 379–80). Benson was not injured. Respondent reported the accident and employee hospitalization to OSHA within 24 hours, which prompted the investigation.

By the time CSHO Beck arrived at the worksite, the equipment and parties involved in the incident were no longer there. (Tr. 57). He also testified that he was unable to enter the locked property. (Tr. 138). Therefore, instead of performing an inspection at the location of the accident, CSHO Beck traveled to Respondent's Houston, TX office, to interview witnesses; and to Respondent's Marshall, TX yard, where the crane was being stored. (Tr. 57).

In addition to interview statements, CSHO Beck took photos of a not-to-scale model of the worksite prepared by Mr. Ray and a member of Respondent's safety team, and took photographs of the crane as it set in the Marshall, TX yard. (Tr. 95, 243-44; Ex. C-21). None of the photographs entered into the record accurately reflect the condition, configuration, or position of the crane at the time of the accident. (Exs. C-16, C-17). Based on his investigation, CSHO Beck concluded that Respondent failed to comply with two regulatory requirements for crane disassembly, and OSHA issued the two violations at issue in this case.

## Discussion

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

The Commission determined that the regulations cited in Citation 1, Items 1 and 2, applied, so this decision only addresses the remaining elements of Complainant's *prima facie* case. *See TNT Crane & Rigging*, 2020 WL 1657789 (No. 16-1587, 2020).

**Citation 1, Item 1**

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.1407(b)(3): Additional measures were not in place to prevent encroachment of power lines.
>
> On or about May 15, 2016, the employer did not use at least one of the measures required to prevent encroachment or contact with the power lines while disassembling the crane, exposed employees to the hazard of electrical shock.
>
> Note: The additional measures are:
>
> i) Use a dedicated spotter who is in continuous contact with the equipment operator.
> ii) A proximity alarm set to give the operator sufficient warning to prevent encroachment.
> iii) A device that automatically warns the operator when to stop movement, such as a range control warning device.
> iv) A device that automatically limits range of movement, set to prevent encroachment.
> v) An elevated warning line, barricade, line of signs, in view of the operator, equipped with flags or similar high-visibility markings.

*See* Citation and Notification of Penalty at 6.

The Standard Was Violated

Complainant contends Respondent violated 1926.1407(b)(3) in three respects: (1) as evidenced by the accident, the measures employed by Respondent to prevent encroachment were ineffective; (2) J.L. was not a *dedicated* spotter as defined by the regulations; and (3) Respondent failed to employ any "additional measures". In response, Respondent argues it was not required to employ additional measures because it determined no part of the crane would come within 20 feet of the power lines, in compliance with 1926.1407(a). The Court finds Respondent

misconstrued its obligation under 1926.1407(a), as well as its supplemental/complementary obligation under 1926.1407(b).

According to 1926.1407(a), "Before assembling or disassembling equipment, the employer must determine if any part of the equipment, load line, or load (including rigging and lifting accessories) *could* get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process." 29 C.F.R. § 1926.1407(a) (emphasis added). If such a determination is made, Respondent must implement the requirements of Option 1, 2, or 3 of the section. *Id.* Option 1 was not at issue here because the line remained energized, so Respondent was bound by Options 2 or 3. *Id.* As such, Respondent was also bound by the requirements of paragraph (b), which was cited by Complainant. See *id.* §§ 1926.1407(a)(2), (3).

Respondent argues that no part of the crane would have come within 20 feet of the power line insofar as its plan was followed. The problem for Respondent, however, has nothing to do with the adequacy of its plan. According to the plain language of the standard, the employer must determine if any part of the equipment *could* get closer than 20 feet; not whether the employer has a plan to prevent such encroachment. Indeed, the whole point of paragraph (b) is to employ administrative or engineering controls that will prevent accidental encroachment and human error. *See id.* § 1926.1407(b). If there was no possibility of contact, there would be no need for a spotter, electronic warning system, range limiter, or barricade. *Id.*

The preamble to the final rule illustrates the contours of a proper assessment, which requires the employer to consider "the area under and around the boom's path as it is lowered" and "other areas radiating from the initial area, both horizontally and vertically, that will be occupied as the equipment components are added, removed, raised, and lowered during the

assembly/disassembly process." Cranes and Derricks in Construction, 75 Fed. Reg. 47906, 47946 (August 9, 2010). The following example provides further clarity:

> As stated in the preamble to the proposed rule, "direction" includes the direction that, for example, the boom will move as it rises into the air after the boom has been assembled on the ground. For example, the boom, when fully assembled on the ground, may be more than 20 feet from a power line. However, when raising it from the ground, it may get closer than 20 feet. Accordingly, under this language, the "direction" that the boom will travel as it is raised must also be evaluated for proximity to power lines.

