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| **IN THE MATTER OF** | * | **BEFORE THE** |
| | * | **COMMISSIONER OF LABOR** |
| **WICKERSHAM CONSTRUCTION &** | * | **AND INDUSTRY** |
| **ENGINEERING, INC.** | * | **MOSH CASE NO. A07360359**<br>**OAH CASE NO. 41-09-34224** |
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## FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. On July 30, 2009, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued a citation to Wickersham Construction and Engineering, Inc. ("Wickersham") for violating Section 5-104(a) of Maryland's Occupational Safety and Health law. The citation stemmed from an inspection that MOSH performed as a result of a worker injuring his foot when part of the boom of the crane that he was disassembling fell on his foot.

The Employer contested the citation and a hearing was held on April 30 and May 24, 2010 at the Office of Administrative Hearings in Hunt Valley, Maryland. Henry R. Abrams, Administrative Law Judge presided as the Hearing Examiner ("HE"). The HE issued a proposed decision recommending that the citation and proposed penalty of $2,250.00 be vacated.

MOSH appealed the proposed decision and the Commissioner of Labor and Industry ("Commissioner") held a review hearing on February 16, 2011. Based upon a thorough review of the factual record, the relevant law, and the arguments made by both

parties, the Commissioner affirms the proposed decision of the Hearing Examiner and vacates Citation 1.

## FINDINGS OF FACT

The employer, Wickersham, is a general contractor. In June of 2009, the employer was engaged in the construction of a water treatment facility in Havre De Grace, Maryland. MOSH Ex. 7. As part of the construction project, the employer used a P&H 670-WLC 70-ton Crawler Crane ("the crane"). T2[1] 149-50. The crane was a mobile crane that operated on tractor treads and was equipped with a 120 foot lattice boom that was separate from but attached to the crane. MOSH Exs. 5 and 6. On Saturday, June 27, 2009, the crane was scheduled to be moved. Moving the crane entailed, among other things, disassembling the lattice boom. The lattice boom was comprised of three sections, a middle section that was 50 feet in length, a 30 foot tip section, and a 20 foot heel section. MOSH Ex. 6; T2 193-95. A three member team of Wickersham employees was assigned to disassemble and to move the crane. MOSH Ex. 7.

The crane "Operator's Manual" outlined 14 steps to be taken to disassemble and remove the crane boom. MOSH Ex. 14 at 4-13 and 4-14. Among other things, the "Operator's Manual" specified that the following steps be taken:

> 1. Relax the boom suspension and attach the guy lines[2] at the first insert adjacent to the tip section. Remove the extra guy lines from the boom point.
> 2. Engage the boom hoist and lift the boom just enough to remove the bottom connecting pins from the tip and insert.

[1] The hearing took place over two days. T1 refers to the April 30, 2010 hearing date. T2 refers to the May 24, 2010 hearing date. T3 refers to the review hearing held before the Commissioner on February 11, 2011.

[2] A guy line is a tensioned cable designed to add stability to a free standing structure.

> 3. Lower the attachment allowing the boom to hinge about the top connecting pins. Provide blocking under the tip section and insert. Remove the top connecting pins.

In the midst of these instructional steps is a bold warning that reads **"do not stand under the boom or inside the boom structure when removing pins. The boom could fall if improperly supported and could cause serious injury**."

The tip of the boom section farthest from the cab was "blocked" or "cribbed" meaning that supports were placed underneath it to prevent it from hitting the ground. MOSH Ex. 6. Additional blocking or cribbing was placed under the rear of the next section to be removed. In addition, pendant lines were attached to the top portion of the 50 foot middle section to hold it in the air while the 30 foot section to which it was attached was being disassembled and removed, however there was no blocking or cribbing under the 50 foot section. T1 60-63.

Harry Smith was the employee who began to disassemble the 30 foot section while the guy lines suspended the top front part of the 50 foot section. Mr. Smith stood inside the boom and drove out the pins. T1 77-78. Pursuant to the Operator's Manual, the bottom left and right pins were supposed to be removed first followed by the top left and right pins. MOSH Ex. 14 4-13, 4-14. Mr. Smith followed a different sequence from the one set forth in the manual. T1 82. No blocking or cribbing was placed under the front portion of the 50 foot section before Mr. Smith removed the final pin. The 50 foot section of the boom dropped, landing on and injuring Mr. Smith's foot. T1 41-42; 78. The Havre De Grace police were called and completed an incident report. MOSH Ex. 4. On June 30, 2009, MOSH conducted an inspection and, thereafter, the citation and notice of penalty were issued. MOSH Ex. 1.

## DISCUSSION

The HE found that MOSH improperly cited the employer under the general duty clause because a specific standard, 29 C.F.R. §1926.550(a)(1), applied and, therefore, reliance on the general duty clause was improper. The HE recommended that the citation be dismissed solely on the issue of improper citation to the general duty clause, and did not otherwise address whether MOSH met its burden of proving a violation. The employer never raised the issue of improper citation to the general duty clause at the hearing.

