



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.

OSHRC Docket No. 09-0239

BOH BROTHERS CONSTRUCTION CO., LLC,

Respondent.

**APPEARANCES:**

Tina D. Juarez and Lindsay A. Wofford, Trial Attorneys; Madeliene T. Le, Counsel for Safety and Health; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Dallas, TX

For the Complainant

Walter W. Christy, Esq., and Jacob C. Credeur, Esq.; Coats Rose, P.C., New Orleans, LA

For the Respondent

**REMAND ORDER**

The Occupational Safety and Health Administration (“OSHA”) inspected the Louisiana worksite of Boh Brothers Construction Co. (“Boh”) following a fatal bridge construction accident, and issued Boh a citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. In an order dated October 4, 2010, Administrative Law Judge G. Marvin Bober affirmed a violation of 29 C.F.R. § 1926.502(d)(8), which requires that “[h]orizontal lifelines . . . be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.” The parties stipulated that the horizontal lifeline to which the alleged violation pertains could have supported up to five workers with a safety factor of two.

In determining that Boh failed to comply with § 1926.502(d)(8), the judge found that more than five Boh employees working on the bridge project were attached to the horizontal lifeline at one time. He based this finding on the testimony of two Boh employees, Manuel

Perez Muniz and Jesus Padron, both of whom testified that they had observed more than five workers simultaneously tied off to the horizontal lifeline on the morning of the accident. The judge noted that their testimony was consistent with that of OSHA’s assistant area director (“AAD”), who testified that he learned from the investigation that, on the morning of the accident, ten employees were tied off to the horizontal lifeline at one time.

In making credibility determinations to resolve this citation item, the judge rejected two particular challenges raised by Boh that questioned Muniz’s and Padron’s overall credibility, but the judge’s findings do not specifically address the credibility of Muniz’s and Padron’s testimony that more than five workers simultaneously tied off to the same lifeline.<sup>1</sup> However, addressing the credibility of these two witnesses on this point is necessary because the AAD’s testimony, which the judge found corroborative, fails to specify the source of the AAD’s knowledge that ten individuals were tied off at one time. Since the AAD may have obtained that information solely from Muniz and/or Padron, his testimony does not necessarily provide additional support for the judge’s conclusion that more than five individuals were simultaneously tied off.<sup>2</sup>

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<sup>1</sup> Although the judge credited the testimony of another Boh employee, Broderick Perryman, to the extent it differed from that of Muniz and Padron, there was no conflict here because Perryman did not know how many employees tied off to the lifeline.

<sup>2</sup> The AAD also testified that the Boh’s safety manager told him that all of the employees working on the morning of the accident—which would have numbered more than five—were tied off. The judge found that this testimony was “consistent” with that of Muniz and Padron. However, it is not clear from the record that the safety manager told the AAD that all of these employees were tied off to the same horizontal lifeline. Indeed, the judge notes in his decision that the horizontal lifeline was not the only tie-off anchor available to these employees.

We thus remand this case to the judge with the instruction that he specifically determine the credibility of Muniz's and Padron's testimony regarding the number of workers tied off at one time to the horizontal lifeline. The judge should also address any other issues that may be affected by these credibility determinations.

SO ORDERED.

/s/  
Thomasina V. Rogers  
Chairman

/s/  
Horace A. Thompson III  
Commissioner

/s/  
Cynthia L. Attwood  
Commissioner

Dated: November 30, 2010

SECRETARY OF LABOR,

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BOH BROTHERS CONSTRUCTION CO.,  
LLC,

Respondent.

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APPEARANCES:

Tina D. Juarez, Esquire  
Lindsay A. Wofford, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Dallas, Texas  
For the Complainant.

Walter W. Christy, Esquire  
Jacob C. Credeur, Esquire  
Coats Rose, P.C.  
New Orleans, Louisiana  
For the Respondent.

