COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4735-10

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

KONECRANES, INC
dba CRANES PRO SERVICES — RESPONDENT

* * * * * * * * *

David N. Shattuck, Frankfort, for the secretary. Andrew R. Kaake, Cincinnati, and Andrew Palmer, Louisville, for Konecranes.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on petition for discretionary review by Respondent Konecranes, Inc. dba Cranes Pro Services ("Konecranes"). We granted review and asked for briefs. By agreement of all parties, this case was tried with *International Paper Company*, KOSHRC 4733-10. These two cases were not consolidated and so our Hearing Officer issued separate recommended orders. We shall follow her example and issue separate decisions on the merits. Although Konecranes and International Paper Company ("IP") were represented by their own counsel at the trial, Mr. Shattuck prosecuted both cases on behalf of the Labor Cabinet ("Labor").

KRS 336.015(1) charges the Secretary of Labor with enforcement of the Kentucky Occupational Safety and Health Act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations,

the Commissioner of the Department of Workplace Standards issues citations. KRS 338.141(1). If the cited employer notifies the Commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission ("Commission") "shall afford an opportunity for a hearing." KRS 338.141(3).

The Kentucky General Assembly created the Commission and authorized it to "hear and rule on appeals from citations." KRS 338.071(4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review ("PDR") with the Commission, and the Commission may grant the PDR, deny the PDR, or elect to call the case for review on its own motion. 803 KAR 50:010 § 47(3). When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v. OSHRC and Interstate Glass,*[1] 487 F2d 438, 441 (8th Cir. 1973), the U.S. Court of Appeals for the 8th Circuit held that when the federal Occupational Safety and Health Review Commission ("federal Commission") hears a case it does so "de novo." See also *Accu-Namics, Inc v. OSHRC,* 515 F2d 828, 834 (5th Cir. 1975), where the Court stated "the Commission is the fact-finder, and the judge is an arm of the commission..."[2]

The Kentucky Supreme Court, in *Secretary, Labor Cabinet v. Boston Gear, Inc,* Ky., 25 SW3d 130, 133 (2000), held: "The review commission is the ultimate

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[1] In *Kentucky Labor Cabinet v. Graham,* Ky, 43 SW3d 247, 253 (2001), our Supreme Court said because Kentucky's Occupational Safety and Health Law is patterned after the federal act, it should be interpreted consistently with the federal act.

[2] See federal Commission rule 92 (a), 29 CFR 2200.

decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v. Secretary of Labor*, Ky. App, 92 SW3d 743, 750 (2002), the Court of Appeals held as follows: "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Introduction

IP manufactures containerboard (cardboard), at its Henderson plant. IP uses an overhead, sixty ton crane which runs on rails the full length of the mill. This crane moves large rolls of cardboard, and the empty spools, about the mill. Konecranes built this crane and has maintained it since that time. IP employees ordinarily use handheld controllers to operate the crane from the mill floor and their employees seldom use the crane bridge. Konecranes makes, sells, and services cranes all over the world.

IP operates its Henderson factory twenty four hours a day, 359 days a year. For the remaining six days, the plant is shut down so that its employees, as well as contractors, including Konecranes, may perform maintenance work and make capital improvements. Transcript of the evidence ("TE"), page 527.

On the day of the fatal accident, two Konecranes employees were performing maintenance on the crane. The deceased, Mr. Stephen Dohoney, a licensed electrician and a Konecranes employee, was working by himself on the crane bridge. Mr. Dohoney was replacing wire by substituting new wire for old wire. The various

witnesses generally agreed that the electricity to the crane could be de-energized (turned off), on the mill floor. Expert witnesses testified that the crane's power could also be turned off from the bridge where Mr. Dohoney worked at the time of his death.

At the time of his death, between 11:00 a.m. and Noon, Mr. Dohoney wore a full body harness which was required to negotiate an 18 inch gap between a walkway and the bridge of the crane, which was some 70 feet in the air above the factory floor. (TE 661 and 650). Brent Jones, a Weyerhaeuser Designated Representative[3] (WDR) testified that he was first notified that Steven Dohoney fell, suspended from his harness, and only later learned that Mr. Dohoney had been electrocuted. (TE 615) and the Hearing Officer's Recommended Order ("KRO," p. 11).

