IN THE MATTER OF	*	BEFORE THE COMMISSIONER
	*	OF LABOR AND INDUSTRY
	*	
GEORGE HYMAN	*	
	*	HEARING DETERMINATION NO. 99-
	*	MOSH CASE No. W2868-006-94
CONSTRUCTION COMPANY	*	OAH CASE No. 93-DLR-MOSH-41-602
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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*. Following an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued three citations to George Hyman Construction Company ("Employer"), alleging violations of various safety standards. Following an evidentiary hearing, Hearing Examiner Laurie Bennett issued a decision affirming the citations.

The Employer filed a request for review. The Commissioner of Labor and Industry ("Commissioner") held a hearing, and heard argument from the parties. Based upon a review of the entire record, consideration of relevant law, and the parties' arguments, the Commissioner affirms the Hearing Examiner's disposition of this matter except as noted below.

PRELIMINARY ISSUE

As a preliminary matter, the Commissioner addresses the issue of MOSH Inspector Robert Smith's testimony. Inspector Smith testified on direct examination on May 11, 1994. T1 at 238-68.[1] It was not until nearly a year and half later, in October of 1995, that the hearing was reconvened. By this time, Inspector Smith had retired, and had moved out of state. T2 at 8-11. Due to a directive from the Federal Occupational Safety and Health Administration, MOSH was precluded from paying Inspector Smith's travel expenses to Maryland to attend the hearing. *Id.* As a result of these circumstances, Inspector Smith was made available for cross-examination by telephone. *Id*. The Employer objected to Smith's telephonic testimony on the grounds that telephonic testimony denied the Employer the right to face-to-face confrontation. T2 at 12-13. The Employer refused to proceed with the cross-examination of Inspector Smith. T2 at 16. Despite the Employer's objection, the Hearing Examiner nevertheless relied on Inspector Smith's direct testimony.

The applicable Office of Administrative Hearings ("OAH") regulation, COMAR 28.02.01.17B, provides:

> If a party does not object, the judge may conduct all or part of the hearing by telephone.

This language is identical to the provisions of the Administrative Procedures Act

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[1] The transcript references are as follows: T1 – May 11, 1994 hearing; T2 – October 16, 1995 hearing; T3 – October 17, 1995 hearing; and TE – Exceptions Hearing Before Commissioner. Hereafter, the Hearing Examiner's Decision is referred to as "HE Decision."

("APA") addressing telephonic testimony. Like OAH's regulation, the APA also requires the consent of the parties for telephonic testimony. See *§* 10-211, State Government Article, *Annotated Code of Maryland*.[2] The courts have strictly construed this section as mandating the consent of the parties. *See Dep't of Human Resources v. Thompson*, 103 Md. App. 175, 203, 652 A.2d 1183, 1191 (1995)(administrative law judge is without authority to admit telephonic testimony where one party objects).

While the Commissioner acknowledges the extraordinary confluence of events -- postponements by both parties, prolonged unavailability of Hearing Examiner due to illness, retirement of witness, and budgetary restrictions imposed by the Federal Occupational Safety and Health Administration -- the statutory language is absolute: the parties must consent to telephonic testimony. Even though Inspector Smith's direct testimony was not conducted by telephone, without his testimony being subject to cross-examination, it may not be relied upon under these circumstances. The Commissioner finds that the Hearing Examiner erred in admitting Inspector Smith's direct testimony. Based upon this conclusion, the Commissioner will evaluate each citation to determine whether MOSH has met its burden of proof disregarding the direct testimony of Inspector Smith.

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[2] Subsequent to the hearing in this case, the APA was amended to provide that a party may object to the holding of a hearing by telephone for "good cause" only. *See §* 10-211(b)(1), State Government Article, *Annotated Code of Maryland* (amendment effective June 1, 1996).

FINDINGS OF FACT

With respect to Findings of Fact 11, 15, and 16, the Hearing Examiner relied in part upon the testimony of Inspector Smith in support of these findings. Disregarding the transcript citations to Inspector Smith's testimony, the Commissioner finds that the other testimony cited by the Hearing Examiner is sufficient to sustain these Findings of Fact. *See* FF 11 – T1 at 226-27, T2 at 73-74, 78-81; FF 15 – T2 at 100-03; FF 16 –T1 at 75-77.

