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July 5, 2018

(via Federal e-Rulemaking Portal)

OSHA Docket Office
Docket ID—OSHA—2007—0066
Technical Data Center, Room N-2625
OSHA / U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Docket ID—OSHA—2007—0066 Cranes and Derricks in Construction

For the attention of Loren Sweatt, Deputy Assistant Secretary of Labor for
Occupational Safety and Health.

Dear Assistant Secretary Sweatt:

On behalf of the National Commission for the Certification of Crane Operators (“NCCCO”), this letter will respond to the Notice of Proposed Rulemaking (“NPRM”) issued on May 21, 2018 (83 FR 23435 *et seq.*) by the Occupational Safety and Health Administration (“OSHA”), with reference to the crane operator certification and qualification requirements of 29 CFR Part 1926 (the “Rule”).

NCCCO has reviewed the NPRM, including the Preamble, and has noted the questions and invitations for comment contained therein. NCCCO’s responses, comments and recommendations are set forth in this letter.

1. Proposed Extension of Time and Delayed Enforcement

As a threshold matter, should OSHA determine that an additional six-month extension is required to complete the rulemaking process, NCCCO would reluctantly support such a proposal. NCCCO appreciates OSHA’s ongoing efforts to develop and continue to improve the proposed Rule.

In any event, depending on the content of the proposed Rule and the status of Rulemaking as of November 10, 2018, NCCCO requests that OSHA consider issuing a directive delaying enforcement (until rulemaking is complete) of key provisions of the Rule, including without limitation the certification requirement and the employer duty to evaluate operators so as to ensure competency.

2. No Exemption for Cranes in the 5,000 -35,000 lb. Capacity Range

Proposed paragraph (a)(2) retains certain exemptions from the training and supervision requirements in proposed paragraph (b) and the certification/licensing requirements in proposed paragraphs (c)-(d). OSHA considered, but has declined to include in its current proposal, any exemption for cranes with a rated maximum lifting capacity in the 5,000 to 35,000 lb. range.

NCCCCO supports and agrees with OSHA's decision not to include an exemption for such cranes, and with OSHA's assessment that "many of the same hazards presented by larger cranes are present for cranes in [the 5,000-35,000 lb.] capacity range".

Experience suggests that cranes in the foregoing capacity range comprise a very substantial part of the cranes currently in service throughout the country. Furthermore, these cranes are typical of the cranes to which operators-in-training are initially exposed, and on which new operators hone their skills. In addition, because cranes in this capacity range are typically highly mobile and common in crane service operations, such cranes are often operated by workers who handle cranes with less frequency than full-time crane operators for whom crane operation is a primary activity.

Under the circumstances, providing an exemption for cranes in the 5,000 to 35,000 lb. range would likely cause a significant number of workers to be exposed to the very hazards the Rule is intended to prevent. By declining to include this exemption, OSHA has proposed a Rule that is more likely to result in outcomes that improve safety.

3. Qualifications of Trainers

Proposed paragraph (b)(4)(i)(B) requires that trainers have the knowledge, training, and experience necessary to direct an operator-in-training on the equipment in use.

Under OSHA's proposal, trainers would not be required to be certified operators or to have passed the written part of a certification test. In this regard, the proposal is different from the requirements of existing paragraph (f)(3).

OSHA has requested public comment on this proposed revision of existing trainer requirements.

NCCCCO proposes that trainers should be required to be certified operators.

Alternatively, NCCCCO proposes that trainers should be required at least to have passed the written part of a certification test and have familiarity with the equipment's controls, consistent with the requirements of existing paragraph (f)(3).

OSHA offers three reasons for proposing the above-referenced changes to trainer requirements. First, OSHA preliminarily concludes that merely passing a written certification test does not confirm a trainer's ability to train other operators. Second, OSHA preliminarily concludes that using certification as a "sole" criterion might exclude individuals who do not possess certification but otherwise have experience to conduct training. Third, OSHA concludes that passing a certification exam is not a "definitive" indicator of safe training practices.