At the time of the fatality, the crane's electric power had not been turned off. Electricity in an industrial setting can be turned off, or de-energized, and the switch can be secured with a padlock so that it cannot be turned back on. Typically, the lock is then tagged. This procedure is called lockout/tagout or LOTO. The employee who hangs the padlock is then instructed to put the key in his pocket so no one else can unlock the padlock or activate the machinery or electricity.

Although no one was on the crane bridge except for Mr. Dohoney at the time of his death, it was stipulated by the parties that he was unexpectedly electrocuted while working on the 120 volt wires without locking out the current. Uninsulated electrician's tools were found on the crane bridge, and one tool found adjacent to the

[3] Weyerhaeuser once owned the IP plant and the acronym for the designated worker (WDR) was retained.

live wires was burned. At the time of his death, Mr. Dohoney was removing insulation from a live wire without wearing protective gloves. He was connecting new wire to the live wire from which he had removed insulation.

The Citations

Labor issued four serious citations to Konecranes. Our hearing officer dismissed serious items 1, 3 and 4. Because Labor did not petition for discretionary review of the dismissal of these serious citations, our hearing officer's decision to dismiss those citations is a final and unappealable order of the Commission. ROP[4] 47(3) and 48(2). Konecranes' serious item 2 is now before the Commission on discretionary review.

For serious item 2, Labor cited Konecranes for its alleged failure to de-energize live electrical parts to which an employee may be exposed. The cited standard reads as follows:

> 29 CFR 1910.333(a)(1)[5] *Deenergized parts.* Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations. Live parts that operate at less than 50 volts to ground need not be deenergized if there will be no increased exposure to electrical burns or to explosion due to electrical arcs.
>
> (emphasis added)

Konecranes' serious item 2 carried a proposed penalty of $4,500.[6] The citation reads as follows:

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[4] ROP is shorthand for our Rules of Procedure, 803 KAR 50:010. While our regulations are not rules, we refer to them as such for convenience. KRS 13A.120 (5).

[5] 29 CFR 1910.333(a)(1) is adopted in Kentucky by 803 KAR 2:318, § 2(1)(a).

29 CFR 1910.333(a)(1) Deenergized parts. Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations. Live parts that operate at less than 50 volts to ground need not be deenergized if there will be no increased exposure to electrical burns or to explosion due to electrical arcs:

a. The employer did not ensure that the 60 ton "Kone" overhead crane, located in the Crane Bay Area at International Paper Company in Henderson, Kentucky, was properly de-energized when at least one employee worked in the areas of potential electrical hazard(s) when changing/repairing 110 volt electrical cords, etc. On or around August 28, 2009, the employee was electrocuted while conducting maintenance/service on the 60 ton "Kone" overhead crane listed above.

The Hearing Officer's Recommended Order

In her recommended order, our Hearing Officer affirmed serious item 2 and the $4,500 penalty. For the reasons fully set forth below, we reverse our hearing officer's recommended order and dismiss Konecranes' citation. In doing so, we adopt the Hearing Officer's Findings of Fact to the extent they support our decision. Where we disagree with our Hearing Officer's findings, we will state our reasoning.

When Steven Dohoney and Mark Poczerwinski, Konecranes' technicians, arrived at the Henderson factory on the day in question, they reported to the WDR, Mr. Jones. The WDR is the liaison between IP and its contractors. Together, Mr. Jones,

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[6] Compliance Officer Porter assessed the severity of the injury as high (high, medium or low) because Mr. Dohoney died. Mr. Porter said the probability of an injury was greater (greater and lesser being the choices in his compliance manual) because Dohoney was working on energized wire without any gloves or insulated tools. Thus, the unadjusted penalty, according to a chart found in the compliance manual, was $5,000. This unadjusted penalty may then be reduced by considering three credits found in 803 KAR 2:115, section 1(2). Konecranes received no credit for size (the number of employees nationwide) because it employed over 2,000 people. Neither did the company receive good faith credit (25, 15 or 0 %), according to the compliance manual, because of the high serious/greater probability assessment. Konecranes received the maximum credit of 10 %, from the compliance manual, because it had not had any serious citations within a three year period prior to the fatality.