On review, MOSH raises four arguments to support upholding the citation: (1) the case relied upon by the HE for the proposition that the general duty citation was inappropriate because a specific standard applies was not good law; (2) the hazards for which the employer was cited go beyond the scope of the specific standard and, therefore, citation to the general duty clause was appropriate; (3) the citation was sufficient to put the employer on notice of the charges against it, therefore, the employer was not prejudiced by the general duty clause citation; and (4) the applicability of a specific standard is an affirmative defense to be raised by the employer and Wickersham's failure to do so resulted in a waiver of that defense. T3 8-16.

Wickersham argued at the review hearing that it should have been cited under a specific standard not the general duty clause. Wickersham asserts that the Commissioner should adopt the proposed decision of the HE in its entirety and vacate the citation.

Wickersham submitted an "Administrative Review Memorandum" in support of its position.[3]

The threshold issue then is whether the specific standard the HE relied upon is applicable. The standard in question, 29 C.F.R. §1926.550(a)(1) provides that:

> The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. Where manufacturer's specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded. Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer.

The hazardous condition cited by MOSH was that "[e]mployees, engaged in removing crane boom sections, did not block up the section that was being disassembled." With respect to abatement, the citation states that "[a]mong other methods, one feasible and acceptable abatement method to correct this hazard is to follow the manufacturer's recommended procedures for dismantling the crane boom. This procedure is found in Section IV of the operator's manual and is a step by step procedure." MOSH Ex. 1. Based on the language of both the standard and the citation, the Commissioner finds that the standard does apply.

Turning to MOSH's first argument, the HE concluded that MOSH cannot rely on the general duty clause where a specific standard has been adopted to address the cited hazard. The HE relied upon *Secretary of Labor v. John T. Brady & Company, Inc.*, 10

[3] In both the employer's "Administrative Review Memorandum" and oral argument, the employer states that "MOSH should have cited Wickersham pursuant to the specific standards found at 29 C.F.R. § 1926.100(a)." *See* Review Memorandum at 2; T3 24. The Commissioner assumes that Wickersham means 29 C.F.R §1926.550(a) and not §1926.100(a) since the latter addresses head protection and does not appear relevant in this case.

O.S.H. Cas. (BNA) 1385 (1982) for this proposition. On review, MOSH argues that the HE's reliance on this case was misplaced because the Second Circuit remanded the case back to OSHA with instructions to reinstate the general duty violation. Regardless of the ultimate status of the *John T. Brady* case, it is a well-established principle that where a specific standard applies, citation to the general duty clause is not appropriate. *Secretary of Labor v. Active Oil Service, Inc*. 21 O.S.H. Cas. (BNA) 1184 (2005); *Secretary of Labor v. Daniel International, Inc*. 10 O.S.H. Cas. (BNA) 1556 (1982); *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2nd Cir. 1977).

MOSH's second argument is that the cited hazards go beyond the scope of the specific standard. T3 16. Indeed, MOSH acknowledges that the specific standard covers some of the hazards in question but argues that citation to the general duty clause was still appropriate. T3 18. The Commissioner disagrees. The standard at issue requires that an employer follow the manufacturer's specifications and limitations with regard to crane operation. The citation finds a violation for failure to block sections of a crane boom as set forth in the manufacturer's specifications. The cited hazard is the failure to "block up the section [of the crane] that was being disassembled" and the suggested abatement was "to follow the manufacturer's recommended procedures for dismantling the crane boom." Other issues were mentioned in the MOSH worksheet and interview statements as possible hazards contributing to the accident including improper sequencing of pin removal, standing inside the lattice boom during disassembly, and failure to review and follow the Operator's Manual's prior to dismantling the crane. MOSH Exs. 8-12. However, these other issues are directly addressed by the Operator's Manual and would

be covered by the specific standard at issue and, therefore, would not fall under the general duty clause. MOSH 14 4-1, 4-13.

On review, MOSH also argues that the crane operator was out of his seat for a period of time and that was a hazard not covered by the standard and, therefore, subject to the general duty citation. T3 16-17. The Commissioner disagrees. The crane operator, Donald Willard, does state in his interview worksheet: "I held tension on the boom at the 50' section. I got out of the seat to see if there was enough tension on the pendant lines." MOSH Ex. 9. He goes on to state: "I noticed pins on the ground but I wasn't sure if they were top pins or bottom pins…I think we took the wrong pins out first…That's what I think went wrong…That's why the boom dropped." MOSH Ex. 9. A reference such as this in a witness statement may in certain circumstances be sufficient to satisfy the fair notice requirement. However, in this case there was no reference in the citation itself to the operator leaving his seat as a hazardous condition nor was there any mention of it during MOSH's case in chief at the hearing. When testifying about Mr. Willard's statement, the inspector did not even reference the issue. T1 81-83.[4]

MOSH also argues on review that the citation was sufficient to put the employer on notice of the violation and, therefore, failure to cite the specific standard is not fatal to the citation. The Commissioner agrees that the language of the citation and the standard are similar and may have provided sufficient notice of the alleged violation, specifically, failure to provide sufficient blocking or cribbing. However, a review of case law suggests that where there is an applicable specific standard, citation to the general duty clause

[4] The only reference to it was during cross examination of the employer's witness. Under cross examination, the witness testified that he "doesn't like it when operators [leave their seat]." T2 261-64.

cannot stand. The purpose of the general duty clause is to cover serious hazards for which no specific standard applies. It is used to augment rather than supplant standards.