BEFORE: G. Marvin Bober  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On October 30, 2008, Boh Brothers Construction Co., LLC (“Boh Brothers”), was constructing the Interstate 10 Twin Span Bridge over Lake Pontchartrain in Louisiana, when a girder slid off the bridge, sending ten Boh Brothers employees into the water. One of those employees, a Boh Brothers foreman, was fatally injured. Following the accident, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection and issued a two-item serious citation to Boh Brothers on January 29, 2009. Boh Brothers timely contested the citation. Citation 1, Item 1, alleged a violation of 29 C.F.R. § 1926.501(b)(15), for failing to ensure employees used the personal fall arrest system provided on the girder. Citation 1, Item 2 alleged a

violation of 29 C.F.R. § 1926.502(d)(8), for failing to protect employees exposed to fall hazards of approximately 35 feet while working without fall protection. The Secretary proposed a \$5,000.00 penalty for each item.

The administrative trial was held from January 11, 2010 to January 15, 2010 in New Orleans, Louisiana. Prior to the administrative trial, the Secretary withdrew Item 1, leaving for resolution only Item 2. Both parties have submitted post-trial briefs.

### **Stipulations**

At the trial, the parties submitted the following joint stipulations (ALJ-1; Tr. 5-7):

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission (“OSHRC”) by section 10(c) of the Act.

2. Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act.

3. An authorized representative of Complainant conducted the inspection at Respondent’s workplace.

4. The Safety Cable Pushover Analysis Letter from Hugh D. Ronald to Kenny Solis dated April 25, 2006 is true and correct copy (is authentic). (Ex. R-6.)

5. Kenny Solis performed the handwritten calculations identified in Exs. R-7 and R-8.

6. Based on the calculations performed by Hugh D. Ronald and Kenny Solis, the lifeline referenced in Citation 1, Item 2 could support up to five (5) individuals and still maintain the safety factor of two as required by § 1926.502(d)(8).

### **Background**

Boh Brothers was hired to construct the Interstate 10 Twin Span Bridge (“the I-10 Bridge”) over Lake Pontchartrain to replace the old bridge that was seriously damaged during Hurricane Katrina in 2005. The I-10 Bridge connects Slidell, Louisiana, on the north shore of Lake Pontchartrain, to New Orleans, Louisiana, on the south shore of Lake Pontchartrain. (Tr. 12-13.)

During the construction, Boh Brothers Foreman Eric Blackmon and his crew attached metal overhang forms to girders on the bridge. A subcontractor attached metal deck pans between the

girders.<sup>1</sup> After the forms and deck pans were attached, a separate Boh Brothers crew poured concrete over the forms, the girder and the deck pans to create the concrete roadway.<sup>2</sup> (Tr. 99-100, 165-66, 174-76, 373-74; Ex. R-12S.)

The overhang form crew typically consisted of eight to fourteen people. On the day of the accident, there were approximately fifteen people in the crew, including two carpenters and a crane operator who were working on the barge floating next to the bridge. The carpenters loaded each overhang form onto a piece of equipment called a “C-caddy.” After the C-caddy was loaded, the crane lifted the C-caddy over to the bridge. Once it was over the bridge, workers on the bridge used tag lines to help guide the C-caddy to the girder. Then two or more workers would use the ladder on the C-caddy to climb underneath the bridge and clamp the overhang form to the girder.<sup>3</sup> Another employee was stationed under the bridge to help clamp and level the overhang form. After the form was locked in place, the employees would climb back to the top of the bridge and the crane operator would return the empty C-caddy back to the barge in order to load another form. Each girder was 135 feet long and 5 feet wide and required six overhang forms, five that were 25 feet long and one that was 10 feet long. The forms were approximately 5 feet wide. As the crew members attaching the overhang forms moved forward, other crew members worked behind them to level the forms and to install handrails and a walkway along the edge of the form. Still other crew members removed (or wrecked) the forms by unlocking them from the girder, after which the C-caddy carried them back to the barge. (Tr. 40-42, 45, 56, 100, 130, 156-57, 174-75, 180-82, 203, 317-18, 359, 379-80, 404-06; Exs. R-12A, R-12D.)

