UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
Complainant,

v.

DANIEL O'CONNELL'S SONS, INC.,
Respondent.

Docket No. 93-2160

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Velma Montoya on July 21, 1995. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke
Edwin G. Foulke
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated 3/15/95

1995 OSHRC No. 13

I certify that a copy of this order has been served on the following parties this 15th day of March, 1995:

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Stella Key Acree

Stella Key Acree
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. DANIEL O'CONNELL'S SONS, INC., Respondent.	OSHRC Docket No. 93-2160

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

II

It is hereby stipulated and agreed by between the Complainant, Secretary of Labor and the Respondent, Daniel O'Connell's Sons, Inc. that:

1. Respondent represents that the alleged violation of 29 C.F.R. 1926.106(d) (Willful Citation 2, item 1) has been abated and shall remain abated.

2. Complainant hereby amends Item 1 of Willful Citation 2 to characterize the alleged violation of 29 C.F.R. 1926.106(d) as a violation of Section 17 of the Act. The proposed penalty for this citation is amended to $5,000.

3. Respondent hereby withdraws its notice of contest to the citation and penalty as amended herein.

4. Respondent hereby agrees to pay a penalty of $5,000 by submitting its check, made payable to U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) to the OSHA Area Office within 30 days from the date of this Agreement.

5. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

6. None of the foregoing agreements, statements, stipulations, or actions taken by Daniel O'Connell's Sons shall be deemed an admission by Respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and Health Act of 1970.

7. No authorized employee representative elected party status in this case.

8. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

9. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its main office on the 28th day of February 1995, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 28th day of February 1995.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
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SECRETARY OF LABOR
Complainant,
v.

DANIEL O'CONNELL'S SONS, INC.,
Respondent.

OSHRC DOCKET
NO. 93-2160

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 23, 1994. The decision of the Judge will become a final order of the Commission on July 25, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 13, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 23, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2160

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. DANIEL O'CONNELL'S SONS, INC., Respondent.	OSHRC DOCKET NO. 93-2160

Appearances:

James Glickman, Esq. Office of the Solicitor U.S. Department of Labor	Barrett A. Metzler, CSP North East Safety Management, Inc. West Hartford, CT
For Complainant	For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, ("Act") to review citations issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed penalty assessment thereof issued pursuant to §10(a) of the Act. Respondent admitted jurisdiction in its answer.

On June 25, 1993, the Secretary issued citations to Daniel O'Connell Sons, Inc. (O'Connell) alleging that Serious and Willful violations occurred at Respondent's worksite located on the Memorial Bridge spanning the Connecticut River and connecting the cities of Springfield and West Springfield, Massachusetts. The complaint charges O'Connell with

a Willful violation of 29 C.F.R. §1926.106(d) and Serious violations of 29 C.F.R. §1926.28(a) and 29 C.F.R. §1926.106(c). The Secretary proposed a $35,000 penalty for the Willful violation and a total penalty of $7,500 for the Serious violations.

By filing a timely Notice of Contest, Respondent brought this proceeding before the Occupational Safety and Health Review Commission ("Commission"). The parties have submitted their briefs and the matter is now ready for decision.

Summary of the Evidence

During May, 1993, Respondent commenced working on the Memorial Bridge. The work entailed the removal and replacement of the road bed and significant portions of the supporting structure. Another contractor had commenced the work and, for unknown reasons, the job was put out for new bids and Respondent was awarded the contract. During the initial phases of its work activity, Respondent was engaged in "cleaning up" debris and work performed by the previous contractor.