In response, NCCCO submits that, while certification may not be an appropriate "sole" criterion or a *sufficient* indication of competence as a trainer, it should be regarded as an appropriately *necessary* condition of establishing such competence and ensuring a "baseline" of knowledge and skills.

Identical considerations underpin OSHA's entire proposed Rule concerning crane operator qualifications. In particular, as many industry stakeholders have expressed to the agency, the framework of the proposed Rule should be a "combination" of basic requirements deemed "necessary to fully ensure that operators are truly qualified to operate the equipment for their assigned tasks." The first of these requirements is certification, which, according to the agency, "ensures baseline knowledge and skills to operate a crane."

For similar reasons, certification should be required of trainers to ensure a "baseline" of knowledge and skills necessary to train an operator. Because the skills necessary to operate a crane are profoundly practical in nature, and not merely theoretical, it is appropriate to establish a basic requirement, *i.e.*, certification, that helps ensure such knowledge and skills.

Requiring that a trainer have a baseline of knowledge and skills as an operator is likely, not only to improve the quality of training, but also to increase safety during training in the event the operator-in-training engages in an unsafe act and the trainer is forced to intervene.

Furthermore, establishing certification as a baseline for the knowledge and skills required of trainers is likely to enhance the opportunities for trainers, rather than tend to restrict those opportunities. The portability of certifications across employers will make it easier to assess, preliminarily, whether an individual has the requisite knowledge and experience to conduct training.

Working in combination with the more general requirement that a trainer have the requisite knowledge, training, and experience, a requirement of certification for trainers is more likely to result in outcomes that ensure the competency of trainers and improve safety at the worksite.

4. Elimination of the Requirement to Certify Based on Capacity of Crane

Proposed paragraph (d)(1)(ii)(B) requires that crane operator testing organizations administer written and practical tests that “[p]rovide certification based on equipment type, or type and capacity.” (Emphasis supplied.)

As reflected in the proposal, OSHA has preliminarily determined that certification by capacity of crane should no longer be required. Among other things, OSHA notes that it is unaware of any evidence establishing a safety benefit for certification by capacity.

OSHA has invited comment on whether the language “or type and capacity” should be removed in the final Rule.

NCCCCO supports and agrees with OSHA’s elimination of any requirement that crane operators be certified by capacity in addition to type of crane.

The industry has been clear in its comments that, whereas equipment “type” is critical when delineating knowledge and skill, equipment “capacity” is just one of many other factors (like configuration) to be considered in the employer’s overall evaluation of an operator’s ability. Like OSHA, NCCCCO is not aware of any direct evidence establishing safety benefits related to certification by capacity. Under the circumstances, NCCCCO also agrees with OSHA that eliminating certification by capacity would eliminate an undue financial burden and result in a large one-time cost savings for the industry.

In addition, NCCCCO submits that the language “or type and capacity” should be removed.

NCCCCO submits that the language “by type and capacity” would unnecessarily lead to confusion in the industry. In particular, the proposed requirement that testing organizations must “provide certification based on equipment type, or type and capacity” would send a confusing and inaccurate message that the **only** options for certification are either (a) by type, or (b) by type and capacity.

While testing organizations may in fact seek to consider factors other than “type” when developing operator certifications, and while those factors may well include “capacity,” the additional factors to be considered may also include boom length, or particular configurations, or unique attachments, or other considerations. Because equipment type is the only *necessary* factor to be considered by a testing organization when establishing different crane operator certifications, only “type” should be included in the Rule.

Thus, removing the language “by type and capacity” would eliminate significant confusion. Conversely, the removal of that language would not preclude testing organizations from specifying different levels of crane capacity (or expressly considering other factors or criteria) in their certifications.

Therefore, NCCCO recommends that the language “or type and capacity” be removed from the final Rule to remove confusion for the industry and certification bodies.

5. Retention of the Requirement to Have Testing Procedures for Recertification

The proposed Rule appropriately retains the requirement for certifications that include *recertification* procedures. Proposed paragraph (d)(1)(iv) requires that crane operator testing organizations “have testing procedures for recertification designed to ensure that the operator continues to meet the technical knowledge and skills requirements in paragraphs (j)(1) and (2)” of section 1427. Similarly, proposed paragraph (d)(4) states that a certification issued under paragraph (d) “is valid for 5 years.”

