UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MORSE DIESEL INTERNATIONAL, INC., Respondent.	Docket No. 99-1937

APPEARANCES:

Melonie J. McCall, Esquire U.S. Department of Labor Office of the Solicitor Arlington, Virginia For the Complainant.	John J. O'Reilly Vice-President of Safety and Health Morse Diesel International, Inc. New York, New York For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This case arises under the Occupational Safety and Health Act of 1970, §§ 651-678 ("the Act"), to review a serious citation and an "other" citation issued by the Secretary to Morse Diesel International, Inc. (hereinafter "Respondent" or "MDI"). On September 14 and 15, 1999, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of MDI's work site, located in Arlington, Virginia, involving the "Wedge One" phase (hereinafter "the project") of the Pentagon Renovation Program. Following the inspection, OSHA issued a citation to MDI alleging serious violations of 29 C.F.R. 1926.502(b)(1) and (b)(2) and an "other" violation of 29 C.F.R. 1926.405(a)(2)(ii)(E). MDI filed a timely notice of contest, and an administrative trial was held in Washington, D.C. on March 14, 2000.[1] Both parties have filed post-hearing briefs.

[1]The parties' exhibits received in evidence during the hearing were GX-1-4 and RX-1-4.

Jurisdiction

The parties agree that MDI is an employer subject to the Act and that the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction in this matter.[2] (Tr. 7)

Testimony of Beverly Crandell

CO Beverly Crandell testified that Jamie Hewes and Ronald Clark, MDI's safety manager and project superintendent, respectively, accompanied her on her walk-around of the project. In regard to the serious citation, she testified that in a mechanical room on the second floor there was a large floor opening with a wire rope guardrail system around it which was not in compliance; specifically, on two opposing sides of the opening the wire rope had sagged significantly, such that it did not meet either the 42-inch requirement for toprails or the 21-inch requirement for midrails.[3] (Tr. 18-22). The CO described how she measured the wire rope as follows:

> I measured the two sides which appeared to me to be ... sagging the most and found them to be out of compliance ... anywhere from 36 inches to 29 inches in height at various points along the area that it was sagging. I didn't just measure one location. I measured several locations and it varied from 36 inches to 29 inches which is I think a significant variance from 42 inches. We allow a three inch deflection. So if the height had been 39 inches throughout I would not have cited anything. (Tr. 19).

The CO said there was a concrete floor approximately 15 to 20 feet below the opening and that a fall of this distance could have resulted in serious injury or death. She also said employees had access to the hazard, in that people were working on the second floor and about six employees were working within 50 feet of the opening. CO Crandell noted that she and the MDI officials observed

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[2]The parties' stipulations, made at the commencement of the trial, are summarized as follows:

1. MDI was the general contractor for the project in September of 1999.
2. As general contractor of the project, MDI was subject to the requirements of the Act.
3. The Commission has jurisdiction over this matter.
4. On September 14 and 15, 1999, OSHA compliance officer ("CO") Beverly Crandell inspected the project.
5. CO Crandell was acting as an authorized representative of the Secretary when she conducted her inspection of the project.
6. OSHA issued MDI a citation and notification of penalty on September 27, 1999, for the violations discovered during the inspection.

[3]The CO identified GX-3 as her photo of the condition. (Tr. 18).

the condition at about 10:30 a.m. on September 15, 1999, after which MDI personnel immediately put up a yellow caution tape so that employees would be aware of it; she further noted that Mr. Clark informed her just prior to the closing conference that MDI accepted responsibility for the condition. (Tr. 22-29, 39). With respect to MDI's correction of the condition, the CO stated that:

> I first learned of their corrective action on this particular guardrail at the point in time that Mr. Pope was conducting the informal conference ... with Mr. O'Reilly and it was brought ... to Mr. Pope's attention that ... they supposedly had done an inspection that morning of this particular area and had found a problem with this guardrail and had corrected it but that was never brought to my attention during my entire walk around nor was it brought to my attention during the closing conference. And if it had been, I don't know that it would have made any difference because conditions and situations at construction sites change very quickly and ... I ... did my walk around at 10:30 in the morning and saw this violation ... as far as I'm concerned employees are still exposed to a hazard and it just would have indicated to me that if there is a problem with steel coming into this area and ... snagging the guardrails that it will indicate an even greater need for this area to be possibly observed and evaluated on a more frequent basis than daily. (Tr. 30-31).

