SECRETARY OF LABOR, Complainant, v. YONKERS CONTRACTING CO., INC., Respondent.	OSHRC Docket No. 00-2011

DECISION

Before: RAILTON, Chairman, and ROGERS, Commissioner.[*]

BY THE COMMISSION:

At issue in this case is whether the Secretary proved that Yonkers Contracting Co., Inc. ("Yonkers"), a heavy and highway construction company, violated 29 C.F.R. § 1926.501(b)(1) by exposing its employees to fall hazards at a reconstruction project on the Manhattan Bridge in New York.[1] Administrative Law Judge Irving Sommer vacated the citation based on the Secretary's failure to establish that Yonkers had actual or constructive knowledge of the violative conditions.[2] Having reviewed his decision, the record, and the

[*]This case was voted upon before Commissioner Stephens joined the Commission. Accordingly, Commissioner Stephens did not participate in this case in order not to delay the issuance of this decision.

[1]The standard reads in pertinent part:

§ 1926.501 Duty to have fall protection.

. . . . (b)(1) *Unprotected sides and edges*. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

[2]Commissioner Rogers notes the following facts. On May 2, 2000, one of Yonkers' painting foremen fell from an open-sided walkway on the bridge. Following an investigation by a compliance officer from the Occupational Safety and Health Administration, the Secretary issued a citation alleging that Yonkers failed to provide adequate fall protection for its mechanic, John Pedone. The judge found that the Secretary established three of the four elements of a violation. *See Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981

briefs of the parties, we affirm the judge's decision.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: December 13, 2002

CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (lst Cir. 1982). He found that the standard applied, that Pedone was exposed to a fall hazard, and that he was not provided with adequate fall protection. However, as a discovery sanction, the judge had precluded the Secretary from imputing to Respondent, to demonstrate knowledge, any awareness that two former Yonkers supervisors might have had of Mr. Pedone's exposure to fall hazards. The Secretary does not challenge this sanction on review.

Commissioner Rogers notes that, in light of the discovery sanction imposed by the judge, the Secretary's theory of knowledge here, as stated in her reply brief, was "confined specifically to constructive knowledge by only arguing that because supervisory personnel were in the area when Mr. Pedone would use the . . . walkway, they should have known that he regularly accessed it." However, the evidence of record in this regard is simply insufficient to meet the Secretary's burden. Commissioner Rogers would point out that the Secretary also might well have met her knowledge burden by showing that reasonable diligence required Yonkers to establish and enforce a work rule to address the fall hazard on the walkway. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992). Instead, as noted above, the Secretary relied on an alternative theory.

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For the Complainant.

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For the Respondent.

Before: Irving Sommer
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) 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 Respondent's work site on the Manhattan Bridge in New York City from May 2 through June 28, 2000. After the inspection, OSHA issued Respondent a two-item serious citation alleging violations of 29 C.F.R. §§ 1926.106(d) and 1926.501(b)(1).[3] The hearing in this matter was held in New York City on September 5 and 6, 2001. Both parties have submitted post-hearing briefs and reply briefs.

Factual Background

Yonkers Contracting Company, Inc. ("Yonkers"), a construction firm, contracted with the New York City Department of Transportation ("NYC DOT") to rehabilitate the Manhattan Bridge. The first phase of the project involved steel rehabilitation, while the second phase involved further steel work on the lower roadways and painting of the structure and towers. During the painting

[3]Originally, the citation had three items. Before the hearing, the Secretary withdrew Item 3, which alleged a violation of 29 C.F.R. § 1926.503(a)(2)(i) for failure to have a fall protection training program. Therefore, only Items 1 and 2, as set out above, are at issue here.

phase, Yonkers had approximately 180 employees at the site. Some of these employees worked within a movable containment area, which had a platform underneath it. After work was completed on a particular part of the bridge, the whole containment area was moved to the next part of the bridge on which work was to be done, using, if necessary, a compressed air pipeline that was along the bridge. When employees needed access to the valves on the compressed air pipeline, they used a transit authority walkway that went along the bridge.[4] (Tr. 40-43, 71-73, 88-89, 109-11, 115, 120-25, 151-53, 201-02, 214-15, 230; R-2.)