Boh Brothers required its employees to use fall protection while setting and wrecking forms, if they were within 6 feet of an unprotected edge. For fall protection, employees working on top of the bridge could tie off either to the lifeline installed on the girder or the “mudhooks” on the girder.

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<sup>1</sup>The deck pans were moved onto the bridge by a crane. (Tr. 206.)

<sup>2</sup>The concrete girders were intended to be permanent structural components of the bridge, somewhat like the “spine” of the bridge. (Tr. 40.)

<sup>3</sup>Each form consisted of two parts, the form itself and the edge form. (Tr. 457-58.)

The lifeline, also referred to as the “safety line” or the “safety cable,” ran the entire length of the girder. While working underneath the bridge, crew members tied off to the C-caddy or other areas under the bridge. Once the overhang forms were leveled, the handrails were installed. The handrails provided additional fall protection on the outer edge of the girder. The deck pans covered the unprotected edge along the girder’s inner side. A second lifeline was added to the girder after the concrete dried. (Tr. 48, 56-57, 66, 83, 203, 212, 319-21, 330, 345-46, 381, 389; Ex. R-12K.)

The accident occurred around lunch time. Blackmon and some of his crew had just attached the last overhang form on the girder. As they were preparing to go to lunch, the girder fell off the bridge and into the water along with Blackmon and nine crewmen. Blackmon was fatally injured. The other employees survived. (Tr. 184-85, 204, 221, 288.)

### **Sequestration of Witnesses**

All witnesses at the trial were sequestered. Pursuant to Rule 615 of the Federal Rules of Evidence, which apply to Commission proceedings under Commission Rule 71, 29 C.F.R. 2200.71, “[t]he practice of sequestering witnesses is twofold. It exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.” *Geders v. United States*, 425 U.S. 80, 87 (1976). *See also* 29 Wright & Gold, *Federal Practice and Procedure: Evidence* § 6242, pp. 53-54 (1st ed. 1997).

### **The Relevant Testimony**

#### **Andrew Coston**

Andrew Coston, a former Boh Brothers carpenter who worked on the I-10 Bridge, is one of those who fell into the water with the girder. He testified that when the girder fell, he was installing handrails on the edge of the walkway. Approximately one-half to three-quarters of the handrails had been pulled taut. Other crew members in front of him were setting an overhang form on the girder. Coston stated that the girder had one lifeline and that he normally would remain tied off to the lifeline until the handrail installation was completed. He also stated that employees working underneath the bridge would tie off to the C-caddy. He did not remember if he was tied off to the lifeline on the day of the accident. He believed that the metal deck pans were installed on the bridge at the time of the accident. Coston further testified that Blackmon conducted job safety analysis (“JSA”) meetings every morning before they started work. The JSA meeting contained a list of work activities to be

performed and the safety requirements. In addition to these daily meetings, Coston also attended a weekly safety meeting every Monday. Coston stated that he was told to tie off to the lifeline but not the mudhooks. According to Coston, tying off directly to the mudhooks was too risky. He also stated that the lifeline broke. Coston was unaware that the lifeline's capacity was five people. (Tr. 13-17, 47, 58-60, 67, 78-80, 83, 89-90; Exs. R-12N, R-5.)

Manuel Perez Muniz

Manuel Perez Muniz, also known as Jose Luis Giron or Bendicto Rosales, was another carpenter in Blackmon's crew who fell into the water. He testified that when the girder fell, he was leveling the overhang form. He further testified that he and eight coworkers were tied off to one lifeline that morning, but that, at the time of the accident, he had untied to prepare for lunch. Muniz said the deck pans were not installed at the time of the accident. He also stated that Boh Brothers conducted weekly meetings on Mondays and that Blackmon did not conduct daily meetings. He admitted, however, that he signed the JSA forms. Muniz stated he was never told about the maximum number of people who could tie off to the lifeline. (Tr. 98-102, 107-10, 113-15, 158.)