As to the "other" citation, CO Crandell testified that during her inspection she observed two overhead incandescent-type light bulbs by a stairway on the fifth floor without guards.[4] She said the bulbs were temporary lighting for employees in the area and that such lighting is normally removed once general illumination is installed. She also said that employees were exposed to the hazard of contacting the bulbs; the bulbs were 8 feet 2 inches from the ground, employees of the electrical subcontractor were using ladders and scissor lifts to install conduit in the area, and she saw workers less than 30 feet away from the bulbs. CO Crandell testified that the unguarded bulbs were clearly visible upon exiting the stairway and that the condition was cited as an "other" violation because contacting the bulbs would result in minimal injuries such as burns. (Tr. 32-36, 40-41, 44-47).

Testimony of Ronald Clark

Ronald Clark, MDI's project supervisor, is responsible for safety at the site. He testified that the project covers five floors and 1.2 million interior square feet, as well as an exterior area that consists of about a half acre, and that at the time of the inspection the project had two shifts, from 7 a.m. to 3:30 p.m. and from 6 p.m. to 4 a.m. He further testified that he arrives at the site between

[4]The CO indicated that the cited lights, shown in GX-4, had previously had the plastic guards that the other lights at the site had but that the guards had broken or melted off. (Tr. 33-34).

3 and 3:30 a.m., that he walks the entire job with the night superintendent and the day superintendent and makes a list of any safety items he sees, and that he gives the list to employees so the items can be corrected. Mr. Clark said that in RX-2, his written log of his 4 a.m. "walk-through" on September 15, 1999, there was a notation about tightening up the cables in the mechanical room on the second floor. He stated these were the cited cables, that he had given Paul Miller, the day superintendent, a list that included these cables, and that Mr. Miller had told him at a 7 a.m. meeting that day that he had taken care of the items on the list. (Tr. 57-58, 67-72, 81). He also stated that he was "very surprised" when he and the CO saw the cables later that morning and that he informed her that:

> We just seen this this morning and fixed this. That's exactly what I said when we walked up on it on the second floor [to] that mechanical room. That's exactly what I said. I said this is ridiculous and at that time no one was in the area. I didn't know who done it. I seen a piece of metal deck laying there. I said this is crazy. I said I was just down here. That's the exact words I told her....We all stood there and ... we seen there was a steel beam lowered in the hole and there was a piece of deck laying there but there was no one in the area. We assumed that it was the steel guy. (Tr. 73-74).

As to the "other" violation, Clark testified that MDI "go[es] through" about 1,000 light bulbs a week and that he has a full-time employee who does nothing but change light bulbs. (Tr. 80-83).

Testimony of Paul Miller

Paul Miller testified that during their 4 a.m. walk-through of the project on September 15, 1999, one of the deficiencies he and Ronald Clark had seen was the loose cables that were the subject of the OSHA citation. He said he himself had corrected the problem by about 4:30 a.m. and that he walked by that same area around 9:15 a.m. and observed that the cables were still in a "good tight position" at that time. He also said that RX-1, his log for September 15, reflected the fact that the subject cables were one of the conditions he had addressed that day. With respect to the "other" citation, Mr. Miller testified that MDI has a laborer who does nothing but check the light bulbs all day and that this is necessary because they constantly burn out. (Tr. 57, 84-95).