NCCCO supports and agrees with the retention of the recertification requirement.

Nevertheless, OSHA has stated that it is “considering deleting the requirement for operator recertification every five years,” and OSHA has solicited public comments about whether the recertification requirement is necessary, or, alternatively, whether compliance with proposed §§1926.1427(b)(5)---*Retraining*, and 1926.1427(f)(5)---*Re-evaluation*, would be sufficient to “ensure operators continue to operate cranes safely after being [initially] certified, trained, and evaluated.”

NCCCO strongly encourages OSHA to maintain the recertification requirement in 1926.1427(d)(1)(iv), for at least six reasons.

First, employer training and evaluation are useful complements to accredited third-party recertification, *but they are not equivalent to, or a substitute for, periodic recertification, because recertification procedures are inherently proactive and preventative.*

Under proposed paragraphs (b)(5) and (f)(5), employers are required to provide refresher training and/or re-evaluations only when the “performance” of an operator or an “evaluation of the operator’s knowledge” demonstrate that they are necessary. Thus, by their very nature, refresher training and re-evaluation are not proactive or preventative measures but, rather, likely to be conducted under post-incident/accident circumstances triggered by demonstrated failures in operating practices.

By contrast, the recertification procedures of an accredited certification program provide a *regular and planned process*, administered by a third-party, independent of whether or not the deterioration in an operator’s performance, knowledge or skill has become obvious or otherwise evident at a worksite.

Periodic recertification procedures are the existing mechanism in the Rule designed to *proactively* assess operators so as to *prevent* incidents/accidents.

Second, *employer training and evaluation are not equivalent to, or a substitute for, periodic recertification, because recertification procedures are significantly more objective.*

Employer training and re-evaluation efforts can be expected to vary considerably depending on the employer's level of sophistication and resources. Moreover, employer evaluation systems are often subjective in nature, and have been shown to be influenced by factors and motivations other than employee performance.

By contrast, the recertification procedures of an accredited certification program are, by their nature, subject to standardized psychometric rigor and impartiality. By incorporating the rigorous test development and administration standards required by accrediting bodies, *recertification* requirements provide substantial benefits that are likely to enhance public confidence and improve safety at the worksite.

Third, *recertification procedures enhance and amplify a certification program's ability to assess operators' baseline knowledge and skills to operate a crane.*

OSHA has recognized the value of requiring accredited "certifications" to demonstrate that an operator has the baseline knowledge and skills to operate a crane. Indeed, these certifications are a cornerstone of the present Rule. The need for these assessments, and the benefits of accredited certification, do not expire five years after initial certification. Recertification effectively provides the same benefits throughout an operator's career.

These benefits are demonstrated by NCCCO's experience with recertification candidates during the eight years since the Rule was first published. Since 2010, no fewer than 3,755 NCCCO-certified candidates have *failed* their recertification exams.

If OSHA were to delete the requirement for operator recertification every five years, and employers were no longer required to recertify their crane operators, previously-certified operators like those who failed NCCCO's recertification exams would be legally able to continue operating cranes – even though an independent, third-party assessment would have determined them to lack the baseline competence to do so.

Moreover, while refresher training and re-evaluations might have "caught" the deterioration in *some* of those certificants who fail recertification exams, it is exceedingly unlikely that such efforts by employers would prevent all such workers from continuing to operate cranes – with obvious consequences for safety at the worksite.

Fourth, although employers are in an opportune position to communicate changes in "company policies" to employees, *it is unrealistic to expect employers to be fully conversant with changes to all "federal, state, and local government policies" and/or the constant stream of amendments to American national standards, such as the B30 Cranes and Derricks*

standard, on which all testing organizations base their exam content. Not a single standard is the same today as it was in 2010, when the Rule was first published.

Thus, the procedural mechanism of recertification serves to establish a baseline of ongoing assessment, and to promote appropriate education and training in the industry concerning changes in government regulations and national safety standards.

