United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Excel Modular Scaffold & Leasing Company dba Excel Scaffold & Leasing,

Respondent.

OSHRC Docket No.: 17-0679

Appearances:

Lindsay A. Wofford, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Steven O. Grubbs, Esq.
Grant Dorfman, Esq.
Sheehy, Ware & Pappas, P.C., Houston, Texas
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Excel Modular Scaffold & Leasing Company dba Excel Scaffolding and Leasing (Excel) contests a Citation and Notification of Penalty (Citation) issued by the Secretary. The Secretary issued the Citation upon the recommendation of Compliance Safety and Health Officer (CSHO) Joshua Mandrell following a fatality investigation he conducted at the dock area of the Marathon Galveston Bay Refinery in Texas City, Texas. An Excel employee drowned when a scaffolding component to which he had attached his personal fall arrest system collapsed and dragged him into Galveston Bay.

Excel timely contested the Citation. The Court held a hearing in this matter on March 19 and 20, 2018, in Houston, Texas. The Court held the record open for admission of a post-hearing witness deposition. The Court closed the record by order issued May 9, 2018. The parties filed briefs on June 25, 2018.

The Secretary cited Excel for four serious violations of the construction standards of the Occupational Safety and Health Act of 1970, 29 C.F.R. §§ 651-678 (Act). The Secretary withdrew Item 2 (alleging a violation of 29 C.F.R § 1926.451(a)(6) for failing to ensure scaffolds were constructed in accordance with the design by a qualified person) during the April 5, 2018, post-hearing deposition of David Doucet (*Doucet Deposition,* Tr. 85-86). The Secretary withdrew Item 3 (alleging a violation of 29 C.F.R § 1926.451(g)(2) for failing to have a competent person determine the feasibility and safety of providing fall protection for employees erecting supported scaffolds) at the beginning of the hearing on March 19, 2018 (Tr. 7).

Item 1 alleges Excel violated 29 C.F.R § 1926.106(d). The parties stipulated Excel "violated 29 C.F.R § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3) Item 4 alleges Excel violated 29 C.F.R § 1926.502(d)(15) by failing to ensure the anchorage points used by employees for attachment of personal fall arrest equipment were capable of supporting at least 5,000 pounds per employee. The Secretary proposes a penalty of $12,675.00 for each item.

For the reasons discussed below, the Court **AFFIRMS** Item 1 as serious and assesses a penalty of $12,675.00. The Court **VACATES** Item 4 and assesses no penalty.

JURISDICTION AND COVERAGE

Excel timely contested the Citation and Notification of Penalty on April 3, 2017. The parties stipulate the Commission has jurisdiction over this action and Excel is a covered business under the Act (*Agreed Prehearing Statement*, ¶ D.1, D.2; Tr. 8). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Excel is a covered employer under § 3(5) of the Act.

BACKGROUND

The Marathon Refinery (Marathon) hired Excel to construct scaffolds underneath its three docks in Galveston Bay. Marathon planned to use the scaffolds when repairing and repainting the underside of the docks (Tr. 40). The scaffolds were a series of connected bays, measuring 10 feet by 10 feet, spanning the area underneath the docks (Tr. 81-82). The scaffolds were "hanging scaffolds" because the support legs of the scaffold were attached to the I-beams located underneath the dock

(Tr. 41-42). The scaffold platform was approximately 6 or 7 inches above the surface of the water (Tr. 210).

To construct the hanging scaffolds, Excel secured a horizontal bar, called a set-up bar, to the bottom flange of the I-beam using two beam clamps (Tr. 53-55). Right angle clamps secured the hanging vertical legs of the scaffold to the set-up bar (Tr. 60). Each of the vertical legs of the hanging scaffold consisted of a 4-foot long pipe attached to a 10-foot long cupped scaffold leg (Tr. 53-57-59). Horizontal runners snapped to the cups of the scaffold leg to create horizontal bracing for the scaffold. Upon completion of the scaffold frame, Excel planked it to create a working surface (Tr. 58-59, 82).