Dohoney and Poczerwinski filled out a form known as a Job Planning Safety Analysis ("JPSA"), which includes an evaluation of the hazards involved and a safety checklist. (Exhibit 9, Exhibit 69, at page 16, Exhibit 79. KRO 6 and 7). This JPSA described the work to be performed as "Replace Rope Guide." (KRO 9). Lock out/tag[7] out was not required for this work because, as Jones testified, electric power was required for inspection and testing. (TE 646). On the day of the fatality, Poczerwinski signed a second, unrelated JPSA which involved his work on the hydrapulper hoist at another location in the plant.

Between 9:30 a.m. and 10:30 a.m., Jones talked with Dohoney in the break room. Dohoney told Jones he would need more wire for the rewiring work. From this, Mr. Jones testified that he understood Dohoney and Poczerwinski had discovered that they needed more wiring "during their inspection." (TE 660). That morning Mr. Jones chanced to look up and saw the crane's motor coupling attached to the rafters with a come-along.[8] (TE 659). Our Hearing Officer took this to mean that "[Jones] thought meant [sic] that the Konecranes technicians were changing the motor coupling as a part of the preventive maintenance." (TE 656 – 660, KRO 10 and 11).

Mr. Jones, IP's WDR, observed that Dohoney and Poczerwinski were in the process of exchanging the crane motor coupling. From Jones' conversation with Mr. Dohoney he understood that Dohoney and Poczerwinski were also inspecting the crane and had determined that they would need more wiring. Neither of these

[7] IP had a lock out policy which did not apply to the 60 ton crane. Konecranes employees were in charge of locking out the crane because only they knew when they would need to move the crane to perform their maintenance work.
[8] A powerful hand operated winch and cable.

activities required the crane's wiring to be de-energized and locked out/tagged out. In fact, the engine coupling work could only be performed with the power turned on so the crane could be moved back and forth.

The completed JPSA did not mention the rewiring work. Mr. Jones observed that the engine coupling exchange had commenced and understood that Dohoney and Poczerwinski were inspecting the crane. We find Jones, and by extension IP, neither knew, nor had reason to know, that Mr. Dohoney was on the crane bridge rewiring the limit switch without de-energizing and locking out/tagging out the power to the crane. Our Hearing Officer's Recommended Order supports our findings. She recognized that IP's Mr. Jones, during his testimony, "made a distinction between 'inspecting' the wiring...and 'repairing' the wiring on the limit switches on the house crane." She found, and we adopt her finding, that Jones knew another JPSA would be needed for the rewiring. (KRO 20).

Our Hearing Officer found that Mr. Dohoney died "between 11:00 am and noon...[o]ne thing was very clear...Dohoney was working on a live wire. There was absolutely no indication that he had attempted to shut down the power or lock off." (KRO 11). We agree and adopt our Hearing Officer's finding.

In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal Commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable

diligence, could have known of the violative conditions.

Labor clearly met its burden of showing that the first three of the *Ormet* criteria were met. Our Hearing Officer found that the cited standard required that power to the crane, specifically the electric wire, had to be de-energized before Mr. Dohoney began his wire replacement work. Then without any analysis, and in one sentence, she covered the four elements required for labor to prove a violation. She held that 29 CFR 1910.333(a)(1) "did apply to the situation, the standard was violated, an employee had access to the hazard, and both employers should have known about the hazard with the exercise of reasonable diligence." For reasons set forth below, we agree with our Hearing Officer that the cited standard applied to the cited condition, that the terms of the standard were violated, and that Konecranes' employee had access to the cited condition. However, for the specific reasons detailed below, we do not agree that Labor met its burden of showing that Konecranes, with the exercise of reasonable diligence, could have known of the violative conditions, and therefore we reverse.

Konecranes and IP both pled the employee misconduct defense. In *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979), the federal Commission set out four elements the employer must prove to establish the defense:

> [the employer] has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.

Our Hearing Officer found that both Konecranes and IP had rules and communicated those rules to their employees. However, she found that Konecranes "did not effectively audit the work practices of its employees in regard to locking out/tagging out." (KRO 17). She limited her analysis of the third element cited in *Jensen*, taking steps to discover violations, to a discussion of Konecranes' auditing practices.

