UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. P. S. BRUCKEL, INC., Respondent.	DOCKET NO. 96-0460

Appearances: For Complainant: Esther D. Curtwright, Esq., Office of the Solicitor, U. S. Department of Labor, New York, N.Y.; For Respondent: Edward Kowalewski, Jr., Esq., Fox & Charles, Clifton Park, N.Y.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, P. S. Bruckel, Inc., at all times relevant to this action maintained at a workplace at the Eagle Harbor Lift Bridge, Over Erie Barge Canal, Eagle Harbor, N.Y., where it was engaged in the business of industrial painting, primarily steel structures, e.g., bridges and tanks (Tr. 373)[1]. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On Friday, October 20, 1995, the OSHA hotline received a call which informed them that a fatality had occurred at the Eagle Harbor Bridge in Gaines, New York (Tr. 9). Upon receipt of this information, OSHA Compliance Officer Colin Sargent ("CO Sargent") received an assignment to go to the worksite on Monday, October 23, 1995. From October 23, 1995 through February 29, 1996, CO Sargent conducted an inspection of the aforementioned worksite. As a result of this inspection, on March 1, 1996, Respondent was issued one citation containing six items alleging serious violations with a proposed total penalty in the amount of $10,500.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on February 11 - 13, 1997. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

BACKGROUND

Respondent was a subcontractor on the subject workplace - a lift bridge, over a barge canal, under rehabilitation. The record reveals that in August 1994 Respondent had been subcontracted by the general contractor at two worksites, Union Concrete, Inc., to sandblast and paint the existing

[1] The term "Tr" refers to the hearing transcript.

trusses of the Eagle Harbor Bridge and the Medina Bridge, which were being rehabilitated in Orleans County, New York (Tr. 205, 214-215; 413-415; Exh. R-15[2]). The Medina Bridge was about fifteen minutes away from the Eagle Harbor Bridge (Tr. 205). These bridges were being refurbished pursuant to two New York State Department of Transportation ("DOT") contracts (Tr. 411-413; Exhs. R-15, R-16, R-17).[3] The record reveals that DOT, in conjunction with a company called Foit Albert Associates[4] ("Foit"), monitored the progress and safety of the work in accordance with the plans and the compliance with DOT regulations (Tr. 106, 215, 336).

Peter Bruckel is the owner of Respondent, and in early 1994 his brother, Jerome "Jerry" Bruckel, started doing some planning for him (Tr. 373-374). The record reveals that Jerry was hired in a management capacity, and thus, had "very little actual hands-on" experience with regard to the physical labor which Respondent's employees performed (Tr. 332; 444-445). Prior to commencing work on the aforementioned bridge projects, Jerry conducted a pre-job survey to identify the hazards and emergency telephone numbers. This information was contained in a document entitled "Pre-Job Safety Survey" dated September 8, 1994 (Tr. 421; Exhs. R-16 and R-17). The survey included the requirements of safety cables, a boat, preservers and buoys.

In early 1995, Jerry assumed the responsibilities of safety compliance, and all of the pre-job planning. He attended a 10-hour OSHA training course, and the Steel Structures Painting Council Safety Program (Tr. 377; Exh. R-7). Jerry prepared the company's written safety program in early 1995 (Tr. 380-381: Exh. R-8). On March 6 and 7, 1995, the program was presented to employees who were to start work in the spring and summer at an orientation program (Tr. 380, 382-383, 502; Exh. R-9). During Jerry Bruckel's presentation at this orientation, he discussed fall protection and demonstrated how body harnesses were worn and used (Tr. 392 -394). Peter Bruckel testified that Jerry also provided orientation to new employees who did not have the opportunity to attend the aforementioned program (Tr/ 396).

From December 1994 to January 1995, Respondent performed work associated with the tasks of sandblasting, cleaning and priming on the northern end of the Eagle Harbor Bridge. Respondent returned in March 1995, and performed the same tasks at the southern end of the bridge until May 1995 (Tr. 336-340; 417-420). In early July 1995, Respondent finished the intermediate coat of paint (Tr. 420). During the course of this work, Respondent rigged the bridge with 3/8th cable which was used for fall protection and provided water protection in the form of life vests, ring buoys and used the boat of the general contractor (Tr. 307-309). At the time of the instant inspection, the canal had been open and there was water in the canal (Tr. 9). The bridge deck and railings had been removed and the deck substructure was in an elevated position, supported on falsework consisting of two vertical support columns joined by cross-bracing. The roadbed was composed entirely of open steel (Tr. 9-10; Exhs. C-1, C-2, & C-4). There were partially constructed counterweight pits which had not been covered, and were 22.55 feet deep at both the south and north ends of the bridge located

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[2] The term "Exh." refers to Exhibits introduced into evidence.

[3] Eagle Harbor Bridge- NYSDOT Project D256106. Medina Bridge - NYSDOT Project D256107.

[4] The undersigned notes that the transcript contains the term "Floyd" in lieu of "Foit".

directly behind the falsework (Tr. 217; Exh. C-11). All the machinery had been removed from the pits, and protruding above the top of the pits and wall of the pit, were vertical reinforcing bars (rebars) (Tr. 28-29, 247; Exhs. C-5 to C-7). Many of the rebars were uncapped and unprotected (Tr. 247-248). Orange netting and a sign which stated "Dangerous" surrounded the rebars (Tr. 222; Exhs C-5 to C-7). The counterweight pit was within a foot of the false-work and cross-bracing (Tr. 222).