*Id.* Based on this understanding, the Court finds Respondent's argument incorrectly interprets 1926.1407(a), concluding that the secondary protections in 1926.1407(b) did not apply. It was clearly *possible* for equipment to approach/contact the power line within the 20-foot distance boundary, because that actually occurred. In fact, even without the unfortunate accident, the record clearly established that the crane equipment could have easily come into contact with the power line. Therefore, Respondent's argument that the secondary/complementary protections of 1926.1407(b) were not applicable is rejected.

Despite Respondent's current argument on that point, the record establishes that Benson and his crew actually considered secondary precautions to ensure encroachment within 20 feet would not occur. Specifically, Mr. Ray and Mr. Benson both testified J.L. was serving as a spotter. (Tr. 340, 254). Considering the power line's proximity to the crane, both J.L. and Mr. Ray expressed reservations about the plan to disassemble the crane in the location suggested by Mr. Benson. (Tr. 216). Thus, at the very least, the crew *acted* as if encroachment *could* happen. This is also supported by Respondent's expert report, which indicated potential minimum clearances of 14.6- to 16-feet, depending on where the jib was set on the trailer. (Ex. R-36 at TNT000409). Thus, the Court finds Respondent was required to comply with 1926.1407(b)(3).

In order to comply with 1926.1407(b)(3), Respondent needed to implement one of the five additional options listed under the standard (and reproduced above). The only option mentioned at

trial was (i), which requires a dedicated spotter.[19] Any argument that J.L., who was holding the becket, was the dedicated spotter for the crane must fail. A dedicated spotter's "sole responsibility is to watch the separation between the power line and the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum approach distance is not breached." 29 C.F.R. § 1926.1401. J.L. did not have the sole responsibility of watching equipment; he was also responsible for maintaining tension on the hoist line. This additional responsibility interfered with his ability to communicate with the operator, as evidenced by Ray's testimony that spotters/riggers use hand signals to communicate and Benson's testimony that he could not hear J.L. yelling at him to "swing" the boom away from the power line. (Tr. 200, 331). In fact, despite Ray's and Benson's post-accident assertions, J.L. and Mr. Ryan told CSHO Beck there was no dedicated spotter at the time of the accident. (C-20 at DOL 00204, 00207).

Based on the foregoing, the Court finds Respondent violated the terms of the standard because it failed to employ additional measures when the crane and its associated equipment could get within 20 feet of an energized power line.

**Citation 1, Item 2**

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1926.1407(d): Assembly/disassembly inside Table A clearance prohibited. Part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, was closer than the minimum approach distance under Table A (see 1926.1408) to a power line.
>
> On or about May 15, 2016, employees attempted to disassemble the 275-ton crane to place the boom on a flatbed truck parked below a 14,400 volt energized power

[19]. Benson testified the crew did not employ any of the other options. (Tr. 332).

line. The load line came in contact with the power line, exposing employees to the hazards of electrical shock.

Note: Disassembling cranes under power lines is prohibited under 1926.1407(c) of this section.

*See* Citation and Notification of Penalty at 7.

The Standard Was Violated

There is no serious dispute about whether this standard was violated.[20] The requirements of 1926.1407(d) are straightforward: no part of a crane, load line, or load is allowed closer than the minimum approach distance under Table A unless the employer has confirmed the power line has been deenergized and grounded. 29 C.F.R. § 1926.1407(d). The power line at issue was neither deenergized nor grounded. Thus, Respondent had to ensure no part of the crane came within the distance provided in Table A. Unfortunately for J.L., as Benson lowered the boom, he failed to swing it over according to the agreed-upon plan and contacted the power line with the hoist line of the crane.[21] (Tr. 93, ; Ex. R-36; C-16 at DOL00182). Because Benson contacted the line as he was booming down, he violated the minimum clearance distance mandated by Table A.[22] Accordingly, the Court finds Respondent violated the terms of the standard.

