United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MORSE DIESEL INTERNATIONAL, INC., Respondent.	: : : : : : : : : :	OSHRC DOCKET NO. 00-2138

Appearances:

Ronald L. Barson, Esquire
Chicago, Illinois
For the Complainant.

Thomas V. Giordano, Esquire
Chicago, Illinois
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site on July 6 and 7, 2000, in Chicago, Illinois, where Respondent Morse Diesel International, Inc. ("Morse") was the general contractor of a construction project called the "Dearborn Center." As a result of the inspection, OSHA issued Morse a serious citation alleging violations of various provisions set out in 29 C.F.R. 1926.501 and 29 C.F.R. 1926.502. Morse contested the citation, and this matter was designated for E-Z Trial pursuant to Commission Rule 203. A hearing was held in Chicago, Illinois, on April 12, 2001. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Matthew McNicholas, an OSHA compliance officer ("CO"), went to the site pursuant to a report of an OSHA official that he had seen fall hazards on the project from his office. Upon arriving at the site on July 6, 2000, the CO held an opening conference with Jack Calatayud, Morse's job site superintendent, and Michael Mandell, a representative of National Wrecking Company ("National"),

the demolition contractor. The CO then conducted his inspection, in the company of Calatayud and Mandell, and he observed various conditions he considered hazards. Specifically, he saw a National employee walking along an unprotected edge, a wire rope guardrail that was only 32 inches above the walking/working surface, and caution tape used as fall protection along the edge of an open-sided floor. He also saw a 10.5-inch-diameter uncovered floor hole in addition to floor holes with covers that were neither secured nor marked to indicate the presence of the holes. The CO photographed these conditions and pointed them out to Calatayud, who agreed to correct them. The CO returned the next day to ensure the conditions had been abated, and he spoke with Calatayud again as well as with Bruce Casey, Morse's safety coordinator, and Vincent Bernardo, Morse's general labor superintendent.[1] CO McNicholas went back to the site on July 18 and August 18, and he held a closing conference with Morse on October 13, 2000. (Tr. 5-28; C-1-8).

Citation 1 - Item 1a

This item alleges a violation of 29 C.F.R. 1926.501(b)(1), which provides as follows:

> Each employee on a walking/working 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.

The CO testified that the basis of this item was the National employee he saw walking along an unprotected edge or walkway, shown in C-2, on July 6; the CO pointed out the condition to Jack Calatayud, who agreed it was a hazard and said he would correct it. The CO further testified that the next day, an OSHA industrial hygienist ("IH") doing lead monitoring at the site took C-3, showing another National employee walking along the same walkway; the IH had asked National's employees to go to her location on a lower level so she could check their pumps, and the employee in C-3 walked along the unprotected walkway to get to a ladder to go the lower level.[2] (Tr. 7-14; 38).

The CO's testimony and photos C-2-3 establish the violative condition, and Morse does not dispute the existence of the condition. Instead, Morse contends that it should not be held liable for

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[1]Bernardo was at the site at the time of the inspection, but Casey was not. The CO learned on July 7 that Morse had brought in a crew on the evening of June 6 to correct the conditions he had noted, and he indicated that the conditions had in fact been abated. (Tr. 25-26; 53; 68; 80-81).

[2]The CO said the top of the ladder was in the lower right-hand corner of C-3. (Tr. 27).

the violative condition because National controlled the demolition area where the condition occurred and the area was restricted such that only National's employees had access to that area.

Commission precedent is well settled that an employer on a multi-employer construction site who creates or controls a hazard has a duty under the Act to protect its own employees and those of other employers "engaged in the common undertaking." *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) and cases cited therein. More specifically to the matter at hand, the Commission has also held that a general contractor may be found liable for a subcontractor's violations where their existence could have been detected with the exercise of reasonable diligence. *Id*. at 1110. In this regard, the Commission has noted:

> [T]he general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

McDevitt Street Bovis, 19 BNA OSHC at 1110, quoting from *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976). To find liability, the extent of the general contractor's supervisory authority at the particular work site must be analyzed. 19 BNA at 1109 n.3.

Vincent Bernardo and Bruce Casey both testified to the effect that while Morse had overall responsibility for the project, subcontractors were responsible for safety in their areas and National was responsible for safety in the demolition area. Bernardo and Casey also testified about their safety inspections of the site, noting that if an unsafe condition they saw and reported to the responsible subcontractor was not corrected promptly, Morse would take care of it. As to an unsafe condition in a restricted area, such as the demolition area, the witnesses indicated they would not enter the area but would tell the responsible subcontractor; if the condition was not remedied, Morse would correct it when the subcontractor was done in the area, but, at the latest, at the end of the day.[3] The witnesses

[3]Bernardo testified he looked for safety problems during his walks around the site, which he did all day. Casey testified he visited the site twice weekly to do safety inspections. (Tr. 54; 64-65).

also indicated that there were several times before the cited instance in which National had damaged fall protection, or not provided it, and Morse had taken care of the problem. (Tr. 54-59; 63-72).