The record reflects that during the time that work was being performed at the Eagle Harbor Bridge, similar work was being performed at the Medina Bridge. During the week of October 9, 1995, Peter Bruckel received a call from Union Concrete Inc.'s Superintendent, Jack Ford, who informed Respondent that DOT wanted the Medina Bridge painted (Tr. 252, 425-426). At the time this request was made, all of Respondent's work crews were involved in jobs in New Jersey. Therefore, Peter Bruckel contacted another contractor for the services of a painter. On October 16 or 17, 1995 (Monday or Tuesday), Peter Bruckel informed his brother Jerry that he was to supervise the painting on Friday at the Medina Bridge (Tr. 428-429). The bridge had to be power washed before the final coat of paint could be applied, so Peter asked Jerry to take Calvin Hoskins, a laborer, with him to perform this task (Tr. 427-429). Prior to his date, Calvin had not done any bridge work and had only performed odd jobs for Respondent (Tr. 145). On Wednesday morning, October 18, 1995, Jerry and Calvin went to the Medina Bridge. However, they were stopped from power washing the bridge by Foit bridge inspector, Andrew Adams, because they did not have the correct biodegradable solvent (Tr. 118, 237). Thus, they went to the Eagle Harbor Bridge and power washed that bridge that morning (Tr. 50, 148, 342). On Thursday, October 19, 1997, Jerry Bruckel and Calvin Hoskins returned to the Medina Bridge to power wash the upper portion of the bridge in preparation for the arrival of the painter the next day (Tr. 119).

On Friday, October 20, 1995, Jerry and Calvin began their workday at the Medina Bridge, where they were to meet a painter. However, it was extremely windy, and they were told by Foit bridge inspector, Andrew Adams that they could not start painting that day because the winds were too high (Tr. 117, 154). According to the testimony of Calvin Hoskins, once this decision was made, Jerry informed him that they were going to the other bridge to take some cables down (Tr. 155). Upon their arrival at the Eagle Harbor Bridge, they first went to the north side of the bridge and took down a "scaffolding pic"- an aluminum platform which had been a portion of the catenary scaffold that was suspended on two cables running north and south below the bridge on the north side of the bridge (Tr. 45, 155). One-half of the pic was over the water in the canal (Tr. 223; Exh. C-11). Calvin testified that they stood on the concrete, abutting the canal, facing south to remove the pic. Directly behind them was the counterweight pic (Tr. 157, 169, 174, 178, & 179). Once they removed the pic, they began loosening the cables connectors (Tr. 179). Calvin testified that he climbed to the top of the bridge and stood ready to assist, as Jerry was up on the cross-bracing loosening the connectors with a wrench ans rachet (Tr. 179-180). Once that was done, Jerry climbed to the cross-bracing and they proceeded to walk the full length of the bridge to the south end - approximately 120 feet. They crossed over open steel structural steel members that were approximately three to four inches in width (Tr. 45-46). Once on the south end, Jerry climbed down on the cross-bracing of the false-work on the south side. He disconnected the southwest end of the cable supporting the catenary scaffold. He then moved to the east side of the bridge and down to the cross-bracing of the false-work while attempting to remove the cable that ran along the east side of the bridge. He was having some difficulty with the cable and instructed Calvin to go back to the center of the bridge to loosen

up the rope that was holding the cable taught to the bottom of the bridge. Calvin traveled to the center and loosened the rope. He called to Jerry and received no answer. As he traveled back to the south end, he observed Jerry lying at the bottom of the counterweight pit which was adjacent to the south end of the bridge (Tr. 46-47, 170-171, 180- 190; Exhs.C-7, C-8, C-9). Jerry wore no safety belt or safety harness (Tr. 47, 182).

SECRETARY'S BURDEN OF PROOF

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DISCUSSION

Citation 1, Item 1a: Alleged Violation of 29 C.F.R. §1926.106(a)

The standard provides:

> Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jackets or buoyant work vests.

The Secretary's citation sets forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/18/95 (as amended) and 10/20/95 employees were working over and adjacent to the canal while attempting to remove a catenary scaffold. The water was approximately 12 feet deep. No life jackets or buoyant work vests were provided.

and Citation 1, Item 1b: Alleged Violation of 29 C.F.R. §1926.106(c)

The standard provides:

> Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

The Secretary's Citation set forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/20/95 employees were working over and adjacent to the canal while attempting to remove a catenary scaffold. The water was approximately 12 feet deep. No ring buoys were available.

Noncompliance and Employee Exposure

The record reveals that the Respondent does not dispute the applicability of the cited standards. The undersigned finds that the record establishes that the Respondent did not comply with the requirements of the standard and that Respondent's employees were exposed to the hazard created by noncompliance. CO Sargent testified that based upon the information he gathered during his investigation he made a determination that life vests and ring buoys were not readily available at the subject worksite (Tr. 40-41). Calvin Hoskins testified that there was water in the canal under the bridge when they performed work at the Eagle Harbor Bridge on October 18 and 20, 1995 (Tr. 152). He testified that prior to his working on the bridge on October 18, 1995, no one told him about the availability of life vests or ring buoys (Tr. 147). Both Foit bridge inspector, Andrew Adams and DOT engineer-in-charge, Scott Sullivan testified that the water depth at Eagle Harbor Bridge on October

20, 1995, was approximately 12 feet (Tr. 143, 232).