On May 2, 2000, Robert Stewart, a compliance officer ("CO") for OSHA, was returning from another inspection when he heard that a bridge painter had died when he fell into the East River from the Manhattan Bridge. The CO called his area director and was given permission to begin an inspection of the subject site. When he arrived at the site, the CO noticed an unprotected walkway along the Manhattan Bridge. During his inspection, the CO learned that the bridge painter was a Yonkers employee and that he had fallen 120 to 140 feet from the unprotected walkway. The CO also learned that no lifesaving skiff had been available to retrieve the employee from the river. The CO did not personally observe anyone working on the walkway when he was at the site. The CO did, however, interview several employees, including John Pedone, a Yonkers' mechanic, and the CO determined that Mr. Pedone had been exposed to a fall from the walkway. (Tr. 8-13, 18-25, 34, 37, 44-45, 48-49, 56-58, 66-68, 72-73, 86-89, 97-02, 132.)

Discussion

To establish an alleged violation, the Secretary has the burden of showing that the standard applied to the cited condition, that the employer violated the terms of the standard, that employees were exposed to the violative condition, and that the employer had actual or constructive knowledge of the violation; to meet her burden, the Secretary must prove all four elements by a preponderance of the evidence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Item 1 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.106(d), which requires the employer to provide a lifesaving skiff where employees are working over or adjacent to water. Respondent argues that the work was being performed over platforms and that there was no danger

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[4]The walkway and the compressed air pipeline were permanent components of the bridge, and both went along the entire length of the bridge. (Tr. 18, 121-22; R-2.)

of drowning, such that no lifesaving skiff was required. (R. Brief, p. 19.) Contrary to this argument, however, the standard does not require the existence of a drowning hazard for the standard to apply. Unlike 29 C.F.R. § 1926.106(a), which specifically requires the existence of a drowning hazard, the cited standard makes no such reference.[5] Further, in *RGM Constr. Co.*, 17 BNA OSHC 1229, 1236 (No. 91-2107, 1995), the Commission explicitly rejected this same argument and held that the standard requires that a lifesaving skiff be available at all times when employees are working over or adjacent to water, including when employees are working on the deck of a bridge, even if they are working behind guardrails or are otherwise protected by a fall protection system. As in *RGM Constr. Co.*, employees of Yonkers were working over and adjacent to water, and it is undisputed that there was no lifesaving skiff at the site. (Tr. 132, 141, 241-42, 149, 195; C-1; R-9; R. Brief, p. 19.) I find that the standard applied and that Respondent failed to comply with the terms of the standard.

I further find that employees were exposed to the cited condition and that Respondent had knowledge of the violation. Exposure to a violative condition may be established by showing actual exposure or access to the hazard. *See Brennan v. OSHRC*, 513 F.2d 1032 (2d Cir. 1975); *see also, Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977). Clearly, employees of Yonkers had access to the cited hazard, as evidenced by the employee who fell off the bridge. (Tr. 70-71.) Consequently, this employee, as well as other employees who were working on the bridge, were exposed to the violative condition. Moreover, Respondent does not deny that it was aware that no lifesaving skiff was immediately available. (Tr. 132, 149; R. Brief, p. 19.) While Respondent may argue that it was not aware that a lifesaving skiff was required, it is evident that Respondent could have discovered the hazard with the exercise of reasonable diligence. Based on the foregoing, the Secretary has satisfied her burden of proving the alleged violation. The Secretary has also demonstrated that the violation was serious, in that it could have resulted in serious physical harm or death. (Tr. 17-18.) Item 1 of the citation is accordingly affirmed as a serious violation.

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[5]29 C.F.R. § 1926.106(a) states that "[e]mployees 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 vest." (emphasis added.) 29 C.F.R. § 1926.106(d), on the other hand, states that "[a]t least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water."

The Secretary has proposed a penalty of $2,500.00 for this item. The CO testified that the proposed penalty was based on the high severity of the violation and the lesser probability of an injury. (Tr. 17-18.) While I agree with the Secretary that no reduction is appropriate for size or for history, I find that the employer's overall safety program demonstrates the company's good faith. (Tr. 54-56, 118-20, 128-31, 154-82.) I conclude that a penalty of $1,500.00 is appropriate for this item.

Item 2 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), which requires the employer to provide fall protection to employees walking or working on a surface with unprotected sides or edges that are 6 feet or more above a lower level.[6] Specifically, the Secretary alleges that Respondent did not provide fall protection to employee John Pedone when he used the walkway to access the valves on the compressed air pipeline, which, as noted above, was occasionally utilized to move the containment area.[7] While Respondent asserts that it was not Mr. Pedone's job to "maintain or inspect" the compressed air pipeline, there is credible evidence on record that Mr. Pedone did some work on the compressed air pipeline as part of his job duties. (Tr. 84-88, 97-02, 126, 199-03, 214-17.) Both Tom Korinis and Antonio Mourao, two former employees for Yonkers, testified that before the accident, they observed Mr. Pedone working on the compressed air pipeline, changing valves and hoses, approximately once or twice a week.[8] (Tr. 84-89, 97-02.) They further testified that they never saw Mr. Pedone wearing or using any fall protection while doing this work. (Tr. 88-89, 99-01.) In addition, Mr. Pedone's own testimony, that he changed

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[6]The cited standard specifically provides that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems."

