

Factual Findings

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Nuprecon, LP ("Respondent") worksite at a naval air station near Seattle, Washington on April 21, 2008. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two violations of the Act.¹ The violation at issue on remand, Citation 1 Item 1(a), alleged a serious violation of 29 C.F.R. §1926.501(b)(1) with a proposed penalty of \$1,875.00.

On April 21, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Kalah Goodman conducted an inspection of work activities at Whidbey Island Naval Air Station in Washington. (Tr. 14-15). The inspection was a programmed planned inspection of the site as a result of the location being listed on OSHA's Dodge Report. (Tr. 14). At the time of the inspection, Respondent had employees working on the third and fourth floors of Hangar Five. (Tr. 17, 26, 72). Respondent's employees were demolishing two hangar bays, two floors of another hangar, and a tunnel. (Tr. 73).

CSHO Goodman entered the third floor of Hangar Five and observed a 21-foot horizontal opening at one outer edge of the floor. (Tr. 20, 60; Ex. 2, 5). The floor opening had a 5/8-inch thick wire cable stretched across it, which was secured to the two columns on either side. (Tr. 20, 40, 74; Ex. 2, 4). There was also red plastic tape surrounding the floor opening in a rectangular pattern, approximately 15 feet from the edge. (Tr. 79-80). The distance from the edge of the third-floor opening to the ground below was approximately 36 feet. (Tr. 75-76; Ex. 5).

¹ The adjudication of Citation 1 Item 1(b) was not addressed in the Commission's *Decision and Remand Order*, and therefore, will not be addressed herein.

CSHO Goodman learned that the 21-foot opening was being used by a Nuprecon employee operating a Bobcat front-end loader to push debris off the edge as part of the building demolition. (Tr. 25). However, at the time of her inspection, the Bobcat operator was not working near the edge. (Tr. 25, 43-44). He was working in an adjacent area on the same floor, piling up piping which was being removed from the building. (Tr. 25). CSHO Goodman observed another Nuprecon employee working near the red tape barrier, but outside its boundaries, on a scissor lift. (Tr. 25, 29, 47; Ex. 4). There were also several Nuprecon employees who passed through the third floor of Hangar Five daily on their way up to the fourth floor. (Tr. 26, 47).

CSHO Goodman testified that the regulations, under these circumstances, provided for only three methods of acceptable fall protection for employees accessing the third floor: guardrail systems, safety net systems, or personal fall arrest systems. (Tr. 26, 28). She testified that the use of a wire rope and red tape to guard this open floor edge was not sufficient. (Tr. 26-29). The Secretary considered all employees working on the third floor of Hangar Five to be exposed to a fall hazard as a result of this condition. (Tr. 46, 48-49; Complainant's Post-Hearing Brief, p.6). The parties agree that a 36-foot fall would unquestionably result in serious injury or death. (Tr. 34, 115).

During the inspection, CSHO Goodman observed and video-recorded the floor opening while standing just outside the red-tape boundary. (Tr. 39). Although she testified that any employee who walked on the third floor was exposed to a fall hazard as a result of this condition, she did not consider herself personally exposed to the fall hazard while standing fifteen feet from the edge. (Tr. 39). She acknowledged that the red tape surrounding the edge indicated to her that she should stay out of that area. (Tr. 40).

She further acknowledged that she never saw any employees working within the boundaries of the red tape. (Tr. 43).

Prior to the inspection, Respondent had implemented and trained its employees on a color-coded system regarding plastic tape boundaries. (Tr. 77). Red tape is recognized as the highest danger level and employees are trained to stay out of any area demarcated with red tape. (Tr. 77). The lone exception in this instance was the Bobcat operator, who actually maneuvered his machine inside the area so that debris could be pushed off the floor opening to the ground below. (Tr. 76, 80, 83-84, 95).

Respondent presented evidence and argument on a multitude of alternative fall protection methods identified in the regulations. However, Aaron Tomaras, Respondent's Superintendent on the day of the inspection, conceded that the wire rope stretched across the opening did not constitute a guard rail system, that the Bobcat operator's use of a seat belt did not constitute fall protection, that the floor opening was not a leading edge, and that "warning line system" referenced in §1926.500 applies only to roof work. (Tr. 88, 90-91, 115). He also conceded that this location was not a roof. (Tr. 91). Avery Brown, Respondent's Field Safety Officer, maintained that the red-taped area surrounding the third floor opening was a "controlled access zone." (Tr. 101-102). However, I find that Respondent was not engaged in the type of activities referenced by the controlled access zone regulation [29 C.F.R. §1926.502(g)]: bricklaying, leading edge work, precast concrete erection work, or residential construction.