Lastly, MOSH argues that the basis for the HE's recommended decision, namely, that a specific standard exists thereby rendering citation to the general duty clause inapplicable is an affirmative defense that Wickersham itself, not the HE, was required to raise. This presents an interesting issue and requires some examination of the relationship between a specific standard, the general duty clause, and the elements of proof in a MOSH case.

In support of its position that failure to cite a specific standard is an affirmative defense that an employer must raise or waive, MOSH cites Rothstein's *Occupational Safety and Health Law* as well as a Federal Review Commission decision, *DB Drilling Corp*, 6 O.S.H. Cas. (BNA) 1806 (1978). T3 10-11. Rothstein notes that "the failure to raise timely an affirmative defense [before the Occupational Safety and Health Review Commission] has been deemed a waiver and precludes the issue from being raised later by the party, by the ALJ or by the Commission on review." Mark A. Rothstein, *Occupational Safety and Health Law* (2013 ed.) 550.

Generally, the Commissioner of Labor and Industry recognizes the decisions of the federal Review Commission as precedent because of the Review Commission's presumed expertise in interpreting and applying the requirements of the OSHA Act which MOSH has adopted in most cases without substantive change. However, on the issue of whether improper citation to the general duty clause is an affirmative defense that must be raised or waived, it is important to note that there are significant differences in the procedural rules governing cases before the Federal Review Commission and cases

arising under the MOSH Act. The federal Review Commission has a specific rule addressing employer contests. An employer's answer must meet the following criteria:

> (1) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.
>
> (2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.
>
> (3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."
>
> (4) ***The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable***.
>
> 29 C.F.R. § 2200.34 (emphasis added).

Maryland law does not have such a requirement. Maryland law only requires that "within 15 work days after receipt of a notice under subsection (a) of this section the employer notifies the Commissioner of an intent to contest the citation or any penalty." Md. Lab. And Emp. Code Ann. §5-213(b)(1). Where a timely notice of contest has been filed by the employer, a hearing is held in accordance with Maryland's Administrative Procedure Act ("APA"), Md. State Gov't Art., *Annotated Code of Maryland* §10-201 et seq.

While nothing in the APA or MOSH's rules require that specific defenses be raised or waived within a prescribed time period, the Commissioner may, depending on the circumstances, find that an employer has waived the opportunity to raise a particular defense. In this case, however, the Commissioner finds that the fact that the issue was raised *sue sponte* by the HE rather than the employer is not fatal.

The *DB Drilling* case cited by MOSH also presents a slightly different issue. In that case, the employer was cited under the general duty clause and argued that the Secretary was required to demonstrate that there was no specific standard applicable to the cited condition before a general duty citation could be issued. The federal Review Commission rejected the employer's argument that the Secretary was required to review the regulations and demonstrate the inapplicability of any regulation that might arguably be relevant to the cited condition before issuing a general duty citation. Rather, it held that the burden is on the employer to demonstrate the applicability of a specific standard.

Under the Federal Rules of Civil Procedure, certain defenses must be "affirmatively" stated in the answer or they are deemed waived. FRCP 8(c). Under Rule 8(c), defenses that must be affirmatively pled or waived relate to matters outside the scope of the plaintiff's prima facie case. In a MOSH case where the employer has been cited under a specific standard, the applicability of that standard is a prima facie element to be proved by MOSH. *See, e.g., Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982). Thus, if the employer in this case had been cited under a specific standard and it was MOSH's burden to prove the applicability of that standard, the HE would not be precluded from finding, *sua sponte*, that MOSH had not met its burden because it had cited the incorrect standard. If an employer cannot be cited under the general duty clause if there is a specific standard that applies and it is MOSH's burden to prove the applicability of a specific standard when citing an employer, it would seem inconsistent with this scheme to suggest that a citation improperly citing the general duty clause should stand simply because the issue was raised by the HE and not the employer.

## ORDER

Therefore, on this _____ day of _____, 2013, the Deputy Commissioner hereby ORDERS:

1. Citation 1, Item 1 for a serious violation of Labor and Employment Article, Section 5-104(a) with a proposed penalty of $2,250.00 is VACATED.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

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Craig D. Lowry
Deputy Commissioner of Labor and Industry