It is Respondent's position that it did provide its employees with U.S. Coast Guard-approved life vests and ring buoys (Tr. 435; Respondent's Answer, Paragraph 15). Peter Bruckel testified that Respondent supplied Jerry with U.S. Coast Guard approved life vests to take to the site (Tr. 437). He testified that the company expected that its superintendents would take them from the shop to the job (Tr. 437-438). Warren Wheeler, currently a supervisor with Respondent, testified that all safety items were present every day that they were on the job, and that the Respondent took several measure to protect its employees while they worked over the waterways at the bridge including having life rings and life vests at the job. He testified that they took their own life vests to the jobsite, and that the ring buoys were hung out every day (Tr. 309, 325).

Harold R. Carpenter, a Foit Albert bridge inspector at the subject worksite, testified that when Respondent's employees arrived at the bridge in the spring of 1995, there were ring buoys available (Tr. 341). He testified that on October 18, 1995, he had observed Jerry and Calvin working at Eagle Harbor Bridge, and did not observe either individual wearing a U.S. Coast Guard life vest or any type of buoy vest (Tr. 352). He acknowledged that the buoys available on the site on October 18, were stored in a control tower which was inside of the bridge approximately two feet from the adjacent counterweight pit on the south side (Tr. 351-352). He also testified that the door to the control tower was normally locked unless they had a workforce present. Additionaly, Andrew Adams testified that when he went to the accident scene on October 20, 1995, he looked for life buoys and discovered that they were locked in the control tower (Tr. 134). Scott Sullivan testified that ring buoys were supplied by the prime contractor, Union Concrete Inc. However, when he went to the site on October 20, 1995, he did not observe any ring buoys or life vests (Tr. 249, 371).

The undersigned finds that based upon the aforementioned testimony, the Secretary has shown that there was a noncompliance with the cited standards. The record also reveals that there was employee exposure to these two violations. Calvin Hoskins and Jerry Bruckel were exposed to the hazard of drowning in the 12 feet of water present in the canal as they worked on top of the bridge performing the power washing operation and removing the catenary scaffold on October 18 and 20, 1995. The record reveals that the presence of open spaces in the bridge decking, the water depth of 12 feet, and the lack of fall protection[5] subjected Jerry and Calvin, who worked without life vests, to the danger of drowning in the event of a fall. Calvin's testimony established that they worked without life vests, and he was exposed to the hazard of falling as he hooked and unhooked his lanyard, and Jerry was exposed to the hazard of falling the entire time he traveled the bridge (Tr. 182-185). Furthermore, in the event of such an emergency, i.e., drowning, there were no ring buoys readily available for emergency rescue operations. The presence of ring buoys would have ameliorated the hazard of drowning. *Secretary of Labor v. Complete General Construction Co.*, 53 F.3d 331, 17 BNA OSHC 1241 (6th Cir. 1995). The presence of ring buoys in a locked control tower inside a control room under the bridge did not establish their availability to Jerry and Calvin as they worked on the bridge deck.

Knowledge

To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative

[5] See discussion below with regard to the lack of fall protection.

condition. *Seibel Modern Manufacturing & Welding Corp.,* 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.,* 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer). In *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

In the instant matter, the Peter Bruckel testified that he had talked to Jerry the Thursday evening prior to the accident and informed him that he was to supervise the painting at the Medina Bridge the next day (Tr. 429). He also acknowledged that Jerry was the competent person at the Eagle Harbor site on October 18 and 20, 1995, solely responsible for the implementation and enforcement of the Respondent's safety program. In his capacity as supervisor on this job, Jerry was expected to have taken U.S. approved life vests, ring buoys, and skiffs to the jobsite (Tr. 436-438). Additionally, the requirement for boats, preservers and buoys appears upon the pre-job survey prepared by Jerry in September 1994 (Tr. 421; Exh. R-16). Accordingly, Jerry was very familiar with the hazards and safety equipment necessary for the performance of work at the subject jobsite.
The record reveals that in spite of Jerry having established the requirements for life vests and ring buoys at this jobsite, he did not exercise any diligence in ensuring that employees were provided the appropriate safety equipment when performing work over water on October 18 and 20, 1995. Furthermore, per Calvin's testimony, Jerry did not inform him about the location and availability of life vests, ring buoys or skiffs (Tr. 60, 146-147). Jerry Bruckel's lack of reasonable diligence to take measures to prevent the occurrence of employee exposure to the cited hazards establishes knowledge imputable to Respondent. Accordingly, the Secretary has established a prima facie case of a violation of §§1926.106(a) and .106(c).

Classification

The undersigned finds that a preponderance of the evidence establishes serious violations. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. 29 U.S.C.§ 666(k). The undersigned finds that the evidence in this case shows that death or serious physical harm due to drowning could result from the exposure to working over water without the presence of the appropriate safety equipment. Accordingly, the Complainant properly classified these violations as serious.

Penalty

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). 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 (No. 88-2691, 1992). The gravity of a particular violation 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. *J.A. Jones, supra.*

The gravity of these two grouped violations - §§1926.106(a) and .106(a) reflect a high severity because the result of injury would have been death by drowning. The probability of injury was lesser because there were two employees with limited exposure - Calvin did tie off as he worked (Tr. 68). The gravity-based penalty of $2,500.00 was appropriately adjusted to reflect the Respondent's small size, i.e., 25 employees (Tr. 63). However, only a 30% reduction for size was given, because of high severity of injury. The record reflects undisputed testimony that no reduction was given for history because this employer had been cited for serious violations within the past three years (Tr. 70). The record appropriately reflects no reduction for good faith. Although Respondent had a written safety program, it was evident from the record that it was not being effectively enforced. The person in charge, Jerry Bruckel, wore no safety harness and did not provide any other safety equipment for himself or his employee. The undersigned also notes that he had been warned the day before the fatal accident for not utilizing a ladder at the Medina Bridge, and the next day he did the same thing at the Eagle Harbor Bridge (Tr. 70-71). Additionally, Jerry did not provide Calvin all of the necessary training necessary for working above water. Furthermore, the undersigned finds that Peter's direction to Jerry, to perform and supervise work for which he had relatively little, if any, "hands-on experience", is indicative of the Respondent's general attitude towards its commitment to safety. Accordingly, a penalty in the amount of $1,750.00 is appropriate.