Citation 1 Item 1(a) alleges that Respondent failed to implement an acceptable fall protection system at the 21-foot opening in the demolition area on the third floor of Hangar Five. (Tr. 26; Ex. 7). In calculating the proposed \$1,875 penalty, CSHO

Goodman concluded there was a high severity of injury, but a low probability of an actual accident. (Tr. 35). She also applied a 15% penalty reduction for the Respondent's good faith during the inspection, and an additional 10% reduction for Respondent's lack of violations in the past three years. (Tr. 36).

Discussion

To establish a prima facie violation of the Act, the Secretary must prove: (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 condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1(a)

The Secretary alleged in Citation 1 Item 1(a) that:

~~29 CFR 1910.66(b)(1) Edge Protection (i. & walking/working surface level~~
was not protected from falling by the use of guardrail systems, safety net systems;
~~(a) The 6-foot diameter zone, unguarded open sided floor located 3 1/2 feet above~~
the lower level. Hazard: Fall from elevation.

The cited standard provides:

Unprotected sides and edges. Each employee on a walking/working surface
(horizontal and vertical surface) with an unprotected side or edge which is 6 feet

(1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

CSHO Goodman is correct that the cited standard provides for only three types of fall protection: guardrails, safety nets, or personal fall arrest systems. Other regulations recognize different types of acceptable fall protection methods if specific types of work activities are being performed. As discussed above, Respondent's own supervisors testified that the wire rope stretched across the opening did not constitute an adequate guard rail system, that the Bobcat operator's use of a seat belt did not constitute fall protection, that the floor opening was not a leading edge, and that "warning line systems" referenced in §1926.500 apply only to roof work. I also concluded above that Respondent was not engaged in the type of activities referenced by the controlled access zone regulation [29 C.F.R. §1926.502(g)]: bricklaying, leading edge work, precast concrete erection work, or residential construction. The record establishes that there was no safety net system at this location. There was some testimony about the presence of a fall restraint, or "yo-yo" system, available for employee working inside the red-taped area. However, the record indicates that the Bobcat operator was not required to use the fall restraint system while in the Bobcat pushing debris over the edge. (Tr. 75-76, 80, 83-84, 95). Furthermore, CSHO Goodman testified that there was no such fall restraint system installed at the time of her inspection. (Tr. 26-28, 47). The preponderance of the evidence establishes that Respondent failed to implement one of the three acceptable methods of fall protection at this location. The terms of the cited standard were violated.

To prove employee exposure to a violative condition, Complainant must establish that Respondent's employees were either actually exposed or that it was "reasonably

predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). The record establishes that the Bobcat operator’s responsibilities on this floor required him to cross the boundary of red tape and push debris over the inadequately protected edge. During this process, the Bobcat operator came within 3½ feet of the opening. (Tr. 96-97). Therefore, the Bobcat operator’s activities alone establish employee exposure to the fall hazard.

Superintendent Tomaras was aware of the condition of this opening prior to the inspection. (Tr. 75-76). Knowledge of this violative condition is imputed through him to the Respondent. *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

In order to establish a “serious” violation of the Act, the Secretary must establish that there was a substantial probability that death or serious physical harm could result from the cited condition if an accident occurred. “In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur.” *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). There is little doubt that a fall from a height of thirty-six feet would have resulted in serious physical harm or death. Citation 1 Item 1(a) was properly characterized as a serious violation. Accordingly, Citation 1 Item 1(a) will be affirmed.

Penalty

In calculating the appropriate penalty for the violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶129,964 (No. 87-2059, 1993). Based upon the facts and discussion above, the court finds that a penalty of \$1,875.00 is appropriate for the violation.

Affirmative Defenses

Respondent did not argue the merits of any affirmative defenses in its post-hearing brief. Therefore, the affirmative defenses identified in Respondent's September 12, 2008 letter to the court are deemed abandoned.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1(a) is AFFIRMED and a penalty of \$1,875.00 is ASSESSED.

/s/
Judge, OSHRC

Date: January 8, 2010
Denver, Colorado