The Employer challenges Finding of Fact 10 on the grounds that the testimony cited by the Hearing Examiner does not support this finding. The Commissioner agrees. The citations to testimony at T1 98-99, 210, and 214-15 do not provide a factual basis for this finding. However, the testimony at T1 222-23 does establish the factual basis for this finding in addition to MOSH Ex. 11 which also describes Mr. Patchlovicz's responsibilities. Based upon this evidence, the Commissioner affirms Finding of Fact 10. As to Finding of Fact 18, the Employer correctly points out that it was Inspector Smith, and not Inspector Wiltz, who marked the rope with chalk. This finding is so modified. The Commissioner affirms the remaining findings of fact.

CONCLUSIONS OF LAW

Violation of 29 C.F.R. 550(a)(7)(i)

The Employer was cited for a violation of 29 C.F.R. 1926.550(a)(7)(i) which provides:

> Wire rope shall be taken out of service when any of the following conditions exist: (i) In running ropes, six randomly distributed broken wires in one lay or three broken wires in one strand in one lay.

To find a violation of a specific standard, MOSH must prove the following elements: that the cited standard applies; that its terms were not met; that employees were exposed to or had access to the violative condition; and that the Employer knew or should have known with reasonable diligence. *Daniel Intern'l Corp.*, 9 O.S.H.C. 2027, 2030 (1981). Putting aside the testimony of Inspector Smith, the Commissioner finds that MOSH has met its burden of proof as to this citation.[3]

Inspector Herbert Wiltz was standing next to the rope as it was being lowered, and he stated that he saw six broken wires. T1 at 76-77.[4] More specifically, he described a total of six broken wires in one lay -- three in one strand and three in another. T1 at 77. These facts were memorialized in his report for the citation. MOSH Ex. 8. There is no evidence to refute that there were six broken wires in one lay -- three in one strand and three in another.[5] The Employer's regional safety director testified that he was standing

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[3] The Employer acknowledged on review that there is sufficient evidence to establish a prima facie case without the testimony of Inspector Smith. TE at 53.

[4] The Commissioner does not agree with the Employer's contention that Inspector Wiltz' testimony and the documentary evidence are somehow inconsistent. Respondent's Ex. 8 states "1 lay, 3 breaks, 2 strands." On direct, Inspector Wiltz testified "one lay – three breaks in one strand and three in another." T1 at 76. The statement in Respondent's Ex. 8 can reasonably be interpreted as one lay with three breaks in one strand and three breaks in the other strand.

[5] While the exact number of broken wires is not clearly depicted in the photograph, the testimony of Inspector Wiltz and his description of the condition of the wires in his report is sufficient to support FF 18. *See* T1 at 77; MOSH Ex. 8.

next to the MOSH Inspectors as the rope was inspected, and his testimony does not dispute that there were the required number of broken wires. T2 at 105-08. The Commissioner finds that MOSH has established that the requisite number of wires were broken.

As to the standard's requirement that the broken wires are located on the running rope, three witnesses, including Inspector Wiltz, the Employer's regional safety director, and the Employer's crane expert, testified that the rope coming off the drum, the rope upon which the broken wires were found, constituted the running rope.[6] *See* T1 at 63; T2 at 119-20; and T3 at 74. Based upon this evidence, the Commissioner concludes that the cited standard applies, and that the Employer failed to comply with the cited standard. The Commissioner also finds that MOSH has satisfied its burden as to employee exposure given that the crane operator was exposed to, and had access to, the violative condition. *See* MOSH Ex. 8.[7]

MOSH characterized this citation as serious. In proving a serious violation, MOSH must demonstrate that the employer has actual or constructive knowledge of the

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[6] During the exceptions hearing, the Employer argues that Respondent's Ex. 7 reflects that there was some internal discussion by MOSH as to whether the rope at issue was on the drum. TE at 25. The relevant issue is whether the breaks are located on the running rope, and not the location of the rope in terms of the drum. As confirmed by the Employer's own safety expert, the running rope includes the rope around the drum that does the lifting. T3 at 74.

[7] Section 550(a)(7)(i) implicitly presumes a hazard in requiring the wire rope to be taken out of service if the requisite number of wires are broken. *See, e.g., Secretary of Labor v. Seibel Modern Manufacturing & Welding Corp.*, 15 O.S.H.C. 1219, 1223 (1991). The Employer has acknowledged this presumption. TE at 56.

violative condition.[8] See § 5-809(a), Labor and Employment Article, Annotated Code of Maryland. In establishing knowledge, MOSH must show that "the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition." See Secretary of Labor v. Atlantic Battery Co., 16 O.S.H.C. 2131, 2138 (1994). On review, the Employer argues that it did everything reasonably possible to detect this violation, and therefore, the Employer could not have knowledge of the broken wires. The Employer takes issue with the Hearing Examiner's conclusion that the Employer had not completed its inspection of the crane on the day of the MOSH inspection, and that the crane therefore was not regularly inspected. In this same line of argument, the Employer contends that just because the Employer could not produce any inspection reports for the crane at issue, the Commissioner should not conclude that these inspections were not conducted.