Fifth, *removing the recertification requirement would deny employers and the industry numerous collateral safeguards and benefits provided by certification bodies.*

Recertification procedures provide much more than the substantial benefits of periodic third-party assessment. For example, by virtue of national accreditation requirements, all certification bodies are required to maintain robust ethics and discipline policies and programs that require them to respond (subject to exacting procedural safeguards) to reports of unethical conduct or inappropriate actions by certificants. These reports may involve, without limitation, instances of unsafe operating practices, violations of substance abuse policies, or other, potentially unsafe, unprofessional behavior. Furthermore, these reports arise under circumstances which may or may not come to the attention of, or involve any corrective action by, a certificant's employer.

As long as certificants are subject to ongoing recertification requirements, any current employer or potential future employer need only consult a certification body's online database to determine whether an operator is in good standing. Without recertification, an operator's certification would lapse after five years and, along with it, employers and the public would lose the additional safety benefits that certification bodies provide.

These benefits are demonstrated by NCCCO's experience with program integrity matters during the eight years since the Rule was first published. Since 2010, no less than 86 NCCCO certificants have had their certification status suspended and/or revoked as a consequence of conduct including unsafe operating practices, violations of substance abuse policies, or other unethical and/or unprofessional conduct.

If OSHA were to delete the requirement for operator recertification every five years, and operators were no longer subject to such ethics and discipline procedures after their initial five-year certification period, many of the operators who are now suspended or revoked each year would remain legally able to continue operating cranes.

Sixth, and finally, recertification is a mandatory component of accredited personnel certification. In other words, *to be accredited by a nationally recognized accrediting agency, a certification must include procedures for recertification.*

Thus, both of the national accrediting agencies (ANSI and NCCA) require certification bodies to have provisions for recertification, and recertification is a fundamental

element of ISO 17024-2012, **ISO/IEC 17024:2012**, *Conformity assessment -- General requirements for bodies operating certification of persons*. NCCCO is unaware of a single professionally accredited personnel certification program *anywhere in the world* that does not have requirements for recertification.

For all of the foregoing reasons, NCCCO strongly encourages OSHA not to delete the requirement for operator recertification every five years.

6. OSHA's Proposal to Have Operators "Deemed Certified" Under Certain Circumstances

Proposed paragraph (d)(2) states that: "If no accredited testing agency offers certification examinations for a particular type of equipment, an operator will be *deemed certified* for that equipment if the operator has been certified for the type that is most similar to that equipment and for which a certification examination is available. The operator's certificate must state the type of equipment for which the operator is certified." (Emphasis added.)

OSHA has solicited comment on the proposed changes encompassed in proposed paragraph § 1926.1427(d).

NCCCO support and agrees with OSHA's proposed elimination of previously included language stating that, under the above-cited circumstances, an operator would be "deemed qualified" to operate equipment under certain conditions. As properly noted by OSHA, this change avoids the misconception that an operator could be considered "competent to safely operate equipment" without also being evaluated in some fashion by the operator's employer.

Nevertheless, for the reasons set forth below, the statement that an operator will be "deemed certified" is problematic.

Accordingly, NCCCO proposes that, in paragraph (d)(2), "deemed certified for that equipment" be replaced with "deemed to have complied with the certification requirements of this section for that equipment." (Emphasis added.)

This suggested modification is about more than just semantics. Proposed paragraph (c)(2) provides two options for satisfying the certification requirement: (i) audited employer programs, and (ii) third-party "certification." The term "certification" is thus understood as referring to a credential issued by a crane operator testing organization which is, in turn, accredited by a nationally recognized accrediting agency and subject to procedures designed to meet rigorous certification standards. Under the Rule, and in common practice, only such testing organizations (or certification bodies) are authorized to issue accredited "certifications" demonstrating that an operator has the

baseline knowledge and skills to operate a crane. In other words, only certification bodies should be authorized to determine whether or not an individual can be considered to be “certified.”

Against this backdrop, using the language “deemed certified” in paragraph (d)(2) may lead to misconceptions regarding what it means to be “certified” or the source of a requisite “certification” under the Rule.

Therefore, NCCCO respectfully submits that replacing the foregoing language with “*deemed to have complied with the certification requirements of this section*” is more precise while remaining entirely consistent with the language currently proposed by OSHA.