**Respondent's Employees Were Exposed to a Hazard**

For Complainant to establish this element, he must show Respondent's employees were exposed to, or had the potential to be exposed to, the zone of danger. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). There is no question J.L. and Benson occupied the zone of danger, as they were both in physical contact with the equipment that contacted the power line.

[20]. Respondent does not address the requirements of 1926.1407(d) in either its original or supplemental post-trial brief.

[21]. Benson insisted the hoist line did not touch the power line; however, Respondent's expert identified the point on the hoist line where contact was made. (Tr. 582-583).

[22]. Respondent was working near a 14-kilovolt line, which requires a minimum clearance distance of 10 feet. *See* 29 C.F.R. § 1926.1408, Table A.

Respondent's employees were about to disassemble the crane in an area where portions of the crane could have (and did) contact the power lines. The process of disassembly required Benson to first swing the boom of the crane 90 degrees from the position it was in after removing the block. (Ex. R-4; R-36 at TNT000408-409). By swinging the boom 90 degrees to the right, the boom was supposed to point toward an adjacent field, away from the power line. (*Id.*). The power line was located towards the rear of the crane truck and in front of the flatbed where Benson was supposed to lay down the jib for removal. (Tr. 206). After that, Benson was supposed to "boom down" the crane to its lowest possible point and then swing it back over the flatbed truck for disassembly. (Tr. 206). Mr. Ray drove the flatbed and was directed by Mr. Ryan, who positioned himself at the back of the flatbed to assess where the truck needed to be parked to receive the jib. (Tr. 206).

Given that the boom and cable were located directly overhead of Mr. Ray and Mr. Ryan when the cable contacted the power line, the Court finds they were also within the zone of danger. According to Respondent's expert, the flatbed was roughly 10 feet from the power line, and the boom, had it been set down, would have been roughly 16 feet away. (Ex. R-36 at TNT000409). This was clearly within the 20-foot buffer zone identified in 1926.1407(a), which required the use of additional protective measures. According to Benson, the crane was not equipped with a warning/shutdown system, and both J.L. and Mr. Ryan told CSHO Beck the crew did not have, nor did they discuss, the use of a dedicated spotter. (Tr. 331; Ex. C-20). In light of these conditions, and Respondent's failure to properly address them, the Court finds all crew members were exposed to the hazard of electric shock as a result of the violative conditions described in Citation 1, Items 1 and 2.

**Complainant Failed to Prove Respondent Had Knowledge of the Condition**

Complainant contends Respondent knew or could have known of the above-discussed violations under two theories: (1) Benson was a supervisor, and knowledge should be imputed to Respondent through him according to Commission precedent; and (2) Benson's conduct was foreseeable due Respondent's failure to train, supervise, and discipline, and thus imputable under Fifth Circuit precedent.[23] Respondent, on the other hand, contends Benson was not a supervisor, because he was not designated as such by Respondent, nor did he exercise responsibilities consistent with that role. Further, Respondent argues Benson was adequately trained and supervised such that his actions on the day of the accident were not foreseeable. While the Court finds Benson was a supervisor for the purposes of the Act, it also finds Complainant failed to prove his actions were foreseeable. Thus, the Court finds Complainant failed to establish that Benson's knowledge of the violations should be imputed to Respondent.

Benson Was Acting as a Supervisor

Respondent disputes Complainant's determination that Benson was acting as a supervisor at the time of the accident. Specifically, Respondent argues its crane operators are not designated as supervisors; do not have the ability to hire, fire, or discipline; and that Benson was not treated as a supervisor by CSHO Beck during the inspection. According to the Commission, neither formal titles nor the ability to hire and fire control the determination of whether an employee is acting as a supervisor. *See Rawson Contractors*, 20 BNA OSHC 1078 (No. 99-0018, 2003). Instead, supervisory status "can be established on the basis of other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf." *Id.* Such indicia

[23]. Because this case took place within the boundaries of the Fifth Circuit, the Court is obliged to apply Fifth Circuit precedent. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794–95 (No. 90-998, 1992) (holding that Commission typically applies precedent of circuit to which a case is "highly probable" to be appealed, even though it may differ from Commission precedent).