Several of the Employer's witnesses testified to the Employer's crane safety program. The regional safety director, and the master mechanic testified that crane operators were to complete a daily inspection of their crane prior to operation. T2 at 139; 167. The requirements of this daily inspection were set out in a written checklist. T2 at 139. In addition to the daily inspection, the Employer's safety program required a weekly

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[8] Section 5-809(a) states that a violation is serious if "there is a substantial probability that death or serious physical harm could result from a condition that exists or a practice, means, method, operation, or process that has been adopted or is in use, unless the employer did not and with the exercise of reasonable diligence could not know of the violation."

crane inspection, and an inspection after 200 hours of operation. Inspector Wiltz also testified that crane operators had informed him that they conducted daily inspections. T1 at 173-74. Despite this general testimony about the Employer's safety program. The record is devoid of evidence showing that the Employer's crane safety guidelines were followed as to the cited crane. The absence of such evidence leads the Commissioner to the conclusion that these guidelines were not followed as to this crane.

The Employer was not able to produce any daily crane inspection checklists for this crane. T2 at 139. Nor was the Employer able to provide any weekly crane inspection reports. T2 at 168. Further, the 200 hour inspection reports produced show that the Employer did not conduct a 200 hour inspection. In fact, only after 616 operating hours was an inspection conducted. This exceeds the Employer's inspection requirements by four hundred operating hours. This evidence when considered in conjunction with the fact that the Employer introduced into evidence inspection reports from other cranes, supports the Hearing Examiner's finding that the Employer did not inspect this crane on a regular basis. *See, e.g., Gilles and Cotting, Inc.*, 3 O.S.H.C. 2002, 2003 (1976)(employer failed to exercise reasonable diligence by failing to reinspect scaffolding). Given this conclusion, the Employer cannot benefit from an inference that the wires had broken recently because the Employer failed to prove that inspections were conducted on this crane's running ropes during the relevant period. Accordingly, the Commissioner finds that the Employer failed to exercise reasonable diligence, and therefore, that the

Employer could have known of the violative condition. This citation is affirmed.

Violation of 29 C.F.R. 1926.550(a)(9)

The Hearing Examiner affirmed the violation of 29 U.S.C. 1926.550(a)(9) concluding that accessible areas within the swing radius of the rear of the rotating structure of the crane were not barricaded in such a manner as to prevent employees from being struck or crushed by the crane. HE Decision at 17. Because the Hearing Examiner relied on the extensive testimony of MOSH Inspector Smith for this citation, the Commissioner will evaluate the elements of proof, putting aside Inspector Smith's testimony, to determine whether MOSH has met its prima facie case. As discussed previously, MOSH must prove that the cited standard applies; that its terms were not met; that employees were exposed to or had access to the violative condition; and that the Employer knew or should have known with reasonable diligence. *Daniel Intern'l Corp.*, 9 O.S.H.C. at 2030.

Section 550(a)(9) requires the following:

> Accessible areas within the swing radius of the rear of the rotating super-structure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

There is no dispute as to the applicability of the standard. On the day of the inspection, the Employer was operating two cranes with rotating super-structures. HE Decision at 7. However, the Employer argues that the Hearing Examiner erred in concluding that the

terms of the standard were violated. TE at 14. The Employer contends that its barricade system complied with the standard because it warned employees of the hazard associated with the rotating portion of the crane. *Id.*

Case law has established that this standard requires the installation of physical barricades. *See Concrete Construction Co.*, 4 O.S.H.C. 1828, 1829 (1976). The purpose of the barricade is to warn employees that the area is dangerous, and to direct employees away from the rotating crane superstructure. *See Brock v. Bechtel Power*, 12 O.S.H.C. 2169, 2171 (1986). The issue then is whether the Employer's barricade was sufficient to direct employees from the dangers of the superstructure. The Commissioner concludes, after review of the photographic evidence, that the barricades did not sufficiently direct employees from the dangers of the rotating end.[9]

PVC piping was connected to all four corners of the crane's cab. *See* MOSH Exhibit 4; T2 at 76. Warning tape, attached to the PVC piping, ran around the perimeter of the crane. T2 at 76. According to the Employer's regional safety director, the pipe and warning tape served as a caution device to alert employees of the swing radius of the rotating end of the crane. T2 at 77. However, the photographic evidence demonstrates that this barricade did not fulfill its stated purpose.

