



571

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

John Y. Brown, Jr.
GOVERNOR

REVIEW COMMISSION

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April 21, 1980

KOSHRC #571

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

J. A. JONES CONSTRUCTION CO.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

BY THE COMMISSION:

A Recommended Order of Hearing Officer Charles A. Goodman III issued under date of November 26, 1979, is presently before this Commission for review pursuant to a Petition for Discretionary Review filed by the Respondent.

Summary of the Case

The case below involved an alleged serious violation of 29 CFR 1926.550(b)(2) (as adopted by 803 KAR 2:030) along with the penalty proposal of \$560.

The cited safety and health standard requires, in part, that cranes in use shall meet the applicable requirements for operation as prescribed in ANSI B 30.5 - 1968, Safety Code for Crawler, Locomotive and Truck Cranes. The description of the violation alleges failure to comply with the prescriptions of the aforementioned code, Section 5-3.2.3(i): "Outriggers shall be used when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane . . ."

The inspection in this case, conducted over several days in November of 1978, was initiated after the report of a fatal accident at the Spurlock Station construction site near Maysville, Kentucky.

The Respondent, one of several general contractors on the project, subcontracted for various aspects of the work. Whalen Erecting Company, a subcontractor, was responsible for receiving, storing and installing reinforcing steel. As part of the written contractual agreement between these parties, Jones agreed to provide crane service to Whalen for unloading, hoisting and rehandling of the reinforcing steel materials.

In accordance with the above-mentioned provision, Leonard Sparkman, an operating engineer, mechanic and employee of Jones, was directed by his foreman, another Jones employee, to report to a location to help several Whalen employees move some steel rebars. The material was located between two trailers so the operator, following hand signals from Whalen's ironworkers, extended the boom between the trailers and lowered the hook. The attached bundle was lifted, the boom retracted and raised. Sparkman did not ask and was not told the weight of the rebar load. The crane's outriggers were not deployed. During the procedure the crane tipped and the boom plunged through a nearby first aid trailer, fatally injuring a nurse working therein.

The Hearing Officer's Recommended Decision initially addresses the factual or proof issue as posed during the hearing and in the briefs submitted by the parties. Mr. Goodman finds that: the crane was a P & H Omega Model 20 with a 3 section boom; the weight of the rebars was 870 to 900 pounds with a shieve block weight of 400 pounds; the operating radius was 35 feet. Operation of the crane under these conditions, without deployment of the outriggers, is found to be violative of the specifications as set forth in the cab chart. In consideration of these findings it is further determined that a prima facie case of a violation is established.

After finding a violation of the cited standard, attention is directed to the second fundamental issue, whether the cited Respondent is responsible for the violation.

The decision sets forth an extensive analysis of the "borrowed servant" doctrine as well as a review of federal OSHA cases involving like circumstances. The Hearing Officer finds two basic principles appearing throughout both the judicial and administrative decisions-- each situation must be considered on a case-by-case basis and control seems to be a significant focus in both settings.

It is further noted that the issue of "control" is more appropriately viewed as a question of responsibility.

Examination of the violation at hand and consideration of the particular facts involved lead the Hearing Officer to conclude that Jones is responsible for the cited violation.

The third major issue involved the Respondent's "knowledge" of the violation. Citing various portions of the record, Mr. Goodman finds that the Respondent's claimed lack of knowledge fails as a defense.

The citation and proposed penalty are affirmed by the Recommended Order.

Decision of the Commission

The Hearing Officer's decision is now before the Commission pursuant to a Petition for Discretionary Review from the Respondent.

We find that it is appropriate to analyze and decide this case in light of the three fundamental issues developed by the parties and addressed in the Recommended Decision.

The Hearing Officer, after hearing and careful review of the record, has found that the facts and proof presented establish a prima facie case of a violation of the standard as alleged.

On review, this Commission has carefully considered all of the evidence below and finds no reason to disturb the factual findings of Mr. Goodman and we are, therefore, unanimously in agreement with the finding of a violation.

A substantial portion of this case has been devoted to the issue of responsibility for the violation. The Respondent has denied responsibility, citing provisions of its contract with Whalen Erecting as well as the tort law concept of the "borrowed servant."

In the decision making process, this Commission and its Hearing Officer often consult the published occupational safety and health decisions of the Federal Review Commission, Administrative Law Judges and the Federal Courts. Although these decisions are not binding upon this body, they do involve essentially the same standards, duties and obligations and are, therefore, persuasive and advisory.