CITATION 1, Item 2: Alleged Violation of 29 C.F.R. §1926.106(d)

The standard provides:

> At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

The Secretary's citation sets forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/20/95 employees were working over and adjacent to the canal while removing a catenary scaffold. The water was approximately 12 feet deep. No skiff was provided.

Noncompliance and Employee Exposure

The record reveals that Respondent does not dispute the applicability of the cited standard. The undersigned finds that the record establishes that the Respondent did not comply with the requirements of the standard and that Respondent's employees were exposed to the hazard created by noncompliance. CO Sargent testified that his investigation revealed that there was no skiff

available at the site where employees were working over or adjacent to water on October 20, 1995 (Tr. 59, 60-61, 70). Andrew Adams testified that his investigation of the accident site on October 20, revealed that the skiff was chained to the contractor's trailer (Tr. 134). Scott Sullivan corroborated the fact that there was no skiff in the water at the bridge site on October 20, 1995. He further testified that the skiff had been stored at a remote location because vandals had stolen a skiff. It was behind a house a couple of a hundred feet away from the canal (Tr. 257). Harold Carpenter also testified that he did not observe a boat or skiff in the water when there was water in the canal and Respondent's forces were working at Eagle Harbor Bridge (Tr. 341). Peter Bruckel testified that the company expected that the superintendent would take life saving skiffs to the jobsite each day (Tr. 438). Calvin Hoskins testified that he was not told by anyone about the location and availability of a skiff prior to his beginning to work on the bridges (Tr. 147).

In view of the above, the undersigned finds that there was no skiff in the water on October 20, 1995, and Calvin Hoskins would have been unaware of where to locate the skiff in the event Jerry fell into the water. Thus, the Secretary has proven that there was no skiff immediately available for the purpose of saving someone from drowning in 12 feet of water. Calvin Hoskins provided detailed testimony of how they traveled from the north side to the south side of the bridge Calvin testified that he utilized his safety belt and lanyard to travel the bridge and Jerry traveled across the bridge without the utilization of any fall protection. As they traveled, Calvin was exposed to the hazard of a fall resulting in drowning as he hooked and unhooked his lanyard and Jerry was exposed to the hazard of drowning the entire time he traveled the bridge. The presence of a skiff would have ameliorated the hazard of drowning. *Secretary of Labor v. Complete General Construction Co.*, *supra.*

Knowledge

The undersigned finds that Jerry's knowledge is imputed to the Respondent. See discussion regarding knowledge with regard to §§1926.106(a) and .106(c) *supra*. Accordingly, the Secretary has established a prima facie violation of §1926.106(d).

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation. The evidence shows that death or serious physical harm could result from the drowning hazard created by exposure to working over water without the presence of the appropriate safety equipment. Accordingly, the Complainant properly classified this violation as serious.

Penalty

The gravity of §1926.106(d) reflects a high severity because the result of injury would have been death by drowning. The record reflects that probability of injury was lesser, because there were two employees with limited exposure and Calvin tied off as he worked (Tr. 68). The gravity-based penalty of $2,500, was appropriately adjusted to reflect the Respondent's small size (Tr. 63). As previously discussed, *supra.*, no adjustments for history or good faith were applicable with respect to this violation. Accordingly, a penalty in the amount of $1,750.00 is appropriate.

CITATION 1, Item 3 Alleged Violation of 29 C.F.R. §1926.501(b)(1)

The standard provides:

> *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 personnel fall arrest systems.

The Secretary's citation sets forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/18/95 (as amended) and 10/20/95 an employee was not wearing a safety belt or harness and was otherwise protected against falls while working above and/or adjacent to the lift bridge counterweight pit and while working above the canal. The employee was attempting to remove a catenary scaffold from the underside of the bridge. The employee was fatally injured when he fell to the bottom of the counterweight pit. The counterweight pit was 22.5 feet deep. The bottom of the bridge deck level was 33.5 feet above the bottom of the counterweight pit and approximately 17 feet above the canal water. A second employee who was wearing a safety harness was also exposed to potential falls whenever he disconnected his lanyard to facilitate his movement from one side of the bridge to the other.