Fredy Leonel Garcia

Fredy Leonel Garcia Avila, known at Boh Brothers as Fredy Garcia, was also a carpenter in Blackmon's crew who fell into the water. He began working in Blackmon's crew about one week before the accident. When the girder fell, Garcia and another employee were cleaning forms. Garcia testified that he untied from the lifeline approximately fifteen minutes before the accident to prepare for lunch. He also testified that Blackmon instructed him to tie off to the lifeline but did not tell him how many people could tie off to it. On cross-examination, Garcia testified that Blackmon did not instruct him to tie off to the lifeline. Instead, his brother, who also worked on Blackmon's crew, told him to tie off to the lifeline. Garcia stated that Blackmon passed around the JSA sheet to sign but did not hold daily meetings. (Tr. 152-54, 158-61, 168.)

Broderick Perryman

Broderick Perryman was a carpenter who worked in Blackmon's crew. He testified that on the day of the accident, he and two coworkers were working on the barge. From the barge, Perryman

could not see how many people were tied off to the lifeline. He did witness the accident, however, and he helped with the rescue effort. Erik Perryman, his cousin, was still tied to the girder by his lanyard when he rescued him from the water. He did not recall seeing deck pans on the girder that fell. Perryman also testified about Boh Brothers' 100 percent tie-off policy, which required any person within 6 feet of an unprotected edge to tie off or use an alternative form of fall protection, such as a handrail. Crew members working on the bridge would tie off to the lifeline on the girder, and they could also tie off directly to the mudhooks on the girder if they were working close by.<sup>4</sup> Perryman did not know how many people could tie off to the lifeline at one time. He said that a second lifeline is installed after the concrete is poured and is used when employees wreck the overhang form. He also said that Blackmon held a safety meeting on top of the bridge every morning and passed around the JSA form to sign. On the morning of the accident, Blackmon discussed the 100 percent tie-off policy at the JSA meeting.<sup>5</sup> Perryman did not recall if Spanish translation was provided during that meeting. (Tr. 171-79, 186, 191-99, 205-08, 212.)

Stephen Devine

Assistant Area Director ("AAD") Devine arrived at the work site on the day of the accident.<sup>6</sup> He testified that during his inspection, he toured the site, took photographs, and interviewed several Boh Brothers employees. Vic Gremillion, Boh Brothers' safety manager, told Devine ten employees fell into the water. Gremillion also told him that the employees were tied off and wearing personal flotation devices. Gremillion further informed Devine that the lifeline was designed for five people.<sup>7</sup> AAD Devine also testified that Ray Arcent, Gremillion's assistant, told him that the deck pans were not attached to the girder on the day of the accident. Boh Brothers provided Devine with the calculations used to design the lifeline. J.T. Watkins, an OSHA AAD and engineer, reviewed these

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<sup>4</sup>The lanyards on their safety belts were approximately 3 feet long. (Tr. 210.) If employees tied off to the mudhooks, their movements would be restricted to a small area.

<sup>5</sup>The record does not contain the JSA form from the day of the accident.

<sup>6</sup>After the inspection, Devine became the AAD in the Houston North office.

<sup>7</sup>Gremillion died before the trial. (Tr. 273.) There is no indication that his death was related to this case.

calculations and concluded the design of the lifeline met OSHA requirements. Based on his investigation, however, Devine concluded that Boh Brothers violated the cited standard by allowing more than five people to tie off to one lifeline at the same time. Devine recommended a \$5,000 penalty for the alleged violation. (Tr. 220-22, 225-26, 231-32, 236, 241-42, 248; Ex. C, ALJ-1.)