include supervising work activities, taking all necessary steps to complete assignments, and ensuring work is performed in a safe manner. *Id. See also Kern Bros. Tree Service*, 18 BNA OSHC 2064 (No. 96-1719, 2000) (knowledge of crew leader who was responsible for seeing that the work was done safely and properly was imputed to employer even though he had no authority to actually discipline an employee). Supervisory status can also be delegated, or exercised, on a temporary basis. *Id.*

According to the crane operator job description, even though an operator has no "direct reports", his duties include "ensur[ing] safety first, along with safe lifting of the load"; "determin[ing] signal person understands and performs proper hand signals"; and completing field tickets to be turned into the branch office, including determinations of additional charges to clients. (Ex. R-11 at TNT000170, 171). According to Troy Pierce, Respondent's VP of Health, Safety, and Environment (HSE), although crane operators are not officially designated supervisors, they can report employees to dispatch or branch managers to have the non-compliant employee removed from a worksite. (Tr. 387). This is a marked difference from riggers and rigger drivers, who are supposed to "assist the crane operator on job tasks during the operation of the crane . . . ." (Ex. R-11 at TNT000174). The fact that operators are expected to ensure worksite safety and assess employee understanding of work plans and practices indicates some delegation of supervisory authority, especially in the absence of other supervisory personnel.

As it relates to this worksite, Benson created the work plan and job safety analysis (JSA), and dictated to the crew how the disassembly work would be carried out. (Tr. 214–17). Additionally, Benson himself came to understand he was acting as the on-site supervisor (Tr. 317, 336). While that fact alone is not conclusive, it is consistent with his actions, the crew's actions, and the delegation of crane operator authority in Respondent's policies described above.

Accordingly, the Court finds Benson was serving as a supervisor on this jobsite for the purposes of the Act.

Foreseeability Under *Yates*

For Complainant to prevail, he must prove that Benson's knowledge of the violative conditions should be imputed to Respondent. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (No. 86-360 *et. al.*, 1992) (holding actual or constructive knowledge of a supervisor can be imputed to the employer). According to Commission precedent, Complainant establishes this element by showing a supervisor had actual or constructive knowledge of a subordinate's, or in this case, his own conduct. *See A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2007 (No. 85–369, 1991); *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (noting that under Commission precedent, a supervisor's knowledge of his own misconduct is imputed to the employer). In the Fifth Circuit, however, Complainant must show the supervisor's misconduct was foreseeable. *See W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006) (finding Commission precedent imputing supervisor's knowledge of his own misconduct impermissibly shifts burden of proof away from Secretary and, therefore, constitutes strict liability). To prove a supervisor's misconduct was foreseeable, Complainant must show the employer's safety policies, training, and disciplinary practices were deficient. *Id.* at 608–609). The Court finds Complainant failed to make such a showing.

First, Complainant attempts to argue *Yates* does not apply to the circumstances of this case. In *Yates*, the Fifth Circuit noted it did not intend to alter the analysis of the "ordinary case", wherein a supervisor's knowledge of his subordinate's misconduct is imputable to the employer without further analysis (at which point the burden shifts to the employer to prove unpreventable employee misconduct). *See id.* at n.7; *see also Calpine Corp. v. OSHRC*, 774 Fed. App'x. 879 (5th Cir. 2019)

(unpublished) (reiterating the rule in the ordinary case but also noting hazardous condition did not arise from supervisory misconduct). Refining that point, the Eleventh Circuit held the knowledge of a supervisor, who is both engaged in misconduct and observes a subordinate employee engaged in the same misconduct, is imputable to the employer because it constitutes the "ordinary case" discussed in footnote 7 of *Yates*. *See Quinlan d/b/a Quinlan Enters. v. Secretary, U.S. Department of Labor*, 812 F.3d 832 (11th Cir. 2016). It is this distinction Complainant latches onto in support of its argument that *Yates* does not apply. This Court disagrees for two reasons.