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[9] The Hearing Examiner concluded that the pipes attached to the superstructure constituted an additional hazard that also had to be barricaded. In support of this conclusion, the Hearing Examiner erroneously relied upon the testimony of MOSH Inspector Smith. Given the Commissioner's conclusion that the barricades do not comply with the standard, it is unnecessary to address the issue of whether the barricades created an additional hazard.

The photograph of the Link Belt Crane depicts the car body, which includes the crawler tracks in a horizontal position and the superstructure, the part that rotates, in a vertical position. *See* MOSH Ex. 4 at 6. This photograph illustrates that given the manner in which the warning tape was installed, it could not serve its intended warning purpose because an employee could stand between the rear crawler track and the rear of the rotating superstructure without coming in contact with the warning tape.[10] An employee could be standing in the swing radius of the rear end of the crane with no warning or direction to indicate to the employee that they could be struck by the rear end of the crane.[11] The Commissioner concludes that the Employer's barricade did not comply with this standard's requirements.[12]

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[10] Given the manner in which the Employer installed the barricades, the same condition would exist on the Manitowoc crane.

[11] The factual circumstances of this case differ from *Brock v. Bechtel Power*, 12 O.S.H.C. 2169 (1986), a case relied upon by the Employer. In *Brock*, a rope and flag barricade was strung around the perimeter of the crane. An employee, who entered the barricaded area, was at least warned as they entered this area by having to cross the rope and flag barricade. Once an employee crossed this area, the employee was warned that they were in danger of being struck by the rear-end of the crane. In contrast, with the Employer's barricade, an employee would have no warning that they were entering the danger zone of being struck by the rotating end of the crane.

[12] In support of the its position, the Employer argues that because this type of warning system is in use throughout the country, the barricade at issue in this case therefore complies with the standard. Respondent's Brief on Review Before Commissioner at 21. As discussed above, the photographic evidence reflects otherwise. Moreover, as noted by the Hearing Examiner, the fact that the use of a safety system is widespread, does not necessarily make it compliant with safety and health regulations. *See* HE Decision at 20. The Commissioner does acknowledge, however, that a PVC pipe and warning tape system could comply with the standard if the pipe and warning tape were placed in such a manner as to warn and direct employees away from the entire swing radius of the rear-end of the crane. In this case, the

MOSH suggested abatement of placing barrels around the perimeter of the crane, and this method was immediately implemented by the Employer. MOSH also suggested abatement of attaching pipes to the tracks of the crane. Although it is without significance to MOSH's prima facie case, the Commissioner notes that the attachment of pipes to the tracks may not comply with Section 550(a)(16), and may also raise issues as to the utility of a barricade in warning employees if the barricade is located significantly below eye level.

Turning to employee exposure, MOSH meets its burden of proof by demonstrating that an employee had access to the zone of danger. See Gilles & Cotting, Inc. 3 O.S.H.C. 2002, 2003 (1976). Access to the zone of danger is demonstrated with proof that employees in the "course of their assigned work duties, . . . or their normal means of ingress/egress to their assigned workplaces, will be, are, or have been in a zone of danger." Id. On review, the Employer asserts that MOSH failed to meet this burden, and that the Hearing Examiner misconstrued the evidence.

Inspector Wiltz testified, and his inspection report reflects, that there were employees working in the zone of danger. T1 at 120, 128, 222-23; MOSH Ex. 11 at 2. Inspector Wiltz stated that he observed employees in the area of the rotating superstructure. T1 at 128. In addition, there is unrefuted testimony that the Employer's

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Employer's barricade system fails because it did not warn an employee of the entire swing radius of the crane.

regional safety director, and a crane supervisor Patchlovicz told Inspector Wiltz that supervisor Patchlovicz and three other employees were involved with the primary operations of these cranes. The Commissioner concludes that there is sufficient evidence to find that employees were in the area of the rotating superstructure, and therefore, that employees were within the zone of danger. *See Dic-Underhill*, 4 O.S.H.C. 1489, 1490 (1976); *General Electric Co.*, 5 O.S.H.C. 1186, 1188 (1977). For the reasons set forth above, the violation of Section 550(a)(9) is affirmed.