On May 25, 1993, William Lambert and Steve Spencer, Safety and Health inspectors for the Massachusetts Department of Labor and Industries, visited the worksite at Respondent's request to view the area and discuss potential safety and health problems (Tr. 20, 21). Respondent was represented by Mr. Lytwyn, Safety Director, Mr. Maiorano, Project Manager and Mr. Kislowski, Superintendent, at this meeting. Mr. Lambert noted several openings in the deck of the bridge, as well as other potential safety hazards and conveyed his concerns to Respondent's representatives. Lambert also "strongly suggested" that a life boat should be made available for launch "and it should be along the river bank" (Tr. 24). According to Lambert, he was told that Respondent "had a boat stolen from them on one bridge job, and they didn't know what they were going to do" (Tr. 24). Respondent also spent "at least $2,000 repairing the boat as a result of vandalism" (Tr. 167). Thereafter, a discussion took place among Respondent's representatives regarding the best method available to comply with the lifeboat requirement. A major concern was the potential vandalism of the boat (Tr. 167, 193, 197, 200, 210, 217). It was decided to keep the boat on the bridge[1] on a trailer inside a "Drago box"[2] for security reasons (Tr. 217). It was

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[1] The bridge is approximately 1000 feet long with four lanes of traffic. Two lanes were closed for construction purposes.

concluded that two methods were available for launching the boat. The first method was to drive the boat to the nearest boat launch (Bondi's Island), about one-half mile away or, secondly, place the boat in the water from the bridge by crane. Mr. Kislowski, the Superintendent, later told the Compliance Officer, however, that it was his intent to leave the boat in the water during the work day after the clean-up phase had ended (Tr. 156). Kislowski stated that they made a "dry run" for launching the boat at Bondi's Island (Tr. 166) prior to June 1, 1993 (Tr. 171) to make sure that it could be done. Kislowski estimated that it took seven to eight minutes to drive the boat and trailer from the bridge and launch the boat at Bondi's Island (Tr. 179). Respondent did not practice launching the boat from the bridge by crane prior to June 2, 1993 (Tr. 180).

On June 2, 1993, Albert Springer, a carpenter employed by Respondent for 27 years, was working on the bridge removing steel brackets from exposed horizontal concrete support beams (Tr.43, Exh. C-3). The road bed had been partially removed exposing the beams and the river fifty feet below. This activity was considered as part of the clean-up work since the brackets had been installed by the previous contractor. Springer and his co-workers initially attempted to remove the brackets while standing in a man basket suspended from a crane and placed alongside the concrete beam. Because of the weight of the brackets, this procedure proved to be unsuccessful (Tr. 44, 45, 46). Springer and his foreman decided that it was necessary for Springer to walk out on the beam and attach the line from the crane to each bracket and the crane would lift the brackets from the beams (Tr. 46). Springer put on a body harness consisting of a life preserver, a safety belt and lanyard (Tr. 49). Mr. Springer intended to attach the safety belt lanyard to reinforcing bars which were protruding from the side of the road bed immediately adjacent to the cement beam (Exhibit C-3). Tangled reinforcing bars were also located at various intervals along the top of the beam (Exhibit C-3). The beam was approximately 12 to 15 inches below the bridge surface (Tr. 88). As Mr. Springer attempted to step onto the beam through the tangle of reinforcing bars, he stubbed his toe and fell off the beam and into the river fifty feet below (Tr. 56-57).

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[2] A Drago box is a storage container approximately 18-20 feet long that is capable of being locked to prevent vandalism (Tr. 79).

He scraped his head and knee on the way down (Tr. 72, 73). After resurfacing, Springer determined that he was not seriously hurt, and yelled up to his co-workers that he was all right. He did so because he was fearful that his co-workers would jump in after him and he didn't want them to risk their lives by jumping in to rescue him (Tr. 74, 75). The current was swift, and he quickly floated downstream. No ring buoy was thrown to him (Tr. 76). After approximately twenty minutes in the river, Springer was rescued by a Springfield Police boat (Tr. 78).

At the time that Mr. Springer fell in the water, Superintendent Kislowski was located at the West Springfield end of the bridge. An employee ran to him and informed Kislowski that Springer had fallen. Kislowski was the designated driver for the rescue launch (Tr. 179); however, a nearby policeman offered to call a police boat by radio to rescue Springer. Kislowski had not considered using the police boat for rescue purposes prior to this time, and the use of that boat was not part of Respondent's rescue plan (Tr. 180, 181). Kislowski immediately agreed and Springer was removed from the river by police boat. No attempt was made by Respondent's employees to launch the rescue boat. After investigating the accident, the Secretary issued citations alleging the following violations:

(a) Willful Citation No. 2, Item No. 1:

> 29 C.F.R. 1926.106(d): A lifesaving skiff was not immediately available at locations where employees were working over or adjacent to water:
>
> > MEMORIAL BRIDGE: IN AN AREA WHERE WORKERS WERE WORKING NEAR OR OVER WATER THERE WAS NOT A LIFESAVING SKIFF IMMEDIATELY AVAILABLE. WORKERS INVOLVED IN CLEANUP OPERATIONS ON THE BRIDGE WERE EXPOSED TO FALLS INTO THE WATER AND THE EXISTING BOAT WAS LOCATED UP ON THE BRIDGE AND WAS NOT IMMEDIATELY AVAILABLE.

The issue to be resolved regarding this alleged violation is whether Respondent's rescue boat was "immediately available" to effectuate a rescue in the event that an employee fell in the river. Upon notification by the Commonwealth of Massachusetts Department of Labor and Industries that a rescue skiff should be at the work site, Respondent's representatives decided to place a boat in a secure container on the bridge.

In the event that an employee fell in the river, the boat was to be launched either by crane or driven to the nearest boat landing approximately one-half mile away. Both alternatives presented major difficulties for Respondent. First, with respect to placing the boat in the river by crane, there was one crane on the site for construction purposes and there was no assurance that it would be available to quickly launch the boat. Secondly, Respondent had not practiced this launching method to determine whether it was feasible to effectuate a rescue in an timely fashion. Third, Respondent had not determined how to place rescue personnel in the boat after its placement in the water. Moreover, no one had been designated to determine whether the crane should be used to launch the boat or the circumstances that must be present in order to launch the boat by crane. The facts elicited at the hearing support the conclusion that launching the rescue boat from the bridge by crane was an ill-conceived rescue procedure which failed to render the rescue boat immediately available for rescue purposes.

Respondent's second rescue option involved the removal of the boat from the Drago box by truck[3] and transportation of the boat and trailer to a boat launch located approximately one-half mile from the bridge. According to Respondent's superintendent, a "dry run" of this procedure had taken place prior to the accident, and it was concluded that the boat could be launched in approximately eight minutes. The facts reveal, however, that Mr. Kislowski's time estimate is extremely optimistic, even under the most favorable conditions. The truck designated to haul the boat and trailer was not used solely for that purpose. It was a general purpose truck used as necessary during the construction work. As a result, it could have been located at any point on the bridge, engaged in a variety of activities at a critical point in the rescue procedure. Moreover, no one had been designated to drive the truck to the boat for hook up and, thence, to the boat landing for launching. Since Mr. Kislowski was the designated boat driver, the boat could not leave the bridge until he was in the truck. At the time of the accident, Kislowski was at the far end of the bridge approximately 500 feet from the boat. Furthermore, as described by Mr. Springer, the traffic

[3] The truck was not attached to the boat trailer. In the event of a fall, the truck had to be driven to the Drago box and hooked onto the boat trailer.

on the bridge was very heavy as a result of two lanes being closed. It would have been necessary to drive the truck and trailer from the middle of the bridge in heavy one-lane traffic around a traffic circle and then to the boat launch located one-half mile from the bridge. Under these circumstances, it is clear that the rescue boat was not immediately available to effectuate Mr. Springer's rescue *See Structural Painting Corp.,* 1977 OSHD (CCH) ¶21,432 *aff'd on other grounds*, 1979 OSHD (CCH) ¶23,817. This fact is supported by the actions of Superintendent Kislowski who, without any hesitation, accepted the fortuitous and unexpected offer by the police officer on the bridge to summon a police boat to rescue Mr. Springer without, thereafter, even attempting to launch the boat which was specifically assigned to that task. Thus, it is concluded that Respondent violated the provisions of 29 C.F.R. §1926.106(d) by failing to make a lifesaving skiff immediately available where employees were working over water. *Secretary of Labor v. Gabriel Fuentes Constr. Co.,* 15 BNA, OSHC 1330.