Lester Untereiner

Lester Untereiner is Boh Brothers' safety representative. He conducts daily inspections of work sites for safety violations, reviews the JSA forms for each work crew, and meets with the supervisors on a daily basis to discuss their work plans. Untereiner testified that Boh Brothers held safety meetings every Monday morning with all employees. A separate Monday morning meeting was held for the Spanish-speaking employees. At these meetings, employees received safety bulletins and discussed site-specific topics. The safety bulletins were available in English and Spanish. In addition to these weekly meetings, Untereiner testified that each foreman conducted a daily meeting with his crew to review the JSA before work began. For these meetings, the foreman relied on crew members to translate for the Spanish-speaking employees. Oscar Gonzales and Jesus Padron were the designated Spanish translators in Blackmon's crew. Untereiner noted that he had attended some of Blackmon's JSA meetings. In addition to these safety meetings, all new employees on the I-10 Bridge project received safety training. Blackmon had received fall protection training in April 2008. (Tr. 295, 299-303, 307-12, 316, 332-34, 361; Exs. R-7, R-8.)

Untereiner further testified that Respondent's safety policy requires employees within 6 feet of an unguarded opening to tie off or use another form of fall protection.<sup>8</sup> Besides using the lifeline on the girder that they are working on, employees may use a retractable lanyard to tie to off to a lifeline on another girder. Untereiner stated that the five-person lifeline limitation was discussed in safety meetings, and he was not aware of the limit being exceeded. He also stated that employees may rely on the handrails for fall protection once the handrails are pulled taut. He noted that the first time

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<sup>8</sup>There were no markers on the bridge to indicate the 6-foot-point from an unprotected edge. Untereiner explained that employees should have known the girders were 5.5 feet wide, and that, therefore, the zone of danger began at the edge of the girder. (Tr. 342-43.)

an employee violates a fall protection rule, they are sent home for the rest of the day. A second offense results in termination of employment.<sup>9</sup> (Tr. 319, 324-27, 330, 348-51, 354, 357.)

Mark Bailey

Mark Bailey was the foreman for the cement crew at the time of the accident. His cement crew worked three to five girders behind Blackmon's form crew, and he did not witness the accident. After the accident, he succeeded Blackmon as the foreman for the overhang form crew. Bailey testified that he uses the same procedure that Blackmon used and that some of Blackmon's crew members worked with him after the accident. He also testified that he is aware of the five-person maximum for the lifeline and remembers discussing it at safety meetings. When he first took over the overhang form crew, he had an additional cable installed on a girder because there were too many crew members to tie off to one lifeline. Bailey further testified that employees could tie off to other areas on the girder. Specifically, he stated that he prefers employees who are stationary to tie off directly to the mudhooks on the girder to avoid becoming tangled up in all of the traffic on the girder. He further stated that the handrails also provide fall protection after they are taut. He did not know, however, if the handrails were taut when the accident occurred. (Tr. 373-77, 383, 386-88, 397, 413, 423.)

Kenneth Solis

Kenneth Solis, a registered engineer, is the senior construction manager at Boh Brothers. Solis helped to design Boh Brothers' fall protection systems, including the lifeline at issue in this case. The lifeline was installed by iron workers before the girder was placed on the bridge. Solis testified that the line supported up to five people with an average weight of 250 pounds and a safety factor of two. Even if the average weight was less, a foreman should not permit additional people to tie off to the lifeline without consulting Solis first. He also testified that he did not consider tying off directly to the mudhooks, but he believed it was possible if the employees were stationary. Solis did not recall speaking to crew members about the five-person maximum, and he never heard Blackmon discuss the five-person maximum. (Tr. 426-27, 435, 440-42, 447, 451-52, 471-72, 480; ALJ-1.)

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<sup>9</sup>Boh Brothers' written safety policy describes a three-level disciplinary system. An employee will receive a "verbal warning citation" for the first violation of a safety rule. For the second violation, the employee receives a "written warning citation." For a third violation, an employee may be terminated. (Ex. R-6; Ex. R-11 at 9.)