Violation of 29 C.F.R. 550(a)(17)

The Employer was cited twice for violating Section 550(a)(17) for failure to permanently mark the rated load capacity on two cranes: the P & H Truck Mobile Hydraulic Crane ("P & H Crane") and the Grove Mobile Hydraulic Crane ("Grove Crane"). Section 550(a)(17) provides:

> The employer shall comply with the Power Crane and Shovel Association Mobile Hydraulic Crane Standard No. 2.

The Hearing Examiner upheld this violation based upon the uncontradicted testimony of both Inspectors Wiltz and Smith that the block was not marked. HE Decision at 23. Due to the Commissioner's exclusion of Inspector Smith's testimony in considering this case, it is necessary to address whether MOSH has met its prima facie case.

Inspector Wiltz testified that he observed that the blocks on the P & H Crane, and the Grove Crane were not marked. T1 at 147. The crane operators were exposed to the

condition because they were operating the crane at the time of the inspection. T1 at 148; MOSH Ex. 13. MOSH demonstrated that the Employer failed to exercise reasonable diligence in not determining the failure to mark the blocks through its inspection program, and therefore, the Commissioner finds that the Employer could have known of the violative condition. T1 at 149; MOSH Ex. 13.

On review, the Employer challenges the citation on the grounds that the standard only refers to the power crane standard, and does not set forth the specific requirements of that standard -- namely that each of the blocks be marked with its load capacity. TE at 30. The Employer's contention is without merit. Courts have upheld the adoption by reference of national standards through incorporation by reference. *See* 29 U.S.C. § 655(a)&(b)(1996); *see also L.R. Willson and Sons, Inc. v. OSHRC and Donovan*, 11 O.S.H.C. 1097, 1103 (1983)(upheld adoption by reference with satisfaction of notice and hearing requirements); *Towne Construction Co. v. OSHRC*, 13 O.S.H.C. 1656, 1658 (1988)(upholding OSHA's adoption of the "fruits of private efforts" as governmental standards).

Under Maryland law, incorporation by reference is a "legal device by which a document is made part of COMAR." *See, e.g.*, 21:12 Md. R. 1 (July 8, 1994). "While the text of an incorporated document does not appear in COMAR, the provisions of the incorporated document are as fully enforceable as any other COMAR regulation." *Id; see also Shaw Construction, Inc.*, 6 O.S.H.C. 1341, 1342 (1978)(employer presumed to have

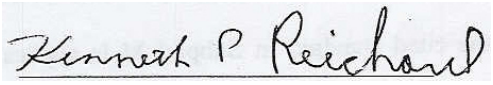
knowledge of standard by virtue of publication in the Federal Register). By law, documents incorporated by reference are available to the public for inspection at various depository libraries in the State and at the Division of State Documents. *Id.* In this case, the power crane standard was available in the MOSH library, and presumably, as required by COMAR, at the Division of State Documents. As the Commissioner has demonstrated, reference in the regulations to a national consensus standard has been found to provide proper notice of a standard's requirements. Ignorance of a standard does not excuse non-compliance. *See Allen v. Tittsworth*, 269 Md. 677, 686, 309 A.2d 476, 481 (1973) (presumption that every person knows the law).

The Employer also contends that the citation must fail because MOSH did not introduce the actual power crane standard into the record. TE at 30. There is sufficient evidence in the record reflecting the requirements of the standard. *See* MOSH Ex. 13. Just as it is unnecessary for a party to introduce the definitive court decision on an issue in order to prevail, similarly, it is not fatal to a party's prima facie case not to introduce a referenced standard. As dictated by the Maryland Register, the Power Crane and Shovel Association Mobile Hydraulic Crane Standard No. 2 is a Maryland regulation. "Every man is presumed to know the law, and that the legislature may enact, amend, or repeal a statute." *Allen*, 269 A.2d at 686, 309 A.2d at 481. The citation under Section 550(a)(17) is hereby upheld.

ORDER

The Commissioner of Labor and Industry hereby ORDERS, this 22nd day of December, 1999, that:

1. Citation 1, alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1926.550(a)(7)(i), is AFFIRMED;
2. Citation 1, alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1926.550(a)(9), is AFFIRMED;
3. Citation 1, alleging an OTHER THAN SERIOUS violation of MOSH Standard 29 C.F.R. 1926.550(a)(17), is AFFIRMED; and
4. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. *See Labor and Employment Article*, § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.



Commissioner of Labor and Industry