7. Qualifications of Evaluators

Proposed paragraph (f)(2) establishes minimum criteria for the person who performs the required evaluation of an operator-in-training. Under the proposed Rule, the evaluation must be conducted by an individual who possesses the knowledge, training, and experience necessary for assessing an operator’s knowledge, skill, judgment, and ability.

Under OSHA’s new proposal, evaluators would not be required to be certified operators or to have passed the written part of a certification test.

OSHA has requested public comment regarding the criteria that an evaluator should satisfy.

NCCCO proposes that evaluators should be required to be certified operators.

Alternatively, NCCCO proposes that evaluators should be required at least to have passed the written part of a certification test and have familiarity with the equipment’s controls, consistent with the requirements for trainers set forth in existing paragraph (f)(3).

As OSHA has noted, at the May 2015 Advisory Committee on Construction Safety and Health (ACCSH) meeting, several representatives from the crane industry asserted that evaluators should be certified.

OSHA offers a number of justifications in proposing that evaluators not be required to be certified. The rationale provided is similar to the one provided for the criteria for trainers. In essence, the agency preliminarily concludes that it is not “necessary” to prohibit all non-operators or non-certified personnel to conduct evaluations of operators. OSHA also preliminarily concludes that certification “alone” does not verify that an operator is competent to safely operate a particular crane at a worksite, and that

passing a certification exam “alone” does not mean an individual has the ability effectively to evaluate an operator’s competency.

In response, NCCCO submits that, as with the criteria for trainers, while certification may not be an appropriate “sole” criterion or a *sufficient* indication of competence as an evaluator, it should be regarded as an appropriately *necessary* condition of establishing such competence and ensuring a “baseline” of knowledge and skills.

As noted above, the framework of the proposed Rule is and should be a “combination” of basic requirements deemed necessary to fully ensure that operators are truly qualified to operate the equipment for their assigned tasks. The threshold requirement for operators is certification, which the agency explains “ensures baseline knowledge and skills to operate a crane.”

For similar reasons, certification should be required of evaluators to ensure a “baseline” of knowledge and skills, including the practical skills, necessary to evaluate an operator.

Requiring that an evaluator have a baseline of knowledge and skills as an operator is likely, not only to improve the quality of evaluations, but also to increase safety during any evaluation in the event the operator-in-training engages in an unsafe act and the evaluator must intervene. Since November 10, 2010, when the crane Rule became effective, no fewer than 685 candidates have been prohibited from continuing with their practical exams after engaging in unsafe acts as recorded by NCCCO Practical Examiners during practical exams. Had the Examiners not also been certified operators, with the training and experience to recognize hazardous and potentially dangerous crane operations, these unsafe acts that might have been allowed to continue, with consequent property damage, personal injury, or worse.

Moreover, establishing certification as a baseline for the knowledge and skills required of evaluators is likely to enhance the opportunities for evaluators, rather than tend to restrict them. The portability of certifications across employers will make it easier to assess whether an individual has the requisite knowledge and experience to conduct proper evaluations.

Working in combination with the more general requirement that an evaluator have the requisite knowledge, training, and experience to assess operators, a requirement of certification for evaluators is more likely to result in outcomes that ensure the competency of evaluators and the quality of evaluations, and to improve safety at the worksite.

8. NCCCO's Recommendation That Evaluators be Precluded from Acting as Trainers

As previously discussed, proposed paragraph (f)(2) sets forth requirements for persons who perform the required evaluations of operators-in-training. Similarly, proposed paragraph (b)(4) sets forth requirements for persons who provide operators-in-training with sufficient training to ensure they operate equipment safely.

However, under OSHA's proposed Rule, evaluators are not precluded from also acting as trainers.

NCCCO proposes that trainers should be precluded from acting as evaluators within the framework of the Rule. Alternatively, NCCCO proposes that trainers should be precluded from acting as evaluators with respect to any operator whom the evaluator has previously trained.

NCCCO submits that individuals responsible for training operators are less likely to be in a position effectively to evaluate operators for whom they provide training services.