### Jesus Padron

Jesus Padron, whose legal name is Elsidés Edgardo Alvarado, worked as a carpenter with Boh Brothers for approximately five years. He testified that on the day of the accident, he leveled the overhang forms after they were set on the girder. He also testified that he and ten coworkers working on the girder were tied off to the same lifeline. At the time of the accident, he was not tied to the lifeline because he was preparing to leave for lunch. He could not remember if Blackmon was tied off to the lifeline. Padron said Boh Brothers required him to tie off if he was within 6 feet of an open edge. If the handrail was installed, however, he did not have to tie off. Padron noted that Blackmon never told him how many people could tie off to the lifeline at one time. (Tr. 492-99, 525, 578.)

### Credibility of Witnesses

Boh Brothers argues that Messrs. Muniz, Padron, and Garcia are not credible witnesses because they used different names and false social security numbers at work. (R. Brief, p. 4; Tr. 110, 495-96.) Boh Brothers also points out that Muniz and Garcia have interests in a personal injury lawsuit arising from the bridge accident. (R. Brief, p. 4; Tr. 112, 166.)

In Commission proceedings, the Judge's findings of fact must resolve the conflicting testimony of witnesses. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978) (“[i]t is the policy of the Commission to ordinarily accept [the Judge’s] evaluation of the credibility of witnesses, for it is the Judge who lived the case, heard the witnesses, and observed their demeanor.”) *Accord, E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2132 (No. 87-0008, 1991). The Commission has the authority to make factual findings where the Judge has not, but it will ordinarily prefer that the Judge make such determinations. *See, e.g., Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1978 (No. 12931, 1977).

In making my credibility determinations, I have considered the testimony of each witness and the fact that the witnesses were sequestered. Messrs. Muniz, Padron and Garcia are not being discredited based on the fact that they used different names or have pending lawsuits related to the accident in this case. To the extent that there are differences in testimony, however, I am assigning more weight to Perryman’s testimony. I observed Perryman’s body language and facial expressions

throughout his testimony. Based on his demeanor and his detailed testimony, I found him to be the most credible and convincing witness.

The testimony of Messrs. Muniz, Garcia and Padron regarding how many people were tied off to the lifeline on the day of the accident is consistent with other testimony in the record. These three witnesses testified that they were tied off to the same lifeline until they began preparing to go to lunch approximately fifteen minutes before the accident.<sup>10</sup> (Tr. 105-07, 152-53, 494.) Muniz testified that he observed eight of his coworkers tied off to the same lifeline on the girder on the day of the accident. (Tr. 107-08.) Muniz's testimony is supported by that of Padron, who testified that at least six crew members were tied off to the same lifeline that day. (Tr. 494, 520.) AAD Devine's testimony is also consistent with that of Muniz and Padron. The AAD testified that Gremillion told him during the inspection that all the employees were tied off on the morning of the accident. He also testified that, during his investigation, he learned that ten employees were tied off to one lifeline on the morning of the accident. (Tr. 222, 241-42.)

Boh Brothers claims that the employees were tied off to other areas on the bridge. (R. Brief, pp. 5-7.) Devine testified, however, that no employees informed him that they could tie off to other areas on the bridge. (Tr. 286.) Moreover, the other witnesses at trial had no personal knowledge of who was tied off on the day of the accident. Although Coston worked on the bridge that day, he could not recall whether he or his coworkers were tied off to the lifeline. (Tr. 58.) Perryman testified that a person may choose to tie off directly to the mudhooks instead of the lifeline, but he admitted that from his view on the barge he could not see where the crew members on the bridge were tied off.<sup>11</sup> (Tr. 186, 199, 205.) Bailey testified that he prefers crew members who are stationary on the bridge

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<sup>10</sup>These employees continued to work for fifteen minutes after they untied from the lifeline. As such, Boh Brothers may have violated § 1926.501(b)(15), which states that "each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system." However, at the start of the administrative trial, the Secretary withdrew Item 1, which alleged a violation of this standard. The issue is therefore deemed waived.