Crews of six workers erected the scaffold bays, three on each side of the bay. The chain of command for the crew ran from the foreman to the leadmen, then to the carpenters, and then to the helpers. On September 12, 2016, an Excel crew including leadman Charles Donnelly Jr., leadman L.G. (the decedent), and carpenter Adrian Guajardo constructed one side of a scaffold bay underneath an area known as Dock 34. Pedro Ventura was the crew's supervisor (Tr. 40-46, 63, 226-27). All crew members were equipped with personal fall arrest systems and were wearing flotation devices (Tr. 91). After finishing the first bay, the crew began constructing one side of a second bay underneath the dock, to be connected to the first bay. L.G. crawled on pipes underneath the dock to get to the location to attach the set-up bar to the I-beam (Tr. 73-77, 81-82). After L.G. had secured the set-up bar, Guajardo handed L.G. the vertical leg, which L.G. attached using a right clamp (Tr. 63, 83, 87-88, 174-75).

The crew members then secured two horizontal runners to connect the vertical leg to the existing scaffold bay but were unsuccessful in connecting the bottom runner. Donnelly crawled from the bay to the dangling vertical leg using the pipes underneath the dock and climbed down the vertical leg of the scaffold in an attempt to connect the bottom runner. He was unable to do so. Donnelly climbed up the vertical leg and L.G. crawled over to the vertical leg and climbed down it to attempt the connection. L.G. attached his lanyard to the vertical leg. As he attempted the connection, the vertical leg fell into the water, dragging L.G. with it. No lifesaving skiff was available at the site. Two Excel employees jumped into the water in an attempt to rescue L.G. The weight of the vertical leg, however, dragged L.G. to the bottom of Galveston Bay, which was

approximately 18 feet deep at that point. Coast Guard divers recovered L.G.'s body later that day (Exh. R-5, p. 53; Tr. 83-92, 184-187).

THE CITATION

The Secretary's Burden of Proof

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

ITEM 1: ALLEGED SERIOUS VIOLATION OF § 1926.106(d)

Item 1 of the Citation alleges:

> At Dock 34, on September 12, 2016, a lifesaving skiff was not immediately available where employees were erecting a tube and clamp scaffold over water.

Section 1926.106(d) provides:

> At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

Excel Violated § 1926.106(d)

Section 1926.106 ("*Working over or near water*') is found in *Subpart E—Personal Protective and Life Saving Equipment* of the construction standards, which sets forth the requirements for employees engaged in construction work. OSHA defines construction work as "construction, alteration, and/or repair, including painting and decorating." §1926.32(g). An employer engages in construction work when "its employees erect, configure, dismantle, and repair the scaffolds that were necessary for" other employees to perform construction work. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, n. 7 (No. 95-1449, 1999). Excel was in the process of erecting scaffolds so Marathon could "repair and repaint the underside of the dock and for them to go back and sandblast and paint, do any modification as far as welding or refabricating." (Tr. 40) "Excel does not dispute the applicability of the standard." (Excel's brief, p. 2)

The Court finds § 1926.106(d) applies to the cited conditions.

The parties stipulate Excel "violated 29 C.F.R. § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3)

There is, therefore, no dispute that the cited standard applies, Excel failed to comply with the standard, Excel's employees had access to the violative condition, and Excel knew of the condition.

The Court finds Excel's violation of § 1926.106(d) is established.

Excel Abandoned Infeasibility Defense

Excel asserted thirty defenses in its Answer, including the affirmative defense of infeasibility (*Answer*, p. 3, ¶ 11). Excel devotes four pages of its brief arguing this defense, under the heading "Excel Met Its Burden to Demonstrate the Infeasibility of Complying with 29 CFR 1926.106(d) Underneath Dock 34." (Excel's Brief, p. 2) In the *Agreed Prehearing Statement*, however, the parties do not identify infeasibility as an issue of fact or law with regard to Item 1:

> **F. Concise statement of issues of fact that remain to be litigated:**
>
> *Citation 1, Item 1:*
>
> 1. Whether failing to have a lifesaving skiff immediately available exposed Respondent's employees to a substantial probability of death or serious injury under the facts and circumstances of this case; and
> 2. Whether the proposed penalty is appropriate.