There are a number of these cases involving loaned and leased cranes on multi-employer worksites, and we find the Tenth Circuit U. S. Court of Appeals decision in Frohlick Crane Service, Inc., v OSHRC and Peter J. Brennan, Secretary of Labor, 1975-76 OSHD (19,922) to be particularly noteworthy.

In Frohlick a crane rental service claimed they were not responsible for a violation because they were not the "employer." A contract provision stated that the leased equipment and person operating the leased equipment "are under the lessee's exclusive jurisdiction, supervision and control."

The Court upheld the finding of a violation, and in reference to the contract provision stated, "any private agreement of this sort between the parties cannot control the statute."

The Court further outlined a stance which we find to be appropriate to the case at hand: "We do not believe it necessary to get involved in any discussion as to the law of borrowed employees . . ."

This is not a tort case. Rather, it is an administrative proceeding brought under remedial legislation designed to provide a safe place to work for every working man and woman in the Nation. The Act should not be given a narrow or technical construction . . ."

We further believe that the decisions in Weicker Transfer & Storage Co., 1974-75 OSHD (19,215), Lidstrom, Inc., 1975-76 OSHD (20,564) and Acchione and Canuso, Inc., 1976-77 OSHD (21,379) support our position that the Respondent cannot contract away its safety and health responsibilities or avoid these duties by infusion of the tort law concept of borrowed servant.

Even if we were to analyze the issue under the borrowed servant and control concepts, there are a number of factors weighing against the Respondent's claim of lack of responsibility. The loan arrangement was conducted on a common job site and was obviously of benefit to both parties. A common sense interpretation would reveal that the provision giving Whalen control involved directions and supervision of the relocation of materials while actual control of the operation, knowledge of the capabilities and responsibility for the crane remained with the crane operator and his employer.

As the Hearing Officer noted, the question of responsibility for an OSH violation is not necessarily determined by an "either/or" analysis and this precept has been firmly established by a myriad of decisions.

Although there may be several parties responsible under the circumstances, this Commission can concern itself only with those parties present and subject to our jurisdiction. We unanimously affirm the finding that Jones is the employer responsible for the violation.

The final issue to be considered involves the Respondent's claimed lack of knowledge of the violation. The Respondent has posed what we believe to be an inconsistent defense by claiming on one hand that the operator was directed to thoroughly acquaint and familiarize himself with the lift capabilities of the crane while also claiming that it was the subcontractor Whalen who was responsible for deployment of the outriggers.

As noted above, the standard and common sense dictate that the operator must know the crane capabilities and determine whether the outriggers should be used for the particular lift. Likewise, the actual determination of load weight is most appropriately within the realm of responsibility of the workers familiar with the material such as ironworkers in this case.

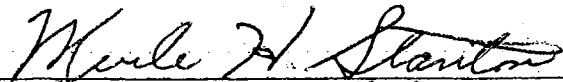
Mr. Sparkman did not know and did not attempt to find the lift load weight in this case and further testified that it was his practice to follow the signals of the ironworkers in determining whether to deploy the outriggers. This practice is in violation of the requirements of the standard and is readily distinguishable from the situation in Secretary of Labor v J. A. Jones Construction Co., OSHRC Docket No. 77-1697.

In the cited Jones case, Whalen did make a load weight determination, although in error, and the Jones operator made the lift after checking the weight calculation in relation to the cab lift chart. The gist of the Administrative Law Judge's decision is that Whalen was responsible for actual computation and Jones complied with its responsibility by relying in good faith on the computation in determining how to make the lift.

The record here indicates that Jones was well aware of its responsibility and could, with the exercise of reasonable diligence, have determined that Sparkman was consistently failing to follow the practice prescribed by the standard and ANSI code.

ORDER

IT IS THE ORDER of this Commission that the Recommended Order sustaining a serious violation of 29 CFR 1926.550(b)(2) (as adopted by 803 KAR 2:030) and a penalty of five hundred and sixty dollars (\$560) is hereby AFFIRMED.


Merle H. Stanton, Chairman

s/Charles B. Upton
Charles B. Upton, Commissioner

s/John C. Roberts
John C. Roberts, Commissioner

DATED: April 21, 1980
Frankfort, Kentucky

DECISION NO. 858

KOSHRC #571
(6)

Copy of this Decision and Order has been served by mailing or personal delivery on the following:


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This 21st day of April, 1980.


Iris R. Barrett
Executive Director