The CO agreed that National controlled the demolition area and that he saw only National employees in that area when he was at the site. However, the CO disagreed that the unprotected walkway shown in C-2-3 was restricted so as to prevent access to it. He said that the barricade depicted in C-3 did not go all the way over to the fence such that individuals could not get past it, that the employee in C-3 had walked past the barricade to access the ladder to go to the lower level, and that various individuals had gone up and down the ladder; in this regard, the CO noted that employees working on lower levels had to go up the ladder to leave the site. He also said that the actual demolition work was going on in the northwest corner of the site, shown in the background of C-3, and that no demolition was taking place along the walkway. (Tr. 32-42).

Based on the foregoing, I conclude that it is appropriate to hold Morse liable for the cited condition. First, Morse had overall responsibility for safety at the site, and the record shows that Morse had previously corrected conditions that represented fall hazards when National had failed to do so. Second, even assuming *arguendo* that the subject walkway was in an area restricted to National, as Morse contends, the photographs of the site show that Morse should have been aware that National employees were using the walkway and exposed to the cited hazard; in particular, C-2 and C-3 depict employees using the walkway, and C-1, an overview of the site depicting the walkway in the background, establishes the walkway was in plain view. Third, Morse clearly had notice of the violative condition on the first day of the inspection, and Jack Calatayud, Morse's job site superintendent, agreed with the CO that the condition was a hazard and that he would take care of it; however, despite Calatayud's assurances in this regard, the same condition was present the next day, as depicted in C-3. This item is accordingly affirmed as a serious violation.

Citation 1 - Item 1b

Item 1b alleges a violation of 29 C.F.R. 1926.502(b)(1), which provides in relevant part as follows:

> Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (1 cm) above the walking/working level.

The CO testified that the basis of this item was a wire rope guardrail being used as fall protection along Adams Street, at the end of the job opposite the demolition work; the CO measured the height of the guardrail during his inspection and found it to be only 32 inches above the ground, and C-5 is his photo of another person holding the tape measure against the guardrail. The CO further testified that when he first arrived at the site on July 6, he saw an individual who he later learned was Calatayud standing right next to the same guardrail. The CO discussed the guardrail with Calatayud when he observed it during his inspection, and he also discussed it with Casey on July 7 and at the closing conference on October 13. (Tr. 14-19; 29; 42-43).

Morse does not dispute the cited condition, but contends that it had made reasonable efforts to correct the condition prior to the CO's arrival. The credible evidence of record does not support this contention. (Tr. 19). The CO testified that Calatayud told him that all the hazards they had observed during the inspection had existed for a day or two, and that, but for the CO's arrival at the site, the conditions would not have been abated until the weekend, which would have been two days later.[4] (Tr. 20). I have considered the CO's testimony about the conditions he saw at the site and what Morse personnel told him, and I have also considered the testimony of Bernardo and Casey, set out *supra*, in regard to their safety inspections of the site and the abatement of hazards. Further, I observed the demeanors of all three witnesses as they testified. I found the CO to be a convincing and credible witness, and I have no reason to doubt his testimony. Based on the CO's testimony, I conclude that Morse was in serious violation of the cited standard. This item is therefore affirmed.

Citation 1 - Item 1c

This item alleges a violation of 29 C.F.R. 1926.502(b)(3), which states as follows:

> Guardrail systems shall be capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge.

The CO testified that on a lower level of the west side of the project, caution tape had been put up around an open-sided floor or floor hole, as shown in photo C-4. The CO said that Casey told

[4]The CO noted that Casey had told him on July 7 that the guardrail had been damaged a week earlier and that he (Casey) had told Bernardo to have it fixed; however, the CO also noted that Casey later told him, on October 13, that he had learned that the guardrail had been damaged when a truck backed into it right before the CO arrived. (Tr. 18-19).

him on July 7 that the caution tape had been erected 6 feet from the edge and that "they didn't have a problem with it being used." The CO also said that it was evident from C-4 that the caution tape was not 6 feet from the edge, that the caution tape was inadequate as fall protection, and that guardrails meeting the standard should have been put up. The CO noted that when he asked Casey and National's superintendent who had erected the caution tape, neither could remember; however, Casey informed him that it had been his decision to put up the caution tape. (Tr. 19-20; 45).