[7]At the hearing, the CO testified that the accident was not the basis of this citation item, and, further, that the accident was due to unpreventable employee misconduct. (Tr. 48-49, 53.)

[8]Mr. Korinis and Mr. Mourao were supervisors of Yonkers at the time of the accident. (Tr. 83-84, 97.) As a discovery sanction, I ordered that any awareness that these two former supervisors might have had of Mr. Pedone's exposure to fall hazards could not be imputed to Respondent to demonstrate knowledge. *See* Order dated August 30, 2001. However, my order does not bar the use of this testimony to establish either the exposure element or Respondent's failure to comply with the terms of the standard.

fittings on the compressed air pipeline as needed and did not use fall protection when he did so, confirms the testimony of Mr. Korinis and Mr. Mourao. (Tr. 214-18, 227.) The record shows that Mr. Pedone accessed the compressed air pipeline by walking on the unprotected walkway, which was clearly more than 6 feet above a lower level.[9] (Tr. 84-89, 97-02, 230.) It is reasonable to infer from this evidence that, during the relevant time frame, Mr. Pedone was exposed to the cited hazard. Based on the record, I find that the standard applies, that Respondent violated its terms, and that Mr. Pedone was exposed to the cited hazard.[10]

As part of her burden, the Secretary must prove that Respondent had actual or constructive knowledge of the cited condition. *See New York State Elec. & Gas Corp.*, 88 F.3d 98, 105-10 (2d Cir. 1996). The CO testified that Respondent did not have actual knowledge of the hazard, but that, in the exercise of reasonable diligence, Respondent should have discovered the hazard. (Tr. 52-53.) In *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992), the Commission held that reasonable diligence involves several factors, including an employer's obligation to: (1) inspect the work area, (2) anticipate hazards to which employees may be exposed, (3) take measures to prevent the occurrence, (3) adequately supervise employees, and (4) formulate and implement adequate training programs and work rules to ensure that work is safe. In view of these factors, the Secretary has not satisfied her burden of establishing knowledge. The record shows that before the start of the project, Yonkers prepared and submitted to NYC DOT a site-specific safety program that included anticipation of hazards specific to each job or task. (Tr. 138, 156-60, 171-73; R-10; R-13.) The record also shows that Respondent's supervisors, city inspectors and outside consultants were on the site daily in order to observe employees and to inspect for hazards and safety violations. (Tr. 118-20, 128-30, 140-47, 174-75.) The consultants provided inspection reports to Yonkers on a weekly basis

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[9]Respondent in essence argues that the standard does not apply because the steel girders that were located 2 feet below the walkway would have prevented a fall of greater than 6 feet in other than "freakish" circumstances. (R. Brief, pp. 10-11.) I find, however, that the steel girders were not a "lower level" within the meaning of the standard since, as evidenced by the accident, they would not have prevented a fall into the river.

[10]Respondent argues that the Secretary has not shown that Mr. Pedone was actually exposed to the cited hazard during the relevant time period. As noted above, however, only access to the violative condition is required, and such access has been established.

listing safety violations discovered. (Tr. 174-78; R-14.) In addition, Yonkers' insurance carrier audited the site on a monthly basis to address and to make recommendations in regard to safety concerns. (Tr. 161-66; R-11.) The evidence of record further shows that employees were adequately trained through safety meetings. (Tr. 168, 173-74, 180-82; R-12, 16.) The Secretary offers no suggestions as to what other steps Yonkers could have taken to demonstrate the exercise of reasonable diligence. I conclude that the Secretary has not met her burden of proof with respect to knowledge. Item 2 of the citation is therefore vacated.

Conclusions of Law

1. Respondent, Yonkers Contracting Company, 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. § 1926.106(d).

3. Respondent was not in violation of 29 C.F.R. § 1926.501(b)(1).

Order

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

1. Citation 1, Item 1 is AFFIRMED, and a penalty of $1,500.00 is assessed.

2. Citation 1, Item 2 is VACATED.

/s/

Irving Sommer
Chief Judge

Date: January 18, 2002