The Secretary's Burden of Proof

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative conditions, and (4) the employer knew or could have known of the violative conditions with the exercise of reasonable diligence. *New York State Elec. & Gas v. Secretary of Labor*, 88 F.3d

98 (2d Cir. 1996); *Carlisle Equip. v. Secretary of Labor*, 24 F.3d 790, 792 (6th Cir. 1994); *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Knowledge is a fundamental element of the Secretary's burden of proof for establishing a violation of OSHA regulations. *Trinity Indus. v. OSHRC*, 206 F.3d 539 (5th Cir. 2000); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). The Secretary may establish the requisite knowledge on the part of the employer through actions of its supervisory employees, *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983), or by showing it knew or with the exercise of reasonable diligence could have known of a likelihood of the noncomplying condition or practice. *Milliken & Co.*, 14 BNA OSHC 2079, 2082 (No. 85-369, 1991). *See also New York State Elec. & Gas*, 88 F.3d 98.

Serious Citation 1, Items 1(a) and 1(b)

Item 1(a) of Serious Citation 1 alleges a violation of 29 C.F.R. 1926.502(b)(1), as follows:

> Pentagon, Wedge 1 Renovation Project, 2nd floor, A2 area, 4C-mechanical room location. The guardrail system consisting of wire rope cable did not have a top rail which was maintained at a 42 inch height; various points of the top rail measured 36 to 29 inches, throughout the guardrail system surrounding the large floor opening exposing employees to a fall hazard of greater than six feet to the next level below.

Item 1(b) of Serious Citation 1 alleges a violation of 29 C.F.R. 1926.502(b)(2), as follows:

> Pentagon, Wedge 1 Renovation Project, 2nd floor, A2 area, 4C-mechanical room location. The guardrail system consisting of wire rope cable did not have a midrail which was maintained at a 21 inch height; various points of the midrail measured from 16 inches to 11 inches, throughout the guardrail system surrounding the large floor opening.

The cited standards, 29 C.F.R. 1926.502(b)(1) and (b)(2), provide as follows:

> (b) *Guardrail systems.* Guardrail systems and their use shall comply with the following provisions:
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> (1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.
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> (2) Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches (53 cm) high.

The evidence set out above establishes that the wire rope guardrail system around the floor hole in the second-floor mechanical room did not comply with the cited standards, that people were working on that floor, and that several employees were working about 50 feet from the opening. I therefore find that the Secretary has demonstrated the applicability of the cited standards, that the terms of the standards were not met and that employees had access to the violative condition. However, for the following reasons, the Secretary has not met her burden of proving that MDI knew, or in the exercise of reasonable diligence could have known, of the violative condition.

The testimony of Ronald Clark and Paul Miller was that they had discovered the condition during their 4 a.m. walk-through of the site that day, that Mr. Miller himself tightened up the guardrails at about 4:30 a.m., and that he reported to Mr. Clark at about 7 a.m. that he had taken care of the problem. Mr. Miller also testified that he had walked by the floor hole shortly after 9 a.m. and that the guardrails were still in satisfactory condition at that time. (Tr. 70-76, 80-81, 84-94). However, when the CO and Mr. Clark saw the floor hole around 10:30 that morning, the guardrails were once more sagging and out of compliance. Mr. Clark's testimony about what he said to the CO when they saw the guardrails is set out *supra*, and although the CO evidently did not recall his statement, I observed the demeanor of Mr. Clark as he testified and found him to be a candid and credible witness. I also observed the demeanor of Mr. Miller as he testified and found him to be equally candid and credible. Consequently, I find as fact that Mr. Clark and Mr. Miller discovered the condition early that morning, that it was corrected shortly thereafter, and that Mr. Miller saw the guardrails again about an hour before the inspection and found them in compliance at that time. I further find that Mr. Clark conveyed this information to the CO at the time of the inspection.