The Secretary asserts that the violation described above is "willful" within the meaning of Section 17(a) of the Act. Although not defined in the Act, "willful" has been defined by the Courts as "conscious and intentional disregard of conditions", "deliberate and intentional misconduct", "utter disregard of consequences" and similar descriptions. *See Brock v. Morello Brothers Construction, Inc.*, 809 F2d 161 (1st Cir. 1987). In order to establish a willful violation, it is necessary to determine the "state of mind" of the employer at the time of the violations. The standard of proof requires that evidence be produced establishing that the Respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. *A. Schenbek and Company v. Donovan,* 646 F2d 799, 800 (2nd Cir. 1981); *Morello Brothers Construction, supra at* 164; *Georgia Electric Co. v. Marshall*, 595 F2d 309, (5th Cir. 1979). Willful violations are distinguished by a "heightened awareness of illegality - of the conduct or conditions - and by a state of mind-conscious disregard or plain indifference." *Williams Enterprises, Inc,* 1986-87, CCH OSHD ¶27,893. The employer's good faith is irrelevant in determining whether a willful violation has occurred. *Secretary of Labor v. Trinity Industries,* 16 BNA OSHC 1665 (11th Cir. 1994).

The record in this case establishes that Respondent was well aware of its responsibility to provide for a life saving skiff at the job site. The Massachusetts Department of Labor had informed Respondent's representatives prior to the start of work that a boat should be placed by the shore (Tr. 24-25). The record also reveals that Respondent was quite concerned about the safety of the boat. The Project Manager, Stephen Maiorano, Superintendent Richard Kislowski and Safety Director, William Lytwyn testified at length that they were greatly concerned about the possible vandalism of the boat if it was left unattended either in the water or at the water's edge. Mr. Maiorano testified that they "generally keep any launches adjacent to the water or ready to be launched" (Tr. 225); however, in this case, they believed that it was necessary to take measures to protect the boat from vandalism. Accordingly, the decision was made to place the boat on the bridge under the watchful eyes of the workers and in a secure container (Tr. 228, 167, 193, 197, 200, 210, 217). Respondent's Safety Director testified that the threat of vandalism was the only reason for not placing the boat in the water for rescue purposes (Tr. 200-201). Thus, Respondent knowingly altered its normal procedure and elevated the security of the boat above its responsibility to provide a readily accessible boat for rescue purposes. Although these actions were intended to be temporary until a barge was placed in the river at some future date, the conscious decision by Respondent's management employees not to have a rescue boat readily available on June 2, 1993 exposed Mr. Springer and his co-workers to serious injury or death by drowning. For the foregoing reasons, it is concluded that Respondent willfully violated 29 C.F.R. §1926.106(d) as alleged.

(b) Serious Citation No. 1, Item No. 1:

> 29 C.F.R. 1926.28(a): Appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions:
>
> A. MEMORIAL BRIDGE: A WORKER EXPOSED TO A FALL IN EXCESS OF 45 FEET OVER WATER WAS NOT PROTECTED FROM A FALL AT ALL TIMES BY MEANS OF AN ATTACHED SAFETY BELT AND LANYARD.

In order to establish a violation of the cited standard, the Secretary must prove the following elements: (1) there was an exposure to a hazardous condition, (2) some other

section in Part 1926 indicates a need for using personal protective equipment, in this case, safety belts, and (3) the employer failed to require the use of the equipment *L.E. Myers Co.*, 12 BNA OSHC 1609; *Pace Construction Corporation*, 14 BNA OSHC 2217. The first element was clearly established by the Secretary. Respondent's employee was exposed to a fall of approximately fifty feet into the Connecticut River while working on a narrow concrete support beam. The second element of proof, however, cannot be as clearly discerned from the record of this case. The citation issued to Respondent and the complaint filed in this matter merely recite the language of Section 28(a) with an explanatory note that exposed employees should be protected "by means of an attached safety belt and lanyard." There is no reference in either document that places the Respondent on notice that some other section in Part 1926 requires the use of safety belts under the conditions present at Respondent's worksite. The Secretary's failure to state in the pleadings the applicable "other section in Part 1926" is not fatal, however, to the Secretary's case. In *L.E. Myers Company, supra*, at Footnote 11, the Commission states:

> [w]e do not say, at this point, that the Secretary must specify in the citation itself the conjunctive section in Part 1926 that 'indicates the need' for personal protective equipment under the particular circumstances, although that seems to us to be the better approach. We only reiterate the due process requirement that *at some point in the proceedings* the respondent must have fair notice of the conjunctive section upon which the Secretary relies. . . . *Emphasis supplied*

At no time during the hearing did the Secretary state, or through his witnesses indicate, the "other section of Part 1926" requiring the use of safety belts. Moreover, Complainant's pre-trial submission merely states that the issue to be tried was "[w]hether respondent failed to ensure that safety belts and lanyards were used at all times while employees worked over water." Respondent, on the other hand, listed the issue to be tried as whether Respondent "committed the violations *alleged in the complaint.*"[4] *Emphasis supplied*

In his post-trial brief, the Secretary, for the first time, announces the "other section in Part 1926" as follows:

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[4] Respondent's representative is a non-lawyer.

> Second, another standard in Part 1926, 29 C.F.R. §1926.105(a) indicates a need for the use of fall protection under these circumstances, such as safety belts. *Id.* No safety nets, referenced in Section 1926.105(a), were used at the site at the time in question. Tr. 86. Because Respondent decided not to use safety belts, [sic][5] Tr. 86[6], it was obligated to use another form of protection.[7]

The Secretary's failure to disclose the fact that Section 1926.105(a) forms an essential element for the violation until the post-hearing brief has denied Respondent fair notice of its alleged violative conduct. *Diebold, Inc. v. Marshall*, 6 BNA OSHC 2002; *Secretary of Labor v. Cardinal Industries*, 14 BNA OSHC 1009, and is a sufficient ground for vacating the alleged violation.

Even if it were possible to glean from the pleadings and trial of this matter that the Secretary was alleging Respondent had violated Section 105(a) by failing to protect employees from falls by means of an attached safety belt and lanyard, the Secretary failed to establish that the use of that equipment was practical under the circumstances of this case as required by that standard. According to the evidence, employee Springer was wearing a safety belt and a lanyard as he attempted to step down from the road bed of the bridge to the supporting beam to attach the lanyard somewhere among a tangle of reinforcing bars when he stubbed his toe and fell. The Secretary argues that the placement of two lanyards on the safety belt would have prevented Mr. Springer's fall from the bridge. However, whether the safety belt had two lanyards or ten lanyards would not have made any difference

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[5] It is apparent, in view of the facts of this case, that the Secretary meant to say "safety nets" rather than "safety belts."

[6] The cited testimony occurred during the direct examination of the employee who fell from the bridge and is the only reference in the entire transcript to safety nets:

> BY MR. GLICKMAN: Mr. Springer, did the company on or before your fall on June 2nd of '92 have a safety net under the bridge, under the portion of the bridge you were working?
>
> Never had no nets there when I was there. We didn't have no nets.

[7] The Secretary has misinterpreted the employer's obligations under Section 105(a). Safety nets must be used when the use of safety belts or other safety devices listed therein are impractical.

in this case for the simple reason that no lifeline or other appropriate structure was provided for attaching the lanyard *before* Springer attempted to step onto the beam.[8] It was during that activity that Springer became exposed to the falling hazard. No evidence was presented by the Secretary establishing that it was feasible or practical to provide a lifeline or other appropriate structure at the worksite in such a manner that the fall could have been prevented.[9] In the absence of any evidence that it was practical to install a lifeline, this citation item must be vacated.

(c) Serious Citation No. 1, Item No. 2

> 29 C.F.R. 1926.106(c): Ring buoys with at least 90 feet of line were not provided and readily available for emergency rescue operations.
>
> A. MEMORIAL BRIDGE: RING BUOYS WITH AT LEAST 90 FEET OF LINE WERE NOT AVAILABLE FOR EMERGENCY RESCUE WHEN WORKERS WERE WORKING OVER WATER.