The Hearing Officer concluded that both Konecranes and IP had written work rules to "prevent electrical hazards" and that they both conducted "sufficient training" to communicate those rules to their employees, thus satisfying elements one and two. (KRO 17).

She then concluded that Konecranes failed to effectively audit the work practices of its employees, and therefore had not taken reasonable steps to discover previous violations, the third element of the *Jensen* analysis. She said Konecranes would only conduct an audit in the field if a supervisor was going to the site for some other reason ("Lane seemed to indicate that the employees came to know when to expect an audit.") (TE 433, KRO 17). She found that Konecranes discovered that Dohoney had previously worked on live electrical parts, at another location, by accident and "[t]here was no additional auditing of his work habits." (KRO 17). Although our Hearing Officer did not use the precise wording found in *Jensen*, it is evident she found that Konecranes failed to take steps to discover violations. A party must prove all four *Jensen* elements to prevail in its employee misconduct defense. Even though our Hearing Officer found that Konecranes did not prove this third element

of the defense, she did not actually rule on the affirmative defense - that is she never formally rejected the defense. By affirming serious item 2, the Hearing Officer by implication rejected the employee misconduct defense. We find this to be in error.

Our Hearing Officer correctly found that Dohoney, before his death, "had shed the required hard hat, goggles, and ear protection."[9] She said when he died "it was apparent that the employee had little regard for work rules." (KRO 17). She found Mr. Dohoney knew he was going to be replacing limit switch cords but left his volt meter in his truck. (KRO 17 – 18). She found that "[b]y far the primary responsibility for Dohoney's death was his own carelessness and overconfidence. However, this is not a comparative negligence case, it concerns the violation of an OSHA standard. With proper diligence by Konecranes and International Paper, the standard could have been met." (KRO 22). The Hearing Officer's findings of employee misconduct, and Mr. Dohoney causing his own death, support the affirmative defense set forth in *Jensen*.

Our Hearing Officer concluded that the cited standard, 29 CFR 1910.333(a)(1), "did apply and was violated." She said "both employers should have known about the hazard with the exercise of reasonable diligence." She then affirmed the citation for Konecranes and the $4,500 penalty. (KRO 24).

Whether Labor Proved the Alleged Violation?

As set out in *Ormet, supra*, Labor must prove that the standard applies, that the terms of the standard were violated, that an employee had access to the cited condition *and*, that the employer knew, or with the exercise of reasonable diligence,

[9] IP required all employees and outside contractors to wear ear plugs while in the facility.

could have known of the violative conditions. For this fourth element, knowledge, Labor may prove actual or constructive knowledge of the violative conditions. Mr. Dohoney, a Konecranes employee, was engaged in electrical repair work on the crane, proving elements one and three. Because the wiring was not de-energized at the time of the accident, Labor proved the second element as well. Hearing Officer Finding 23 (KRO 11).

The requirement for proof that an employer had knowledge of the violation is found in KRS 338.991(11),[10] the definition of a serious violation:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
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> (emphasis added)

If, for example, Labor can prove the employer knew of the violation, that is actual knowledge. However, at the time of the fatal accident, Mr. Dohoney was working by himself on the crane bridge, some 70 feet in the air above the shop floor, As a result, Labor failed to prove that Konecranes had actual knowledge of the violative condition. According to the statute, without proving actual knowledge, Labor may prove that Konecranes, with the exercise of reasonable diligence, could have known of the violation, and therefore had constructive knowledge.[11]

Labor Failed to Prove Konecranes was not Reasonably Diligent.

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[10] KRS 338.991 (11) is identical to 29 USC 666,§17(k).

[11] Knowledge "may be actual or constructive." Mark A. Rothstein, *Occupational Safety and Health Law*, 2011 edition, section 5:15, page 191.

In *Precision Concrete* Construction, CCH OSHD 32,331, page 49,552, BNA 19 OSHC 1404, 1407 (2001), the federal Commission held that the employer had constructive knowledge of the violation because it failed to exercise reasonable diligence:

> ...the Secretary argues that Precision had constructive knowledge of the violation because it failed to exercise reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, CCH OSHD 29,807, page 40,584 (1992)...