(*Agreed Prehearing Statement*, p. 15)

> **G. Concise statement of issues of law that remain to be litigated:**
>
> 1. Whether Citation 1, Item 1 is a serious violation of the Act[.]

(*Agreed Prehearing Statement*, p. 17)

As noted, the parties stipulated Excel "violated 29 C.F.R. § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3) The Court sought to clarify the specific issues remaining with respect to Item 1. When directly questioned on this matter, counsel for Excel omitted any mention of the infeasibility defense.

> The Court: [T]he stipulations on that particular violation, does that indicate that -- let's see -- Citation 1 is not an issue. You are saying here that the Respondent -- there is an agreement that Respondent violated that by not having the skiff immediately available; that the employees were exposed to the cited condition; and that Respondent reasonably could have known of the violative condition. It looks like applicability of the standard may be the only thing that you are not agreeing to? Does the Court not understand what that stipulation is?

> Counsel for Excel: Basically the stipulation is, Judge, we stipulate we did not comply with the standard. However, we challenge the serious type of the violation classification.
>
> The Court: *So you are only challenging the classification?*
>
> Counsel for Excel: *The classification and, of course, that goes along with that, the penalty amount.*
>
> The Court: Okay. All right. I just wanted to be sure that I understood what was remaining at issue in this item. All right. So we are talking about the serious classification and the corresponding penalty, which is $12,675.

(Tr. 8-10) (emphasis added)

Having declared at the beginning of the hearing that only the characterization and penalty of Item 1 were at issue, Excel cannot now rely on the infeasibility defense. "Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense. *Bettes v. Stonewall Insurance Co.,* 480 F.2d 92 (5th Cir.1973); *see also Bull's Corner Restaurant, Inc. v. Director, Federal Emergency Management Agency,* 759 F.2d 500 (5th Cir.1985)." *Ingraham v. United States,* 808 F.2d 1075, 1079 (5th Cir. 1987). Excel's prehearing stipulations rendered its post-hearing defense unexpected. The Secretary does not address infeasibility in his brief. It would be prejudicial to the Secretary to consider the defense. The Court determines Excel abandoned the infeasibility defense when it stipulated only the characterization and penalty of Item 1 remained at issue.[1]

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[1] To prove infeasibility, an employer must show by a preponderance of the evidence that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure."' *Westvaco Corp.,* 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993).

Excel argues the area underneath Dock 34 where L.G. fell was cramped and not navigable by a skiff. The record establishes, however, Excel's employees were also working on the dock and accessed the hanging scaffolds by using a ladder from the top of the dock. There is no evidence of difficulty navigating a skiff if an employee fell from the dock or the ladder into an area of the water that was not underneath the dock. Had Excel not abandoned the infeasibility defense, the Court would find Excel failed to establish the infeasibility of complying with § 1926.106(d). An employer is required to provide "limited compliance where it furnishes some protection, even if exact compliance is not possible." *Cleveland Consolidated, Inc. v. O.S.H.R.C.,* 649 F.2d 1160, 1167 (5th Cir.1981)" *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 579 (5th Cir. 1994). Furthermore, Excel touts as its "alternative protective measure" the personal floatation devices provided to its employees. This is not an alternative measure, but is required by § 1926.106(a) ("Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.").

Characterization of the Violation

The Secretary characterized the violation of § 1926.106(d) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp*., 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996).