On June 3, 1993, the day following Mr. Springer's fall into the river, Compliance Officer Varney inspected the worksite and observed a ring buoy in the rescue boat which, at that point, was in the water tied up along the shore. The Compliance Officer did not observe any other ring buoys at the site (Tr. 129, 130). There is no evidence in the record regarding the presence or absence of ring buoys at the site on June 2, 1993, other than Mr. Springer's statement that a ring buoy was not thrown to him (Tr. 76). Thus, there is no evidence that Respondent failed to comply with the above standard at the time Mr. Springer fell from the bridge on June 2. There is evidence, however, that employees were working on the bridge over the river in a man basket on June 3 (Tr. 128, Ex. C-12). The Compliance Officer's testimony that no ring buoys were on the bridge on June 3 was not rebutted by Respondent. Since the bridge was approximately 1000 feet long, and the standard requires that the distance between ring buoys shall not exceed 200 feet, a minimum of five ring buoys were

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[8] Section 1926.104(b) provides: "Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

[9] Lifeline is defined at Section 1926.107(c) as "a rope, suitable for supporting one person, to which a lanyard or safety belt (or harness) is attached.

required to be placed on the bridge on June 3, 1993. Thus, the Secretary has established the essential elements for the violation on that date.

The evidence reveals, however, that the exposed employees were wearing life vests and the rescue boat was immediately available in the water for rescue purposes. Moreover, the Secretary has failed to provide any evidence that the failure to place ring buoys on the bridge could have resulted in serious injury or death under the circumstances present at the worksite. Thus, it is concluded that the alleged violation should be affirmed as an Other Than Serious violation. *Secretary of Labor v. C. Erickson and Sons, Inc.*, 15 BNA OSHC 1980 (1991); *Secretary of Labor v. Pace Construction Corp.*, 13 BNA OSHC 2161 (1989).

(d) Penalties

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. J.A. Jones Construction Company,* 15 BNA OSHC 2201 (1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.,* 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p.40,033(No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.,* 10 BNA OSHC 2070 (No. 78-6247), 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.,* 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738, p.32,107 (No. 76-2644, 1981).

With respect to Willful Citation No. 1, Item No. 1, the Secretary has proposed a penalty of $35,000. There is nothing in the record, describing the analysis employed by the Secretary in arriving at that figure. The record establishes, however, that a high gravity factor should be assessed in arriving at a penalty. Although there was a small number of employees exposed to the hazard and the employer intended to maintain the rescue boat on the bridge only until a barge was placed in the river, the precautions taken to rescue employees from the river on June 2, 1993 were grossly inadequate. Moreover, it is concluded that the

likelihood of injury resulting from the failure to provide a readily available rescue craft was high. Considerable weight is also given, to the employer's lack of good faith. The record clearly establishes that the employer was far more concerned about the safety of its boat than for its responsibility to rescue employees from the river. Respondent's representatives at the worksite were fully aware of the need to have a rescue boat readily available, and made a conscious, intentional decision not to fulfill that responsibility. For these reasons, the penalty proposed by the Secretary is appropriate.

With respect to Respondent's failure to provide ring buoys, it is concluded that the gravity factor is low since the exposed employees were wearing life vests and the rescue boat was readily available at the time the violation was observed by the Compliance Officer. Therefore, a penalty of $100 is appropriate.

Findings of Facts

Findings of fact relevant and necessary to a determination of all issues have been made above. *Fed. R. Civ. P. 52(a).* All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Respondent willfully violated 29 C.F.R. §1926.106(d).
4. At the time and place alleged, Respondent violated 29 C.F.R. §1926.106(c) and said violation was Other Than Serious.
5. At the time and place alleged, Respondent was not in serious violation of 29 C.F.R. §1926.28(a).

Order

1. Willful Citation No. 2, Item No. 1 is affirmed and a penalty of $35,000 is assessed.
2. Serious Citation No. 1, item No. 2 alleging a violation of 29 C.F.R. §1926.106(c) is affirmed as an Other Than Serious violation and a penalty of $100 is assessed.

3. Serious Citation No. 1, Item No. 1 alleging a violation of 29 C.F.R. §1926.28(a) is vacated.

ROBERT A. YETMAN
Judge, OSHRC

DATED: June 16, 1994
BOSTON, MASSACHUSETTS