Morse contends the caution tape was temporary and that, based on what Calatayud told the CO, the condition had existed for a day or two and it would have been corrected over the weekend, which would have been two days after the CO's arrival.[5] (Tr. 20). Morse's contention that the tape was a temporary measure is not consistent with what Casey told the CO at the site. Moreover, that the condition had existed for a day or two, and that it would have been corrected two days after the CO's arrival, is no defense to the alleged violation. Item 1c is affirmed as a serious violation.

Citation 1 - Item 2a

Item 2a alleges a violation of 29 C.F.R. 1926.501(b)(4)(ii), which states that:

> Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

The CO testified that during his inspection, he observed two floor holes on a lower level of the site. He noted that one of the holes, shown in C-6, was in a fairly open area, that it was near a stairwell that had been erected to get to that level and that he saw it when he was walking to a particular area of the northwest portion of the site. He also noted that the floor hole was 10.5 inches in diameter and that holes measuring 2 inches or more are required to be covered.[6] (Tr. 21-23).

Morse does not dispute the violative condition, but contends that it should not be held liable for the condition. It asserts that demolition work is such that conditions at the site were constantly changing, that it had a reasonable program of inspections to discover and abate hazards promptly,

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[5]Morse does not contend that the area shown in C-4 was controlled by National. In any case, the CO said that he learned that National had not been working in that area for some time. He also said that the individuals in C-4 were millwrights of another subcontractor and that the demolition work was taking place in an area to the top and left of C-4. (Tr. 43-46).

[6]The standard defines "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof or other walking/working surface." *See* 29 C.F.R. 1926.500(b).

and that it could not have known of the cited condition in the exercise of reasonable diligence. However, as noted in the previous items, the CO specifically testified that Calatayud told him that all the hazards they had observed had existed for a day or two. (Tr. 20). The CO further testified that he did not recall anyone from Morse stating they did not know about the floor holes he saw. (Tr. 51). Finally, the CO testified that both National and the steel erector were working in the area of the floor hole and that, as set out *supra*, the hole was near a stairwell going to the ground floor, indicating that the hole was in a location where Morse should have discovered it. (Tr. 21-22; 46-48). I find that Morse was in violation of the subject standard, and Item 2a is affirmed as a serious violation.

Citation 1 - Items 2b and 2c

These items both allege violations of 29 C.F.R. 1926.502(i)(4), which provides that:

> Covers for holes in floors, roofs and other walking/working surfaces shall meet the following requirements ... (4) All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

The CO testified that on the southern portion of a lower level of the project, he discovered floor hole covers that were not secured and had been displaced; in addition, the covers to the holes were not marked to indicate the presence of the holes. The CO said that C-7 showed steel plate covers to floor holes that had been displaced, while C-8 showed a wooden spool that was being used to cover floor holes and was not marked to indicate the holes.[7] (Tr. 23-25; 49).

The CO's testimony and C-7-8 clearly show that the floor hole covers were not color coded or marked as required. Morse does not dispute these conditions, but it contends that it should not be held liable for them for the same reasons set out in the preceding discussion. However, as noted in that discussion, the CO testified that Calatayud told him that all the hazards they observed during the inspection had existed for a day or two; the CO also testified that he did not remember anyone from Morse stating that they were not aware of the floor holes. (Tr. 20; 51). I find that Morse was in violation of the cited standard, and Items 2b and 2c are affirmed as serious violations.

Penalty Determination

[7]The CO stated that he had moved the spool shown in C-8 in order to take his photo but that he had not moved the covers shown in C-7. (Tr.24; 49).

The Secretary has proposed a grouped penalty of $4,500.00 for Items 1a through 1c and a grouped penalty of $3,150.00 for Items 2a through 2c. The CO testified that the gravity-based penalty for Item 1 was $5,000.00 and that the gravity-based penalty for Item 2 was $3,500.00. He further testified that no reductions to the penalties were given for size, due to the number of employees, or for good faith, but that a 10 percent reduction was given for history because the company had no history of violations in the previous three years. (Tr. 31). In view of the CO's testimony, I conclude that the penalties as proposed are appropriate. Accordingly, a total penalty of $4,500.00 is assessed for Items 1a through 1c, and a total penalty of $3,150.00 is assessed for Items 2a through 2c.

Conclusions of Law

1. Respondent, Morse Diesel International, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.501(b)(1), 1926.501(b)(4)(ii), 1926.502(b)(1), 1926.502(b)(3), and 1926.502(i)(4).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 2 of Citation 1 are AFFIRMED as serious violations, and penalties of $4,500.00 and $3,150.00, respectively, are assessed for these items.

/s/

Irving Sommer
Chief Judge

Date: 13 JUL 2001