Noncompliance and Employee Exposure

The record reveals that Respondent does not dispute the applicability of the cited standard. The undersigned finds that the record establishes that the Respondent did not comply with the requirements of the standard and that Respondent's employees were exposed to fall hazards. CO Sargent testified that his investigation revealed that Jerry and Calvin were exposed to falls from the bridge deck into the water which was approximately 17 feet below. They were also exposed to falls from the bridge deck into the counterweight at a distance of 33 and ½ feet. They were exposed to falls from the bridge deck level to the top of the concrete wall which was a distance of 11 feet (Tr. 73). The record contains no evidence of the presence of guardrail or safety net systems. Calvin provided testimony which established that Jerry wore no safety harness or lanyard the entire time they worked at Eagle Harbor Bridge. His testimony also establishes that as they stood underneath the pic on the concrete pillars to remove the pic, they were both exposed o a fall from the concrete pillar to the ground or water on either side of the pillars (Tr. 157, 169-170). His testimony also establishes that once the pic was removed, Jerry worked with no fall protection the entire time, thereby exposing himself to a fall into the canal (Tr. 181-182). As Calvin walked to the south side, he had to unhook and rehook his lanyard several times, thereby exposing himself to a fall protection into the canal through the open decking (Tr. 183-184). Once on the south side Jerry climbed down on the cross-bracing and began loosening the cables again without fall protection thereby exposing himself to a fall into the counterweight pit below (Tr. 186). Calvin also testified that as they power washed the bridge on October 18, 1995, he was not able to employ his fall protection as he moved from east to west on the bridge, and Jerry wore no fall protection (Tr. 148, 189). Thus, the record establishes that Jerry and Calvin were exposed to fall hazards as they climbed the cross-bracing, worked and walked across the open steel beams, and removed the pic.

Knowledge

The record reflects that Jerry Bruckel worked on both October 18 and 20, 1995, at the Eagle Harbor Bridge without any fall protection. The Respondent's written safety program was prepared by Jerry and provided for fall protection, via a personnel fall arrest system for bridge painting. The program provided that workers exposed to falls more than six feet would wear body harnesses for continuous fall protection (Exh. R-8). Jerry taught employees when and how to use the body harnesses during the Respondent's orientation program in March 1995. Furthermore, Calvin testified that Jerry showed him how to use the safety harness (Tr. 146). In spite of his knowledge, Jerry

worked without fall protection, and permitted Calvin to work in a manner where he was not continuously protected from fall hazards (Tr. 183-184). Additionally, Calvin's testimony that he mentioned to Jerry that he should be wearing a safety belt and Jerry's responses that he did need one, is indicative of Jerry's knowledge (Tr. 152).[6] This evidence unequivocally establishes Jerry knew of the cited violations. For the reasons discussed above, *supra.*, his knowledge is imputed to Respondent. Accordingly, the Complainant has established a prima facie case of the §1926.501(b)(1).

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation. The facts of the instat matter establish that at the time of Jerry's fatal fall guardrails, safety nets, nor a personal fall arrest system had not been employed to protect him from falling.

Penalty

The gravity of the violation reflects high severity because the expected injury from this condition would have been serious physical harm, permanent disability or death. The probability was assessed as greater because the two employees had to travel the full length of the bridge, i.e., 120 feet, and as described by Calvin Hoskins, it was extremely windy (Tr. 154). The deceased was never protected against falls and Mr. Hoskins had to disconnect his lanyard from time to time which exposed him to falls. The gravity-based penalty of $5,000, was appropriately adjusted to reflect the Respondent's small size (Tr. 63). As previously discussed, *supra.*, no adjustments for history or good faith were applicable with respect to this violation Accordingly, a penalty in the amount of $3,500.00 is appropriate.

CITATION 1, Item 4: Alleged Violation of 29 C.F.R. §1926.701(b)

The standard provides:

> *Reinforcing steel*. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

The Secretary's citation sets forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/18/95 (as amended) and 10/20/95 employees were exposed to an impalement hazard while working above vertical reinforcing steel that protruded approximately 4 to 12 inches above the top of the south counterweight and protruded approximately 2 to 4 feet above the top of the walls of the counterweight pit. The employees were attempting to remove a catenary scaffold from the underside of the lift bridge.

Noncompliance and Employee Exposure

The record reveals that Respondent does not dispute the applicability of the cited standard. The undersigned finds that the record establishes that the Respondent did not comply with the requirements of the standard and that there was employee exposure to the cited condition. CO Sargent testified that his investigation revealed that both Jerry and Calvin were exposed to potential impalement hazards when they worked at the south end of the bridge. The record discloses that at one time the general contractor had capped the rebar, however, vandals had taken most of the rebars

[6] The undersigned, having observed Calvin's demeanor during the course of his testimony, finds his testimony very credible. The record also reveals no factors, such as bias or lack of knowledge, to negate this finding.

(Tr. 255). On October 20, 1995, the rebars within the open counterweight pits adjacent to the bridge were not capped, covered or bent (Tr. 75, 247-248). The record reveals that as Jerry and Calvin climbed the cross-bracing of the falsework they were exposed to a fall into the counterweight pit (Tr. 221- 222, 233; Exhibit C-11). Additionally, as they stood on the concrete to remove the pic, there was exposure to a fall into the pit (Tr. 223-224; Exh. C-11). CO Sargent also testified that his investigation revealed that there was evidence the deceased struck one of the vertically protruding rebar on the counterweight when he fell into the counterweight pit (Tr. 75). The Respondent presented no evidence to contradict any of these findings.

Knowledge

Peter Bruckel testified that when his employees are exposed to hazards such as exposure to rebars, they should take whatever action is necessary to prevent an accident (Tr. 475).[7] Furthermore, as Complainant's counsel pointed out during the presentation of her case, a portion of the fall protection requirements within the project proposal which Respondent had with NYSDOT provided that fall protection be provided whenever there was the possibility of impalement at any height (Tr. 248-249; Exh. C-13). In spite of the aforementioned, on October 20, 1995, Jerry Bruckel demonstrated no diligence or effort to guard against impalement as he and Calvin proceeded to climb and work at the bridge on October 18 and 20, 1995. This lack of reasonable diligence established knowledge imputable to the Respondent. See discussion, *supra.* Accordingly, the Complainant has established a prima facie case of a violation of §1926.701(b).