The evaluation contemplated by the proposed Rule should provide an *independent* assessment of the "skills, knowledge, and judgment" necessary to operate the equipment safely. If the training and evaluation functions are combined and not separated, and if the evaluator is called upon to exercise substantial judgment in evaluating the subject or potential subject of training, then the validity of the evaluation tool is likely to be compromised because an evaluator may lack the requisite objectivity when conducting assessments of operators who are former or potential trainees.

Significantly, this separation of training and assessment functions is a requirement of both ANSI and NCCA accreditation, and is a key provision of the ISO standard governing personnel credentialing. ANSI requirement 5.2.3 states:

"Offering training and certification for persons within the same legal entity constitutes a threat to impartiality. A certification body that is part of a legal entity offering training shall: . . . (e) "ensure that personnel do not serve as an examiner of a specific candidate they have trained for a period of two years from the date of the conclusion of the training activities . . ."

Similarly, NCCA's Standards (notably Standard 3) mandate that policies and procedures demonstrate that all functions performed by personnel related to the certification body, e.g., staff, volunteers, SMEs, governance members, etc., must be impartial in relation to training for certification.

By separating the training and evaluation functions, the proposed Rule is more likely to result in outcomes that ensure the quality of evaluations and improve worksite safety.

9. OSHA's Proposal to Allow "Substantially Different" Determinations

Proposed paragraph (f)(3) states that "the employer may allow the operator to operate other equipment that the employer can demonstrate does not require *substantially different* skills, knowledge, or judgment to operate." (Emphasis added.)

OSHA has requested comment on its proposal to include an evaluation requirement in addition to certification.

While reserving comment on other aspects of the evaluation requirement, *NCCCCO submits that, as set forth in the proposed Rule, the language "substantially different" is ambiguous.* On the one hand, the language may be read to signify that an employer who has completed an evaluation may, under certain conditions, allow an operator to operate other equipment without conducting an additional evaluation. On the other hand, the language could be read to mean that, under certain conditions, the employer may allow an operator to operate other equipment without an additional evaluation *and without regard to any independent requirement of certification.* In other words, the language could be read to mean that an employer's determination that no "substantially different skills, knowledge, or judgment" are required to operate "other equipment" excuses both the need for any additional evaluation and the need for any particular certification.

Thus, in addition to allowing the employer to determine whether an additional *evaluation* is necessary when operating "other equipment," paragraph (f)(3) could be construed to mean that an employer has authority to interpret the scope of a certification program or category or to simply ignore the scope of the certification.

NCCCCO requests that OSHA clarify the proposed §1427(f)(3) to indicate that the employer is only determining whether additional evaluation is necessary for different equipment, and that the employer's approval to operate "other equipment" may be given only if the operator is also certified or deemed to have complied with the certification requirements for type of the other equipment at issue.

To the extent the language of proposed paragraph (f)(3) is intended to grant the employer authority to interpret the scope of individual certifications and/or certification programs, NCCCCO disagrees with OSHA's proposal.

By virtue of deep expertise in certification and detailed knowledge of their own certification programs, *certification bodies themselves* should remain the sole authority concerning the scope of their accredited certifications and which types of equipment are covered by any particular certification. To do otherwise would almost certainly invite employers to apply inconsistent and ill-informed approaches in making determinations about whether or not "other equipment" is covered by a particular certification.

10. Apparent Typographical Error in Paragraph (f)(5)

Proposed paragraph (f)(5) includes a reference to “retraining under paragraph (b)(6) of this section.” Although the section does not include a paragraph (b)(6), it does include a paragraph (b)(5) entitled “Retraining.” Accordingly, NCCCCO respectfully submits that the reference in paragraph (f)(5) appears to be a typographical error.

Conclusion

NCCCCO expresses its appreciation for OSHA’s ongoing commitment to refining and clarifying the crane operator certification and qualification requirements of 29 CFR Part 1926 and, in particular, the opportunity to comment on this proposed rulemaking. NCCCCO will be pleased to assist OSHA further in any manner requested.

Respectfully submitted,

Graham Brent

Graham Brent
Chief Executive Officer

GB/