Excel focuses on the circumstances of L.G.'s death, arguing it "could not have reasonably foreseen the hazard that eventuated, and the absence of the skiff was not a factor in [L.G.'s] fatality. Several eyewitnesses testified, without contradiction, that [L.G.] fell under the water immediately and that it was not possible to retrieve him from the surface." (Excel's brief, p. 7) With regard to L.G., Excel contends, "A skiff would not have saved him." (*Id.* at 8)

The Court finds Excel's focus solely on the tragic death of L.G. to be too narrow. It is well-established that finding a violation of an OSHA standard is not dependent on the specific facts of a particular accident; a violation may be found in the absence of any accident. *See Boeing Co.*, 5 BNA OSHC 2014, 2016 (No. 12879, 1977) (finding of a violation does not depend on the cause of the particular accident that led to the case); *Concrete Constr. Corp*., 4 BNA OSHC 1133, 1135 (No. 2490, 1976) ("The Act may be violated even though no injuries have occurred, and even though a particular instance of noncompliance was not the cause of injuries."); *Kansas City Power & Light Co*., 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982) ("Indeed, both the judge and Respondent improperly define the hazard at issue in terms of the asserted cause of the specific incident that led to injury[.]").

Here, L.G. was working with two other crew members on his side of the scaffold bay. Foreman Ventura was on the top of the dock moving materials, and three members of his crew were on the other side of the bay. Excel leadman Mario Castro, one of those crew members, jumped into the water in an attempt to save L.G. (Tr. 92). To access the hanging scaffolds, Excel employees used a ladder extending from the top of the dock down to the water (Tr. 76). All of these employees were working over or near water on September 12, 2016, and had access to the hazard of falling into the water. If an employee fell but avoided L.G.'s unfortunate circumstance of being attached to a

heavy object that dragged him to the bottom of the bay, the presence of a skiff could well prevent serious injury.

Excel quotes the deposition testimony of David Doucet in support of its argument that failure to provide a skiff was not a serious violation of § 1926.106(d).[2] The testimony, however, underscores Excel's misplaced focus on the details of L.G.'s death. Doucet was asked why he believed the CSHO's determination of high severity for the violation was incorrect.

> Doucet: Because the skiff is -- is there to rescue someone and prevent them from drowning, but since all the employees had on personal flotation devices, then that's -- would prevent them from drowning. At that point the skiff is just to -- there to pull you out of the water. So there wouldn't be a -- a drowning hazard to be able to justify a serious classification.
>
> Q.: Yeah. And if -- if an employee is -- is tied off to -- I don't know how much -- let's say, just for the sake of argument, 100 pounds of -- of steel and equipment -- if he's tied off to it when it falls and goes to the bottom of the channel, would you expect that to happen in less than three to four minutes?
>
> . . .
>
> Doucet: It would be before that, yes, sir.
>
> Q.: Even while -- even if he's wearing a personal flotation device?
>
> Doucet: Yes, sir.
>
> Q.: Would a rescue skiff, in the situation that presented itself in this case, have done anything to have saved [L.G.'s] life?
>
> Doucet: No, sir.

(*Doucet Deposition*, Tr. 84)

Doucet argues the skiff was unnecessary because L.G. sank immediately and could not have been helped by its presence. He also contends the other employees would not have been helped by a skiff if they had fallen into the water "since all the employees had on personal flotation devices [that] would prevent them from drowning." (*Id.)*

The Commission has held, however, that the Secretary is not required to prove a drowning hazard exists to establish a violation of § 1926.106(d). In *RGM Constr. Co.*, 17 BNA OSHC 1229

[2] Doucet is a former Area Director for OSHA. Excel proffered him as an expert witness in matters concerning OSHA standards and the items at issue in this case during his April 5, 2018, deposition. The Secretary objected, arguing Doucet's testimony does not meet the standard set out in Fed. R. Evid. 702, and that an expert's interpretation of OSHA standards is not appropriate in Commission proceedings (*Doucet Deposition*, Tr. 18). The Secretary subsequently filed a motion to strike Doucet's testimony. On August 3, 2018, the Court issued an order sustaining the Secretary's objection to the qualification of Doucet as an expert witness in this proceeding. The Court denied the Secretary's motion to strike

(No. 91-2107, 1995), the employer argued it was not in violation of § 1926.106(d) "because RGM did not believe that there was a danger of drowning, as the employees were not working on the water or under the bridge. Unfortunately, the company misconstrued section 1926.106(d) which makes no reference to the danger of drowning. The standard requires that the skiff must be at the worksite at all times when employees are working over or adjacent to water, including when they are working on the deck of the bridge, even if they are working behind guardrails or are otherwise protected by a fall-protection system." *Id.* at 1236.