Penalty

The gravity of the violation reflects high severity because the resulting injury from this condition would be serious physical harm, permanently disability or death. The probability was low because there was limited exposure to the two employees (Tr. 75). The gravity-based penalty of $2,500, was appropriately adjusted to reflect the Respondent's small size (Tr. 63). As previously discussed, *supra.*, no adjustments for history or good faith were applicable with respect to this violation Accordingly, a penalty in the amount of $1,750.00 is appropriate.

CITATION 1, Item 5: Alleged Violation of 29 C.F.R. §1926.1051(a)

The standard provides:

> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

The Secretary's citation sets forth:

> a) Eagle Harbor Lift Bridge Over Erie Barge Canal. On or about 10/20/95

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[7] The record discloses that rebar caps were the responsibility of the general contractor (Tr.. 356). However, Respondent as a subcontractor had a responsibility to ensure that their workers worked in a safe manner. Respondent maintained an obligation to at least have provided reasonable alternative steps to protect its employees. Respondent has not met its burden in meeting the requirements for the multi-employer defense. *See Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994).

employees were exposed to potential falls while climbing the diagonal bracing of the false work to access the catenary scaffold and the bridge deck levels on the lift bridge. The bridge deck level was approximately 12 feet above the top of the counterweight pit walls and the catenary scaffold was approximately 9 feet above the walls. The bridge deck was approximately 34 feet above the bottom of the adjacent counterweight pit and approximately 18 feet above water level.

The record reveals that Respondent does not dispute the applicability of the cited standard. The undersigned finds that the record establishes that the Respondent did not comply with the requirements of the standard and that Respondent's employees were exposed to the hazard created by noncompliance. Calvin Hoskins testified that he and Jerry Bruckel climbed upon the cross- bracing of the falsework in order to gain access to the catenary scaffold and the bridge deck on October 18 and 20, 1995 (Tr. 148,151,185,190; Exh. C-8). He further testified that there was a ladder present at the jobsite on both occasions but it was chained up (T. 153). CO Sargent testified that he determined that a ladder could have been placed from the concrete wall of the canal wall to the bridge deck because the engineer-in-charge told him that the ironworkers had accessed the bridge this way, and that he himself had also accessed the bridge deck with a ladder placed on top of the canal wall (Tr. 83). Harold Carpenter testified that a ladder could have been safely placed at the jobsite for safe access to the bridge on October 18, 1995 (Tr. 351). Scott Sullivan testified that there was space available at both ends of the bridge for the placement of a ladder, however, on October 20, 1995, there were no ladders set up on the jobsite (Tr. 235, 258). Jerry and Calvin's use of the cross-bracing in lieu of ladders certainly subjected them to fall hazards. As explained by Scott Sullivan if one climbed the cross-bracing, one was exposed to a fall into the canal on one side and a fall into the counterweight pit on the other side (Tr. 233).

Knowledge

The evidence establishes that Respondent was aware of the violation. The undersigned notes that the project proposal which Respondent had with NYSDOT provided provided that "[c]limbing on forms, falsework, or the structure to gain access to work areas [was] expressly prohibited." (Tr. 248-249; Exh. C-13). Jerry's disregard of this provision of the contract proposal, as well as the OSHA mandate of the use of ladders where there was an elevation change of 19 inches or more, was even more blatant in light of the fact that he had been orally reprimanded the day before for similar conduct (Tr. 238). Andrew Adams provided testimony that on October 19, 1995, he observed Jerry Bruckel using barrier tubes in lieu of a ladder to gain access to the Medina Bridge (Tr. 112-114). He informed Jerry that he had to use a ladder. This reprimand certainly put Jerry on notice of the illegality of his conduct. In spite of this incident, on October 20, 1995, Jerry did not ensure that ladders were used on the jobsite. His knowledge is imputable to Respondent for the reasons discussed above, *supra.* Accordingly, Complainant has established a prima facie case of a violation of §1926.1051(a).

Penalty

The undersigned finds that the record supports the following findings with respect to the proposed penalty. The gravity of the violation reflects high severity because the resulting injury from this condition would be serious physical harm, permanently disability or death. The probability was low because there was limited exposure to the two employees (Tr. 75). The gravity-based penalty of $2,500, was appropriately adjusted to reflect the Respondent's small size (Tr. 63). As previously

discussed, *supra.*, no adjustments for history or good faith were applicable with respect to this violation Accordingly, a penalty in the amount of $1,750.00 is appropriate.

Affirmative Defenses

Respondent raised the following three affirmative defenses within its Answer: (1) unpreventable employee misconduct with respect to Items 1a, 1b, 2, and 3 - water related items and fall protection; (2) lack of knowledge and control with respect to Item 4 - exposure to protruding reinforcing steel; and (3) that compliance was not feasible and would have created a greater hazard with respect to item 5 - use of a ladder to access bridge. The Respondent has amended its pleadings to assert the affirmative defenses of isolated unpreventable misconduct and lack of employer knowledge with respect to all items of the citation (See Respondent's Pre-Hearing Response, p. 3 and Respondent's Reply-Brief, p. 8). The undersigned finds Respondent has not met its burden of proving any of these affirmative defenses.