First, the Fifth Circuit did not discuss the proper analysis for when both supervisor and subordinate are simultaneously engaged in the same misconduct. Indeed, as noted by the Eleventh Circuit in *Quinlan*, the facts in *Yates* were different than those before the Eleventh Circuit: the supervisor in *Quinlan* was engaged in the same misconduct as his subordinate, whereas the supervisor was engaged in different misconduct than his subordinates in *Yates*. As noted by the *Quinlan* court, the Fourth Circuit was confronted with a situation where the supervisor and subordinate were both engaged in the same misconduct and nonetheless held imputation of the supervisor's knowledge of his misconduct in that circumstance was improper without further analysis. *See Quinlan*, 812 F.3d at 840 (citing *L.R. Willson & Sons, Inc. v. OSHRC,* 134 F.3d 1235 (4th Cir.1998)). Thus, this Court refuses to extend the rationale of the Eleventh Circuit to the clear rule laid down by the Fifth Circuit in *Yates*.

Second, regardless of whether the Fifth Circuit would adopt the Eleventh Circuit's rationale, this Court does not find it applicable to this set of facts. Benson, acting as a supervisor, planned the process of disassembly and dictated to the other employees how it would be carried out, from where the crane and trucks would be located to having J.L. hold the becket at the end of the hoist cable while he moved the boom into position. Subsequently, it was Benson who failed to

comply with the plan when he lowered the boom before swinging it over the adjacent field, which sent the hoist cable into the power lines. As noted in Respondent's own position description, the operator is responsible for "ensur[ing] safety first, along with safe lifting of the load", which presumably includes identifying additional protective measures when working within 20 feet of an energized power line. Likewise, the only person capable of preventing encroachment into the minimum approach distance was the crane operator, Benson, who was at the controls of the crane and should have been paying attention to his signal man. As such, the only individual engaged in violative conduct here was Benson. Complainant established that other employees were *exposed* to the hazard caused by the violation, but presented no evidence to suggest any other employee was engaged in the violative conduct identified in the Citation. Complainant's argument that *Yates* is not applicable to this case is rejected.

Benson's Actions Were Not Foreseeable

As noted above, Complainant must show a deficiency in Respondent's safety policy, training, or discipline in order to prove Benson's actions were foreseeable. Complainant argues Respondent's safety program is little more than a paper program, which says more than it actually does. Specifically, Complainant argues: (1) Respondent's rules are nothing more than a rote reproduction of the OSHA standards; (2) Respondent failed to provide Benson with appropriate training; and (3) Respondent did not appropriately audit worksite practices or punish transgressions when identified. Respondent contends it had a robust written safety program that is communicated through weekly and periodic trainings and is enforced through workplace audits and disciplinary action. Based on the evidence presented, the Court finds Complainant failed to prove Respondent's safety policies, training program, or disciplinary actions were deficient.

Respondent's safety policy is extensive and has rules that specifically govern the conduct identified in the Citation. The policy tracks the language of the standard's requirements but does not merely reproduce the standards themselves—it is specific so as to guide employee behavior. *See Mosser Construction Co.,* 15 BNA OSHC 1408, 1415 (No. 89-1027, 1991) (holding a work rule must be clear enough to eliminate employee exposure to the hazard). Specifically, it indicates what the minimum approach distance is for power lines, requires supplemental requirements for any activities occurring within 20 feet, and identifies what those requirements are. (Ex. R-2 at TNT000132). Complainant failed to present sufficient evidence for this Court to conclude that Respondent's rules governing crane operation near power lines were insufficient.

Regarding training, Complainant argues Respondent failed to show it provided Benson with training that covered operating a crane near power lines. For the most part, Complainant relies on Benson's testimony, wherein he claimed he did not receive such training from Respondent. This line of argument is problematic for two reasons: (1) it does not properly characterize Benson's testimony; and (2) Respondent's reliance on third-party training does not translate to a failure to meet its obligation to ensure Benson was properly trained.

Benson initially testified he did not receive high power line training from TNT and that he never received a safety manual at any point. (Tr. 343). On the very next page of the transcript, however, Benson clarified he received power line training while he worked for TNT, albeit through the Houston Area Safety Council. (Tr. 344; Ex. R-41 at TNT000777). He also noted he had received similar training through his previous employer and understood and was able to comply with TNT's policy, which requires maintaining a 20-foot distance from power lines while operating a crane. (Tr. 345). Benson was also an actively certified NCCCO crane operator. (Tr. 341).