<sup>11</sup>Perryman also testified that two of the crew members he rescued were still tied to the girder when it fell in the water. He did not specify whether they were tied to the lifeline. (Tr.187, 206.)

to tie off directly to the mudhooks on the girder. (Tr. 383.) He further testified that a second lifeline could be installed if necessary. (Tr. 386-87.) Bailey, however, did not arrive at the work site until after the accident occurred, and there was only one lifeline on the girder that fell. (Tr. 375, 397.) Bailey's testimony about having to install a second line when he first took over Blackmon's crew shows it is conceivable that the work flow may require more than five people to tie off to a lifeline at one time. And, while Untereiner testified that employees may use retractable lanyards to tie off to a lifeline on another girder, he did not know if anyone used retractable lanyards on the day of the accident. (Tr. 319-20, 324-25.) On this record, I find credible the eyewitness testimony of Messrs. Muniz, Garcia and Padron as to the number of people who were tied off to the lifeline.

There are conflicts in testimony regarding whether Blackmon held daily JSA meetings at the site. Muniz testified that he attended a weekly meeting on Mondays but did not attend daily JSA meetings. He admitted, however, that he signed the JSA attendance sheets. (Tr. 113-16; Ex. R-5.) He also testified that the job instructions were given in English and that he was paired with Padron for translation. (Tr. 113.) Similarly, Garcia testified that Blackmon passed around the JSA attendance sheet but did not hold daily meetings. (Tr. 159-60.) Perryman testified that Blackmon held JSA meetings every morning before they started work, including the morning of the accident. (Tr. 177-79.) Perryman's testimony is supported by Coston's testimony that Blackmon held JSA meetings every morning. (Tr. 67.) Perryman's testimony is also consistent with the JSA attendance sheets Boh Brothers submitted at the trial. (Ex. R-5.) I therefore credit Perryman's testimony and find that daily JSA meetings were held.<sup>12</sup>

### **The Secretary's Burden of Proof**

To prove a violation of a standard, the Secretary must show by a preponderance of evidence that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known of the violation with the exercise of reasonable diligence. *Atlantic Battery*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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<sup>12</sup>In so finding, I note that the inconsistencies in testimony may be due to the fact that neither Muniz nor Garcia speaks fluent English. (Tr. 95, 149.) Blackmon held the meetings in English, and he relied on other crew members for Spanish translation. Further, the JSA forms that were passed around during the meetings were in English. (Tr. 332, 338; Ex. R-5.)

### Discussion

The cited standard, 29 C.F.R. § 1926.502(d)(8), provides that “[h]orizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.”

There is no dispute that the cited standard applies. Boh Brothers was engaged in constructing a bridge. The single lifeline attached to the girder was a horizontal lifeline.<sup>13</sup> (Tr. 242; ALJ-1.) The parties stipulated that Boh Brothers designed the lifeline to comply with the cited standard, such that the line would support up to five people with a safety factor of two. (ALJ-1, Stip. F.) At issue is whether, on the day of the accident, the lifeline was used in a manner that maintained the safety factor of two.

Based on the testimony of AAD Devine and Messrs. Muniz, Garcia and Padron, the record demonstrates that more than five people were tied to the lifeline at the same time. (Tr. 107-08, 152-53, 222, 241-42, 494). It is undisputed that the lifeline was only designed to support five people to maintain a safety factor of two. (ALJ-1, Stip. F.) Thus, I find that the Secretary has met her burden of proving that Respondent failed to meet the terms of the cited standard.