Respondent asserts the defense of unpreventable employee misconduct based upon the Peter Bruckel's testimony that there was nothing he could have done to prevent Jerry's actions, and argues that to impute the unforeseeable and implausible conduct of Jerry to Respondent would amount to the imposition of strict liability. (See Respondent's Post-Trial Brief, pp. 10-14). In support of its defense the Respondent cites several cases the courts recognized that Congress intended to require elimination only of preventable hazards and violations had been dismissed because of the unpreventable conduct of foremen.[8] The Respondent argues that the courts in these cases found that imputing the foreman's knowledge and conduct to the respondent amounted to the imposition of strict liability which the Act did not authorize or intend. *Horne,* 3 BNA OSHC at 2062. The undersigned acknowledges that the findings in the cases cited by Respondent are in accord with well established Review Commission precedent which recognize that there are circumstances where the employer has done everything reasonably possible to assure compliance, but the supervisor nevertheless creates a violation which was unforeseeable and thus unpreventable. In such situations, the employer can affirmatively defend by demonstrating that the supervisory employee's misconduct could not have been prevented. *Floyd S. Pike Electrical Contractor, Inc.,* 6 BNA OSHC 1675 (No. 3069, 1978). Review Commission precedent essentially has extended the unpreventable employee misconduct defense to supervisors, and held when the alleged misconduct is that of a supervisory employee, the employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax, and where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *L. E. Meyers Co,* 16 BNA OSHC 1037 (No. 90-945, 1993); *Daniel Construction Company,* 10 BNA OSHC 1549 (No. 16265, 1982). Because Jerry was a supervisor, to establish that Jerry's conduct was unpreventable, Respondent would have to show either that Jerry acted in contravention of effectively implemented work rules designed to detect and prevent the instant violations, or that Jerry's actions were so idiosyncratic that an employer would not take the

[8] *Horne Plumbing and Heating v. OSAHRC and Dunlop,* 528 F.2d 564, 3 BNA OSHC 2060 (5th Cir., 1976); *Hogan Mechanical Inc,.*6 BNA OSHC 1221 (No. 15438, 1977); and *Brennan v. OSAHRC and Republic Creosoting Company*, 501 F.2d 1196, 2 BNA OSHC 1109 (7th. Cir., 1974).

possibility of such action into account in establishing a safety program. *Todd Shipyards Corporation*, 11 BNA OSHC 2179, 2180 (No. 77-1598, 1984).

In the instant matter, Respondent argues that Peter Bruckel gave Jerry Bruckel specific instruction to work at the Medina Bridge and gave him no instruction to do any work at the Eagle Harbor Bridge. He testified that he was not aware that Jerry had been at Eagle Harbor on October 18th through the 20th until the accident investigation (Tr. 423). The record reveals that Jerry had mentioned to Peter during their Thursday evening conversation that the general contractor wanted to get the cables down off the Eagle Harbor Bridge (Tr. 429). Peter testified that he told him that he "shouldn't be messing with the cables because of lack of experience." Jerry responded that he could "handle it"(Tr. 429). Peter testified that he reiterated his instruction that he should not handle the cables and he had no reason to believe that Jerry would not follow his instructions (Tr. 430).[9]

The record reveals that Jerry prepared the respondent's safety program, and he participated in the presentation of portions of the safety program including fall protection. He also developed a pre-job survey which addressed the need for safety equipment for working over water. Jerry Bruckel testified that tool box talks were held at both the Eagle Harbor and Medina Bridges (Tr. 499). However, the record does not establish that this information was adequately communicated to its employees on a consistent basis. Calvin testified that the only training he received regarding bridge work came from Jerry during the drive to the jobsite. This training occurred during the course of the drive to the worksite and consisted of his review books and Jerry telling him where to hook the safety harness. Additionally, the Respondent presented no evidence of topics covered at the alleged Eagle Harbor and Medina jobsite tool box talks. The only evidence of topics covered during tool box talks was presented in Respondent's Exhibits 1 and 2, which concerned a jobsite in New Jersey. This evidence falls short of establishing an effectively communicated safety program.

Additionally, the Respondent presented insufficient evidence of effective enforcement of these work rules through supervision and disciplinary measures. The record reveals that the Respondent had a safety committee - Warren Wheeler, Peter and Jerry Bruckel - to whom safety infractions were reported and met on an as needed basis. Warren Wheeler, a foreman for Respondent, testified that the Respondent's disciplinary policy consisted of a written reprimand for the first offense, a written reprimand with a day off without pay for the second offense, and if there was a third offense the safety committee would decide if termination was necessary. Warren testified that he never gave any written warnings and only verbally addressed issues. The record reveals that the actions of the committee consisted of convening after OSHA had issued the company a citation in July 1995, and informing employees that their blood levels were high (Tr. 289, 323, 404; Exh. R-12 and R-13). The record contains no other definitive action taken by this committee. Additionally, the letters advising of high blood lead levels was presented as an example of a "warning"given to an employee. This evidence falls short of demonstrating effective supervision and disciplinary measures. The only other evidence of disciplinary action is contained in Exhibit R-14, which Respondent wrote in response to

[9] The undersigned is not convinced that this argument is persuasive in demonstrating a lack of knowledge. The record reveals that Jerry was performing work at the Medina Bridge for which he had very little "hands-on" experience. Thus, the fact that Peter had informed Jerry that he had no experience in the handling of cables does not convince the undersigned that this information without more would have persuaded Jerry that he was too inexperienced to have handled the cables.

a request by the State of New York Department of Transportation's June 7, 1995 communication to Respondent (Tr. 439-440; Exh. C-15). Two employees of Respondent in two different incidents within two hours of one anther had been cited for violations involving fall protection. The State ordered immediate action including reprimands of the employees involved. (Exh. R-14). The State also ordered the Respondent to hold safety meetings to address these issues.[10] The undersigned also notes that in June 1995, two employees at two different locations, were cited for violative conduct involving fall protection, and subsequently, in October 1995 Jerry was involved in related conduct. This indicates that reprimands for the June incident were ineffective and that the subsequent enforcement of the safety program was lax. Furthermore, in spite of Respondent's commitment to safety in response to the State in June 1995, when OSHA visited Respondent's worksite in July 1995 a serious citation was issued (Tr. 314-316, 456-458).