Excel's failure to have a lifesaving skiff immediately available where its employees were working over or adjacent to water increased the likelihood of death or serious injury to an employee falling into the water. The use of personal flotation devices (which is required by § 1926.106(a)) does not eliminate the hazard of drowning. Guajardo was asked if his flotation device "would hold your head up if you fell into the water." He responded, "Maybe not with tools, but yes." (Tr. 91) If an employee working over or adjacent to water ends up in the water, an unexpected event has already occurred. He or she may have fallen after being injured, or be injured in the fall, depending on the distance. The fallen employee is likely to be disoriented or panicked. Being weighed down by tools or tangled in a lanyard are potential additional stressors. Having a lifesaving skiff immediately available lessens the likelihood of death or serious physical injury.

The Court determines the Secretary properly characterized Excel's violation of § 1926.106(a) as serious.

PENALTY DETERMINATION

"'In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith.' *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). 'Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.' *Siemens Energy & Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted)." *N. E. Precast, LLC; & Masonry Servs., Inc,* 26 BNA OSHC 2275, 2282 (Nos. 13-1169 and13- 1170, 2018).

Doucet's testimony altogether (*Order Sustaining Secretary's Objection to Expert Testimony and Order Denying Secretary's Motion to Strike Expert's Testimony*).

Excel employed over 250 employees. It did not have a history of OSHA violations at the time of the fatality (Tr. 311). Excel has a written safety program, and the Court credits the company with good faith.

The gravity of the violation is high and its severity outweighs the other factors. "'Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors.' *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973)." *Id.*

The absence of a lifesaving skiff when employees are working continually over or adjacent to water exposed the employees to death by drowning. The Secretary states three employees were exposed to the hazard (Secretary's brief, p. 23).[3] The Secretary contends the employees were exposed "for approximately one year." (*Id.*) The alleged violation description, however, alleges the violative condition occurred "on September 12, 2016." The Court finds the duration of exposure to the violation is limited to the day specified in the alleged violation description. OSHA's *Safety Narrative* of the incident states it occurred shortly before lunch (Exh. R-3, p. 2). The Court determines the duration of exposure is approximately four hours. The likelihood of injury was high. Excel required its employees to wear personal flotation devices, which provided some precaution against injury.

Based on the foregoing factors, the Court determines a penalty of §12,675.00 is appropriate for Item 1.

Item 4: Alleged Serious Violation of § 1926.502(d)(15)

Item 4 of the Citation alleges:

> At Dock 34, on September 12, 2016, the anchorage point used by employees working under the dock while erecting the scaffolding was not capable of supporting at least 5,000 pounds.

Section 1926.502(d)(15) provides:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows:

[3] The record indicates more than three Excel employees had access to the violative condition, but the Court accepts the Secretary's representation of three exposed employees for the purpose of determining the penalty.

(i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and

(ii) under the supervision of a qualified person.

Applicability of the Cited Standard

Section 1926.502(d)(15) is found in *Subpart M—Fall Protection*. Section 1926.500(a)(1) provides in pertinent part: "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926." Excel was under contract to erect scaffolds at Dock 34 to enable Marathon to repair and repaint the dock, a construction activity. Section 1926.502(d) provides: "Personal fall arrest systems and their use shall comply with the provisions set forth below[,]" which includes § 1926.502(d)(15).