Konecranes had work rules and training programs. "[A]ll of the testimony and exhibits support the contention that Dohoney was trained, and specifically told, not to work on energized equipment." Finding 39, KRO 16; Finding 42, KRO 17. Konecranes anticipated the hazards its two employees would encounter at International Paper, working on the crane without locking out the electric power to the crane on the shop floor. On the day of the fatal accident, Konecranes' service supervisor, Steve Ballow, gave "explicit instructions to shut off the main disconnect on the ground level before going upstairs to work on the crane." (TE 412, 461, 462). This is evidence of anticipation of hazards and supervision by Konecranes.

Konecranes also regularly performed audits of its technicians' service runs to customers. (TE 440). Scott David Lane testified for the company. At the time of the fatality he was the branch manager at Konecranes' Evansville office. (TE 387). He

testified that the company "review[ed] service reports." (TE 408). He said he gave Mr. Dohoney a final warning, short of termination, when he performed an audit of a service run for Duke Energy[12] in Owingsville, Indiana and discovered Dohoney had worked on an electrical pendant which at the time was live and carrying 110 volts. (TE 423; Exhibits 55 and 64). Our Hearing Officer said this audit was "discovered only by accident;" however this is not supported by Mr. Lane's testimony. Lane testified that he was not the only manager to perform audits for Konecranes. (TE 448; Exhibit 53). Mr. Lane said he terminated another employee, Tony Ashton, "for the exact same offense." (TE 425). Mr. Lane said he was "doing an audit on 8-20 at Guardian Automotive" when he discovered that Ashton, who was performing work on a crane, had turned off electric power but did not lock out the switch as required by company rules. (TE 425). We find Mr. Lane's testimony is compelling evidence that Konecranes supervised its employees who worked in the field servicing cranes and made reasonably diligent efforts to discover violations.

Labor argues Konecranes did not perform sufficient audits to prove it was exercising reasonable diligence. Konecranes counters that it did much more than that to "prevent the occurrence of violations." *Precision Concrete, supra.* Konecranes points to its system for paring new employees with more experienced hands for six months, review of service reports, supervisory interviews with new employees to determine if they understand the safety rules, random audits, anticipation of hazards and the seven electrical safety classes Mr. Dohoney attended, one two days before the fatality.

[12] TE 446.

The evidence indicates that Konecranes performed 18 field audits in 2007 and 2008 and 6 audits in 2009, through August of that year. (Exhibits 53 and 54). Twenty-four audits over a period of 32 months, are sufficient to prove reasonable diligence by the employer.

Konecranes has met its burden of showing that it was diligent in its efforts to instruct its technicians not to work on live electrical parts. On the day of the fatality, Mr. Ballow cautioned the two technicians to lock out IP's crane's electricity on the shop floor before going up to the bridge. On the issue of supervision, Mr. Dohoney had received a final warning about working on live wires. The employment of Tony Ashton had been terminated for identical conduct. Mr. Dohoney was present during a discussion of Ashton's firing. Mr. Dohoney's final warning, coupled with Ashton's termination, are further proof of supervision and reasonable diligence.

We find that Konecranes exercised reasonable diligence and reverse our Hearing Officer on this point. Konecranes' history of providing rules and training, its supervision of its field technicians, its anticipation of hazards, and its audits of its employees at customer work sites all support our finding. Labor has failed to prove Konecranes did not exercise reasonable diligence or had constructive knowledge of the violation. *Precision Concrete, supra.*

Because Labor failed to prove Konecranes had knowledge of the violation, actual or constructive, we reverse our Hearing Officer and dismiss the citation. *Ormet, supra.*

Konecranes Proved its Employee Misconduct Defense.

Jensen Construction, supra, sets out the four elements an employer must prove to prevail in the affirmative defense of employee misconduct: the company has safety rules, it has communicated those rules to its employees, it has a system for detecting violations, and it enforces violations of those rules.

When our Hearing Officer affirmed the citation, she did not explicitly rule on Konecranes' employee misconduct defense. She did, however, find the company "did not effectively audit the work practices of its employees..." (KRO 17). This is element three set forth in *Jensen.* Because her Recommended Order affirmed the citation and the $4,500 penalty, she by implication denied the defense of employee misconduct.