In addition, subsequent testimony by four company representatives contradicted Benson's testimony that he did not receive training from Respondent. Mr. Pierce testified Benson received company handbooks, including safety manuals, during his orientation and provided evidence to that effect. (Tr. 407; Ex. R-47 at TNT000233). Further, Pierce testified Respondent also tested the competencies of all new employees to ensure they possessed the skills and qualifications they claimed to have. (Tr. 412-414). This included a field test on a crane in the yard, as well as a written test, both of which had to be satisfactorily completed prior to operating a crane in the field. (*Id.*; Ex. R-2) Jamie Arnold, the Marshall branch manager, testified that he verified Benson's certifications, including the training he received through the safety council, which covered power line training. (Tr. 589). Mr. Arnold also testified he was familiar with Benson's skills and abilities before he started with Respondent. (Tr. 588). Third, Jeff Bonner testified he conducted the onboard training of Benson, which included power line safety and encroachment distances. (Tr. 596). Though Complainant challenged his testimony, based on his inability to recall the time of such training, Bonner specifically recalled training Benson, which the Court found credible. (Tr. 597-598). Finally, Mr. Ray also testified that Respondent provides employees with power line training. It was one of the first sessions he received "because we're around power lines so much." (Tr. 248).

The Court is convinced the foregoing illustrates Respondent met its obligation to ensure Benson was properly trained and understood company policy regarding operating a crane near power lines. Not only did Respondent verify Benson's prior experience and training through testing, it also ensured Benson continued to receive training either through weekly training presentations or through a verified third-party provider. (Tr. 589). *See LJC Dismantling Corp.*, 24 BNA OSHC 1478 (No. 08-1318, 2014) (holding that adequacy of instruction, training, and supervision should be assessed in light of prior work history and training and that it is Secretary's

burden to show deficiency and additional training that would be required); *S.J. Louis Construction of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016) (same). Complainant did not prove Respondent failed to ensure adequate instruction or communicate its safety policy regarding operating a crane near power lines.

Finally, Complainant contends Respondent's audit and disciplinary program were also deficient. Complainant's evidence in this regard is equally scant. Specifically, Complainant argues that because Respondent failed to audit the worksite where the accident happened, its audit program was deficient. Mr. Pierce testified Respondent deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites. (Tr. 416). He also introduced samples of audits performed at those worksites. (Ex. R-49). Mr. Ray, who works in the field, testified that jobsite audits occurred regularly. (Tr. 266-67). *See also S.J. Louis*, 25 BNA OSHC 1892, *supra*. (program was sufficient which consisted of a full-time safety director and five field safety supervisors that conducted random and scheduled field safety audits). Simply because one worksite was not audited over the course of a one-week project (that was originally scheduled to be completed in one day), does not mean the audit program, as a whole, was deficient. Without more, the Court finds Complainant's evidence failed to establish the insufficiency of Respondent's audit program.

Similarly, the Court finds Complainant failed to prove Respondent's disciplinary program was insufficient. Again, Complainant relies on the lack of audits at this particular worksite as its sole evidence that Respondent's disciplinary program was insufficient. Absent a specific reason why Respondent should have sent an audit team to review Benson's work performance, the Court finds this line of argument unpersuasive. Respondent submitted a sample of disciplinary actions taken in response to violations of company rules, including Benson's ultimate termination. (Ex. R-

27, R-29). These actions are consistent with the progressive disciplinary policy laid out in Respondent's orientation packet. (Ex. R-12 at TNT00055).

Based on the foregoing, the Court finds Complainant failed to prove Benson's violative conduct was foreseeable. Accordingly, the Court finds it is improper to impute Benson's knowledge of the violative conditions to Respondent.

## Conclusion

Complainant failed to establish that Respondent knew, or with the exercise of reasonable diligence, should have known of the violative conditions cited in Citation 1, Items 1 and 2. Complainant failed to prove that Respondent should have foreseen Benson would violate the cited regulations, and company policy, by failing to maintain adequate clearance from overhead power lines as the crew began the disassembly process. Accordingly, Citation 1, Items 1 and 2 will be vacated.

## Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED; and
2. Citation 1, Item 2 is VACATED.

/s/ Brian A. Duncan

Date: October 15, 2020
Denver, Colorado

**Judge Brian A. Duncan**
U.S. Occupational Safety and Health Review Commission