In view of the foregoing, MDI did not know about the guardrails being out of compliance. As to whether MDI should have known of the condition, Mr. Clark's testimony indicates that it was caused by the steel subcontractor lowering steel into the floor hole and that he was aware that this work was going on. (Tr. 74-75). However, the testimony of Mr. Clark and Mr. Miller was that they made an early-morning walk-through of the entire project daily to detect safety problems, that any such problems were noted on lists for prompt correction, and that there was a 7 a.m. follow-up every day when supervisory personnel would report their corrective actions to Mr. Clark; in addition, as

Mr. Miller testified, he "routinely walk[ed] the whole job all day long."[5] (Tr. 68-73; 81, 84-88). Based on this testimony, plus the evidence that MDI had a safety program that was communicated to supervisory personnel such as Mr. Clark and Mr. Miller, *see* GX-1, I conclude that MDI exercised reasonable diligence in attempting to ensure that safety problems such as the sagging wire rope around the floor hole were promptly detected and corrected.

In reaching the above conclusion, I have considered the CO's testimony, when asked how often inspections of guardrail systems like the one at issue should occur, that they should be inspected "every hour" and "[a]s often as necessary in order to protect the employees." (Tr. 40). However, the Act does not impose on employers an absolute duty to detect and eliminate all safety hazards at work sites; rather, as indicated *supra*, an employer must exercise reasonable diligence. MDI was not in violation of the cited standards, and Items 1(a) and 1(b) of Citation 1 are vacated.

"Other" Citation 2

Citation 2, Item 1 alleges a violation of 29 C.F.R. 1926.405(a)(2)(ii)(E), as follows:

> Pentagon, Wedge 1 Renovation Project, 5th Floor, A1 Area, D-ring, near west side stairway. Two overhead incandescent light bulbs were not protected by a guard to prevent accidental breakage.

Section 1926.405(a)(2)(ii)(E), the cited standard, provides as follows:

> (ii) *General requirements for temporary wiring* ... (E) All lamps for general illumination shall be protected from accidental contact or breakage.

The evidence set out *supra* establishes that the cited light bulbs were temporary lighting on the project, that they were not guarded as required, and that employees were working on ladders and scissor lifts in the area of the unguarded bulbs. The Secretary has thus demonstrated the applicability of the standard, that the terms of the standard were not met, and that employees had access to the violative condition. However, like the serious citation, I find the Secretary has not met her burden of proving that MDI knew or should have known that the light bulbs were unguarded. There is no evidence that any MDI supervisory personnel were aware of the condition. Moreover, the testimony of Mr. Clark and Mr. Miller shows there were numerous light bulbs on the project, that about 1,000 bulbs a week were replaced, and that MDI had a full-time employee who did nothing but check light

[5]Mr. Clark indicated he told the CO about these walk-through practices. (Tr. 73).

bulbs and replace them as necessary. (Tr. 80-83, 91-92). Their testimony also shows they made an early-morning walk-through of the entire project every day to detect safety problems, that any such problems were noted on lists for prompt correction, and that there was a daily 7 a.m. follow-up at which time supervisory personnel would report on the corrected items to Mr. Clark; further, Mr. Miller testified he "routinely walk[ed] the whole job all day long." (Tr. 68-73; 81, 84-88). Finally, the record shows MDI had a safety program that was communicated to supervisory personnel such as Mr. Clark and Mr. Miller. (GX-1). In view of the record, I conclude that MDI was not aware of the subject bulbs and that MDI was reasonably diligent in attempting to ensure that safety problems such as unguarded light bulbs were promptly detected and corrected. This citation item is vacated.

ORDER

Based upon the foregoing decision, the disposition of the citation items is as follows:

Citation 1	**Violation**	**Disposition**
Item 1(a)	29 C.F.R. 1926.502(b)(1)	Vacated
Item 1(b)	29 C.F.R. 1926.502(b)(2)	Vacated
Citation 2	**Violation**	**Disposition**
Item 1	29 C.F.R. 1926.405(a)(2)(ii)(E)	Vacated

G. Marvin Bober
Administrative Law Judge

Dated: September 18, 2000
Washington, D.C.