We have dismissed the serious citation and penalty because we find that Labor failed to prove Konecranes had knowledge, actual or constructive, of the violation. *Ormet, supra.* However, even if we were to hold that Labor had proved all of the *Ormet* elements, we would nevertheless reverse the Hearing Officer because we hold that the employee misconduct defense shields Konecranes from the violation. *Jensen, supra.*

Jensen Elements One, Two and Four

Konecranes proved it had rules to prevent its employees from working on live electrical parts. Ben Begley, Konecranes director of safety training, discussed company efforts to provide training about how to work on live electrical parts: first test with a multi-meter, de-energize the equipment and lock out, and then test again. (TE 323 – 325; Exhibit 3, Konecranes electrical safety and lock out

procedures; Exhibit 4, the company's safety policy). Michael Gibson, Konecranes' expert, testified that the company's employees received the electrical safety training required by 29 CFR 1910.331 through 1910.335, electrical work practices and required training. (TE 484). Our Hearing Officer stated: "all of the testimony and exhibits support the contention that Dohoney was trained, and specifically told, not to work on energized equipment." (KRO 16). We agree with our Hearing Officer and adopt her findings. We find Konecranes proved *Jensen's* element one - that the company had rules designed to prevent its employees from working on live electrical parts.

Our Hearing Officer found Konecranes had "sufficient training to communicate the necessity of locking out/tagging out" to its employees when working on electrical parts. (KRO 17). Her findings on this subject, which we adopt, are supported by exhibits 48 through 52, training records for Mr. Dohoney and other Konecranes employees. Konecranes proved Mr. Dohoney had, in the space of his year's employment, attended seven safety classes which emphasized the prohibition against working on live wires, and that his last class was just two days before his fatal accident. (TE 392 – 394). We find Konecranes proved that it communicated its safety rules, including electrical safety, to its employees, satisfying element two of the employee misconduct defense. *Jensen, supra.*

Before taking up *Jensen* element three, which is at issue in this case, we find Konecranes proved element four of the defense: that the employer had a history of disciplining its employees for violations of its safety and health rules. Konecranes

dismissed Tony Ashton for working on live wires in violation of company policy. (TE 425). Furthermore, Konecranes proved Mr. Dohoney himself was on a final warning for working on live wires. He was told he would be fired for working on live wires if he was caught again. (TE 349; Exhibit 55, a memo to Mr. Dohoney explaining he would be fired if he were to work on live electric parts without de-energizing and locking out).

Labor cited to our decision in *Bowlin Energy,* KOSHRC 4444-07, page 23, arguing that reprimands are not proof of an effective discipline program. However, Tony Ashton's employment was terminated and Mr. Dohoney received a final warning with termination of employment as the next step. (Exhibit 55).

Jensen Element Three

Jensen, element three, says an employer relying on the employee misconduct defense must prove it has taken steps to discover violations. This element is often the most difficult for a company to prove. Our Hearing Officer found Konecranes "did not effectively audit the work practices of its employees in regard to locking out/tagging out." (KRO 17). Here the Hearing Officer, without expressly ruling on the company's employee misconduct defense, impliedly did so by affirming the citation.

Professor Rothstein, in his administrative law text,[13] sets out several examples where companies have difficulty proving they had a system for detecting violations. These include widespread noncompliance with rules, involving both the number of employees and the number of incidents:"[W]here the employer did not discipline

[13] *Occupational Safety and Health Law,* 2010 edition, section 5:27, page 214 and 215.

employees after prior incidents of violative conduct, subsequent violations have not been considered 'unpreventable.'"[14] A company's defense is more likely to fail if a supervisor has been found in violation of the rules. None of these examples we have just cited apply to Mr. Dohoney's failure to observe the company rules against working on live wires.

Because Mr. Dohoney's conduct was not in plain sight, we do not know how long Mr. Dohoney was engaged in working on live wires. Given the efforts of Mr. Dohoney and Mr. Poczerwinski[15] that morning to disengage[16] the motor coupling from the crane's electric motor and suspend it from the rafters with a come-along, we can only infer Mr. Dohoney had not been long engaged in the live rewiring work prior to his death. (TE 656 – 660).