Additionally, the Respondent offered no evidence about the supervision and disciplinary process of its supervisors. If one such a program were present, the ineffectiveness of any safety and disciplinary program for supervisors has been highlighted by the fact that after Peter instructed Jerry not to handle the cables because of his inexperience on the Eagle Harbor Bridge, Jerry went ahead and handled the cables. He not only put himself at risk he was accompanied by an inexperienced worker for whom he provided little if any training on the hazards of bridge painting. Additionally, in spite of Respondent's acknowledgment that its superintendents are accountable for safety at the jobsite, Respondent did not hold the superintendent accountable at the New Jersey jobsite where OSHA had previously issued citations for violations of the lead standard (Tr.440-441). Another example of the laxness of Respondent's safety program was the fact that Jerry, and under his supervision Calvin, climbed the cross-bracing of the bridge in lieu of a ladder. A practice that was strictly prohibited within the DOT contract. Respondent presented no evidence of what efforts it would have taken in order to monitor adherence to its safety rules or to detect the failure to comply with orders. The record also demonstrates that in spite of having been warned the day before not to engage in hazardous activity Jerry engaged in the same activity the next day. In light of the above, the undersigned finds that Respondent has failed to prove the unpreventable or isolated employee misconduct defense.

Respondent has also asserted that with respect to Item 4, "it had no knowledge of, nor could it reasonably have been expected to detect the alleged hazard, and further, [its] employees were not actually exposed to the alleged hazard nor was it reasonably predictable that [its] employees would have access to the alleged hazard in the course of their work or their normal routes to and from their assigned workplace." Answer, Paragrah 18. This defense appears to fall within the ambit of the multi-employer defense. To meet this defense an employer must show it (1) did not create the hazardous condition, (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard, and (3) took reasonable alternative steps to protect its employees or did not have and could not have had with the exercise of reasonable diligence, notice that the violative condition was hazardous. The record indicates that at the time of the accident the orange netting and sign "Dangerous" were both present in the area of the rebars (Tr.

[10] Peter Bruckel's June 7, 1995, response included a commitment to hold tool box meetings on a more frequent basis (3 or more times a week) to address safety issues and fall protection. The tool box talks contained in Exhibits R-1 and R-2 are all dated subsequent to this letter.

131-132, 222; Exhs. C-6 & C-7). Respondent acknowledged at the hearing that it was not its position that its employees could be exposed to hazardous conditions, such as working above rebars, it did not create (Tr. 475). However, In spite of the presence of exposed rebars, Jerry and Calvin worked above said rebars and the record is void of any steps taken which would have protected them against the hazard of impalement. Peter's testimony that employees should take the proper precautions to avoid any accidents or problems when presented with such hazards does not meet the Respondent's burden of proof in meeting this defense. Accordingly, Respondent has failed to meet this defense.

Respondent has also alleged the affirmative defenses of infeasibleness or greater hazards. Respondent asserts that stairways or ladders from the top of the counterweight pit walls or bottom of the counterweight pit could not be installed in compliance with the applicable standards or would have created a hazard to Respondent's employees. In order to prove the defense of in feasibility, respondent must demonstrate that (1) literal compliance with the requirements of the standard was infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either an alternative method of protection was used or no alternative method of protection was feasible. *See Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1190 (No. 92-1891, 1995) Respondent produced no evidence that the use of a ladder to gain access to the bridge was infeasible and that an alternative means of protection was used or that no alternative method of protection was feasible. The undersigned finds the record supports a contrary finding. The record demonstrates that Respondent's employees had used man-lifts and ladders for access to the bridge during various phases of their work at the Medina and Eagle Harbor Bridges [Tr. 116, 121, 124 (Andrew Adams), 340 (Harold Carpenter), 422-423 and 494-495 (Peter Bruckel)].

In order to prove the defense of greater hazard defense, an employer must show that the hazard of compliance was greater than that of noncompliance; and that an alternative means of protection was not available and that a variance was either unavailable or inappropriate. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1185 (Nos. 89-2883 and 89-3444, 1993). Again the record is void of any evidence that Respondent took any steps to avoid employee exposure to the rebars, or that an alternative means of compliance was not available. Respondent also did not show that it sought a variance and that one was either unavailable or inappropriate. Accordingly, the undersigned finds that Respondent did not show that climbing the cross-bracing was safer than using a ladder or any other elements of this defense.

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

Citation 1, Item 1a , alleging a serious violation of §1926.106(a) and Citation 1 Item 1b, alleging a serious violation of §1926.106(c) are AFFIRMED with a grouped penalty of $1,750.00.
Citation 1, Item 2, alleging a serious violation of §1926.106(d), is AFFIRMED with a penalty of $1,750.00.

Citation 1, Item 3, alleging a serious violation of §1926.501(b)(1) is AFFIRMED with a penalty of $1,750.00.
Citation 1, Item 4 alleging a serious violation of §1926.701 is AFFIRMED with a penalty of $1,750.00.
Citation 1, Item 5 alleging a serious violation of §1926.1051 is AFFIRMED with a penalty of $1,750.00.

Covette Rooney
Judge, OSHRC

Dated:
Washington, D.C.

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