On this record, the Secretary has also proved that employees were exposed to a fall hazard. The Secretary asserts that overloading the lifeline exposed employees to the risk that the lifeline could break and cause employees to fall into the water. (S. Brief, p. 23-24.) The AAD testified without rebuttal that if a person tied to an overloaded line fell, it could lead to a domino effect causing multiple people to fall. (Tr. 246-47.) Solis, Respondent’s senior construction manager, testified that he took the domino effect into account when designing the fall protection system.<sup>14</sup> (Tr. 474-75.) Solis, however, did not testify about the domino effect on an overloaded lifeline. The AAD also testified that the handrails could not withstand the force of multiple employees falling. (Tr. 247.) Even if the

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<sup>13</sup>A horizontal lifeline is a “component consisting of a flexible line ... for connection to anchorages at both ends to stretch horizontally ... and which serves as a means for connecting other components of a personal fall arrest system to the anchorage.” 29 C.F.R. § 1926.500(b).

<sup>14</sup>Solis also testified that, even if the average weight of each employee was less than 250 pounds, a foreman should not have permitted additional people to tie off to the lifeline without consulting Solis first. (Tr. 472.)

handrails could have withstood the force of multiple people, deck pans were not installed on the other side of the girder, leaving an unprotected edge along the inner length of the girder for which the lifeline provided no protection. (Tr. 107, 207-08, 225-26, 243, 346.) Moreover, several employees worked in areas where handrails had not been installed. For example, there were no handrails installed at the front of the girder where Blackmon and at least two others attached the last overhang form. (Tr. 78-79, 89-90.) I find, accordingly, that Boh Brothers employees were exposed to the cited hazard.

The Secretary has additionally established that Boh Brothers knew or should have known that more than five employees tied off to the lifeline at the same time. Foreman Blackmon was present on the girder on the day of the accident. (Tr. 14.) Blackmon's knowledge is imputable to Boh Brothers. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). *See also Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (employer may be deemed to have constructive knowledge of a violation that is in plain view and is not ephemeral in nature). Further, the record shows that Respondent's safety program was inadequate. The company conducted new employee training and held company-wide meetings every Monday as well as daily JSA meetings. (Tr. 64, 112-13, 307.) Untereiner and Bailey testified that they discussed the five-person capacity during these safety meetings. (Tr. 354-57, 377.) Besides the safety meetings, Boh Brothers disciplined employees who violated the fall protection policy. (Ex. R-6.) I nonetheless find that Respondent's safety program was deficient because Boh Brothers failed to adequately communicate that the lifeline could only support five people at one time. Messrs. Perryman, Coston, Garcia and Padron all testified that they were unaware of the lifeline's five-person capacity. (Tr. 60, 154, 191, 525.) Thus, the safety program was clearly insufficient. I find, accordingly, that the Secretary has demonstrated the alleged violation.

The Secretary has characterized the violation as serious. A serious violation is one for which "there is a substantial probability that death or serious physical harm could result." *See* Section 17 of the Act, 29 U.S.C. § 666(k). The AAD testified that the risk posed by overloading the lifeline was that the fall arrest system would fail, causing employees to fall 30 to 35 feet into the lake below. (Tr. 217, 246.) The fall could result in serious injuries ranging from broken bones to death. (Tr. 247.) I conclude that the Secretary has shown that this violation was serious.

The Secretary has proposed a \$5,000.00 penalty for this item. Under section 17(j) of the Act, when assessing a penalty, the Commission must give due consideration to "the size of the business of

the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” See 29 U.S.C. § 666(j). As to the gravity of this violation, I find it high, in that if any of the exposed employees had fallen off of the bridge, the result most likely would have been death or serious injury. As Boh Brothers has approximately 1,540 employees, no reduction in penalty for size is warranted. (Tr. 251.) Similarly, no adjustment for history is warranted, in light of a previous serious citation Boh Brothers received within the last three years. (Tr. 251.) I find that the proposed penalty is appropriate. A penalty of \$5,000.00 is therefore assessed.

**Findings of Fact and Conclusions of Law**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(15), is VACATED.

1. Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.502(d)(8), is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.

/s/

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G. Marvin Bober  
Judge, OSHRC

Dated: 10/4/10  
Washington, D.C.