Professor Rothstein, writing about *Jensen* element three, says "[i]n essence, the employer is presenting evidence that it lacked even constructive knowledge of the noncomplying conditions. Thus, the success of the defense will depend on whether the employer exercised reasonable diligence in detecting workplace hazards." Pages 213 - 214. In *Precision Concrete, supra*, the federal Commission addressed the issue of constructive knowledge. The Commission said consideration of the constructive knowledge issue included an evaluation of an employer's work rules and training programs, his supervision, his anticipation of hazards and his "measures to prevent the occurrence of violations." *Precision Concrete*. Konecranes had rules and had

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[14] *Id.*, page 215.

[15] Neither party called Mr. Poczerwinski as a witness.

[16] This work required the two employees to unbolt the engine coupling and back the crane away from the suspended coupling; in other words, the crane needed electric power. TE 657.

communicated them to its technicians. Mr. Lane told Mr. Dohoney on the morning of the fatality to lock out the crane on the shop floor before working on the bridge. This demonstrates Konecranes' understanding of the hazard, working on live wires, and its efforts through its supervisor to communicate that understanding to its employees. This is evidence of supervision and reasonable diligence. *Precision Concrete.*

In its brief to the Commission Konecranes cites to its monitoring of work orders, which is how the company discovered that Dohoney had previously worked on live wires. Konecranes gave Mr. Dohoney a final warning for his conduct. Dohoney worked for his employer for one year. For his first three months on the job he worked with a more senior Konecranes employee. (TE 400). This conduct by the employer speaks to its efforts to prevent violations.

As we have explained, Konecranes introduced evidence of audits for 2007, 2008 and 2009 up until Mr. Dohoney's fatality. Konecranes conducted 18 audits for 2007 and 2008 (Exhibit 53), and six audits for 2009 through August (Exhibit 54). Our Hearing Officer gave little credence to these audits. She said Konecranes' employees knew when a supervisor was coming to a work site. Even if we set aside these field audits for that reason, and we do not given their sheer number, we still have the rules, the training, the supervision and the anticipation of hazards to demonstrate the company's efforts to eliminate violations. *Precision Concrete, supra.*

Mr. Dohoney had been trained not to work on live wires. He had been disciplined for previously working on live wires and knew his next violation would result in

termination of employment. He knew Tony Ashton had been fired for working on live wires. Mr. Dohoney was instructed on the very day of the fatality not to work on live wires. Mr. Dohoney was present for the discussion explaining Ashton's termination of employment to his fellow workers. There is little else the company could have done other than provide continuous oversight of Mr. Dohoney. The hallmark of Konecranes' electrical safety policy is its rule which prohibits employees from working on live electrical parts. In other words, Konecranes' employees have no discretion about working on live wires, it is forbidden. We would view this case differently if Konecranes' rules allowed employees to decide for themselves when they could work on live wires. In *Mass. Electric Construction Co v Occupational Safety and Health Administration*, 215 F3d 1312 (1st Cir. 2000), CCH OSHD 32,024, page 47,845, BNA 18 OSHC 2077, 2079, the Court affirmed an administrative law judge's order denying the employer's employee misconduct defense because company rules allowed its electricians to decide for themselves when it was safe to work on live electrical parts. "While the company's reliance, as found by the ALJ, on the usually good judgment of an experienced electrician may have been reasonable, it was not in compliance with federal regulations [which prohibit working on live electric parts]:"

> 'Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them.'

Konecranes has proven it insists on compliance with its rules and regularly enforces them.

Given Konecranes' implementation and communication of its rules and its efforts to monitor and supervise its employees, we find the company's safety program was adequate. We find Konecranes proved element three of the employee misconduct defense. *Jensen Construction, supra.*

We have dismissed the serious citation and its penalty for Labor's failure to prove that Konecranes had actual or constructive knowledge of the cited condition. Had Labor met its burden, we nevertheless would have reached the same result because Konecranes met its affirmative burden of proving the employee misconduct defense. *Jensen.*

It is so ordered.

March 12, 2013.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify this decision of the review commission was served on this March 12, 2013 on the following in the manner indicated:

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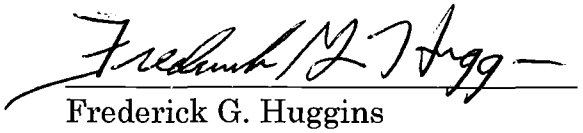

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