Excel argues § 1926.502(d)(15) does not apply to the cited conditions because § 1926.451(g)(1), found in *Subpart L—Scaffolds*, provides:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

Since it is undisputed L.G. was working less than 10 feet above the surface of the water at the time of the accident (he was approximately 6 or 7 inches above the water's surface), Excel argues he was not required to use fall protection at all; therefore, Excel contends, the cited standard does not apply to the cited conditions.

The Secretary counters with the subparagraph following the one relied on by Excel. Section 1926.451(g)(2) provides:

> Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

The Secretary argues, "Excel determined it was feasible to use fall protection and employees understood that Excel required 100% tie-off while erecting the scaffold (Tr. 141-42, 486). Once Excel required employees to use fall protection, it was required to comply with the OSHA standards outlining its safe use." (Secretary's brief, p. 14)[4] The Secretary also points out § 1926.451(g)(3) incorporates only § 1926.502(d) from the § 1926.502 standards:

[4] Excel requires its employees to tie off when working 6 feet or more above a lower level (Tr. 515).

> In addition to meeting the requirements of 1926.502(d), personal fall arrest systems used on scaffolds shall be attached by lanyard to a vertical lifeline, horizontal lifeline, or scaffold structural member.

The Court agrees with Excel that § 1926.502(d)(15) does not apply to the cited condition, but reaches that conclusion using a different rationale, involving the intertwined elements of applicability and exposure to a hazard. The Court determines the cited standard addresses fall hazards, exacerbated by the fall distance, resulting in death or serious physical injury. It does not contemplate the hazard of drowning and so does not apply to the cited condition.

The Secretary argues L.G. and Donnelly "were exposed when they anchored their lanyards to the vertical leg in an attempt to connect the bottom horizontal runner. [L.G.] was attached to the vertical leg when it collapsed, and he drowned because of the accident. Employee exposure is established." (Secretary's brief, pp. 21-22) The Secretary does not say exposure to *what.* His language implies the hazard to which the violation of § 1926.502(d)(15), a fall protection standard, exposed the employees was that of drowning.

> One of the elements of a violation which the Secretary must prove is that employees were exposed to the violative condition. *Gary Concrete Prod.*, 15 BNA OSHC 1051, 1052, 1991–93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86–1087, 1991). The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90–2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987–90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86–247, 1990).

RGM Constr. Co., 17 BNA OSHC at 1234.

A "zone of danger" is "determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees *which the standard is intended to prevent*." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976) (emphasis added). Section 1926.502(d)(15) is found in *Subpart M—Fall Protection.* Section 1926.501(b) requires the employer to provide fall protection for its employees when they are working 6 feet or more above a lower level. The standards found in *Subpart M* are, therefore, intended to prevent falls to lower levels of 6 feet or more.

In the present case, it is undisputed L.G. and Donnelly were located approximately 6 to 7 inches above the water when they were tied off to the scaffold component. The Commission has

held the surface of water is a "level" within the meaning of the fall protection standards. Section 1926.500(b) defines *lower levels* as "those areas or surfaces to which an employee can fall. Such areas or surfaces include … water."

Section 1926.502(d)(15) is intended to prevent death or serious physical injuries resulting from the impact of striking the lower surface, not drowning hazards. Support for this position is found in the discussion of the fall protection standards in *Safety Standards for Fall Protection in the Construction Industry*:

> The Eastern Contractors Association, Inc. (ECA) (Ex. 2-3) commented that "The fall protection requirements 6 feet on open sided floors and 10 feet on scaffolds should remain as is," and explained that the situations were different and each presented unique problems. In the proposed revision to subpart L, Scaffolds, the Agency proposed (§1926.451(e)) that employees working on scaffolds more than 10 feet above lower levels be protected from fall hazards (51 FR 42707, November 25, 1986). The appropriate height threshold for fall protection on scaffolds will be set in the final rule for subpart L. The ECA also stated the height at which fall protection is required should be the same for all trades. OSHA agrees and this final rule reflects that concern.
>
> On the other hand, the SSFI (Ex. 2-89) recommended that the proposed and existing height thresholds for fall protection at unprotected sides and edges, low-pitched floors, roof, etc. be changed from 6 feet (1.8 m) to 10 feet (3.05 m). Based on the BLS injury and fatality data, discussed above (Ex. 3-6), **OSHA believes that employees performing construction work on walking and working surfaces 6 feet (1.8 m) or more above lower levels are exposed to a significant risk of injury and death. Accordingly, more workers would be injured or killed if the height threshold for fall protection were raised to 10 feet (3.05 m).** Therefore, OSHA is not making the suggested change.

Safety Standards for Fall Protection in the Construction Industry, Final Rule, 59 FR 40672-01 (August 9, 1994) (emphasis added).

It is the distance of the potential fall that creates the hazard contemplated by the standards found in *Subpart M.* When the hazard of falling is accompanied by the hazard of drowning, OSHA has promulgated standards that anticipate that possibility. For example, § 1915.71(j)(i), found in *Part 1915—Occupational Safety and Health Standards for Shipyard Employment,* provides

> Scaffolding, staging, runways, or working platforms which are supported or suspended **more than 5 feet above a solid surface**, or **at any distance above the water,** shall be provided with a railing which has a top rail whose upper surface is

> from 42 to 45 inches above the upper surface of the staging, platform, or runway and a midrail located halfway between the upper rail and the staging, platform, or runway.

(emphasis added)

Section 1915.71(j)(1) presumes a hazard of falling to a solid surface when the distance is more than 5 feet, but presumes falling into water from any height is hazardous. Likewise, § 1915.71(j)(3) requires specific equipment to prevent drowning for employees working over water, while requiring fall protection only for employees working more than 5 feet above a solid surface:

> Rails may be omitted where the structure of the vessel prevents their use. When rails are omitted, **employees working more than 5 feet above solid surfaces shall be protected** by safety belts and life lines meeting the requirements of §§ 1915.159 and 1915.160, and **employees working over water shall be protected by buoyant work vests** meeting the requirements of § 1915.158(a).

The standards found in *Subpart M* are specification, not performance standards. "Specification standards, in contrast [to performance standards], detail the precise equipment, materials, and work processes required to eliminate hazards." *Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1106 (No. 14-0816, 2013). Specification standards presume a hazard if the standard is violated. "Where a standard presumes a hazard, . . . the Secretary need only show the employer violated the terms of the standard." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016). The fall protection standards presume *fall* hazards, not drowning hazards. Applying § 1926.502(d)(15), a fall protection standard, to a condition that poses a drowning hazard deprives the employer of fair notice. "[H]azards must be defined in a way that gives an employer fair notice of its obligations under the Act by identifying the conditions or practices over which the employer can reasonably be expected to exercise control" *Missouri Basin Well Serv., Inc.*, 26 BNA OSHC 2314, n. 23 (No. 13-1817, 2018).

If § 1926.502(d)(15) were to apply to the cited condition, the Secretary failed to establish exposure to a fall hazard. Neither *Subpart M*, addressing fall protection for construction, nor § 1926.451, addressing fall protection for scaffolds, requires protection for falls of approximately 6 inches. If the hazard at issue is drowning, the cited standard does not apply because drowning is not the hazard § 1926.502(d)(15) is intended to prevent. Although the elements of applicability and exposure are intertwined, the fundamental deficiency in the Secretary's case is the inapposite choice of the standard cited.

The Court concludes § 1926.502(d)(15) does not apply to the cited condition. Item 4 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.106(d), is **AFIRMED** and a penalty of $12,675.00 is assessed; and

2. Item 4 of Citation No. 4, alleging a serious violation of § 1926.502(d)(15) is **VACATED**, and no penalty is assessed.

/s/

Date: October 24, 2018

Sharon D. Calhoun

Administrative Law Judge
Atlanta, Georgia